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Substance vs. procedure: Constitutional enforcement and constitutional choice☆

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ABSTRACT

The *constitutional political economy* research program established by Nobel Laureate James M. Buchanan provides a rigorous analytical framework for the analysis of constitutional choice. I focus on two issues that have received only limited attention in the *CPE* literature: the problem of constitutional enforcement and the role of judicial review. I demonstrate that incorporating a concern for enforcement into constitutional analysis has significant implications for the the choice among rules, and suggests that procedural constitutional constraints have significant advantages over constitutional norms that attempt to secure broader, substantive values.

Social interactions – in athletic contests, the marketplace, or politics – are structured by *rules*. Because rules affect the incentives confronting participants, they shape outcomes. In the absence of an off-sides rule, for example, soccer players would be tempted to "hang out" in front of the opponent's goal; games would likely be faster-paced and higher scoring (although, perhaps, less "beautiful"). Because participants (or spectators) usually care about the results of social interactions, a natural question arises: What rules should the participants choose to enhance the likelihood of playing a "good game"?

This *choice of rules*, particularly in the context of collective (i.e., political) decision-making, lies at the core of the *constitutional political economy* (CPE) research program, founded by Nobel Laureate James M. Buchanan. Buchanan describes the domain of *CPE* this way:

> [I]n any setting of human interaction, the results depend on the rules within which persons engage, one with another, and, if these results can be evaluated on some scalar of preferability, so can the rules themselves. Just as there are "better" and "worse" outcomes, there are "better" and "worse" sets of rules that generate patterns of these outcomes... Attention to the rules, to the structure of politics itself, would seem to be in order (Buchanan, 2008, pp. 171–172).

Buchanan's central contribution, going back to his seminal work with Gordon Tullock in the *Calculus of Consent* (1962), has been to develop a rigorous analytic framework for studying this problem of constitutional choice, giving rise to a voluminous literature. In this paper, I adopt the "Buchanan approach" to consider two related issues that have received only limited attention in the *CPE* tradition: the problem of constitutional enforcement and the role of judicial review.[1] The central

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[1] Notable exceptions are Niskanen (1990) and Ordeshook (1992), who focus on issues of enforcement, while Sutter (1997) and Wagner and Gwartney (1989) consider judicial review. I return to these contributions below.

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argument of the paper is that the challenge of enforcing constitutional norms – which has largely been treated apart from the problem of rule choice – cannot be separated from the evaluation of alternative rules. Incorporating a concern for enforcement into the analysis of constitutional design has profound implications for the characteristics that make constitutional frameworks more resistant to erosion and – for that reason – more desirable.

To make this argument, I proceed in a number of steps. In the next section, I provide an overview of Buchanan's approach, and argue that the issue of enforceability – raised by Buchanan, but not explicitly incorporated into the analysis – is more significant for constitutional choice than most current work suggests. Building on the work of Weingast (1997) and Sutter (1997), I then lay out a theory of constitutional enforcement, including the role of judicial review in generating compliance with constitutional norms. With this theory in mind – including an account of the conditions that make enforcement problematic – I consider the implications of the enforcement problem for constitutional design and argue that *procedural* constraints offer significant advantages over constitutional norms that attempt to secure broader substantive values. A final section concludes.

1. Buchanan's constitutional economics

At the heart of the Buchanan approach lies a distinction between what Buchanan calls a *constitutional* and a *sub-constitutional* level of collective decision-making (or, alternatively, the "level of rules" and the "level of actions"). Sub-constitutional politics occurs as individuals pursue their separate aims *within* a set of well-defined rules. In contrast, constitutional politics concerns the choice *among* alternative rules themselves. Analysis at this level asks which rules – given their implications for sub-constitutional politics – will generate outcomes that are preferable.[2] The distinction is analytically central because the choice problem confronting individuals at the two levels differs fundamentally. Within a game, players usually have (at least partially) conflicting interests. But they have a common interest in *playing a better game*, that is, in improving (if possible) the game's framework in ways that secure outcomes that are more highly valued by all participants. As a result, despite the fact that sub-constitutional politics is characterized by conflict, individuals may be able to find agreement at the level of rules. Constitutional politics can be a cooperative venture:

> As it operates and as we observe it to operate, ordinary politics may remain conflictual... while participation in the inclusive political game that defines the rules for ordinary politics may embody positively valued prospects for all members of the polity (Buchanan, 1990, 9).

Buchanan's concern that politics at the constitutional level provide "positively valued prospects for all members," and that it do so in the eyes of the participants themselves, is reflected in his normative commitment to the use of the *unanimity principle*. Unanimity legitimizes constitutional choice because it ensures that all participants are made better off as a result of the constitutional exchange (including any agreement to give up the individual veto for sub-constitutional collective choices).[3] In this sense, unanimity constitutes the political equivalent of voluntary exchange in the market place.

Of course, achieving unanimous agreement requires clearing a high hurdle – a point that gives rise to a subtle analysis of optimal rule choice for sub-constitutional politics in chapter 6 of the *Calculus of Consent*. But unanimity can be reached if the choice environment at the constitutional level can be structured so as to ensure that individuals find themselves behind a "veil of uncertainty." Behind the veil, individuals will concern themselves with the broader implications of rules for "typical" individuals (since they are unable to choose on the basis of their particular interests), thus making unanimous agreement possible. Buchanan and Tullock (1962, p. 78) put it this way:

> Essential to the analysis is the presumption that the individual is uncertain as to what his own precise role will be in any one of the whole chain of later collective choices that will actually have to be made. For this reason... the individual will not find it advantageous to vote for rules that may promote sectional, class, or group interests because, by presupposition, he is unable to predict the role that he will be playing... His own self-interest will lead him to choose rules that will maximize the utility of an individual in a series of collective decisions with his own preference on the separate issues being more or less randomly distributed.[4]

[2] In this paper, I focus on *political* decision-making, that is, decisions taken by those in positions of power within a set of rules (the level of actions) and the rules that govern how power can be exercised (the level of rules). A similar analysis can also be carried out with respect to the interactions of private individuals within a set of rules (some of which are defined and enforced by the state).

