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0521808480 - Recreating the American Republic: Rules of Apportionment, Constitutional Change, and American Political Development, 1700-1870

Charles A. Kromkowski

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Recreating the American Republic

*Rules of Apportionment, Constitutional Change, and
American Political Development, 1700–1870*

Rules of apportionment are vital elements of every social and political order. In marriages and families, in business partnerships and social organizations, and in every government and supranational relationship, rules of apportionment exist in various written and unwritten forms. In every form, the rule of apportionment affects not only how collective decisions are made and by whom, but also how and why a particular constitutional order develops over time. *Recreating the American Republic* provides a first and far-reaching analysis of when, how, and why these rules change and with what constitutional consequences.

This book reveals the special import of apportionment rules for pluralistic, democratic societies by engaging three critical eras and events of American political history: the colonial era and the American Revolution; the early national years and the 1787 Constitutional Convention; and the nineteenth century and the American Civil War. The author revisits and systematically compares each seemingly familiar era and event – revealing new insights about each and a new metanarrative of American political development from 1700 to 1870.

Charles A. Kromkowski is Lecturer in the Department of Politics at the University of Virginia.

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CHARLES A. KROMKOWSKI

University of Virginia



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Preface

The Paradox of Constitutional Consent

*But of all the means we have mentioned for ensuring the stability of constitutions – but one which is nowadays generally neglected – is the education of citizens in the spirit of their constitution.*¹

Amidst the welter of discrete approaches and dispositions that happily constitute the social sciences, studies of past and present politics remain unified by a common interest in the conditions, causes, and consequences of collective authority. Across the disciplines of political science and history, many of these studies provide descriptions or measurements of various forms of collective authority. Other studies provide explanations of the causes or consequences of this authority; still others provide theories that account for its creation, transformation, or breakdown. This study speaks directly to these two disciplines and their common interest by describing, by explaining, and by proposing and testing a theory accounting for the development of the American political order between 1700 and 1870.

To engage these parallel but divided audiences in these purposes, this study's format not only enables a comparative historical analysis of the events and eras surrounding the American Revolution, the 1787 Constitutional Convention, and the American Civil War, it also facilitates the recognition and synthesis of the distinct scholarly contributions made by the disciplines of history and political science. This synthesis extends beyond a respectful acknowledgment of their unique disciplinary canons to include both the historian's aspirations to understand and to document

¹ Aristotle, *Politics*, Book V, ch. ix.

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the particular and the contingent within an historical narrative and the political scientist's aspirations to analyze evidentiary domains without methodological bias in order to report general relationships and the logic of historical paths taken. In so doing, this study aspires to contribute to our historical understanding of the American constitutional experience, to methodological and theoretical debates concerning the analysis and dynamics of constitutional order and change, and to an emerging recognition and recovery of the benefits that follow from a union (or better yet, a fuller reconciliation) of the historical and political sciences.

The real possibility that this study's analytical format, synthetic purpose, or empirical and theoretical fields may initially appear unfamiliar to some individuals on either side of the disciplinary divide prompts the appeal for readers to suspend (at least temporarily) their respective disciplinary predispositions. Such a suspension, the following chapters demonstrate, must and will be justified by the double yield of a full and yet more rigorous historical account of American political development and of a rigorous and yet more realistic explanation and theory of constitutional order and change. For these readers and all others, *Recreating the American Republic* hopefully will be viewed as both a deep exploration of the substances and dynamics of constitutional order and a literary device for engaging and uniting disparate individuals and forms of scholarship divided by artificial boundaries that imperialistically and too often unproductively continue to divide the social sciences.

To engage these purposes and audiences, we can begin by pondering the nature of apportionment rules and the vexing constitutional action problem associated with their change. While this preparatory focus may not today be considered a common or neutral point of departure for the study of American politics and its development through time, the remainder of this Preface reveals how the logic and language of existing theoretical accounts fail to provide a ready-made means for engaging and understanding the problematics and possibilities of consensual constitutional order and the processes of apportionment rule change. With the nature of apportionment rules and their elemental relationship to order and change in full view, Chapter 1 identifies the three familiar American cases of apportionment rule change that this study subsequently examines. Whereas the analytical and literary tools of the historian's craft are recognized and employed in later chapters, Chapter 1 surveys the set of ideas and tools typically employed by political scientists to explain political change. This chapter, in addition, makes explicit the research design required to address the four questions that ground this study: namely,

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when, how, and why rules of apportionment change, and with what immediate and longer-term constitutional consequences. Definition of this study's theoretical problem, its set of cases, and its comparative research design likely will satisfy one discipline's initial methodological requirements, but it certainly will leave the other eager for the details and documentation of the three case studies completed in Chapters 2 through 9. Hopefully, these chapters will not disappoint students of either discipline, for they simultaneously tell the individual stories of three historically momentous apportionment rule changes and the general but equally intriguing story of American political development from the Revolution to Reconstruction.

What is a rule of apportionment and why do apportionment rule changes open windows onto the foundation, dynamics, and historical development of constitutional orders in general and of the American political order in particular? In brief, a rule of apportionment defines the intragovernmental distribution of collective decision-making authority. As such, every constitutional order (at whatever level of social aggregation) can be identified and assessed in terms of its rule of apportionment. Although these rules assume a variety of forms, one of the most familiar defines the basis for dividing political representation within a national legislative assembly. The original U.S. Constitution, for example, specified that representation in the U.S. House of Representatives shall be divided among the states according to the whole number of free persons and three-fifths of all other persons, excluding untaxed Indians. In the U.S. Senate, representation was to be divided equally among the states: two senators per state.

