

*The
Strategic
Constitution*

ROBERT D. COOTER

The Strategic Constitution

ROBERT D. COOTER

PRINCETON UNIVERSITY PRESS

PRINCETON, NEW JERSEY

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Published by Princeton University Press, 41 William Street, Princeton,
New Jersey 08540
In the United Kingdom: Princeton University Press, 3 Market Place, Woodstock,
Oxfordshire OX20 1SY
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Second printing, and first paperback printing, 2002
Paperback ISBN 0-691-09620-1

The Library of Congress has cataloged the cloth edition of this book as follows

Cooter, Robert.
The strategic constitution / Robert D. Cooter.
p. cm.
Includes bibliographical references and index.
ISBN 0-691-05864-4 (cl. : alk. paper)
1. Law and economics. 2. Constitutional law—Philosophy. 3. Game theory. I. Title.
K487.E3 C667 2000
342'.01—dc21
99-058556

British Library Cataloging-in-Publication Data is available

This book has been composed in Times Roman

Printed on acid-free paper. ∞

www.pupress.princeton.edu

Printed in the United States of America

2 3 4 5 6 7 8 9 10

PREFACE AND ACKNOWLEDGMENTS

WHEN TOLSTOY decided to write a novel about the “Decembrist Revolt” of 1825 against Tsar Nicholas, he began setting the stage by describing Napoleon’s invasion of Russia in 1812. One thousand pages later at the end of *War and Peace* a minor character appears whom Tolstoy intended to be the main character in the original, unwritten novel. Life is what happens while you are planning something else.

Comparing the great to the small, I planned a book on public law and economics, the first two chapters of which would concern constitutional law and economics, but I could not summarize succinctly a field that barely exists. So I ended up writing this book, which is a systematic account of constitutional law and economics as it exists today. I develop an original conception of democracy while synthesizing the application of economics and political science to constitutional law. I try to write in a way that is accessible to students and scholars from different disciplines. The book should be suitable for use in a class for advanced undergraduates, law students, or graduate students. Each chapter contains problems and exercises to test and deepen the reader’s understanding.

I have taught parts of this book to students at Berkeley for several years. I have benefited from their comments, especially those by my teaching assistants Noah Baum and Neil Siegel. Winand Emons and Omri Yadlin, who taught from the book in successive years visiting Berkeley, gave me valuable comments and saved me from some errors.

I participated in intensive discussions on comparative topics in constitutional law at a conference in Saarbrücken in 1995. I presented early drafts of parts of this book in 1996 and 1998 when I lectured to European doctoral students and faculty in Switzerland at Studienzentrum Gerzensee, Stiftung Der Schweizerischen Nationalbank. I have also benefited from discussions at the annual meeting of the European Association of Law and Economics, the Latin American and Caribbean Law and Economics Association, and annual meetings of the Comparative Law and Economics Forum.

Discussions with Geoffrey Brennan and Phillip Pettit during my visit at the Australian National University in July 1998 forced me to elevate the generality of my analysis. Bruno Frey prompted me to rethink my views about direct democracy. My thanks to Debby Kearney of the Boalt Library reference staff for being a master detective and finding many references based on few clues from me. Thanks for various comments and help along the way to Chris Swain, Dhammika Dhamapala, Eric Rasmussen, Sandy Hoffman, and Georg von Wangenheim. Finally, I wish to thank Geoffrey Garrett and Bruce Chapman, whose thoughtful reviews of the manuscript’s first complete draft gave me a fresh perspective on my project, and also Peter Dougherty of Princeton University Press.

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Taking Consequences Seriously: Introduction

Nothing is clear-cut around here except the forest.

—Don Costello, tribal court judge in Oregon

JUST AS the bishop is the highest authority in a cathedral, so the constitution is the highest law of the state. Below it lie statutes and below statutes lie regulations, policies, orders, and decisions, as depicted in figure 1-1.

The constitution is the state's highest law in several respects. First, the constitution is more *general* than most other laws. Constitutions allocate basic powers to officials and recognize fundamental rights of citizens, whereas most legislation regulates behavior or implements policies. Second, the constitution *trumps* other laws in the sense that the constitution prevails whenever it contradicts another state law.¹ Third, the constitution is usually more *entrenched* than other laws in the sense of being harder to change.

The first two traits of constitutions relate to the third trait. As a law becomes more general and powerful, changes in it cause greater disruption. To avoid disruptions, general laws should change more slowly than specific laws.² Consequently, changing a constitution usually requires more burdensome procedures than enacting a statute or making a regulation. Figure 1-2 depicts the typical relationships between the generality of laws and the transaction costs of changing them.

A recent book surveying constitutional theory begins by saying, "The trouble with constitutional law is that nobody knows what counts as an argument."³ As the highest law, the constitution is the logical beginning of the state's legal power. Law posts enough road signs for a knowledgeable traveler to find his way. Above the constitution, however, law runs out and the traveler enters "a place where the eyes of man have never set foot."⁴ Being highest, constitutional law evokes the best efforts of scholars and political commentators. Being located where law runs out, constitutional arguments are subtle and evasive. History, philosophy, religion, politics, sociology, and economics hover above the constitution as depicted in figure 1-1. Scholars and officials disagree over how to use these sources for making and interpreting constitutions.

¹ Some scholars believe that international law trumps national constitutions. Perhaps international law is above national constitutions, like the pope is above the bishop.

² The absence of constitutional stability motivated this Russian joke: "In 1992 a customer entered a bookshop and asked for a copy of the Russian constitution. The shopkeeper replied, 'Sorry, but we don't carry periodicals.'"

