THE INTERNATIONAL LIBRARY OF CRITICAL WRITINGS IN ECONOMICS 24

PUBLIC CHOICE THEORY

VOLUME III

Charles K. Rowley

Public Choice Theory
Volume III

The Separation of Powers and Constitutional Political Economy

Edited by

Charles K. Rowley

General Director
The Locke Institute
Fairfax, Virginia, US

and

Professor of Economics
Center for Study of Public Choice
George Mason University, US

An Elgar Reference Collection

Published by
Edward Elgar Publishing Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Edward Elgar Publishing Company
Old Post Road
Brookfield
Vermont 05036
USA

A CIP catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Public choice theory/edited by Charles K. Rowley.
p. cm. — (An Elgar reference collection) (The International library of critical writings in economics)
Includes bibliographical references.
Contents: v.1. Homo economicus in the political market-place — v.2. The characteristics of political equilibrium — v.3. The separation of powers and constitutional political economy.
1. Social choice. I. Rowley, Charles Kershaw. II. Series. III. Series: The International library of critical writings in economics.
HB846.8.P833 1993
302'.13—dc20 92–34367
CIP

ISBN 1 85278 160 2 (3 volume set)

Printed in Great Britain by Galliard (Printers) Ltd, Great Yarmouth

Public Choice Theory
Volume III

The International Library of Critical Writings in Economics

Series Editor: Mark Blaug

Professor Emeritus, University of London
Consultant Professor, University of Buckingham
Visiting Professor, University of Exeter

This series is an essential reference source for students, researchers and lecturers in economics. It presents by theme an authoritative selection of the most important articles across the entire spectrum of economics. Each volume has been prepared by a leading specialist who has written an authoritative introduction to the literature included.

A full list of published and future titles in this series is printed at the end of this volume.

Acknowledgements

The editor and publishers wish to thank the following who have kindly given permission for the use of copyright material.

American Economic Association for article: James M. Buchanan (1987), 'The Constitution of Economic Policy', *American Economic Review*, **77**, 243–50; Dennis C. Mueller (1976), 'Public Choice: A Survey', *Journal of Economic Literature*, **15** (2), 395–433.

Constitutional Political Economy for article: James M. Buchanan (1990), 'The Domain of Constitutional Economics', *Constitutional Political Economy*, **1** (1), 1–18.

Duke University School of Law for article: Barry R. Weingast (1981), 'Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships', *Law and Contemporary Problems*, **44** (1), 147–77.

Garland Publishing Inc. for article: Charles K. Rowley (1990), 'The Reason of Rules: Constitutional Contract versus Political Market Conflict', *Annual Review of Conflict Knowledge and Conflict Resolution*, **2**, 195–228.

Hamline Law Review for article: Charles K. Rowley (1989), 'The Common Law in Public Choice Perspective: A Theoretical and Institutional Critique', *Hamline Law Review*, **12** (2), 355–83.

Journal of Public Finance and Public Choice for articles: M.S. Kimenyi, W.F. Shughart and R.D. Tollison (1985), 'What do Judges Maximize?', *Journal of Public Finance and Public Choice*, **3**, 181–8; James M. Buchanan (1983), 'The Public Choice Perspective', *Journal of Public Finance and Public Choice*, **1**, 7–15.

Kluwer Academic Publishers for articles: John R. Carter and David Schap (1987), 'Executive Veto, Legislative Override, and Structure-Induced Equilibrium', *Public Choice*, **52** (3), 227–44; Richard E. Wagner (1988), '*The Calculus of Consent*: A Wicksellian Retrospective', *Public Choice*, **56** (2), 153–66; William C. Mitchell (1989), '*The Calculus of Consent*: Enduring Contributions to Public Choice and Political Science', *Public Choice*, **60** (3), 201–10; Charles K. Rowley (1991), 'A Changing of the Guard', *Public Choice*, **71**, 201–23.

Oxford University Press for articles: Terry M. Moe (1990), 'Political Institutions: The Neglected Side of the Story', *Journal of Law, Economics, and Organization*, **6**, 213–53; Rafael Gely and Pablo T. Spiller (1990), 'A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases', *Journal of Law, Economics, and Organization*, **6** (2), 263–300; Jean Tirole (1986), 'Hierarchies and Bureaucracies: On the Role of Collusion in Organizations', *Journal of Law, Economics, and Organization*, **2** (2), 181–214; John Ferejohn and Charles Shipan (1990), 'Congressional Influence on Bureaucracy', *Journal of Law, Economics, and Organization*, **6**, 1–20; Dennis C. Mueller (1991), 'Constitutional Rights', *Journal of Law, Economics, and Organization*, **7** (2), 313–33.

