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REPLY TO STONE SWEET

Georg Vanberg

Professor Stone Sweet's comments raise a number of interesting and important problems, not only for the specific model I have presented, but for the more general question whether, and if so, to what extent, game-theoretic analysis is an appropriate tool for the study of constitutional politics in Europe. Stone Sweet has identified key objections, and I share some of his concerns. Nevertheless, I am more optimistic about the prospects for the fruitful use of game-theoretic models in this area. My reply will therefore consist of two parts. In the first, I want to respond to some of the specific objections that have been raised to my analysis. In the second, I want to make a few more general remarks about the use of game theory in investigating constitutional politics.

Political Compromise, Electoral Punishment, and German Abortion Policy

The central conclusion of my model is that the availability of abstract judicial review strengthens opposition parties, and can lead to two different kinds of 'compromise'. The first kind (which I call *constitutional* compromise) occurs when majority parties respond to the threat of abstract review by attempting to write a bill that will pass muster constitutionally. The second kind of compromise (which I call *political* compromise) occurs when majority parties decide to strike a bargain with the opposition, in return for which the opposition agrees not to initiate judicial review. As Stone Sweet points out (1998: 330), it is constitutional compromise that has been studied extensively.

Stone Sweet is not convinced that political compromise, which to my knowledge has not previously been explicitly distinguished from constitutional compromise, is as significant as my model suggests. On a theoretical level, he points out that within my model, the conclusion that political compromise is significant depends on the assumption that parties are punished electorally for coming into conflict with the court. Without that assumption, 'the second form of autolimitation will be a theoretically plausible, but empirically anomalous phenomenon' (p. 332). On an empirical level, such compromise to bypass the court has not, to his knowledge, been identified in the French context (p. 330).

As Stone Sweet notes, and as I suggest in the closing pages of the paper, it is highly implausible to suppose that voters care solely about conflict with the court in casting their vote. They are also likely to care about the concessions parties make in order to compromise. Electoral punishment will therefore be incurred not only for coming into conflict with the court, but also for breaking policy promises. Further, if Stone Sweet's contention is correct that (at least in France) parties incur little electoral punishment for coming into conflict with the court, one of the benefits of political compromise diminishes, which should entail a decline in its relative frequency.[1] Even more important, within the confines of the one-dimensional model, if parties incur no electoral punishment for coming into conflict with the court, political compromise never occurs (λ goes to infinity). The distinction between political and constitutional compromise thus depends crucially on the assumption of electoral punishment.

However, this is only true in the one-dimensional version of the model. Relaxing the assumption of unidimensionality to extend the model to two dimensions makes it easy to demonstrate that the assumption of electoral punishment is not necessary to generate political compromise (see Figure 1).

Suppose the 'abstract review game' is played only once, so that future considerations, including electoral punishment, are irrelevant. Further, assume (for ease of the graphic exposition) that the function which determines constitutionality takes on a particularly simple form: within a certain distance from the status quo, X_{SQ}, the court declares legislation constitutional, and for any proposal that is more radical, it declares the proposal unconstitutional (the area of constitutionality is indicated by the circle *CC*). In this case, subgame-perfection demands that *C* will appeal any proposal by *I* that is further from *C*'s ideal point, X_C, than the status quo. Under these conditions, *I* faces a fairly straightforward choice. It can either make a *constitutional* compromise, and propose π, the closest point to *I*'s ideal point, X_I, that the court will still declare constitutional. Or it can make a *political* compromise and propose T_C, the closest point to *I*'s ideal point that *C* will not appeal. Which one of these two proposals is preferred by *I* depends on the relative distances of X_I, T_C, and π, which are determined by the exact location of ideal points and the restrictiveness of the court. If the court is sufficiently restrictive, as in Figure 1, *I* may prefer to propose T_C, and the court is bypassed through a political compromise between majority and opposition. Notice that this compromise would be unconstitutional if the court ever got a chance to review it.