[3] "The practicable difficulties of implementing such idealized politics as exchange must, of course, be acknowledged. But such acknowledgement does not, in any way, remove the normative significance of the unanimity benchmark. As Knut Wicksell noted a century ago, any collective action worth its costs, as evaluated autonomously by participants, must be able, at least in principle, to command unanimous consent for its implementation at some cost-sharing arrangement" (Buchanan and Congleton, 1998, p. 22). For a critical discussion of the unanimity principle in Buchanan and Tullock's approach, see Kliemt (1994).

[4] At one level, the idealized choice environment of the constitutional stage constitutes a useful (hypothetical) benchmark for constitutional analysis. But there are also practical implications of this conception. For example, to the extent that constitutional rules can be endowed with a measure of stability, certainty about the distributional implications of specific rules will be reduced because they govern an unknown number of future instances. Moreover, it may be possible to structure conditions for constitutional choice in ways that further increase the uncertainty faced by participants, e.g., by subjecting newly adopted rules to some delay before implementation.

A concrete example can help to illustrate the kind of constitutional analysis that emerges out of this approach. Building on central insights of public choice economics, Buchanan (in joint work with Roger Congleton) argues that democratic politics as it exists in most Western polities generates – given its majoritarian character – strong incentives (at the sub-constitutional level) to engage in "discriminatory" policy-making (Buchanan and Congleton, 1998). Politicians and constituents can profit by targeted assignment of benefits (and costs) of public policy, and it is individually rational to pursue opportunities for doing so. Nevertheless, Buchanan and Congleton argue, because such pursuit of distributional advantage may often destroy available aggregate gains, the overall result of such a majoritarian policymaking process is likely to be less desirable than the outcomes of an alternative constitutional framework in which *no* targeted benefits can be provided (see also Olson, 1982).[5] Buchanan and Congleton conclude that at the constitutional level, citizens may have a common interest in the adoption of a "generality principle" that constrains policymakers from bestowing selective benefits (or costs) on particular individuals or groups:

> We argue that our politics may be made "better" in the evaluation of all participants, if political action can be constrained constitutionally so as to meet more closely the generality norm (Buchanan and Congleton, 1998, p. xxi).[6]

Naturally, to the extent that constitutional rules (like a generality principle) limit behavior, those who run up against these constraints will be tempted to circumvent or undermine them. Attempts at evasion or even "constitutional erosion" are part and parcel of sub-constitutional politics. That is, constitutional frameworks require enforcement. It is the implications of the need for enforcement and the potential for constitutional erosion that are at the heart of the current paper. Of course, the problem of enforcing constitutional rules has been addressed by other scholars (e.g., see Buchanan, 1975; Niskanen, 1990; Ordeshook, 1992; Sutter, 1997; Weingast, 1997). Significantly, however, these contributions have focused on the primary problem that *all* rules require enforcement, and have therefore treated the enforcement problem as a general challenge confronting any constitutional order. The fact that rules may *vary* in the extent to which they are vulnerable to evasion or erosion has received scant attention. One (unintended) consequence of this approach has been to treat enforcement separately from (and subsequent to) the problem of constitutional choice. It is not hard to see why. If enforcement poses a general challenge for all rules, then the problem of achieving compliance does not distinguish among them. For purposes of comparative institutional analysis, considerations of enforcement can be put aside.[7] This has been the most common approach in the *CPE* tradition, which tends to focus on the intended working properties of alternative rules while paying less attention to potential challenges in implementation.[8]

2. Enforcement and constitutional choice

Suppose, however, that rules are not all equally vulnerable to evasion or erosion, i.e., that some rules are more likely to be enforced consistently than others. In this section, I argue that if this is the case, the problem of constitutional choice can no longer be treated as separate from the problem of ensuring compliance. Instead, the likelihood that any given rule can be enforced becomes a relevant consideration in choosing among rules, and has systematic implications for the type of constitutional rules that are preferable (an issue that is the focus of Section 6).

It is useful to begin by providing a more precise account of what I mean by "enforcement" (or, conversely, evasion or erosion of a rule). Consider an individual faced with a choice of alternative constitutional rules. In choosing a particular rule, it is the individual's intention to constrain or guide sub-constitutional behavior in ways that will produce what seems to her a desirable pattern of outcomes. For example, the adoption of a balanced budget requirement is intended to achieve fiscal restraint, the adoption of a "generality principle" has the goal of eliminating discriminatory ("special interest") legislation, and the purpose of an explicit listing of voter eligibility requirements is to eliminate disenfranchisement of particular voting groups. Because it is these intended implications for sub-constitutional patterns of outcomes that are central to the individual's evaluation of alternative rules (that is, she chooses among rules on the basis of her evaluation of the subsequent patterns of outcomes), a rule is "enforced" (from the perspective of an individual engaging in constitutional choice) as long as it remains unchanged by a formal amendment and is applied in a manner that achieves these patterns. In contrast, I use the terms "evasion" or "erosion" to denote a significant change in the de facto constraints imposed by a constitutional norm

[5] Buchanan and Congleton (1998, p. 34): "The important point to be emphasized is that majoritarian politics, in itself, creates alternatives for political choice and actions that necessarily introduce distributional elements, quite apart from the possible existence of nonexistence of collective alternatives that are positive sum in some aggregative sense. From the recognition of this point there follows the implication that, in many situations, the redistributional alternatives may come to dominate those that might yield larger benefits in some aggregate measure."