University of Chicago Press for articles: W. Mark Crain and Robert D. Tollison (1979), 'The Executive Branch in the Interest-Group Theory of Government', *Journal of Legal Studies*, **VIII** (3), 555–67; William E. Landes and Richard A. Posner (1975), 'The Independent Judiciary in an Interest-Group Perspective', *Journal of Law and Economics*, **XVIII** (3), 875–901; James M. Buchanan (1975), 'Comment', *Journal of Law and Economics*, **XVIII** (3), 903–5; William A. Niskanen (1975), 'Bureaucrats and Politicians', *Journal of Law and Economics*, **XVIII** (3), 617–43; Julius Margolis (1975), 'Comment', *Journal of Law and Economics*, **XVIII** (3), 645–59; Albert Breton and Ronald Wintrobe (1975), 'The Equilibrium Size of a Budget-Maximizing Bureau: A Note on Niskanen's Theory of Bureaucracy', *Journal of Political Economy*, **83**, 195–207; Barry R. Weingast and Mark J. Moran (1983), 'Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission', *Journal of Political Economy*, **91** (5), 765–800; Donald Wittman (1989), 'Why Democracies Produce Efficient Results', *Journal of Political Economy*, **97** (6), 1395–1424.

University of Michigan Press for article: J.M. Buchanan and G. Tullock (1962 and renewed in 1990 by J.M. Buchanan and G. Tullock), 'A Generalized Economic Theory of Constitutions', Chapter 6, in J.M. Buchanan and G. Tullock (eds), *The Calculus of Consent*, 63–84.

Every effort has been made to trace all the copyright holders but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

The publishers wish to thank the library of the London School of Economics and Political Science, The Alfred Marshall Library, Cambridge University, and the Photographic Unit of the University of London Library for their assistance in obtaining these articles.

Contents

Part I
The Executive

[1]

THE EXECUTIVE BRANCH IN THE INTEREST-GROUP THEORY OF GOVERNMENT

*W. MARK CRAIN and ROBERT D. TOLLISON**

I. INTRODUCTION

As the Federalists designed it, there are two ways in which a bill can become a law in U.S. legislatures. Bills become law which obtain a simple majority in both houses of the legislature and the signature of the chief executive, or which obtain two-thirds majorities in both houses without the consent of the chief executive (in both cases bills are subject to judicial review). The economic approach to politics and regulation has made genuine progress in the analysis of various aspects of this legislative process. For example, the legislature and the independent judiciary have been the subjects of a good deal of the recent attention of scholars in this area.[1] The question, however, of how the agents in the legislative process are interconnected by the rules for passing laws has received only limited attention in the literature. Most particularly, and the issue of concern in this paper, the role of the executive veto in an interest-group theory of government has not been explored. Before turning to our approach of explaining vetoes as a means of enhancing the durability of legislation (by analogy to Landes and Posner's theory of the independent judiciary),[2] we will review briefly the field of alternative hypotheses.

A primarily theoretical approach to the veto centers around applications of the Shapley-Shubik[3] index of voting power. In this approach the voting

* Center for Study of Public Choice, Virginia Polytechnic Institute and State University.

[1] See especially Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257 (1974); William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J. Law & Econ. 875 (1975); George J. Stigler, The Sizes of Legislatures, 5 J. Legal Stud. 17 (1976); W. Mark Crain, On the Structure and Stability of Political Markets, 85 J. Pol. Econ. 829 (1977); Robert E. McCormick & Robert D. Tollison, Legislatures as Unions, 86 J. Pol. Econ. 63 (1978); W. Mark Crain & Robert D. Tollison, Constitutional Change in an Interest-Group Perspective, 8 J. Legal Stud. 165 (1979) [hereinafter cited as Crain & Tollison, Constitutional Change].

[2] Landes & Posner, *supra* note 1.