Most rules of apportionment, to be sure, reflect constitutional realities that extend significantly beyond their written constitutional forms. This lack of transparency between the nature of the object and its external appearance typically makes the systemic study of rules of apportionment intractable. Despite this, rules of apportionment remain highly significant. At lower levels of aggregation, rules of apportionment are embedded deep within individual decision-making behavior and within interpersonal relations such as marriages and business partnerships.² In

² The observation that apportionment rules are the psychological patterns that define human decision making prompts more reflection but it cannot detain or distract us here. At this level, apportionment rules are the deeply embedded and likely latent decisional rules that determine choices among rationally plausible alternatives. Dilemmas are paralyzing choice situations due to the lack of an operable decisional rule. For further illustration of the consequences of this observation, see Eric Voegelin's commentary on

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marriages these rules typically are the informalized or customary terms by which mutual decisions are made; in business partnerships the terms of these rules typically are defined within written, legally enforceable contracts.³ At higher levels of aggregation (for example, inter- or supra-national relations) rules of apportionment often can be conceived in terms of a panoply of material, territorial, and psychological factors that determine and affect the bargaining positions of two (or more) actors engaged in the expectation of some form of collective action.⁴

Although the full range of apportionment rules would be difficult to study comprehensively, these rules nevertheless are elemental parts of every constitutional order because they define the relationship between autonomous, uncoordinated interests. In so doing, apportionment rules establish a minimum level of decision-making coherence and coordination necessary for collective action. In constitutional orders where collective authority is not a momentary exchange, wholly dependent on force, monopolized by a single individual, or dispersed among self-representing individuals, the rule of apportionment has a special relationship to the stability of the order because it affects how socially organized interests and their agents will be embodied within the process of collective decision making. In this respect, modern forms of representative governance cannot fully be described or analyzed without recognition of a constitutional order's rule of apportionment. Indeed, the fact that some apportionment rules permit the *re-representation* of a plurality of societal interests within the collective decision-making process (and, thus, reciprocal relations between governmental authority and society) offers a basis for distinguishing democratic forms of government from governmental forms characterized by either monocratic (or "unitary") apportionment rules or the general (and more simple) characteristic of existential representation.⁵

Aeschylus' *The Suppliants* in *New Science of Politics* (Chicago: University of Chicago Press, 1952), pp. 70-73. See also Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988).

³ See Elizabeth S. Scott and Robert E. Scott, "Marriage as Relational Contract," 84 *Virginia Law Review* 1225 (1998); Robert Scott, "Conflict and Cooperation in Long-Term Contracts," *California Law Review* (1987) 75: 2005-2054.

⁴ See James D. Fearon, "Bargaining, Enforcement, and International Cooperation," *International Organization* (1998), 52(2): 269-305; James D. Fearon, "Bargaining Over Objects that Influence Future Bargaining Power," paper presented at the 1997 American Political Science Association Meeting, Washington, DC.

⁵ See Eric Voegelin, *The New Science of Politics* (1952). Voegelin defines the historical existence of a society in terms of "existential" representation, or the presence of the capacity to act for a society as a whole. Aristotle's description of how Pisistratus came

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Rules of apportionment are important for another elemental reason: Their stability has long-term informational consequences. Once established, that is, apportionment rules tend to remain in place. Although not immune to incremental adaptations, an established rule of apportionment – like all constitutional rules – is valued because it conveys information about the immediate position and longer-term prospects for various interests and individuals within a particular political order. In this respect, knowledge of the rule of apportionment provides a lens through which individuals and societal interests can assess their political capacities to secure the collective legitimization of their interests.

Finally, apportionment rules are important because the combination of their distributional and informational characteristics often prompts particularly contentious types of political conflict. Why, for example, should one set of interests be privileged over any other set of interests when the matter concerns a collectively binding decision? Moreover, if it is granted that a multiplicity of interests constitutes every society, then the rule of apportionment determines no less than who will govern and who will be the governed. This is an important distinction within every constitutional order, but its import is self-evident for all democratic forms of governance sustained by voluntaristic forms of consent.

Apportionment rule changes, thus, are important for several reasons. First, these rule changes offer nearly transparent opportunities for analyzing fundamental shifts in the distribution of collective decision-making

to rule Athens offers a classic example of existential representation under a “unitary” (and tyrannical) rule of apportionment. According to Aristotle, “When [Pisistratus] had finished the rest of his speech, he told the people what had been done with their arms, saying that they should not be startled or disheartened but should go and attend to their private affairs, and that he would take care of all public affairs” which he and his sons did for the next thirty-six years. (*The Athenian Constitution*, del. sp. trans. P. J. Rhodes, Harmondsworth, Middlesex; New York: Penguin Books, 1984), chapters 15.5, 15–19.

This study of “plural” apportionment rules and of governmental forms based on plural rules offers specialized insights concerning constitutional orders in which various individuals and interests are engaged in and consent to the creation and maintenance of a constitutional order. Whereas many have previously concerned themselves with the histories, the principles, and practical mechanics concerning the consensual maintenance of “plural” constitutional orders, few have fully engaged the additional difficulty of accounting for the consensual creation of this particular form of constitutional order. Modern theories of democracy, therefore, either note that the mechanics of founding moments are forever lost in the mists of time or they unwittingly mimic the Machiavellian logic that because “the many are incompetent to draw up a constitution” the founding of consensual democratic forms of governance necessarily requires nondemocratic and “reprehensible actions.” See Machiavelli, *Discourses on the First Ten Books of Titus Livy*, W. Stark, ed. (London: Routledge and Kegan Paul, 1950), I, 9, 2–3.

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authority. Second, wholesale apportionment rule changes are unexpected events because the decisions to abandon and to replace an existing apportionment rule will have adverse or uncertain effects upon presently empowered interests.⁶ As a result, this type of rule change is not likely to occur without cost, resistance, and coercion.

In consensual constitutional orders – that is, where association with and recognition of collective authority is inherently noncoercive – the opportunity to choose among alternative rules of apportionment raises acute, if not paradoxical, order-making and order-sustaining problematics. For although rationally directed individuals would expect a new set of constitutional rules to provide a baseline of stability for all interests, it also would be evident that these new rules would have discrete (and potentially suboptimal or disastrous) distributional consequences. A paradox, thus, arises: Although a group of rational actors might desire to forsake the dark forests of anarchy, they still might not be able to negotiate their way back into either history or the constitutional gardens promised by a collective authority.