[6] Buchanan's concern with the generality principle already surfaced in the *Calculus of Consent*; see especially chapter 19 (Buchanan and Tullock, 1962).

[7] For example, addressing concerns that a constitutional balanced budget requirement may be difficult to enforce, Buchanan (1997, p. 130) notes: "The first, and elementary, point to be made is that any rule (law, constraint) once put in place, will necessarily provide incentives for a violation, either openly or covertly. This effect is inherent in the notion of a rule. . ." In other words, Buchanan places emphasis on the "elementary" problem that *all* rules are subject to erosion. The analysis below focuses on the implications of the (secondary) fact that rules are not *equally* vulnerable.

[8] For example, Berggren (2000) has offered a critique of Buchanan and Congleton's generality principle, arguing that adoption of this principle might entail a "fiscal explosion" as benefits must be extended generally across society. Berggren proposes a modified generality principle that constrains government spending to a specified share of GDP. Leaving aside the question whether a "fiscal explosion" is likely under a generality principle, what is striking about this debate from the current perspective is that no explicit consideration is given to the question whether the original or the modified generality principles could be enforced in a consistent fashion over time.

that is unaccompanied by a formal change.[9] Putting it differently, constitutional erosion occurs when players are able to affect a change in the *de facto* application of the rule that allows them to take actions that were intended to be prohibited despite the fact that the rule remains "in force."[10]

Erosion in this sense differs from formal constitutional change, that is, explicit change adopted through a procedure that is itself chosen at the constitutional level. Although John Locke's 1669 draft of the Fundamental Constitutions of Carolina aspired to permanence, constitution writers are generally inclined to anticipate the need for adaptation of a constitutional framework to experience and to changing conditions.[11] In contrast to constitutional erosion, changes adopted through formal amendment procedures – especially if these procedures are designed to "mimic" choice at the constitutional level through institutional mechanisms that ensure more inclusive decision-making and increase uncertainty about distributional consequences – are likely to be qualitatively different, and to enjoy greater legitimacy, than constitutional change that occurs outside of this process. I return to this issue in more detail below.

With these definitions in mind, consider individual choice at the constitutional level. As a shorthand, assume that the constitutional framework is expected to be enforced through a "black box" mechanism (this black box will become the focus of analysis in the next section). Looking ahead to sub-constitutional politics, for any rule, there are two potential types of erosion (or evasion) – relative to her intentions – that an individual can anticipate:

1. *Lack of in-period enforcement:* Players may be able to take actions that are inconsistent with the intended constraints of the rule because the "black box" cannot generate a sanction sufficient to induce compliance.
2. *Consistency across time:* There are sufficient sanctions to constrain players to respect the constraints imposed by a rule *as understood by the black box*. But over time, the interpretation of the rule by the black box shifts in a manner that implies that actions that the individual intended (at the constitutional stage) to be prohibited become possible (or vice versa).

That is, in evaluating alternative rules, the individual can anticipate two ways in which any rule may be undermined: First, the rule may not be adequately enforced. Second, even if adequately enforced, interpretations of the rule can shift over time. In either scenario, the *de facto* "pattern of actions" that the individual (at the constitutional stage) intends to achieve by adoption of the rule is not realized. Importantly, note that no exogenous *normative* assessment of such change is implied – subsequent alteration of a rule may or may not be normatively desirable in some larger sense. The relevant point is simply that if an individual chooses among constitutional rules on the basis of the implications for outcomes that she intends these rules to have, she will take into account the possibility that the *de facto* administration of the rule will diverge from her intentions. I may want to create a constitutional framework that ensures fiscal restraint; in deciding whether a balanced budget amendment is a good means for doing so, the question whether it can actually be enforced "down the road" is important to my decision.

To see why considerations of enforceability are relevant for constitutional choice, consider a simple example. Suppose an individual faces a choice between two rules, *B* and *W*. Each rule is intended to constrain the exercise of governmental power in a specific way. Assuming that each rule is implemented as intended by the individual, the individual prefers the pattern of outcomes produced by rule *B*. In this sense, she "prefers" *B* to *W*. However, the individual also recognizes that rule *B* is vulnerable to erosion. It is (for reasons we will focus on below) liable to be applied in ways other than those intended by the individual. Rule *W*, in contrast, is not vulnerable to erosion, and the individual is highly confident that it will be implemented as intended. In such a scenario, it is possible that the individual would choose *W* over *B* if the pattern of outcomes that can result from *B as it may come to be applied* is sufficiently worse from the individual's perspective than the outcomes produced by *W*. In other words, the possibility of erosion has significant implications for constitutional choice: Rules that induce outcomes that are judged less favorably than the *intended* outcomes of an alternative rule may be preferable if they can be enforced more reliably.[12] In other words, the question of the *enforceability* of constitutional rules moves to the fore. We now turn to this issue.

[9] Lutz (1994) draws a similar distinction between constitutional alteration (de facto change without formal change) and constitutional amendment. I assume that the unanimity principle at the constitutional level ensures that individuals agree on the intended purpose of constitutional rules that are adopted; that is, for current purposes, I ignore the possibility that actors at the constitutional level are unable to find agreement and adopt vague principles in order to "cover up" fundamental differences. This is, of course, an important possibility that deserves attention in future work.

[10] It is critical to distinguish this argument from contemporary jurisprudential theories that focus on the "intent" of the framers. Such theories are intended as guides to judicial interpretation (an issue to which I return below). In contrast, the current argument is not concerned with how judges ought to interpret a constitution; rather, it is a positive, descriptive account of the considerations that are relevant for individuals in choosing among alternative rules at the constitutional level. One such consideration is the likelihood that a rule does what the individuals who choose it want it to do, and this likelihood, in turn, is a function of how judges *actually* make decisions. I return to this issue in section 5 .