[3] L. S. Shapley & Martin Shubik, A Method for Evaluating the Distribution of Power in a Committee System, 48 Am. Pol. Sci. Rev. 787 (1954).

power of a legislative body is inversely related to its size, and since the veto constitutes the executive branch as a third house of the legislature (subject to provisions for overriding vetoes by the legislature), the chief executive can be seen as possessing a great deal of voting power relative to the other two houses in a tricameral system of legislation. In fact the chief executive embodies approximately one-sixth of the voting power contained in the three houses. Brams[4] offers an instructive review and interpretation of this literature, to which the reader may refer for additional references and discussion. Our concern with the voting-power approach is that it contains little predictive power. Since we want to devise a predictive theory of the executive veto, this type of approach offers only the grossest type of help in this regard (e.g., more power means more vetoes?).

A second approach to the role of the chief executive dates from *The Federalist* and finds its modern incantation in *The Calculus of Consent* by Buchanan and Tullock.[5] Hamilton, for example, observes in *The Federalist No. 73* that

> A man who might be afraid to defeat a law by his single VETO, might not scruple to return it for reconsideration; subject to being finally rejected only in the event of more than one third of each house concurring in the sufficiency of his objections. He would be encouraged by the reflection, that if his opposition should prevail, it would embark in it a very respectable proportion of the legislative body, whose influence would be united with his in supporting the propriety of his conduct in the public opinion. A direct and categorical negative has something in the appearance of it more harsh, and more apt to irritate, than the mere suggestion of argumentative objections to be approved or disapproved by those to whom they are addressed. In proportion as it would be less apt to offend, it would be more apt to be exercised; and for this very reason, it may in practice be found more effectual. It is to be hoped that it will not often happen that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time; and this, too, in spite of counterpoising weight of the Executive. It is at any rate far less probable that this should be the case, than that such views should taint the resolutions and conduct of a bare majority. A power of this nature in the Executive, will often have a silent and unperceived, though forcible, operation. When men, engaged in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared.[6]

This view essentially rests on a separation-of-powers argument. The veto equips the chief executive with a means of insuring that legislative bargains

[4] Steven J. Brams, Game Theory and Politics 157-97 (1975).

[5] James M. Buchanan & Gordon Tullock, The Calculus of Consent 248 (1962).

[6] The Federalist at 480 (Modern Library ed. 1941).

which meet the approval of a majority of the voters are the only ones accepted, and the minimum size of logrolling coalitions is thereby raised. The role of the veto is to control the external costs that minority-inspired legislation places on the citizenry. The problem that we find with this normative approach to vetoes is that the chief executive is construed as a vacuous good guy who seeks to protect the interests of the majority. This view flies in the face of the myriad of special-interest measures that are not only passed by both houses and signed by the chief executive, but are also in many cases proposed by the executive branch.

In this paper we will propose a positive theory of the executive branch and its relation to the legislative process as manifested in the casting of vetoes. Our theory builds on the fundamental study of the independent judiciary from an interest-group perspective by Landes and Posner.[7] They argue that granting the judiciary independence with life tenure for judges is a way to increase the durability (and hence the present value) of special-interest legislation. This result follows because judges rarely nullify or hold laws unconstitutional under these circumstances. Indeed, judges exhibit a pronounced tendency to resolve legal disputes in terms of the expressed intentions of the legislature which originally enacted the law. This sort of behavior by an independent judiciary increases the net worth of bargains reached between legislators and special interests, especially by contrast to a situation where each legislature appoints its own slate of judges and attempts to repeal the legislative bargains reached in previous sessions of the legislature.[8]

In their analysis, however, Landes and Posner overlook the analogy between the veto power of the chief executive and the nullification power of the independent judiciary. We will pursue the functional equivalence between these two powers in an interest-group theory of government in this paper. We argue basically that the veto power is a means of enhancing the durability of legislation, just as are the independent judiciary and the procedural rules of the legislature in the Landes-Posner theory. In effect, we will argue that the veto power raises the costs of reneging on previous legislative contracts, and as such we expect to observe more vetoes in cases where attempts are being made to renege or to alter substantively previous legislative contracts with special interests. For example, larger majorities (independently of party) in the two legislative houses reflect a lower cost of reneging on existing legislative contracts with special interests. Somewhat paradoxically, then, from an interest-group perspective we expect to observe more vetoes when a chief executive confronts large majorities, even of his own party, in

[7] Landes & Posner, *supra* note 1.

