
No Salvation through Constitutions

Jasay versus Buchanan and Rawls

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Anthony de Jasay's vast contributions to our understanding of economics and politics span many domains, but his analysis of the nature and operation of the state tends to attract attention. It is thus not surprising that *The State* ([1985] 1998) continues to be the main focus of interest in Jasay's work, but in the process other important contributions by Jasay pass relatively unnoticed or are at least underappreciated. One of the underappreciated but central insights in Jasay's work is the notion of unholy constitutional political economy. The essence of this insight is the consistent application of public-choice assumptions to the constitutional domain, with all the associated consequences. This article starts by outlining the standard public-choice approach to constitutions and then proceeds to present the main arguments of Jasay's critique and its main implications, with special emphasis on the contrast between Jasay's framework and that erected by James Buchanan and John Rawls. The analytical relevance of Jasay's contribution is then illustrated with two constitutional cases that can to a significant extent be considered symmetrical: the United States, to which Jasay himself devotes considerable attention in his reflections about the political economy of constitutions, and Portugal.

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Public Choice on Constitutions

James Buchanan and Gordon Tullock provide the classical framework for the standard public-choice approach to constitutional political economy: “The individual will find it advantageous to agree in advance to certain rules (which he knows may work occasionally to his own disadvantage) when the benefits are expected to exceed the costs. The ‘economic’ theory that may be constructed out of an analysis of individual choice provides an explanation for the emergence of a political constitution from the discussion process conducted by free individuals attempting to formulate generally acceptable rules in their own long-term interest” ([1962] 1999, 7).

Several points in this approach are worth emphasizing. The first is the assumption of methodological individualism. The conjunction of this assumption with cost-benefit analysis provides much of the novel explanatory power of public-choice theory. Also important is the idea that political constitutions “emerge” from a process of discussion where individual deliberation and individual choice are assumed to play a key role in the development of the constitutional framework. Finally, the emphasis on long-term interests is also relevant, for reasons that are made clear later in this essay.

So far this vision is broadly consistent with general public-choice assumptions, but then a crucial element is introduced to distinguish individual participation in collective choice in the domain of constitutional politics from individual participation in collective choice in “ordinary,” regular politics: in the context of “constitutional discussion,” Buchanan and Tullock add, “the prospective utility of the individual participant must be more broadly conceived than in the collective-choice process that takes place within defined rules” ([1962] 1999, 7).

This apparently mild condition in fact introduces a sharp cleavage between “normal” parliamentary politics and constitutional politics. Within a framework of methodological individualism, assumptions about the outlook with which individuals enter a given collective-decision process are necessarily fundamental to the expected outcomes of that process. If individuals are deemed to regard their own prospective utility within the arena of constitutional decision making in a form that is substantially different from what occurs in “normal” politics, that view will necessarily entail important differences for the resulting theories and expectations in what concerns constitutions.

Buchanan and Tullock are clear in stating that their “theory of constitutional choice has normative implications only insofar as the underlying basis of individual consent is accepted” ([1962] 1999, 7), which precisely emphasizes the central role played by the assumptions about how individuals engage in the constitutional process.

Within this contractual approach to the constitutional problem, having individual participants conceive “more broadly” of their “prospective utility” than in normal everyday collective-choice processes that take part within a given constitutional framework requires the assumption that in some fundamental way these same

individuals are in a different position when deciding about a constitution. This fundamental difference—within a rationalistic and utilitarian methodology—will necessarily have to do with the knowledge that individual participants possess about relevant data concerning current and future states of affairs. To the extent that lack of knowledge generates uncertainty, individual participants in the constitutional process who decide rationally can be expected to indeed take a broader approach to their “prospective utility.”

As Dennis Mueller explains when synthesizing public-choice approaches to the constitutional contract, “The minimum uncertainty needed to produce unanimous agreement on a constitution covering the full spectrum of possible actions is over future identities” (2003, 619). If individual participants have knowledge about future states of the world but are uncertain about their own individual identity (and thus about their own individual position in relation with those future states of the world), it will be rational for them to approach the constitutional negotiation with a broader interpersonal outlook. Another way to put it would be to stress that identity uncertainty in the constitutional domain nullifies the self-interested approach to politics that constitutes the essence of the public-choice approach to regular politics. By not being aware of their future identity (which in practice means not having a “self”), individuals can rationally be expected to enter the constitutional process without the self-interested bias that characterizes their choices and actions in other circumstances.