[11] The final article of Locke's constitution provided that "(t)hese fundamental constitutions, in number a hundred and twenty, and every part thereof, shall be and remain the sacred and unalterable form and rule of government of Carolina forever." Forever turned out to be rather short. Although briefly employed, the constitution was never ratified and became obsolete by the early 1700's.

[12] Putting it differently, risk-averse individuals may prefer rules with lower mean outcomes to rules with higher mean outcomes if the variance of the former is smaller than the variance of the latter; that is, individuals may prefer rules that result in consistent outcomes over time to rules that give rise to greater variance, even if the average outcomes produced by the former are less preferable than the *intended* outcomes of the latter. Similarly, among rules with similar mean outcomes, those with smaller variance – i.e., those that can be enforced more reliably – will be preferred.

3. Constitutional maintenance

Given that enforceability of constitutional rules – and especially *variation* in the likelihood of successful enforcement – is central to constitutional choice, explaining how constitutions are enforced, and why some rules are more likely to generate compliance, is of obvious importance. Barry Weingast's (1997) work on constitutionalism is a useful starting place. The underlying assumption of the approach is that enforcing limits on political power ultimately requires the threat of organized public resistance to "sovereigns" who overstep the bounds (see also Hardin, 1999; de Mesquita et al., 2003). Taking this assumption as a foundation, Weingast focuses on the conditions that make this mechanism "credible," that is, the conditions under which a promulgated rule can effectively constrain actions by the sovereign through the threat of a public backlash. Weingast considers a simple, but instructive repeated-game model. Suppose "society" is composed of two social groups. Nominally, the sovereign is supposed to respect certain "rights" that these groups possess (e.g., a right to property). The sovereign can remain in power as long as he enjoys the support of at least one social group. If both groups oppose him, he is deposed. All else being equal, each group values respect for its own rights; it does not directly care about respect for the rights of the other group. The sovereign prefers to violate rights, but will respect them if doing so is necessary to maintain power. The three players engage in the following (repeated) interaction: The sovereign chooses whether to violate the rights of citizens (either of all citizens, or of only one group) or to respect their rights. In response, citizens choose whether to support the sovereign or (at some cost) to challenge him. If both groups oppose him, he is removed. Otherwise, he remains in power.[13]

Not surprisingly, the model yields "nasty" equilibria in which the sovereign is able to violate the rights of citizens with impunity. But the critical lesson of Weingast's model is that it is also possible for citizens to constrain the sovereign. Doing so requires coordinated action: Citizens in both groups must have the same expectations regarding those actions by the sovereign that constitute a "transgression" and should result in a withdrawal of support. If citizens share the expectation that action y is "out of bounds," and if they believe that others will withdraw support in response to observing y, they are willing to do so as well. The consequence is that the sovereign perceives a credible threat of removal from office, and moderates his behavior accordingly.

The key issue, naturally, is how such coordinated understandings of what constitutes a transgression can be achieved. Weingast points to public proclamations of constitutional rules (for example, the Revolution Settlement in 1688) as significant events precisely because their salience can coordinate citizen expectations regarding impermissible actions. Speaking more broadly, this argument suggests a particular perspective on the importance of political culture and history. If coordinated citizen expectations regarding the appropriate boundaries of the state are critical in constitutional maintenance, societies that are more homogenous – with respect to preferences regarding their political order, but also with respect to political experiences and history – are more likely to be in a position to maintain a constitution. On this account, shared preferences and heritage – culture, for lack of a better term – are *not* primarily important because of the *particular* values citizens hold (as they are in traditional accounts, for example Almond and Verba (1963)). What is critical is that they are *shared* values that can serve to coordinate expectations. Moreover, constitutional norms that tap directly into these shared values and experiences are more likely to be enforceable than those that do not. Consider the "quasi-constitutional" stature of the number of Supreme Court Justices in the United States. Although this number is not fixed in the Constitution, and was adjusted on a regular basis during the nineteenth century, the political experience of Franklin D. Roosevelt's court-packing plan (e.g., see Leuchtenburg, 1996) has elevated the current size of the Supreme Court to an inviolable principle: It is unimaginable that a US President or Congress would propose to change this number because doing so would be seen – by political opponents *and* supporters – as a plain violation of the "rules of the game." It is the focal nature of a particular episode in American political history that creates the highly coordinated, specific expectations that enforce this norm.

4. Judicial review and constitutional enforcement

While a common political culture and history can serve to coordinate understandings of constitutional norms, they cannot uniquely determine citizen evaluations of sovereign actions. Constitutional norms rooted in a shared heritage limit the interpretative scope for application, but rules must be expressed in words, and words – especially if applied over long time spans – will necessarily give rise to *ambiguity*. Consider a rule that is intended to limit some sovereign actions ("Unreasonable searches are unconstitutional"), but it does so in a manner that creates – at least for some actions – ambiguity about how the rule classifies these actions ("Is it unreasonable to search the trunk of a car stopped for a routine traffic violation?"). Different citizens are likely to come to different conclusions. As the rule is applied in particular circumstances, the "coordinated expectations" that are central to enforcement can break down. The result is that the rule may not be enforceable: Without a shared understanding of the action at issue, citizens will not punish a sovereign in a coordinated, predictable fashion, and

[13] Opposing the sovereign is costly in Weingast's model, but only moderately so. If both groups oppose the sovereign, their success in removing him is assured. Such assumptions are tenable in some circumstances, but they do, of course, abstract away from additional obstacles to organizing opposition that may be present in totalitarian systems in which opposition can be prohibitively expensive and success (at least for individual participants) is not assured, leading to significant problems of collective action that need to be resolved for effective resistance. For an analysis of resistance politics and collective action in such cases, see Lohmann (1994) and Karklins and Petersen (1993).

the constraint imposed becomes meaningless – at least with respect to those actions sufficiently "close to the line" to permit plausible disagreement. Note that this constitutes (in terms of the distinction drawn in Section 2), a problem of "in-period enforcement." Enforcement fails because there is no sufficient sanction to deter a violation.