[8] As we will discuss below, Landes and Posner also stress the role that legislative procedures, such as majority voting, play in enhancing the durability of special-interest legislation by making it more difficult to repeal laws once they are enacted.

the legislature. We also expect that the veto as a source of durable legislation will be traded off efficiently against other sources of durability. For example, where turnover in the legislature is lower, there will be less need for the veto as a source of durable legislation.[9]

The paper proceeds as follows. A theory of the executive veto from an interest-group perspective is developed and contrasted to the Landes-Posner theory of the independent judiciary in Part II. An empirical test of the major implications of the theory using data on vetoes across state governments in the United States is presented and discussed in Part III. Some concluding remarks are offered in Part IV.

II. The Executive Branch as an Enforcer of Long-Term Political Contracts

As Samuels points out in his comment on the theory of the independent judiciary offered by Landes-Posner, they do not consider the role of the executive veto in their analysis.[10] The analogy between the executive branch and the independent judiciary in the interest-group theory of government is straightforward, though Samuels does not draw it.

Landes and Posner base their argument on the concept of a market for special-interest legislation (e.g., a law which restricts entry into an industry) in which the legislature sells laws and special interests buy them. The price that a winning special-interest group would bid will depend to a large extent on how durable their legislative protection is expected to be. In private sales and contracts there are legal sanctions to deal with the event of nonperformance by a seller or buyer. There are no similar legal sanctions in politics, which raises the question of how long-term political contracts are enforced. Landes and Posner point to two important sources of durable special-interest legislation.

First, the procedural rules of the legislature can impart durability to a law once it is initially passed. For example, a majority-voting requirement makes the passage of legislation a costly process so that, once a law is on the

[9] Hamilton, in The Federalist No. 73, also recognized the effect of the veto in promoting more durable law, but in the sense of promoting "good" law rather than sustaining "bad" law.

> It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.

The Federalist, *supra* note 6, at 478.

[10] Warren J. Samuels, Comment, 18 J. Law & Econ. 907 (1975).

books, it is unlikely that it will be repealed or substantively altered in the near future. Hence, aspects of legislative organization such as majority voting, bicameralism, the committee system, the seniority system, and so on can be seen as increasing the expected lifetime of a special-interest law. In the Landes-Posner theory higher costs in the legislative process lead to more durable and therefore to more valuable special-interest legislation as reflected in a rotation of the demand curve for special-interest legislation to the right.[11]

Second, the independent judiciary is an equally important source of durable law. This follows because (*a*) judges rarely nullify or hold a law unconstitutional (an empirical observation), and (*b*) in the event of a legal dispute over the meaning of a law, judicial methodology tends to lead to an interpretation of the law in terms of the intentions of the enacting legislators. On both counts the independent judiciary increases the durability and hence the present value of special-interest legislation. One might think of the contrasting case where each legislature appointed its own slate of judges and proceeded to try to undo the legislative bargains reached by preceding legislatures. In such an environment demanders of special-interest legislation would not be willing to bid very much (if anything) for protection which was effective only for the term of the existing legislature. The grant of independence and life tenure to judges, then, can also be seen as rotating the demand curve for special-interest legislation to the right by imparting greater durability to legislative contracts with special interests.

Presumably, investments in institutional arrangements in the legislature and the judiciary which give greater durability to political contracts are proximately optimized. For example, a stricter voting rule in the legislature would imply less need for judicial independence at the margin.

Essentially, then, Landes and Posner attack the idea that a separation of powers very accurately describes how our government functions. Rather than acting as a brake on the actions of the legislature or acting to represent minorities which cannot achieve representation elsewhere in the system (as some political scientists argue), the independent judiciary acts to enforce long-term contracts between special interests and legislators.[12]

Landes and Posner took their main task to be the development of a theory of judicial independence, and they consequently do not pursue many of the empirical implications of their model. They do examine factors (such as the age of judges) which should predictably be related to judicial nullification rates, and their findings in this regard make economic sense (older judges,

[11] Landes & Posner, *supra* note 1, at 881.

[12] The latter, of course, is a form of minority representation, but not of the type envisaged by political scientists. For references to the political science literature, see Landes & Posner, *supra* note 1.