To understand this potential for failure more fully, consider the simplified representation of the paradox of constitutional consent in Figure 1. Assume that two individuals or socially organized interests (X and Y) face the decision whether to commit to the formation of a collective authority. Assume that the origin of the graph represents the expected utility of a preconstitutional status quo. When, therefore, both actors expect a proposed constitutional rule to return common or approximately equal benefits, their consent could reasonably be expected. The expected utility of this set of constitutional rules forms an axis of common informational gain represented by the southwest-northeast diagonal.

Consider the expected utilities of the additional bundles of proposed constitutional rules: A, B', B'', C, and D. Each constitutional bundle is expected to return different relative gains to the two actors. Commitment to include these rules thus raises more complex, although not nec-

⁶ One example will suffice. In 1844, John Quincy Adams, a member of the U.S. House of Representatives, attempted to introduce a resolution enacted by the Massachusetts legislature calling for amendment of the three-fifths clause of the Constitution's original rule of apportionment. So vigorous were the objections in Congress that both the House and Senate refused to *receive and print* the resolution. As Alabama Senator William King protested at the time: "Was there a man within the hearing of his voice that believed for one moment, that such an amendment could be made; and if it could be, by any possibility, that the federal Government would last twenty-four hours after it was made." *Congressional Globe*, 28th Congress, 1st sess. (January 23, 1844), p. 175.

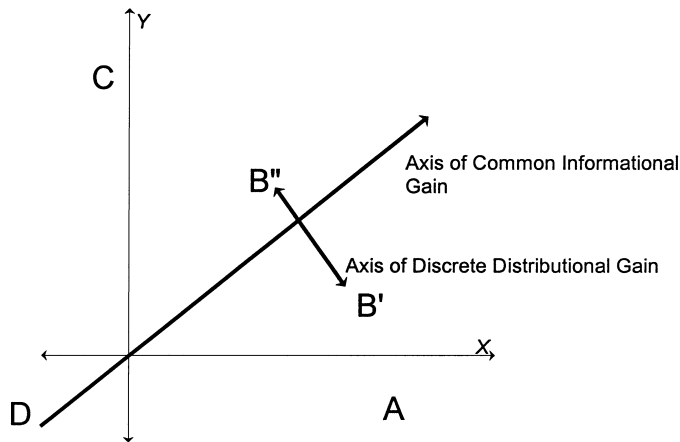


FIGURE 1. The Calculus of Constitutional Consent

essarily insurmountable, problematics. Actor X, for example, might exchange its consent for constitutional bundle “C” for actor Y’s reciprocal consent for constitutional bundle “A.” In so doing, the net expected value of the proposed constitutional order would be increased.⁷

When, however, actors X and Y care more about relative individual gains than net gains or when the values of different rules are not fungible, constitutional rule exchanges likely will not be completed or maintained. When, moreover, the rule choice is discrete (for example, between B’ and B’’) and the expected utility difference is significant, consent also cannot be expected. For what would motivate either actor to forsake a relative distributional benefit? For one, the expected relative benefit may be so trivial that, at some point, a constitutional hold-up (and the resulting stream of “lost” gains) would not seem to be worthwhile. In rare circumstances, however, when the relative difference between two proposed constitutional rules is expected to distinguish the governing from the governed, consent would seem highly improbable and the imperative to sustain a constitutional hold-up would be almost indefinite. Choices among rules of apportionment are one of these circumstances.

Exposure of the inherent problematics associated with constitutional consent – especially the problem of discrete distributional differences –

⁷ See Fritz W. Scharpf, “Coordination in Hierarchies and Networks,” in *Games in Hierarchies and Networks*, Fritz W. Scharpf, ed. (Boulder, CO: Westview Press, 1993), pp. 125–165.

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suggests a basis for the familiar opinion that the creation of consensual constitutional orders is either impossible or ironically dependent upon coercion. As David Hume, an eighteenth-century proponent of this idea, concluded: “Almost all the governments, which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent, or voluntary subjection of the people.” The paradoxical problematics of constitutional consent, moreover, persist beyond the founding moments of a political order. Or as Hume additionally observed:

The face of the earth is continually changing, by the encrease of small kingdoms into great empires, by the dissolution of great empires into smaller kingdoms, by the planting of colonies, by the migration of tribes. Is there any thing discoverable in all these events, but force and violence? Where is the mutual agreement or voluntary association so much talked of?⁸

What then are we to make of the familiar idea that many modern constitutional orders – including long-term exchange relationships at the supranational, international, and intranational levels – appear to have been established, altered, and maintained without naked usurpation, conquest, or domination? Are there credible accounts and a logical basis that explain both the consensual creation and maintenance of this type of collective authority? Three intellectual traditions offer a set of potentially useful answers that merit some consideration. In the first tradition the paradox is simply negated by explaining that the formation and maintenance of consensual unions occur by chance, by nature, or by convention. In addition to ignoring the core problem facing pluralistic constitutional orders, accounts built upon these tropological devices render human freedom and intentional political design secondary to arbitrary probability functions, preexisting communal dispositions, or unaccounted-for accidents of incremental drift. Moreover, the calculus of constitutional consent typically is portrayed against the backdrop of an apparently viable but unseen constitutional order. The utility of the logic and language of this intellectual tradition is limited by other considerations. Contemporary proponents of the “by chance” account, for example, overlook the inappropriateness of their reliance upon proba-

⁸ David Hume, “Of the Original Contract,” *David Hume, Political Essays*, Knud Haakonssen, ed. (Cambridge, UK: Cambridge University Press, 1994), pp. 189–190. For an interesting historical counterexample to Hume’s generalization, see Joseph Felicijan, *The Genesis of Contractual Theory and the Installation of the Dukes of Carinthia* (Klagenfurt, Austria: Družba sv. Mohroja v Celovcu, 1967).