To make matters worse, political interests who would like to avoid the constraints imposed by a rule may exploit potential ambiguities in order to undermine coordinated citizen expectations – a move reminiscent of Riker's "heresthetics" (Riker, 1996). That is, constitutional erosion can occur as a sovereign intent on breaking a rule attempts to "mask" as a ruler committed to the constitutional order who simply happens to hold a different interpretation of what a rule demands. Such a strategy is particularly likely to be successful if some citizens have interests that are implicated in the evaluation of the sovereign's actions. Those who stand to gain may be inclined to give him the "benefit of the doubt," even if they *would* censor the sovereign if it became plain that he is not committed to upholding the constitutional order.

Solving this problem of "in period enforcement" requires resolving the ambiguous classification of sovereign actions – that is, it requires that "coordinated" citizen understandings (and therefore reactions) with respect to particular actions can be maintained or established. One way to think about the role of judicial review is as a solution to this problem. Court rulings that declare an action by the sovereign "in bounds" or "out of bounds" can resolve the coordination problem confronting citizens by substituting a new, clearer signal – a trip wire of sorts – around which citizen reactions can be coordinated. A sovereign who refuses to recognize judicial decisions is clearly not committed to the constitutional order, and should be opposed. Sutter (1997, pp. 146–147 puts the argument this way:

> Halting a violation of the constitution may require the coordinated efforts of many citizens. Miscoordination may render these protests ineffective... A divergence of opinion [regarding an alleged violation] creates potential for coordination failure... The verdict in a Supreme Court case serves as a focal point, minimizing coordination problems... When enforcing limits on government requires coordinated effort, appointing judges to render a verdict is beneficial *even if* the judges were no more competent than the average citizen.

Note that this argument has a radical implication. From this perspective, the value of judicial review lies *not* in the quality of legal reasoning (the analysis of which is the object of much legal scholarship and debate). Its value derives from the fact that a judicial verdict (whether "right" or "wrong" in some deeper sense) can serve as an unambiguous signal around which citizens can coordinate their evaluation of sovereign actions. Irrespective of the details of a particular decision, the fact *that* a decision has been made, and *that* a policymaker refuses to follow that decision can send a clear signal that the policymaker is no longer committed to respecting the constitutional order, and should be resisted. Once the Supreme Court announces that Nixon must turn over the tapes, refusal to do so can no longer be explained by divergent interpretations of executive privilege – refusal to comply clearly reveals an attempt to play outside the rules.[14] This "coordination function" of judicial review has led Sutter – and others – to argue that "[j]udicial review is a relatively efficient means of enforcing a constitution" (Sutter, 1997, p. 147) – although obviously for reasons that differ from more traditional arguments that ground a defense of judicial review in the claim that judicial decision-making is qualitatively superior, at least in some circumstances (e.g., see Bickel, 1962).

5. Judicial Review and Constitutional Change

Judicial review can provide an efficient solution to the problem of "in-period" enforcement. The focal nature of judicial decisions – which coordinates citizen expectations – endows courts with considerable power.[15] But as noted in Section 2 , from the perspective of an individual selecting among alternative rules, enforcement poses an additional challenge: Consistency across time.[16] In this section, I argue that the problem of enforcing constitutions over time in a manner that

[14] Importantly, this argument implies that there is nothing *special* about judicial review. In principle, other institutions could perform the same signaling function, including (to take it to an extreme) a public coin-toss. However, to work, any mechanism must be accepted by a sufficient number of participants as the "referee," and these participants must believe that others will similarly recognize it. Given historical contexts, courts are in a good position to meet this requirement (a kind of "common knowledge" condition) since they are widely regarded as the legitimate institution for resolving constitutional questions – thus establishing judicial decisions as a signaling device that most citizens believe other citizens are likely to recognize. At the same time, this mantle of legitimacy probably depends on the quality of judicial decisions, especially the fact that they are perceived to be justified (e.g., by reference to the constitution or a statute), and are not simply an expression of the judges' will (Shapiro, 1981; Tyler and Rasinski, 1991; Gibson, 1989, 1991). This is the critical reason why judicial decision-making can be circumscribed through appropriate constitutional language, a point to which I return below.

[15] In a related argument, Calvert (1992) suggests that the power of leaders generally derives from the fact that they create focal points that resolve problems of social coordination, a point also anticipated in David Hume's essay *On the Origins of Government* (Hume, 1985).

[16] While judicial review can provide a solution to the problem of "classification," it inherits some of the same difficulties it is meant to resolve. The sanction that gives force to judicial decisions is the threat of a public backlash against sovereigns who choose not to comply (Vanberg, 2005; Carrubba, 2009). Whether courts can serve as a coordinating device for the enforcement of constitutional norms therefore depends on the ability of courts to deliver a "clear signal" that can serve as a catalyst for coordinated citizen action. And this ability, in turn, *varies* with characteristics of cases *and* with the political environment. Thus, the threat of a public backlash for non-compliance can be a powerful inducement for respecting judicial decisions, but "[t]o be effective... this mechanism requires not only that a sufficient number of citizens are willing to support a court in a confrontation with a legislative majority, but also that these citizens will become aware and convinced that a governing coalition has chosen to evade a judicial ruling. And the ease with which such monitoring can take place depends fundamentally on the political environment surrounding a decision, including the complexities of the issues at stake, the constellation of public interests, the presence of organized interest groups, and the behavior of opinion leaders" (Vanberg, 2005, 56). Just like constitutional norms give rise, to varying degrees, to the problem of detecting constitutional violations (on the current account, the principal reason for creating courts with the power

is consistent with the expectations or intentions that form the basis for constitutional choice typically *cannot* be solved through the institution of judicial review – and is perhaps even exacerbated by it.