For Buchanan and Tullock, this identity uncertainty is consistently a key aspect of their vision of constitutional political economy:

Agreement seems more likely on general rules for collective choice than on the later choices to be made within the confines of certain agreed-on rules. Recall that we try only to analyze the calculus of the utility-maximizing individual who is confronted with the constitutional problem. 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 he is considered not to have a particular and distinguishable interest separate and apart from his fellows. ([1962] 1999, 78)

Identity uncertainty propels individual participants to abstain from voting for constitutional rules that favor particular group interests. Because uncertainty prevents individuals from knowing whether they will end up in future winning or losing coalitions, it is rational—and in line with the “self-interest” of the individual who ignores his own “self”—to vote, so to speak, in the general interest of the (constitutional) community.

The whole standard public-choice approach to constitutional political economy thus crucially depends on the reasonability of the assumption of identity uncertainty. Buchanan and Tullock appear to consider this uncertainty nonproblematic: “The uncertainty that is required in order for the individual to be led by his own interest

to support constitutional provisions that are generally advantageous to all individuals and to all groups seems likely to be present at any constitutional stage of discussion” ([1962] 1999, 78–79). As explored later, this avoidance of what really is a serious problem provides the core target for Jasay’s objections, with important implications for the way we ought to think about constitutional political economy within a public-choice approach.

Jasay’s Critique of the Sanctity of Constitutional Rules

Under the standard public-choice approach, constitutional rules constitute a key tool for limiting the power of government and constraining different competing groups’ ability to exploit democratic politics to the benefit of their own interests. As John Meadowcroft explains, “Normal, day-to-day politics, then, will be ‘politics within rules,’ political activity will take place within clear, unanimously agreed, constitutional boundaries” (2011, 108).

Therefore, if the assumptions laid out in the previous section regarding individual participants’ behavior in constitutional politics cannot be said to hold, it follows logically that the role played by constitutional rules in limiting power should be subject to serious questioning. It is precisely through this line of reasoning that Jasay develops his critique of the standard public-choice approach to constitutional political economy.

Although the core ideas of this critique influence much of Jasay’s vast body of work, the critique can perhaps be better understood in its fully developed form through some of the essays included in *Justice and Its Surroundings* (Jasay 2002). The essence of Jasay’s critique of the view of constitutional rules as mechanisms to limit government power lies in the argument that the constitutional processes that deliver those rules should be regarded—if one is consistent about the public-choice approach and its assumptions—as subject to the very same influences that generate redistributive and exploratory outcomes in “ordinary” politics.

A nondualistic vision of human behavior can be said to be at the heart of public-choice theory. This vision implies that self-interested behavior by individuals as market participants should not be contrasted with a supposedly non-self-interested pattern of behavior in the political sphere. Theories and perspectives that either explicitly (or, more frequently, implicitly) adopt such a dualistic approach end up with an idealized version of government power that make them oblivious to the realities of government failure. If one takes seriously the assumptions about self-interest in the market, one ought to apply the same assumptions to the political process. If one does not, then one would in fact be arguing that individuals who remain self-interested agents in market activity somehow are magically (and systematically) transformed into essentially purely altruistic beings once they move to the domain of collective choice.

Because public-choice theorists can find no rational basis for upholding this dualistic vision, it follows that the political process must be analyzed according to the

same assumptions about the role of self-interest in individual behavior. For some reason, however, the same logic does not seem to be consistently applied when the constitutional domain is analyzed. As Jasay points out,

In public choice, winning groups get the best available payoffs and impose worse ones on the losers. However, for some reason or other, this ceases to be true where the payoffs are indirect and take the form of alternative constitutional rules, which are but gates giving access to direct payoffs. Redistributive direct payoffs depend on collective decisions, and constitutions are systems of rules for making them. One can identify these rules as, in effect, indirect payoffs. Some rules hinder redistributive decisions, others help them. Hence some constitutions are a manifest source of better direct payoffs for the prospective beneficiaries of public largess than others. The contractarian-cum-public-choice school appears to hold that these persons and their respective groupings respond to incentives and maximize payoffs when shaping legislation and imposing policies, but not when shaping the constitution that is a determinant, both of what policies may be imposed and who is entitled to impose them. (2002, 80)