This two-dimensional example demonstrates that once one leaves the restrictive world of the one-dimensional version of the model, the distinction between the two types of compromise does not depend on the assumption of electoral punishment. Whether or not a political compromise will be struck turns fundamentally on the level of judicial deference to the legislature. The larger the threat posed by the court, the greater are the incentives to bypass it through a political compromise, a proposition that seems to accord well with intuition.[2]

1. Interviews with Justices of the Constitutional Court and members of the Bundestag staff confirm that, at least in Germany, parties do seem to worry about the electoral consequences of conflict with the court. The court routinely finishes as one of the most trusted public institutions in opinion polls. It should also be noted that several puzzles emerge if one simply accepts Stone Sweet's suppositions about the nature of electoral punishment. If there really is no cost to appealing for the opposition, it is surprising that only one-third of all bills is appealed in France. More importantly, if electoral punishment were incurred exclusively for breaking policy promises, it would affect both political and constitutional compromise equally. In either case, the party has to make a concession. Such electoral punishment would therefore reduce the overall willingness of majorities to engage in 'autolimitation,' not just the occurrence of political compromise.

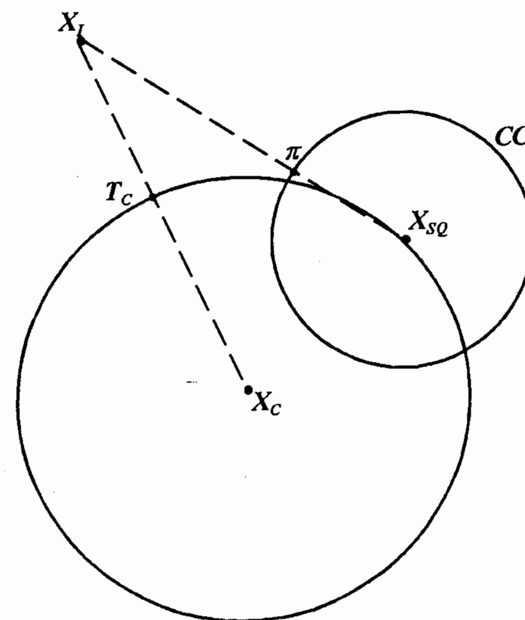

Figure 1. Two-dimensional model: political compromise without electoral punishment

2. Naturally, the introduction of electoral punishment in the two-dimensional example might affect the relative frequency of political compromise, as in the one-dimensional model. The perceptions of political parties about the kind of electoral punishment they are likely to face is a variable that can be measured, at least in principle, and can account for differences in behavior between countries and at different times.

Naturally, this refinement does not address the second question raised by Stone Sweet, which concerns the empirical relevance of political compromise. As he insists, and I agree, showing that 'bypassing' the court is theoretically possible does not in and of itself establish that it is an important phenomenon empirically. Since my own knowledge of French constitutional politics is largely derived from Stone Sweet's excellent work on the subject, I must defer to his judgement that, at least in France, political compromise is largely irrelevant. In my own work on the German Constitutional Court, I have been able thus far to identify at least one highly important case in which such compromise seems to have taken place.

During the negotiations over German reunification in 1990, one issue that was highly contentious and could not be solved concerned the question of how to reconcile the liberal East German and fairly restrictive West German abortion laws. The issue was finally left out of the Unity Treaty, and passed on for a newly elected parliament to resolve. A new abortion law was passed in June 1992. In May 1993, the Constitutional Court invalidated the bill after an abstract review proceeding. In June 1995, the Bundestag passed a revised statute. This bill was based on a last-minute compromise hammered out in a late-night negotiation session between the largest parties, including the two governing parties (CDU/CSU and FDP) and the major opposition party (SPD). Only the Greens and the PDS (the Communist successor party), who together controlled a mere 79 of 672 seats, far short of the 224 votes needed to initiate abstract review, were left out of the compromise. Two former justices of the Constitutional Court have suggested in interviews that this compromise bill was designed by the large parties to bypass the Court.[3] This interpretation is clearly supported by several floor statements made during the final debates on the bill. Consider the following excerpts (all translations are my own):

> *Inge Wettig-Danielmeier (SPD)*: I do not believe that we have resolved all our differences today. But we have found a compromise that prevents the Constitutional Court from being called on again to adjudicate this issue. (Bundestag Debates, 13th Legislative Session, p. 3757 B)

> *Dr Jürgen Meyer (SPD)*: This compromise was also possible because negotiators could speak for a sufficiently large majority of their own party, and promise that a renewed abstract review proceeding would not be initiated. (Bundestag Debates, 13th Legislative Session, p. 3775 A)

A member of the Greens made the most explicit statement. As a small opposition party, the Greens did not control a sufficient number of seats to initiate abstract review on their own, and they clearly perceived the lack of