Constitutional norms can give rise to ambiguity, making spontaneous coordination of citizen expectations regarding the application of rules to particular actions problematic. By providing a focal point, courts resolve this coordination challenge. But the very fact that there is a coordination problem to be solved implies the obvious point that judicial resolution of cases involving these constraints is *also* not determined. Over time (as well as across jurisdictions), judges may interpret constitutional norms in divergent ways, with significantly different results for the de facto implications of the constraints.[17] Another way to put this is to say that at any point in time, judicial review constitutes – by virtue of a decision's focal powers – an effective mechanism for imposing the particular interpretation of a constitutional norm adopted by a majority of justices on a polity.[18] But – depending on the interpretative latitude provided by a rule[19] – judicial review will not necessarily generate enforcement that is consistent with the expectations of those who choose rules at the constitutional stage.[20]

A remark by former Supreme Court Justice Sandra Day O'Connor provides a poignant illustration of the degree to which changing judicial interpretations can affect the de facto meaning of constitutional rules. During a law school symposium on recent campaign finance decisions, she quipped: "Gosh, I step away for a couple of years and there's no telling what's going to happen."[21] Although intended to be funny, the quip reveals an underlying reality: Resort to judicial enforcement of constitutional provisions – perhaps necessary to avoid coordination failures in the face of ambiguity resulting from the application of rules – is, from the perspective of an individual choosing constitutional rules, not a mechanism that will reliably result in enforcement that is consistent with the intentions that guide individual choice among rules. In the language used in this paper, in the eyes of an individual at the constitutional level, judicial review can result in constitutional erosion.

It is in this context that the distinction between *enforcing* and *changing* constitutional constraints – raised earlier – becomes relevant. Although it is impossible to draw a hard and fast line between judicial decisions that "merely" enforce the constitution and those that change a constitutional rule, it is clear that some opinions result in outcomes that fundamentally shift the meaning – and thereby the effective constraint – of a constitutional rule. The phrase "amendment by interpretation" highlights this transformative element in judicial decision-making.[22] Putting it differently, judicial review serves not simply to "enforce" constitutional rules by achieving coordination in the face of potential ambiguity. The focal power of judicial decisions can also be used to *change* constitutional constraints through the adoption of novel interpretations of constitutional language.

Significantly, such judicial amendments are the product of a process that is profoundly affected by sub-constitutional politics. Judicial decisions are typically made by majority rule. And while judges are often insulated against some external influences, there exists overwhelming evidence that their decisions are driven by their ideological commitments ("policy preferences"), and influenced by the political environment surrounding cases.[23] Indeed, a common strategy in "ordinary" politics in most advanced industrial democracies is to "constitutionalize" political disputes in hopes of achieving through judicial decisions what is harder to achieve through the legislative process or by an explicit constitutional amendment.[24] In other words, constitutional change that emanates from judicial interpretation is usually not driven by the inclusive, broad perspective that legitimatizes constitutional choice in the Buchanan approach. Instead, courts are targets in the sub-constitutional game for political interests intent on advancing their particular agenda by using the judicial process to impose

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of judicial review in the first place), so detecting compliance with judicial decisions depends on the particular context of a decision. Moreover, there are both exogenous (the nature of the subject matter and the possible remedies before the court) and endogenous (how clearly the court annunciates the consequences of its decision) components to this. In short, generating compliance with judicial decisions via the threat of a public backlash against office holder who refuse to be bound by judicial pronouncements is not a straightforward problem (see also Staton and Vanberg, 2008) – an issue I leave aside here.

[17] In principle, the norm of *stare decisis* is intended to counteract inconsistencies in interpretations over time and space. But stare decisis applies primarily to lower courts in a judicial hierarchy, and thus has less binding force for Supreme Courts over time. Moreover, empirically, it is reasonably well-established that the norm does not exercise a strong constraint on judicial decision-making (Segal and Spaeth, 1996).

[18] Recall Charles Evans Hughes' blunt assessment that "(w)e are under a Constitution, but the Constitution is what the judges say it is. . ."

[19] I return to the importance of interpretative latitude below. To anticipate, judges are likely to be constrained to adhere to "plausible" interpretations of constitutional language. The breadth of constitutional language thus provides more or less opportunity to judges in offering novel interpretations of a rule.

[20] Naturally, an important question is why the expectations of those who choose rules at the constitutional stage are relevant. In a narrow sense, this is a question that is beyond the scope of the current argument, which is concerned with extending the analysis of the Buchanan approach, which focuses on the choice of an individual at the constitutional stage. That is, the goal of the analysis is to draw conclusions regarding the kinds of rules that individuals should choose at the constitutional stage; it is not an argument designed to establish the normative legitimacy of those rules. A broader answer is that going beyond the expectations of individuals at the constitutional stage is closely related to questions of constitutional adaptation and change, and thus raises the question *how* such change ought to be accomplished. I focus on this issue below.

[21] Cited in *New York Times*, 7/24/2010, p. 1.

[22] The radical shift in the Supreme Court's interpretation of the Commerce Clause over a series of decisions in 1937 provides an obvious example. Referring to Owen Roberts, the swing justice in these cases, Leuchtenburg (1996, p.143) reports that following the Court's decision in *West Coast Hotel v. Parrish* (1937),"one correspondent asked 'Didn't the Welshman on the Supreme Court do a pretty job of amending the Constitution yesterday?'"