To the extent that constitutional rules can be regarded as gateways to direct payoffs in the future (and it seems difficult to argue otherwise from a rational-choice perspective), they constitute, in fact, indirect payoffs. Rational individual participants in the constitutional process will certainly care about those indirect payoffs—namely, in terms of trying to secure a constitutional arrangement that maximizes their interests as much as possible. In this context, the only logical expectation would be that individuals will enter the constitutional process with the intention of securing a set of constitutional rules that provides greater opportunities for the payoffs they desire to come about in the future. It is thus inconsistent to establish a dualistic contrast regarding human behavior in the sphere of constitutional politics and the sphere of ordinary politics. If one takes public-choice assumptions seriously and consistently, one should expect constitutional processes to be subject to broadly the same type of influences and distortions that public-choice theory so keenly analyzes in ordinary politics.

Contrary to its acute and insightful analysis of ordinary politics and public-policy formulation and implementation, the standard public-choice approach to constitutional political economy is also for the most part at a loss to explain actual constitutions and constitutional processes in the real world. The unjustified application of a dualistic vision means that this approach is incapable of incorporating within the same framework the analysis of defective constitutions. Curiously enough, this incapability is similar to how pre-public-choice neoclassical economics was quick to point out numerous instances of market failure but had very little to say about real-world

instances of government failure, which it tended to discard either as unfortunate aberrations or as problems outside the scope of economics.

What then can the public-choice theorist do when faced with actual, defective constitutions in the real world? As Jasay explains, they are left out of the analytical framework applied to all other forms of collective action and regarded simply as unfortunate and avoidable aberrations: “In actual life, for ad hoc reasons there happen to be defective constitutions which are not neutral, but loaded in the sense of facilitating collective choices that are contrary to the Lockean ideal or to some notion of natural right. By the contractarian logic, however, these are avoidable aberrations, for there is, in a society with the usual divergent interests, a place to be filled by a constitution that could have been unanimously agreed upon in an original contract, if the occasion to propose one had arisen” (2002, 80).

The main failing of this approach to constitutional political economy—as Jasay perceptively warns us—is that “defective constitutions” do not come about for random ad hoc reasons—but are caused by the very same features of the political process that public-choice theory has done so much to illuminate when it comes to ordinary politics. The pursuit of particular group interests, the imposition of exploitative schemes, and the establishment of rules that favor rent-seeking behavior by some groups to the detriment of others (and of the common good of society) through constitutional processes are not unfortunate aberrations—they are features that ought to be expected from the operation of politics in the constitutional sphere.

Furthermore, even if one happens to start out with a relatively “nondefective” constitution (an event that most public-choice theorists would probably classify as remarkably rare), what would prevent it from being changed into a “defective” one through the operation of ordinary politics? Constitutions are, after all, human arrangements, and although standard public-choice theory regards stability as one of the characteristics of a good constitution, it would be hard to argue that a good constitution is immutable. To the extent that constitutional changes are allowed, they will come along through some form of ordinary politics (again, it is hard to envisage how it could be otherwise). If that happens, then ordinary politics will end up over time “contaminating” the good constitution, and so a defective constitution will be established sooner or later. By the same token, if it were somehow possible to prevent the formation of defective constitutions by changing the way individual participants act in these processes, then why not apply the same procedure to ordinary politics and thereby solve all of our collective-action problems?

At a more general level, the forced dualistic contrast between constitutional politics and ordinary politics leads to an inconsistent approach wherein public-choice theory studies ordinary politics from a thoroughly positive perspective while at the same time introducing rather stringent normative conditions into its study of constitutional politics. This inconsistency, in turn, has important implications for the way the public-choice approach relates to broader theoretical understandings of the social and political order.

Jasay, Buchanan, Rawls, and Nozick on Veils

As explained earlier, the assumption of identity uncertainty plays a pivotal role in the standard public-choice approach to constitutional political economy. The role of this “veil of uncertainty” in Buchanan’s constitutional political economy (and in that of other public-choice scholars who follow him) is not dissimilar to John Rawls’s “veil of ignorance” (Meadowcroft 2011, 55).