3. Personal interviews: Freiburg, Germany, 8 May 1997 and Karlsruhe, Germany, 9 January 1998.

this threat as part of the reason for their non-inclusion in the compromise ('Karlsruhe' refers to the seat of the German court):

> *Rita Grießhaber (Bündnis 90/Die Grünen)*: But of course – and I know what that's like – we Greens cannot offer to forgo a trip to Karlsruhe ... I know that such an offer not to initiate review is an important political asset. But it is problematic that precisely such threats are used around here to make policy. (Bundestag Debates, 13th Legislative Session, p. 3763 B)

These statements strongly suggest that something very close to what I have characterized as a political compromise occurred in this case to bypass the constitutional court. Moreover, this compromise concerned an issue that has been of tremendous political importance in Germany since the court first ruled on abortion policy in 1975. If nothing else, the presence of an example like this in a crucial policy area ought to convince us that a more systematic empirical investigation of political compromise is worth while.[4]

Game Theory and Constitutional Politics

Game-theoretic approaches have several advantages. They rest on an explicit set of assumptions. The implications of those assumptions are then investigated deductively. Because assumptions and conclusions can be easily checked and challenged by other scholars, such an approach can be useful in 'communicating ideas openly and honestly' (Huber, 1996: 15). Moreover, by drawing attention to the motivations of actors, and the incentive structures they face, game-theoretic analysis naturally focuses on causal explanations.[5] In the end, the goal of the analysis must be to provide new insights into the phenomenon under investigation, and it should entail testable propositions. Ultimately, whether or not game theory is a useful tool must be judged by whether it leads to new, and testable, insights.

I think the present paper provides an example of game-theoretic analysis meeting this standard in the context of European constitutional politics. The distinction between political and constitutional compromise is a new insight, which has not, to my knowledge, been discussed explicitly in earlier work. That is not to say that game-theoretic analysis is necessary to draw the distinction; once one is aware of the possibility of bypassing the court, the dichotomy is quite intuitive. However, the paper demonstrates that a

4. Another important variable that I have not modeled, but which is likely to affect the potential for political compromise, is the general 'openness' of the judicial review process. The more open is access to the constitutional court (e.g., through constitutional complaints or concrete review), the more difficult it will be for parties to effectively prevent the court from reviewing a political compromise. The fact that access is extremely open in Germany makes this example even more interesting.

5. Of course, I am not implying that other approaches cannot exhibit the same advantages.

deductive approach can sometimes alert us to empirical phenomena that might not be as obvious in inductive approaches.

A more fundamental question Stone Sweet raises in the second part of his comment is whether game theory can be successfully employed in moving beyond the kind of partial analysis I have engaged in here to a more comprehensive theory of constitutional politics. Most important, he believes that 'game-theoretic analyses, at least at their present stage of development, are unable to capture the dynamic nature of constitutional politics' (p. 334).[6]

This question identifies an important challenge to rational choice theorists with an interest in this area. In fact, an evolving game-theoretic literature has already begun to meet this challenge. Considerable progress has been made in investigating constitutional stability and constitution-making (see Hardin, 1989; Ordeshook, 1992; Weingast, 1997). Most important for present purposes is recent work by Calvert and Johnson (1997), who sketch a game-theoretic approach to the role of principled argument in constitutional interpretation. Whether or not these efforts will ultimately succeed in providing formal approaches to a more general theory of constitutional politics is an open question, and will, in part, depend on whether or not game-theorists are able to find satisfactory solutions to some of the challenges which Stone Sweet has identified. In the remaining few pages, I would like to expand in a little more detail on these challenges.

One crucial area that should be of concern to rational choice theorists is the process of judicial decision-making itself. The present paper renders the internal decision-procedure of the court simply as a 'black box'. In studying American courts, rational choice scholars have tended to treat courts as though they were unitary actors with simple policy preferences like other players (see the literature cited above). In a recent paper, Ferejohn (1995) has argued that such an approach is not likely to be satisfactory. Even if justices are inclined to pursue their policy preferences in reaching decisions, the 'interpretive regime' under which they must operate provides certain constraints on their behavior (Ferejohn, 1995: 195). Moreover, the authority of courts depends to a certain extent on the fact that they provide reasoned arguments for their conclusions. In reaching decisions, justices are thus likely to be motivated, at least to some extent, not only by the nature of the final outcome, but also by process (Ferejohn, 1995: 193). How to incorporate such concern for process into a more formal approach is not immediately obvious, and it is an important task for research.