[23] It would be impossible to provide a comprehensive list of the relevant literature here. For excellent overviews, see Spaeth and Segal (2002) and Epstein and Knight (1998).

[24] In the case of the Commerce Clause, Friedman (2009, p. 213) documents that FDR explicitly rejected the possibility of formal constitutional change through Article V as too cumbersome and risky. Instead, a decision was made to pursue a "judicial" amendment, if necessary by "packing" the Court with additional justices.

novel interpretations of constitutional norms in an attempt to change the de facto implications of constitutional constraints. As Buchanan puts it in *The Limits of Liberty*:

> Ideally, [courts] may be umpires in the social game; actually, these institutions modify and change the basic structure of rights without consent of citizens. They assume the authority to rewrite the basic constitutional contract. . . Democracy can generate quite enough of its own excesses even if decision-makers adhere strictly to constitutional norms for behavior. When these norms are themselves subjected to arbitrary and unpredictable change, by decision-makers who are not representative of the citizenry, the omnivorousness of the state becomes much more threatening (Buchanan, 1975, p. 163).[25]

To critique this facet of judicial review does not imply, of course, that constitutional frameworks do not require adaptation to changing circumstances and experience. Rather, what is critical is the nature of the process by which such adaptation takes place. Because constitutional rules create the fundamental framework for sub-constitutional politics, they should be chosen (and amended) through a process that ensures gains for all participants. This requires a process characterized by inclusive decision-making rules (in the limit, unanimity rule) and an environment characterized by sufficient uncertainty surrounding particular individual interests in the larger social game. An appropriately designed formal amendment procedure is more likely to possess these characteristics. In this sense, the Buchanan perspective suggests a preference for channeling demands for constitutional change into such a process.[26]

6. What kinds of rules?

The obvious remaining question is whether it is possible to say anything systematic about the properties of constitutional rules that are resistant to erosion (including erosion by judicial amendment), and that – should they prove inadequate and in need of revision – are more likely to induce a formal amendment. If both considerations matter to individuals at the constitutional level, what kinds of rules should they focus on? I have already suggested that rules that "fit into" the historic and cultural context of a polity are more likely to be understood in a common manner by citizens, and will therefore be easier to enforce (see section 3). But perhaps more important is the nature of the language in which a rule is framed. Constitutional rules that rely on broad, general concepts are more likely to lead to divergent expectations regarding their meaning in specific instances, and therefore raise the risk of coordination failure. While it is possible to resolve such ambiguity through the "signaling" function of judicial review, this solution lodges considerable power in the hands of judges whose interpretations of the rule decide individual cases. In contrast, rules that rely on narrow terms make "spontaneous" coordination of citizen expectations more likely and circumscribe the interpretations that judges can plausibly advance.[27] While it is, of course, impossible to eliminate all ambiguity or interpretive latitude, it is possible to *limit* both, and thus to enhance the prospects that a rule can be enforced in a manner that is consistent with the intentions that underpin the choice among rules at the constitutional level.

It is easy to see the importance of the distinction between *procedural* and *substantive* constraints emphasized by Wagner and Gwartney (1989) in this context. Substantive constitutional norms – e.g., prohibitions against "unreasonable searches" or pledges to respect the "dignity of persons" – are more likely to rely on broad language that provides room for interpretation. In contrast, procedural constraints (e.g., "To be law, both houses of Congress must pass the same bill in identical form, and the President must sign it.") typically rely on narrow, well-defined terms that leave little interpretative room. The reason is immediate. Procedures usually involve (a) designating who is entitled to participate in a decision, (b) a "recognition rule" that allows us to determine when a collective decision has been taken (e.g., "Ratification of a treaty requires a 2/3 majority in the Senate," or the amendment procedures of Article V), or (c) establishing qualifications for those who act under the constitution (e.g., "The president must be 35 years of age," or "To vote, one must be 18 years of age.") In other words, it is

[25] See also Justice Owen Roberts' famous dissent in *Smith v. Allwright*, objecting to the majority's overruling of a recent precedent: "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject. . . It is regrettable that. . .[this court] should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."

[26] Niskanen (1989, xiii) similar expresses reservations about constitutional changes that come about "by extra-constitutional procedures, by compliant courts, rather than by the Article V procedures for formal amendments that would have provided a test whether these changes were supported by a broad consensus." Of course, formal amendments can have features that are analogous to changes that are the result of amendment by interpretation, especially if amendment procedures are not conducive to creating a choice environment that approximates choice at the "constitutional level." For example, loose amendment procedures that require a simple majority for constitutional amendment (such as in Israel) are likely to encourage an amendment process that is treated as a simple extension of ordinary politics, and may therefore not lead to a more general constitutional deliberation that is removed from the immediate concerns of present political struggles.

[27] There are two reasons why narrow language is likely to constrain judges. If the power of judges derives from their ability to coordinate citizen expectations, their power depends on maintaining the status of "focal point" for constitutional questions in the minds of citizens. A court that consistently appears to ignore clear constitutional language is unlikely to maintain this position over time. Second, judges are less likely to ignore clear language because they have been trained to regard interpretation of the text as foundational to their job – if there is only one (or a limited number) of interpretation, they are unlikely to ignore it. Ambiguity in the text is problematic precisely because judges can "exploit" it while maintaining that they are simply interpreting the text.

the very nature of procedures that they must be precise because they often (though not always) rely on identifying *who* can act and *how* we can determine what they have done (e.g., passed a law).