In Rawls ([1971] 1999), individual ignorance regarding future position in society, skills, natural attributes, and even particular conceptions of the good is essential to make effective a strong condition of equality. By eliminating any possibility of diversity of interests in the original position, Rawls’s veil of ignorance aims to remove all sources of partiality, therefore leaving impersonal criteria as the only option for the definition of constitutional principles and rules. In a Rawlsian framework, just institutions are established by placing individuals in an original position where they are unaware of all of their relevant individual characteristics. Thus, they remain individuals in name only. In fact, the two principles of justice are arrived at through a social contract arrangement wherein those involved constitute a collective mass of indistinguishable clones, for all practical purposes unaware even of the fact of their individual personalities.

As Jasay synthesizes this view, “In this original position, all initial endowments disappear behind a ‘veil of ignorance.’ If people had no endowments, or had equal ones, or were ignorant of what they had, it would be pararrational for them to agree that inequalities are to be evened out except if they work to the advantage of the least favored among them. This, Rawls’s ‘difference principle,’ is the product of prudential reason once fairness has led all to ignore any initial advantages they may have” (2002, 108). Under this light, Rawls’s approach can be seen as an extreme case of the error committed by standard public-choice theory when analyzing the constitutional domain. The hypothetical veil that ensures uncertainty of outcomes at the individual level simultaneously imposes a normative condition of equality at the collective level.

But although Rawls’s veil is more extreme, it is not—from the perspective of the critique leveled by Jasay—qualitatively different from the veil imposed by Buchanan and standard public-choice theory. Public choice’s veil of uncertainty does not presuppose total ignorance (Brennan and Buchanan [1980] 2000, chap. 2). It is also a less-ambitious veil in that it does not aim at establishing the principles of justice that will define the social contract. But its basic function is very similar in that both veils constitute key assumptions for distinguishing individual action at the level of the social contract (where constitutional rules are set) from individual action at all other levels (which is supposed to be played out under the previously defined constitutional rules).

Once this similarity is fully understood, it should come as no surprise that Buchanan had in fact a rather positive view of Rawls’s overall vision of the social contract (even if not of several of the details). Buchanan went so far as to state that

he shared with Rawls (as well as with other social contractarians) not only the aversion to normatively evaluating political processes and institutions by nonindividualistic standards but also a common understanding that politics is not a permanent conflict of interest (2001a, 224). This proximity between the two authors is, of course, entirely consistent with both Rawls's and Buchanan's approach to constitution deliberation and more specifically to the employment of veils to remove both self-interest and adversarial elements from that type of deliberation.

At the same time, however, this proximity between Rawls and Buchanan means that—from the perspective of Jasay's critique—both are guilty of the same inconsistent reasoning regarding what concerns constitutional political economy. Both Rawlsians and standard public-choice theorists are guilty of conceiving a sanctified version of the constitutional process that is incompatible with reasonable assumptions about human behavior. It can perhaps be said that the public-choice theorists' guilt is heavier because the distinctiveness of their whole approach is based precisely in rejecting that mistake when it comes to analyzing ordinary politics. But the difference in their guilt is only a matter of degree. In essence, if one accepts Jasay's critique, both the Rawlsian “veil of ignorance” and public choice's “veil of uncertainty” must be considered untenable approaches to constitutional political economy.

In criticizing public choice's (in particular Buchanan's) reliance on a veil for its analysis of constitutional political economy, Jasay argues: “It is no doubt as easy to reach unanimous agreement on innocuous terms (and perhaps on any terms whatever) under these conditions as it is to agree with oneself. The result is still trivial, no less so than the one reached without the help of the veils. But it is a little disappointing to find perhaps the foremost champion of methodological individualism of our time producing this result by resorting to a device that effectively obliterates individuals and opens the back door for some holistic entity to take the place they can no longer usefully occupy” (2002, 174).