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bilistic models to simulate constitutional decision making.⁹ Proponents of the “by convention” account, by contrast, implicitly assume or counsel obedience to, not consent for, collective authority. And proponents of the “by nature” account typically place severe restrictions on community scale – thereby revealing the inapplicability of this solution as well.

In the second intellectual tradition, consensual constitutional orders are explained in terms of a spontaneously generated motive to elect or to defer to the judgment of individual leaders who are deemed the best able to govern. This classic story portrays the presence of “valorous,” “virtuous,” or “visionary” leaders as a necessary condition for the creation and maintenance of a constitutional order. The unitary (and specifically “monarchical”) rule of apportionment typically recommended in these accounts solves the paradox of constitutional consent in two ways. First, the extraordinary leader is authorized to select and to impose a particular solution among the various possibilities when founding a constitutional order. Second, different societal interests typically are barred from direct representation within the subsequent collective decision-making process.¹⁰

⁹ The classic story of the so-called Theban Pair (Eteocles and Polynices) provides a cautionary reminder of the problematics of ascribing probability functions to individual or group-level calculi concerning constitutional choices and commitments. As recounted by Greek dramatists Aeschylus and Euripides and the Roman poet Statius, Eteocles and Polynices were the sons of Oedipus who, after their father’s self-inflicted demise, agreed to rule Thebes on an annually rotating basis. After the first year, however, Eteocles refused to yield to Polynices. As a result, the Theban order faced civil war from within and foreign threats from without. In the midst of this constitutional crisis, the two brothers fought and killed each other. According to the story, their enmity was so enduring that their funeral flames refused to unite. (See Aeschylus, *Seven Against Thebes*; Euripides, *Phoenissae*; and Statius, *Thebaid*).

¹⁰ This second account also includes heroic stories of deference to individual leaders who subsequently (and quite incredibly) established constitutional orders defined by “plural” apportionment rules. For example, the story of popular trust granted to Cleisthenes during his armed struggles against Isogoras in the wake of the collapse of the Pisistratid tyranny and Cleisthenes’ subsequent division of the Athenians into thirty trittyes and one hundred demes is accounted as the birth of Athenian democracy. (See Aristotle’s account in *The Athenian Constitution*, chapters 20–21).

Another form of this account of consensual collective authority, far too complex to be addressed in this study, enlightens part of the historical development of the Christian church. The origins of modern institutions of representation and democratic government (including “plural” apportionment rules and majority rule) are directly traceable to the theoretical concepts and practices that developed within this tradition. See Arthur P. Monahan, *Consent, Coercion and Limit: The Medieval Origins of Parliamentary Democracy* (Kingston, Ontario: McGill-Queen’s University Press, 1987); Arthur P. Monahan, *From Personal Duties toward Personal Rights: Late Medieval and Early Modern Political Thought, 1300–1600* (Montreal: McGill-Queen’s University Press, 1994).

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The third intellectual tradition employs the language and logic of agreement and contract to explain the phenomena of political order. This tradition has ancient associations with the idea of covenant, yet its modern cast of storytellers warrants special attention for they aim to identify the individual motives and calculations that make consent and consensual orders possible. One of the most famous advocates within this tradition, Thomas Hobbes, proposed that individuals would freely consent to form a collective authority when they individually fear the violent consequences of an anarchic state of nature. Disappointingly, however, the particular political order created within the Hobbesian account is maintained perpetually by coercion, not by consent.

John Locke, writing after Hobbes and recovering and extending themes articulated during the English republican era, offered a different basis for his contractual account. Unlike Hobbes, Locke proposed that political order was maintained by specific limitations on the scope of collective authority, and by the direct consent of voters during elections and the tacit consent of nonvoters through their territorial residence. The Lockean account, however, explained that consent during the creation of a political order emerged spontaneously out of a shared set of societal interests – thereby solving the paradox of constitutional consent by denying the existence of important, discrete distributional differences.

Hume's subsequent critique of the Hobbesian and Lockean social contract accounts exposed the need for more rigorous and realistic accounts of the calculus of constitutional consent. In more recent years, most accounts within this intellectual tradition have tended to emphasize rigor over realism. Indeed, it has become widely accepted that a minimally rigorous explanation of macrolevel (or societal) phenomena like the creation, development, and breakdown of political orders must be built upon explicit microlevel (or actor-centered) assumptions concerning human motives and intentions. As political theorist Jack Knight argues, "[i]f social institutions are the product of human interaction, the substantive content of institutional rules" which frame and constitute social phenomena "should embody the goals and motivations underlying those interactions."¹¹ Moreover, as neocontractarian theorists James M. Buchanan and Gordon Tullock declared, the success of an account within this tradition can be evaluated in terms of how well it

¹¹ Jack Knight, *Institutions and Social Conflict* (Cambridge, UK: Cambridge University Press, 1992), p. 27.

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answers the question: “Can the existing organization of the State be ‘explained’ as an outgrowth of a rational calculation made by individual human beings?”¹²

Beyond their microlevel orientations, neocontractarian theorists offer different solutions to the problems of constitutional consent. Two of the best-known solutions depend on the introduction of so-called “veil” devices. These devices, in brief, solve the problem of discrete distributive conflicts by altering the decision-making context in a way that detaches individuals from their interests in relative or discrete gains. Buchanan, Tullock, and Geoffrey Brennan, for example, place constitutional decision makers behind a “veil of uncertainty” that prevented them from anticipating the probable consequences of various constitutional rules.¹³ Indeed, as Brennan and Buchanan contend, the “more general and more permanent” the rule, the less likely the capacity to forecast its consequences. As a result, “[t]he uncertainty introduced in any choice among rules or institutions serves the salutary function of making potential agreements more rather than less likely.”¹⁴ With similar consequences, John Rawls introduced a “veil of ignorance” that made it impossible for individual constitutional decision makers to anticipate how they would be affected by different rules. The resulting ignorance of consequences prompted these individuals to select rules impartially. Thus, as Viktor J. Vanberg and James M. Buchanan concluded, “[p]otential conflict in constitutional interests is not eliminated” behind the

¹² James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor, MI: University of Michigan Press 1962), p. 316.