Because procedural rules often involve a designation of who can exercise political power, they give rise to a secondary dynamic that also aids enforcement. Violation of a procedural rule implies diminishing or ignoring the prerogatives of actors who are empowered by it. Even if these actors agree with the underlying purpose of the violation, they are unlikely to accept it because it undermines their basis of influence. That is, violation of procedural rules directly implicates the interests of policymakers, who typically guard their powers jealously. We would expect them to resist, and to draw public attention to attempts to circumvent procedures. This mechanism, of course, is a particular version of the broader principle James Madison had in mind when he argued in *Federalist 51* that "ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."

In short, procedural constraints – because of their narrow and precise language, and because they touch more immediately on the interests of office-holders – are more likely to be resistant to constitutional erosion than substantive rules. They leave less room for interpretive differences, which is to say that violations of such constraints are usually "obvious" (i.e., coordinated expectations are not difficult to establish). As a result, overstepping procedural boundaries poses a credible risk of massive resistance by citizens – something that those in power are unlikely to risk. Indeed, a cursory look at the nature of constitutional disputes resolved by the US Supreme Court provides some circumstantial evidence for this claim. Of the 2337 decisions involving a constitutional question issued by the Supreme Court between 1953 and 2006, far and away most involved disputes surrounding "substantive" provisions. In descending order of frequency, 371 cases (16%) revolved around interpretation of the fourteenth amendment's guarantee of "due process", 292 cases (12.5%) involved questions surrounding the first amendment's right to "free speech," 282 (12%) focused on the meaning of "equal protection" under the fourteenth amendment, 252 (11%) raised questions regarding the standards for an "unreasonable search" under the fourth amendment, 98 (4%) involved the commerce clause, and so on.[28] Virtually none of the cases involved *procedural* provisions of the Constitution. This does not imply, of course, that procedural provisions are always respected; but it clearly suggests that there is far less room for disagreement with respect to their meaning – otherwise we would surely expect to see such disputes "come up" in judicial proceedings. Moreover, the fact that there is less interpretive latitude in the application of procedural rules implies that pursuing change in such rules through the judicial process is difficult. Procedural rules are more likely to lead to calls for formal amendment. Indeed, leaving aside the Bill of Rights, the vast majority of formal amendments to the US Constitution touch on procedural constitutional norms.

7. Conclusion: implications for constitutional choice

One of James M. Buchanan's most significant contributions has been the development of the constitutional political economy research program. The central insight of the Buchanan approach, going back to the *Calculus of Consent* (Buchanan and Tullock, 1962) is that there is a crucial distinction between the choice of actions *within* rules and the choice of the *rules* themselves. While ordinary ("sub-constitutional") politics may be conflictual, "constitutional politics" – the choice of rules within which social interactions occur – can be a consensual venture that holds out the hope for mutual gain. Many of Buchanan's later contributions, including *Politics by Principle, Not Interest* (1998, joint with Roger Congleton) have focused on identifying improvements in constitutional frameworks that are likely to "create a better game."

In this paper, I have taken up two issues that are directly related to this research program. The first is the issue of enforcement. To the extent that constitutional rules constrain sub-constitutional politics, those who encounter constitutional obstacles to their aims do not always accept these boundaries. Attempts at constitutional erosion are a constant threat. While this enforcement problem has been recognized in the *CPE* literature, it has largely been treated as a challenge that has no direct bearing on constitutional choice and can be dealt with as a separate matter. In contrast, I have argued that enforcement must be a central consideration in the process of constitutional design. Rules are not equally vulnerable to attempts at evasion and erosion. Consequently, choosing rules that are resistant to erosion is an important consideration in designing a constitutional framework. Moreover, I have argued that relying on the judiciary for enforcement – a common prescription, not just in *CPE* circles – can have significant shortcomings.

The second central claim of the paper is that in light of the enforcement problem, rules that rely on narrow, specific language, that are procedural in nature, or that tap into focal understandings that emerge out of a shared political history may offer better prospects of successful constitutional governance than rules that attempt to achieve the same results through direct, substantive constraints or that employ broad, aspirational language.[29] This does not imply that it is possible or desirable to avoid all uncertainty about the implications of constitutional rules for the future. Constitutions are – by their nature – incomplete contracts. But it is possible to limit the scope of plausible interpretation, and thereby raise the likelihood of enforcement.

[28] Data come from the Spaeth Supreme Court Database.

[29] Such a perspective also suggests that we ought to be modest in efforts to "transplant" constitutional norms. Rules that can effectively constrain political power in one place – perhaps because they tap into focal historical and cultural experiences, like FDR's court-packing plan – may *not* be equally successful in places that lack this context.

As a final caveat, it is important to note that the argument I have developed does not imply that constitutional change and adaptation are illegitimate or undesirable. If constitutional rules are found to be unworkable, or if citizen preferences evolve, constitutional adaptation is required. Rather, the argument leads to the conclusion that it is a mistake to prepare for the necessity of constitutional change through the adoption of vague principles and broad language that provide wide interpretive latitude. Such a solution injects sub-constitutional politics into constitutional revision, and endows judges with power to "remake" the constitution in a manner that may not be consistent with considered citizen judgment at the constitutional level. The Buchanan approach suggests that it is preferable to limit the power of judges and to channel demands for constitutional change into a formal amendment process that, if properly designed, can encourage deliberation that extends beyond current political disputes and more closely resembles ideal choice at the constitutional level. Naturally, there are delicate trade-offs involved in designing amendment procedures that can accomplish this. I do not think that I can put this point better than Supreme Court Justice Joseph Story, writing in his *Commentaries on the Constitution*, published in 1833:

> It is obvious, that no human government can ever be perfect; and that it is impossible to foresee, or guard against all the exigencies, which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people. . . It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people. The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory (Story, 1833, §§ 1821).

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