There is a second, and in a sense more fundamental, concern. Most game-theoretic models, including the one presented here, take a certain institutional framework as an exogenously imposed set of rules or constraints within which the 'game' unfolds. They are concerned with determinate situations. In certain respects, however, constitutional politics is an open, dynamic, and indeterminate process. Constitutional phrases are ambiguous, and applying them to particular circumstances invariably demands interpretation. Only through such interpretation does a constitution take on concrete meaning. Primarily, this concretization of the constitutional text is performed by constitutional courts, who adjudicate constitutional disputes, and in so doing establish particular interpretations of a constitutional provision. Other actors, in turn, can use the accumulated jurisprudence of a court in an attempt to anticipate future rulings.

A crucial consequence of the dynamic nature of this process is, as Stone Sweet points out, that the 'rules of the game', in the sense of the constitutional constraints that actors face, are constantly evolving. For that reason, actors may not only, or even primarily, be interested in the immediate policy implications of a particular case, but rather in the establishment of a new constitutional principle.[7] Unlike other legislative 'tools,' e.g. a presidential veto, the right to initiate judicial review is thus not only concerned with particular policy outcomes, but also with establishing and changing the 'rules of the game' themselves. Modeling this process formally is likely to require moving beyond the conventional issue space used here. The approach suggested by Calvert and Johnson (1997) provides a first step.

Stone Sweet and I are thus in agreement that substantial challenges remain if game-theorists are to succeed in making progress towards a more comprehensive theory of constitutional politics. Whether these challenges can be met is an open question. I am more optimistic than Stone Sweet that the current state of research shows promise, and that such success can be achieved. In the meantime, it seems to me, the relevant question must be whether or not game-theoretic approaches can be useful in more limited pursuits, such as the one presented here. Game theory is one tool among many that are available to scholars with an interest in constitutional

6. Stone Sweet criticizes me for not modeling these dynamic aspects. The obvious reason for that modeling choice is that I was simply not concerned with the dynamic aspects of rule-making in the paper, but rather with the impact that the availability of abstract review has on opposition power.

7. A specific example can illustrate the point. The German constitution requires the consent of the upper house (Bundesrat) for legislation in a variety of policy areas. A crucial question was whether or not this provision also implied that Bundesrat consent is required for amendments to legislation that originally required such consent. In 1975, the governments of Bavaria and Rheinland-Pfalz used an abstract review proceeding to clarify this question. The Court ruled that not all amendments require renewed Bundesrat consent, a decision that has significant implications for the power of the upper house.

politics, and uncertainty about its promise in solving ultimate problems should not prevent us from making use of it where appropriate.

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DEVELOPING AN ANALYTICAL FRAMEWORK FOR MULTIPLE-USE COMMONS

Victoria M. Edwards and Nathalie A. Steins

ABSTRACT

Much of the work on common-pool resources has tended to focus on 'single-use' commons, where the resource system is used for extraction of a single 'use' unit. However, as traditional commons evolve, research that explains the persistence of common-pool resources with multiple ownership, use and management structures will become increasingly relevant. This paper extends the analytical framework put forward by Oakerson (1986, 1992), for application to multiple-use common-pools, where multiple types of use are made of the resource system. Four components are introduced: (1) multiple-use analysis of physical and technical attributes; (2) multilevel analysis of decision-making arrangements; (3) social characteristics of the broad user community; and (4) analysis of contextual factors. The multiple-use framework facilitates the understanding of multiple-use commons in a chosen time period and institutional change over time. The example of the New Forest commons in England is used to explain the operation of the framework in a field setting.

KEY WORDS • analytical frameworks • commons • institutions • multiple-use • New Forest

Introduction

In the increasingly popular debate over the sustainable use of natural resources, of particular interest to resource managers are the problems associated with common-pool resources (Ciriacy-Wantrup and Bishop, 1975; McCay and Acheson, 1987; Berkes, 1989; Ostrom, 1990; Bromley et al., 1992). In this debate, Hardin's 'Tragedy of the Commons' (1968) has become a strong symbol of the problems of common resources. Implicit in Hardin's theory is an assumption that when a natural resource is physically and legally accessible to multiple users, the result will be a 'free for all', with users competing with one another for a greater share of the resource,

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