¹³ James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (1962). Buchanan and Tullock, to be fair, do not attempt to engage the difficult questions concerning the consensual formation and consequences of apportionment rules. Consistent with their normative goals and their methodological individualism, they assume a “rule of unanimity or full consensus at the ultimate constitutional level of decision-making” (p. 6). They further contend that if the intragovernmental distinction between the majority and the minority is expected to vary stochastically, then consent for the establishment of the institution of majority rule would be rational because it would reduce the expected long-term costs of negotiating agreements. This assumption can be used to ground an account of the consensual establishment and maintenance of majority rule. However, prior to the selection of an apportionment rule the logic of stochastic variation loses much of its lustre because it requires the highly unusual generalization that individuals would not expect different consequences from different rules of apportionment. Rather, because rules of apportionment are almost never expected to have “stochastic” consequences, constitutional consent among discrete interests remains an elemental and prior-level problematic of constitutional order not addressed by Buchanan and Tullock.

¹⁴ Geoffrey Brennan and James M. Buchanan, *The Reason for Rules* (Cambridge, UK: Cambridge University Press, 1985), pp. 29–31.

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Rawlsian veil “but the veil of ignorance transforms potential interpersonal conflicts into intrapersonal ones.”¹⁵

Rather than reconstructing the choice context to overlook or to exclude distributional conflicts altogether, other neocontractarian accounts more realistically permit a diversity of interests among the negotiating parties. One account, for example, explains that consent emerges when these parties agree “to split” their differences – thereby equalizing their absolute gains.¹⁶ Another solution suggests a Hobbesian-like logic by maintaining that consent follows from the recognition that the gains from coordination exceed the minimalist gains or negative results of an anarchic (or noncooperative) status quo.¹⁷ Moreover, once rational actors calculate negotiation costs and the “losses” from withholding consent, the benefits promised by the proposed collective authority do not necessarily have to be extensive.¹⁸

A third solution achieves consent by redefining the calculus of constitutional decision making to include evaluation of both immediate and long-term expected gains. By extending the “shadow of the future,” the discounted value of future expected gains is added to immediate expected gains. Individuals, thus, are motivated to consent when the expected sum of immediate and longer-term gains exceeds the sum of possible short-term losses associated with consenting.¹⁹

A fourth solution achieves constitutional consensus by limiting the number of political actors during the constitution-making process. Larry L. Kiser and Elinor Ostrom, for example, contend that the formal determination of the size and responsibilities of a new “constitutional” order, the process of selecting its members and its operational procedures,

¹⁵ See John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971); Viktor Vanberg and James M. Buchanan, “Interests and Theories in Constitutional Choice,” *Journal of Theoretical Politics* (1989), 1: 52–53.

¹⁶ Fritz W. Scharpf, “Coordination in Hierarchies and Networks,” in *Games in Hierarchies and Networks* (1993), p. 139. See also John R. Nash, “The Bargaining Problem,” *Econometrica* (1950), 18: 155–162.

¹⁷ James D. Buchanan, *The Limits of Liberty* (Chicago: University of Chicago Press, 1975). See also Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge, UK: Cambridge University Press, 1991), p. 85.

¹⁸ See John G. Cross, *The Economics of Bargaining* (New York: Basic Books, 1969); and Fritz W. Scharpf, “Coordination in Hierarchies and Networks,” in *Games in Hierarchies and Networks* (1993), pp. 125–165.

¹⁹ See Robert A. Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984); Michael Taylor, *The Possibility of Cooperation* (Cambridge, UK: Cambridge University Press, 1987). Cf. Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge, UK: Cambridge University Press, 1991), p. 19.

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“must be made by individuals in the constitutional body functioning in a constitutional choice situation.” These decisions are affected “by the composition of the community . . . , the rules governing the interaction that will establish the . . . [constitutional order], and the good that . . . [the constitutional order] represents.” Moreover, according to Kiser and Ostrom, constitutional framers “may agree that all interested [parties] have one vote in the constitution of the association or that the larger [parties] have more votes in constituting the association than the smaller [parties]. The members may bar some [parties] from participating in the constitutional level of choice.”²⁰

Three final solutions have not been as fully developed as the others, although they share a similar Lockean logic. The fifth solution posits that the emergence of “focal points” permits unconnected individuals to perceive a single course of action around which their expectations converge.²¹ The sixth and seventh solutions, more specifically, propose that consent follows when negotiating parties devise either “institutional arrangements that minimize the expected distributional effects” or “institutions that can easily be changed.”²² The former (or “minimization”) solution implicitly proposes that consent becomes likely when negotiations are limited to constitutional rules that promise nearly similar expected benefits – in other words, when there is a liberal contraction of the set of constitutional possibilities to those nearest the axis of common interests identified in Figure 1.²³ The latter (or “metaconstitution”) solution presumes that negotiating parties “are aware of the fallibility of their constitutional constructions” for future conditions and, therefore, are wary of long-term commitments to an inflexible constitutional design.²⁴

²⁰ Larry L. Kiser and Elinor Ostrom, “The Three Worlds of Action: A Metatheoretical Synthesis of Institutional Approaches,” in *Strategies of Political Inquiry*, Elinor Ostrom, ed., (Beverly Hills, CA: Sage Publications, 1982), pp. 212–213.

²¹ Michael Hechter, “The Emergence of Cooperative Social Institutions,” in Michael Hechter, Karl-Dieter Opp, and Reinhard Wippler, eds., *Social Institutions: Their Emergence, Maintenance and Effects* (Berlin: Walter de Gruyter, 1990), pp. 27, 13–33. See also Thomas C. Schelling, *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1960).