Interestingly, Buchanan is strongly critical of Robert Nozick's approach precisely because the latter does not put forth a constitutional theory to justify his starting principles of justice (2001b, 426). Nozick (1974), of course, starts from the premise that individuals have rights, and he abstains from entering into the type of constitutional scenarios that are central to both Buchanan and Rawls. In Nozick's deontological approach, property rights rely on the previous existence of voluntary transfers, with the challenge posed by first possession being faced through the application of the Lockean proviso. This explanation, as Jasay notes, raises problems of its own but also provides a clearer picture of what is also a key challenge posed to constitutional political economy: “Almost any form of the Lockean proviso can be levered up to a requirement that equates justice with conformity to some general feature of the social state of affairs. Equal initial endowments, or some other broad equality, is the privileged feature. Theories of justice can either do this, or they can define justice by reference to individual rights that are independently accounted for. They can hardly do both at the same time” (2002, 140–41).

To account for constitutional agreement on individual rights, theories can either obliterate individuals (by employing mechanisms such as the veil) or independently account for the origin and legitimacy of those rights. In this sense and in light of Jasay's critique, Nozick's approach can be deemed more defensible because it starts from the assumption that individuals have rights. It is true—as Buchanan harshly points out—that Nozick fails to discuss satisfactorily where those rights are supposed to come from, but by this silence he implicitly acknowledges that rights cannot arise from the same constitutional framework that needs to presuppose the existence of those very same rights if it is to be meaningful.

Implications for Constitutional Political Economy

Now that the essence of Jasay's critique of the standard public-choice approach to constitutional economy has been laid out, its main implications can be discussed. What results from Jasay's position might be described, in contrast, as “unholy constitutional political economy,” an approach to constitutional political economy that consistently applies the same assumptions about human behavior that are applied to other spheres of human action, be it the market or ordinary politics.

What does pursuing this path of reasoning to its logical conclusions entail? If anything, it would appear that the expectation ought to be that individuals and groups will be even more assertive in fighting over constitutions than they are in fighting over something in ordinary politics. In the real world, this should be expected to happen to the extent that constitutional processes provide valuable opportunities to set up rules that skew ordinary politics in favor of some groups to the detriment of others.

If one takes the implications of rational self-interested behavior to their logical conclusions, the arena of constitutional deliberation—particularly in settings where there are formal written constitutions—can be expected to be a much-contested setting where different groups seek to impose their views and interests on society as a whole. The fact that constitutional rules shape and constrain ordinary politics and public policy will make the constitutional arena more—not less—attractive in this regard. If for some reason—historical, sociological, or otherwise—a particular group or faction has the opportunity to exercise greater influence over the constitutional framework at a given moment in time, one can safely predict that this group or faction will exploit the constitutional process to the maximum that its ability allows. It will do so in order to improve its chances of benefitting from payoffs that it values more and to impose costs on the rest of society. As Jasay explains, “Nor is there much reasonable ground for believing that collective rationality can prevail at the constitutional level if it cannot prevail in ordinary fiscal legislation. If it is irrational for a winning coalition to forego potential gains, it is equally irrational for it to adopt a constitution that would oblige it to forego potential gains. If such a constitution is in fact accepted, it is not necessary; if it is necessary, it will not be accepted (or will be circumvented)”

(2002, 121). In fact, if individuals are rational, respond to incentives, and maximize payoffs when shaping ordinary legislation and public policies, those very same (real) individuals can be expected to be even more—not less—assertive when shaping the constitution that to some extent indirectly determines those payoffs.

This expectation can be illustrated with a very simple example. Let us assume that in a given polity four public policies can be chosen from, ranging from public policy A (the least redistributive) to public policy D (the most redistributive) and that every year (for example, when the budget is approved) one and only one of the four policies will be picked in the domain of “ordinary” politics. Let us also assume that when the choice among public policies A, B, C and D is being made, an organized interest group is lobbying for more redistribution. This group will prefer policy D to C, C to B, and B to A. Every year the group will try to the best of its ability to have the government enact the most redistributive policy it can effectively help to approve.