³ Gerhardt and Rowe 1993, p. 1.

⁴ The Beatles' *Magical Mystery Tour*.

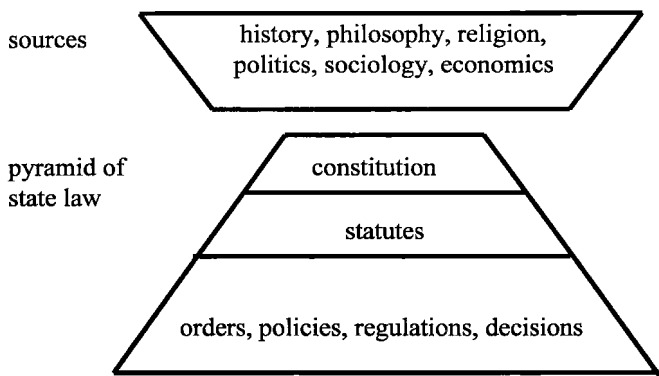


Fig. 1-1 Pyramid of State Law and Its Sources

In spite of these disagreements, some kinds of arguments should prove compelling to everyone. Political constitutions can cause suffering on a vast scale or lay the foundation for a nation's liberty and prosperity; thus, making, amending, and interpreting constitutions is a political game with high stakes. To help people win this game, theory should explain the constitutional causes of liberty and prosperity. By predicting the consequences of fundamental laws, constitutional theory can inform the public, guide politicians, and improve the decisions of courts. Predictions about the consequences for human welfare of alternative understandings of the constitution should count as arguments for everyone.

As currently practiced, constitutional theory mostly concerns the history and philosophy of constitutional texts. Some legal scholars, who find the sources of constitutional law in history, interpret a constitution by scrutinizing the original understanding of its makers. Other scholars insist on interpreting all laws

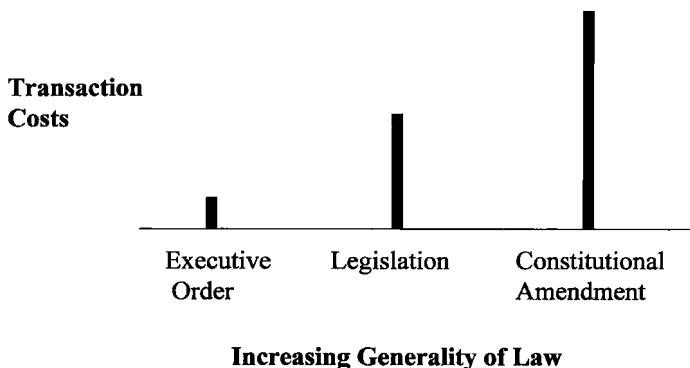


Fig. 1-2 Transaction Costs of Changing Laws

according to their plain meaning.⁵ Still others examine the philosophical, moral, or religious inspiration for a constitution. These approaches clarify a constitution's normative commitments, such as the vision of individual autonomy inspiring constitutional rights.

Wittgenstein wrote, "Philosophical problems can be compared to locks on safes, which can be opened by dialing a certain word or number, so that no force can open the door until just this word has been hit upon, and once hit upon any child can open it."⁶ Much of moral and political philosophy proceeds by searching for the right words for ideas. Like philosophy, constitutional theory devotes much of its energy to setting concepts straight. The right word can unlock conflation and set thought free.

The meaning of the words and the philosophy of its makers, however, cannot predict the response of people to a law. From the viewpoint of a person who takes consequences seriously, constitutional theorists look too hard for the right words and not hard enough for the real causes.⁷ Constitutional theory needs more models and less meaning. After preaching his Sunday sermon in nineteenth-century Boston, a liberal minister overheard a conservative congregant remark, "Beans in a bladder. No food today for hungry souls." Similarly, consequentialists leave the banquet of constitutional scholarship while still hungry for predictions.

Philosophers and economists sometimes feel an affinity for each other based on their mutual commitment to rationality. More often, however, they feel antipathy over different conceptions of rationality. By confusing economics and utilitarianism, philosophers sometimes imagine that they can identify fatal flaws in economic reasoning without troubling to learn the subject.⁸ Conversely, by confusing moral commitments with preferences, economists sometimes imagine that they can dismiss philosophical traditions far older than economics without troubling to learn the arguments for and against relativism.⁹ Although I admire moral and political theory, I also think that constitutional theory is too preoccupied with philosophical arguments and methods.

Instead of examining history or clarifying normative commitments, this book takes another tack. An individual sometimes gains an advantage in social life by making a commitment. An individual commits by arranging his affairs so that he cannot benefit from violating the commitment. To illustrate, a person commits to keeping a promise by signing a legal contract so that breach costs him more than performance. Similarly, citizens can gain an advantage when the state commits to a constitution. A state commits to a constitution by arranging

⁵ Law and economics scholars have debated whether a law should be interpreted according to its plain meaning (Macey 1986) or in light of its underlying political bargain (Easterbrook 1994).

⁶ Wittgenstein 1993, p. 175. Quoted in the conclusion to Summers 1998.

⁷ Rawls asserts (1971) that utilitarianism does not take differences between individuals seriously, and this claim apparently inspired Ronald Dworkin to title his book *Taking Rights Seriously*.

⁸ Note that the ordinalist tradition in economics explicitly rejects the tradition of Bentham.

⁹ A student once said to me, "I'm doing ok in everything except philosophy. My professor has his philosophy and I've got mine."