²² Knight, *Institutions and Social Conflict* (1992), p. 194.

²³ Elaboration of the liberal tradition since Locke is too extensive to summarize adequately here. For a sample of the varied applications of the “minimization” solution, see Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, 1955); Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974). Adam Przeworski implicitly contends that this “minimization” solution is most likely when the relative electoral strength of various societal interests is unknown [*Democracy and the Market* (1991), p. 87].

²⁴ Viktor J. Vanberg and James M. Buchanan, “Constitutional Choice, Rational Ignorance, and the Limits of Reason,” in *The Constitution of Good Societies*, eds., Karol E. Soltan

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But why consent would follow from this seventh (or “metaconstitution”) solution does not become clear until two further assumptions are more fully explicated. The first assumption is that the set of negotiating agents gains a degree of autonomy from the principal societal interests they represent. This autonomy, in turn, weakens the representation of discrete distributional differences during constitutional negotiations. The second assumption is that the relationship among the set of negotiating agents is grounded (at some level) in the reflexive norms (or general standards) of truthfulness, reciprocity, and trust. For without the advent of this common bond, the solution of institutional flexibility promises little more than future opportunities to become reengaged in discrete and likely disastrous distributional conflicts.²⁵

Many of the logical and descriptive weaknesses of these solutions have been thoroughly debated, and they require no extended rehearsal here. The Buchanan and Tullock “veil of uncertainty” assumes that individuals possess the foresight to calculate the immediate and long-term benefits of a rule-based constitutional order but that these individuals are incapable of anticipating the likely distributional consequences of these rules. In a similar way, the Rawlsian “veil of ignorance” relies heavily on the unrealistic assumption that individuals behind the veil understand the general benefits of constitutional order but are ignorant that constitutional choices have discrete distributional consequences.²⁶ Both “veil” accounts, moreover, presume that individuals assent because of what is *not* known, when traditional philosophical discussions typically portray assent following the *acquisition*, not the absence, of knowledge.

The other neocontractarian solutions also fail to provide sufficiently realistic accounts of the process, outcomes, and consequences of consti-

and Stephen L. Elkin (University Park, PA: Pennsylvania State University Press, 1996), p. 53. Cf. Przeworski, *Democracy and the Market* (1991), p. 82.

²⁵ See Ian R. Macneil, “The Many Futures of Contracts,” *Southern California Law Review* (1974), 47: 691–816; Ian R. Macneil, “Contracts: Adjustment of Long-term Economic Relations under Classical, Neoclassical, and Relational Contract Law,” *Northwestern University Law Review* (1978), 72: 854–905; Ian R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven: Yale University Press, 1980); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, UK: Cambridge University Press, 1990); Fritz W. Scharpf, “Coordination in Hierarchies and Networks,” in *Games in Networks and Hierarchies*, ed., Fritz W. Scharpf (1993), pp. 125–165; Charles F. Sabel, “Constitutional Ordering in Historical Context,” in *Games in Networks and Hierarchies*, ed., Fritz W. Scharpf (1993), pp. 65–123.

²⁶ Viktor Vanberg and James M. Buchanan, “Interests and Theories in Constitutional Choice,” *Journal of Theoretical Politics* (1989), 1: 53.

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tution making. The “splitting the difference” solution, for example, appears unrealistic when there are nontrivial differences in the bargaining positions of the actors engaged in negotiation. Under these circumstances, this solution yields clear advantages to comparatively “weaker” parties – thereby encouraging, not necessarily ending, constitutional hold-ups. Moreover, as Douglas D. Heckathorn and Steven M. Maser point out, comparatively “stronger” parties may refuse to consent to a proposed constitutional agreement because “it is politically irrational in the sense that it is judged to be inconsistent with the strength of the individual’s strategic position.”²⁷

Other problems undermine the credibility of the “optimality” solution. The first problem is that constitutional decisions are almost never limited to a dichotomous choice between an anarchic status quo and a single constitutional order. Rather, prospective constitution makers typically are confronted with multiple alternatives that promise better conditions than the status quo. Thus, although the desire to leap from anarchy clearly exists, the particular leaping direction remains indeterminate.²⁸ The discrete interests problematic, moreover, reemerges once political actors are permitted to calculate the expected distributional consequences of particular rule proposals.²⁹

The “iteration” solution is plagued by several apparent inconsistencies when applied to the constitutional choice process. This solution, in particular, requires ad hoc or reductive assumptions about how individuals discount future gains and calculate the risks of future commitments. As a result, individuals who value the future and who are risk-averse are likely to commit to long-term agreements. Yet, as Charles F. Sabel argues, “surely this is to say that cooperative parties cooperate, and it leaves open the question of whether cooperation is a likely outcome or not.”³⁰ A second problem is that if the values of future gains are to be discounted, then why not also discount expected future losses attributable

²⁷ Douglas D. Heckathorn and Steven M. Maser, “Bargaining and Constitutional Contracts,” *AJPS* (1987), 31: 156.

²⁸ The classic problem here is also known as the Buridanus ass paradox. A hungry jackass is confronted with two equidistant stacks of hay and dies of starvation because it cannot decide between the two appealing options.

²⁹ Douglas D. Heckathorn and Steven M. Maser, “Bargaining and Constitutional Contracts,” *AJPS* (1987), 31: 156–157.

³⁰ Charles F. Sabel, “Constitutional Ordering in Historical Context,” in *Games in Hierarchies and Networks* (1993), p. 83n. See also Michael Hechter, “On the Inadequacy of Game Theory for the Solution of Real-World Collective Action Problems,” in Karen Schweers Cook and Margaret Levi, eds., *The Limits of Rationality* (Chicago: University of Chicago Press, 1990), pp. 240–249.