Now let us assume that a new level of political decision making is introduced: the polity is to have a constitution that effectively constraints the scope of ordinary politics. In order to achieve this objective of limiting governmental powers, the constitution will limit the number of possible policies from four to only two, which are to be determined through constitutional politics. It will also lock in this situation for a minimum period of, say, five years. Let us further assume that there are two possible constitutions: Constitution X, which allows policies A and B but makes policies C and D unconstitutional, and Constitution Y, which allows policies C and D but makes policies A and B unconstitutional. What is to be expected of the constitutional process? If one applies public-choice assumptions consistently (i.e., without veils) to the domain of constitutional political economy, there would be a very high probability that the organized interest group will lobby as hard as it can for Constitution Y. After all, if it is successful in constitutional politics, it will be able to lock in for (at least) the next five years an outcome that consists of one of its two preferred policies and excludes its two least-preferred policies. In fact, given some additional simple assumptions, it can be shown that the group will act rationally by investing more in its lobbying efforts in constitutional politics than in ordinary politics.

Furthermore, if for some reason Constitution Y is the law of the land, it should in principle be expected that the pro-redistribution organized interest group will from that point on become a vigorous defender of the constitution. But if for some reason Constitution X is the law of the land, it should in principle be expected that the pro-redistribution organized interest group will from that point on become a vigorous opponent of the constitution.

It is possible to conceive some dynamic scenarios wherein this outcome would not necessarily be the case, but in most instances it would appear to be an accurate description of what a consistent public-choice approach to constitutional political economy should predict.

In other words, nonneutral constitutions are not aberrations—they are the logical outcome of most instances where constitutional politics is played out by real

human persons (instead of by veiled clones). If so, efforts to purify politics through constitutional reform will tend to have a very poor rate of success in the real world (Jasay 2002, 184–85). It may well be that in most cases in the real world, politics determine constitutions, not the other way around.

Practical Illustrations: The United States and Portugal

Two brief practical and to some extent contrasting cases illustrate the adequacy of the suggested approach of constitutional political economy when dealing with constitutional issues in the real world: the United States and Portugal.

The U.S. constitutional process is well known and in fact is in the background (even when it is not mentioned) of much of public-choice scholarship on constitutions. Jasay (2002) himself is, of course, well aware of this connection and thus discusses the U.S. case as one where the starting framework was generally benign (from a broadly classical liberal perspective) but nevertheless converged over time to become rather more interventionist.

Formulating the problem in general terms, Jasay asks: “Let it be the case, however, that there is a benign constitution to begin with and the greedy gremlins who swarm around public choices had no hand in its making. Since, however, they know no taboos and are led by interest, what is to stop them from profanely starting to reshape the constitution the moment it provides them with the rule system for engineering agreement to non-unanimous choices?” (2002, 81).

Several paths may lead to constitutional decay, so to speak. The first is that successively narrower majorities (starting with the qualified majority initially requested for constitutional reform) gradually alter the constitution until it reaches the point of unlimited simple majority democracy. This path would certainly be fully compatible with a consistent application of public-choice assumptions, and perhaps at least some of the record of constitutional change in the United States can be framed according to this model, but it is likely that such a process of gradual formal constitutional changes by ever-narrowing majorities is not even necessary.

It is more likely, as Jasay also points out, that the most effective route to constitutional change is through interpretation of the law itself. Law must always be interpreted to be applied. and it would be naive to regard judicial interpretation as immune to the political and sociological climate of the day. If ordinary politics and public opinion move in a given direction, sooner or later constitutional politics will reflect those changes. If ordinary politics and public opinion become more social democratic, the constitutional framework will end up reflecting that trend even if the text remains the same. The evolution of the U.S. constitutional framework can be seen in this light:

This is how the very Fifth and Fourteenth Amendments, once seen as the cornerstones of private property rights and the freedom of contract, have since been discovered to be no obstacle at all to the elaborate regulation

of business, the broad advance of eminent domain, extensive legislative intervention in the distribution of incomes, “positive” discrimination, the shift of power from state to federal authorities, and so forth. Without significant recourse to any “rule for changing rules” that the original Constitutional contract may have provided for, enough of the essentials have changed *de facto* to transform American politics from “constitutional” to “majoritarian” democracy. (Jasay 2002, 82–83)

Although the U.S. case is interesting as an illustration, the pertinence of Jasay’s critique is perhaps clearer if one considers the (widely more common) case where the initial constitution is already deeply defective (again, from a broadly classical liberal perspective) at the moment it is approved.