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to the adoption of a particular constitutional rule? For individuals may withhold their consent because they foresee that a small, seemingly trivial relative advantage projected over time would yield significant (and potentially threatening) differences among the contracting parties. At minimum, therefore, if the “shadow of the future” device is to be introduced then it must be utilized to calculate both the expected benefits and costs associated with constitutional consent.

The “focal point,” “minimization,” and “metaconstitution” solutions also are not beyond criticism. One obvious problem with the first two solutions is that it is not clear precisely how they “solve” the discrete distributional conflicts raised by different rules of apportionment. For “focal points” are temporary rhetorical devices and contraction beyond the inclusion of a constitutional rule of apportionment clearly does not seem possible. At minimum, therefore, the efficacy of these solutions requires deeper theoretical elaboration of the relationship between constitutional rules of apportionment and the larger framework of constitutional rules within which they ultimately are embedded.

The problems with the “metaconstitution” solution follow directly from the “agent autonomy” and “reflexive norms” assumptions relied on to explain this solution. More specifically, that is, how do agents become autonomous from the principal source of their authorization? And how do norms like reciprocity and trust emerge in the face of stubbornly discrete distributional differences? These elemental questions typically are not broached or given their required research focus, although an array of sources offers insights suggestive of various preliminary answers. Policy-oriented and journalistic accounts, for example, regularly expose how bribery or graft corrupts principal-agent relationships.³¹ Scale changes – typically caused by demographic or electorate changes – are other significant conditions that promote the attenuation of representational relationships.³² Other answers are suggested by behavioral science research that portrays human rationality as limited by computational capacities or affected by signaling or reference point changes.³³ Others have extended

³¹ Kimberly Ann Elliott, ed., *Corruption and the Global Economy* (Washington, DC: Institute for International Economics, 1997); see also John T. Noonan, *Bribes* (New York: Macmillan, 1984); Jon Elster, *The Cement of Society* (Cambridge, UK: Cambridge University Press, 1989), pp. 263–272; Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (New York: Academic Press, 1978).

³² Charles A. Kromkowski and John A. Kromkowski, “Why 435?: A Question of Political Arithmetic,” *Polity* (1991), 24: 129–145; *ibid.*, “Beyond Administrative Apportionment: Discovering the Calculus of Representative Government” (1992), 25: 495–497.

³³ Amos Tversky and Daniel Kahneman, “Rational Choice and the Framing of Decisions,” *Journal of Business* (1986), 59: 251–278; George A. Quattrone and Amos Tversky, “Contrasting Rational and Psychological Analyses of Political Choice,” *APSR* (1988),

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these insights by demonstrating that political preferences are multi-dimensional and that decision-making behavior is contextually sensitive.³⁴ As a result, the causes of “agent-autonomy” can be explained in terms of calculation errors, the framing of decision-making options, or real or anticipated changes in the context within which decision makers are embedded.

The spontaneous origins of inter-agent norms also are understudied. Traditional accounts, of course, simply assume that norms are static conditions that require no explanation – for example, the classic Hartzian synthesis of American political thought projects a liberal consensus across time and space.³⁵ Yet as decision theorist Christina Bicchieri recently argued, “Asking why social norms persist through time, or why we tend to conform to them, does not shed any light on the norm-formation process, since *how* norms emerge is a different story from why they tend to persist.” Among others, Bicchieri proposes that norm-emergence can be explained as “the outcome of learning in a strategic interaction context” and that norms, therefore, are “a function of individual choices and, ultimately, of individual preferences and beliefs.”³⁶ Bicchieri’s account requires sequential actions among strategic actors. Notably, others contend that norm-formation and “learning” can emerge in response to long-term uncertainty about the efficacy of particular constitutional rules or in highly selective relationships through the process of bargaining and deliberation.³⁷

CONCLUSION

How do these theoretical insights and their noted logical and descriptive shortcomings inform this study of apportionment rule change and the development of the American political order between 1700 and 1870?

82: 719–736; Lisa Anderson and Charles A. Holt, “Information Cascades in the Laboratory,” *American Economic Review* (1997), 87(5): 847–862.

³⁴ Bryan D. Jones, *Reconceiving Decision-Making in Democratic Politics* (Chicago: University of Chicago Press, 1993).

³⁵ Hartz, *The Liberal Tradition in America* (1955).

³⁶ Christina Bicchieri, *Rationality and Cooperation* (Cambridge, UK: Cambridge University Press, 1993), pp. 228–230.

³⁷ See Viktor J. Vanberg and James M. Buchanan, “Constitutional Choice, Rational Ignorance, and the Limits of Reason,” in *The Constitution of Good Societies*, eds., Karol E. Soltan and Stephen L. Elkin (1996), pp. 39–56; Charles Sabel, “Constitutional Ordering in Historical Context,” in *Games in Hierarchies and Networks* (1993), pp. 65–123; Fritz W. Scharpf, “Coordination in Hierarchies and Networks,” in *Games in Hierarchies and Networks* (1993), pp. 125–165; Jack Knight, *Institutions and Social Conflict* (1992).

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For one, the paradox of constitutional consent identifies a set of problematics that calls into question the possibility and viability of consensual constitutional orders within modestly complex societies. To date, theoretical efforts (although fully endowed with the formalistic rigor of microlevel foundations) have failed to provide a satisfactory general solution for this most fundamental of modern political questions. As such, the causes of this failure offer useful negative examples for this study's narrowly circumscribed theoretical focus.

Clearly, one cause of the failure of prior theoretical efforts can be attributed to their disregard of the possibility that consensual constitutional orders are constructed and maintained over a multiplicity of potentially distinct interests. In this respect, the grand accounts of Hobbes and Locke are decidedly nonmodern because they do not fully accept the serious and perennial constitutional problematics of aggregation and consent in the midst of substantive and discrete distributional differences.

Contemporary efforts, to be sure, typically are keen on recognizing diversity within the human condition but they, thus far, have failed to address directly the fundamental question concerning the origins and constitutional consequences of rules of apportionment. In John Rawls's most recent account, for example, he disregards the elemental import of this question by simply "eliminating the bargaining advantages that inevitably arise within the background institutions of any societies from cumulative social, historical and natural tendencies."³⁸ Rawls often is singled out to bear the brunt of a seemingly permanent critique but on this particular limitation he stands in good company.³⁹

³⁸ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 23. The lack of an "exit" or secession option from association with a single constitutional framework is another unrealistic and ad hoc limitation underlying the choice context within Rawls's account.

³⁹ In *Calculus of Consent* (1962), for example, Buchanan and Tullock concede that "the individual's evaluation of collective choice will be influenced drastically by the decision rule that he assumes to prevail" but they argue that this decision raises "a problem of infinite regression" (p. 6). In *A Theory of Justice* (1971), Rawls contends that without his "veil of ignorance," "the bargaining problem of the original position would be[come] hopelessly complicated" (p. 140). Larry L. Kiser and Elinor Ostrom acknowledge that apportionment rules have important consequences on subsequent alternatives and choices. They contend, however, that the complications that arise by examining the means by which constitutional rules are initially determined "add little to the explanatory and predictive powers" of their framework for institutional analysis [Larry L. Kiser and Elinor Ostrom, "The Three Worlds of Action: A Metatheoretical Synthesis of Institutional Approaches" (1982), p. 215]. Similarly, in *Governing the Commons* (1990) Elinor Ostrom engages the problematics of voluntary cooperation, but acknowledges

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A final cause of theoretical failure (and a third negative example for this account) is a direct consequence of the widespread failure to construct rigorous *and* realistic accounts of the creation and maintenance of consensual constitutional orders. Whereas “rigor” customarily entails the specification of the individual motives underlying societal-level phenomena, “realism” minimally requires the explicit reconstruction of the “cumulative” background of human institutions and tendencies that make the constitution of consent both problematic in practice and paradoxical in theory. Self-styled constitutional apologists and normative theoreticians may privately relieve themselves of this additional requirement. So be it. Others, however, like political scientists Elinor Ostrom and Adam Przeworski, clearly demonstrate that rigor and realism are not mutually exclusive in their theoretically oriented accounts of consensually constructed and maintained institutions of collective authority.⁴⁰

Informed by all of these examples, this study seeks to complement and extend the language and logic of existing theoretical accounts on the formation and maintenance of constitutional order in several ways. First, this study seeks to understand constitutional consent within a context defined by the possibilities and problematics raised by the presence of multiple and discrete interests. Second, this study directly confronts the acute difficulties and consequences associated with consensual apportionment rule creation. Third, this study moves beyond a purely abstract discussion of constitutional order to construct analytically rigorous *and* historically realistic accounts of several creations, transformations, and

that “[a]nalyzes of deeper layers of rules are more difficult for scholars and participants to make” so that “[w]hen doing analysis at any one level, the analyst keeps the variables of a deeper level fixed for the purpose of analysis. Otherwise, the structure of the problem would unravel” (p. 54). Significantly, although without explanation, Ostrom includes a “rule” for aggregating individual-choice calculi in her general model: see figure 6.1, p. 193. See also Ostrom’s suggestion that this rule is typically imposed or exists by convention (pp. 200–201). In arguably the most penetrating theoretical analysis to date, Adam Przeworski readily admits that constitutional agreement is problematic because “institutions have distributional consequences” that “affect the degree and manner in which particular interests and values can be advanced.” Yet when the interests of negotiating agents are discrete, “balanced and known,” Przeworski admits he is not sure how a constitutional choice among different constitutions will be completed [*Democracy and the Market* (1991), pp. 81, 83–84]. Finally, it can be added that the problematics raised by the choice of an apportionment rule are not typically addressed by state-centered theorists who view the process of state creation in terms of a zero-sum struggle to control the monopoly of organized violence. See Margaret Levi, *Of Rule and Revenue* (Berkeley: University of California Press, 1988), pp. 41–47.

⁴⁰ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990); Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (1991).

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Preface: The Paradox of Constitutional Consent

breakdowns of the American political order. Fourth and finally, this study complements existing theoretical accounts by proposing that a general solution to the vexing problem raised by apportionment rule change, a diversity of interests, and the commitment to consensual constitutionalism likely will not emerge as a chance deduction of an as yet undiscovered general law. Rather, a fuller understanding of both the problem and the path to its solution will be secured more quickly and appropriately from the recovery and collection of the particular solutions devised, sustained, and renegotiated by specific individuals within specific historical contexts.

The political development of the United States between 1700 and 1870 offers a near ideal set of conditions to probe more deeply into the constitution of consent amidst the problematics of diversity. For not only is this extended period of constitutional stability generally unaffected by destabilizing influences from without and from below, this period is twice punctuated by the decidedly coercive actions that triggered and ended the American Revolutionary War and the American Civil War. In effect, therefore, this period offers a rare opportunity to assess not only the emergence and development of consensual order over an extended period of stability but its breakdown by both coercion from above and secession from below.

Other conditions also are nearly ideal. For example, for much of the period between 1776 and 1861 (that is, from the Second Continental Congress to the Secession crisis) the rule of apportionment corresponded closely with the terms defined within a written constitutional form. This time period, therefore, provides an unusually transparent opportunity to track the terms and processes defining the intragovernmental distribution of collective decision-making authority by focusing (at least, initially) on the written form and consequences of apportionment rules articulated in the Articles of Confederation and the U.S. Constitution. Finally, and most fortunately, because of the professional stewardship of numerous generations of dedicated archivists, librarians, publishers, scholars, and their benefactors, the depth and accessibility of the historical record over the selected period and series of political events are quite likely without parallel in the history of human civilization. The following analysis and synthesis of American political development and whatever fruits they may bear are therefore grounded in and emerge from fields that have been diligently prepared and cared for by others.