A prime example of this second situation is Portugal—namely, its 1976 constitution. George Bragues synthesizes the relevant facts concerning the 1976 constitutional framework and its impact on the country as a whole (2012, 330–33). Following the 1974 revolution that deposed the authoritarian regime known as *Estado Novo* and a period of great instability that included the radical Left’s attempt to establish a dictatorial regime, a new democratic constitution was approved in 1976. The 1976 constitution clearly reflected the balance of power at the time, with a strong leftist and interventionist bias. The preamble to the Portuguese Constitution (which still holds today) symbolically instructs the government to “open a path to a socialist society.” More substantively, a vast array of positive rights is prescribed in the Constitution: from housing, social security, education, and a universal health-care system to job security, paid holidays, and education and culture. All of these rights—and many others, including the rigidity of labor laws—are explicitly mandated by the Constitution, which also specifies particular obligations of provision by the state.

In line (but symmetrically) with what happened in the United States, the extreme socialist bias of the 1976 Portuguese Constitution has not prevented some important relaxations in key areas. So, for example, a wide set of nationalizations that became constitutionally entrenched were reversed in the 1989 revision of the Constitution, thus paving the way for later privatization of firms and sectors that were initially destined exclusively for state ownership and direct control. Changes in public opinion as well as in the pressures arising from integration in the European Union (Alves 2014) ultimately proved stronger than the initial written text of the 1976 Constitution. Nevertheless, a strong interventionist bias continues to prevail to this day.

In fact, the rapid expansion of public expenditure (fully in line with the letter and spirit of the Constitution) in the past few decades has led to three collapses of the Portuguese economy and to subsequent requests for external assistance and bailouts, the last of which took place in 2011 (Alves 2011; Bragues 2012). Throughout this period, the Constitution has been a key element in political debate, with the leftist parties and unions taking every opportunity to defend the Constitution’s interventionist provisions. Since 2011, notwithstanding the conditions attached to

the bailout, the Portuguese Constitutional Court has repeatedly blocked—by ruling them unconstitutional—a vast array of government measures aimed at restricting public spending. Although some spending restrictions have nevertheless been implemented, the Portuguese case makes it quite clear that constitutional politics is played out as an extension of ordinary politics.

A more thorough analysis of the constitutional processes in both countries would of course be necessary to draw deeper conclusions, but both cases seem to illustrate quite clearly the relevance of Jasay's critique of the standard public-choice approach to constitutional political economy. Constitutions—regardless of their starting point—are not in any way removed from the considerations and conflicts of ordinary politics. If anything, they would seem quite often to be pivotal in the rent-seeking disputes that characterize the dynamics of mixed economies (Alves and Meadowcroft 2014).

Conclusion

The sharp cleavage traditionally drawn in public-choice theory between constitutional politics and ordinary politics is theoretically unsustainable and analytically inadequate. Jasay's critique and his underlying approach are fully consistent with public-choice theory and in fact improve that theory by extending its key assumptions to the domain of constitutional analysis. By doing so, Jasay lays the foundation for the development of a generalized public-choice theory (2002, 83) that breaks loose from artificial confinement the analysis of political choices within a given constitutional framework.

Individuals, groups, and majorities in the domain of constitutional politics should be regarded as operating under the same assumptions that are deemed to frame their behavior in ordinary politics, even if specific features of the political processes vary from one setting to the other. More attention should be paid to this key insight in Jasay's work, both by those working within the public-choice tradition and by those working in the field of constitutional and public-policy analysis.

What else can play the limiting role that constitutions are for the most part unable to perform is unclear. To some extent, perhaps strong social conventions may provide an effective check against the worst perils of collective choice (Jasay 2002, xvi–xvii). Regardless of the alternatives, one key finding in constitutional political economy appears difficult to refute: belief in salvation through constitutions is noble but ultimately futile.

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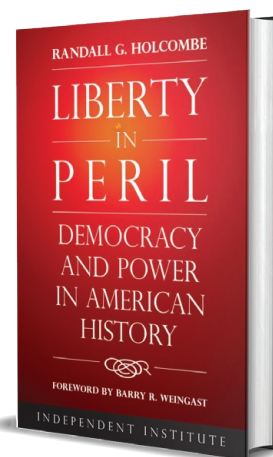
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