

Strategies of Constitutional Scholarship

Eric A. Posner

ROBERT D. COOTER, *The Strategic Constitution*. Princeton, N.J.: Princeton University Press, 2000. Pp. 412. \$36.

At roughly the same time that economics made its way into legal scholarship, it also entered political science, to which it introduced the powerful metaphor of the political market in which laws and other government actions are goods that are bought and sold like any other commodity. A number of ideas followed. Individuals bound together by interest and circumstance overcome the free-rider problem and form interest groups that disproportionately influence legislation at the expense of the unorganized public. Officeholders maximize their chances of reelection by designing political institutions—congressional committees, voting rules, courts, agencies, parties—that shield incumbents against challengers. Candidates for public office compete for votes by adopting positions as close as possible to the attitudes of the median voter. These and related insights make up the scholarship known variously as public choice, positive political theory, and political economy.

Law and politics have a deep and intricate relationship, and for that reason one might have predicted that the economic analysis of politics and the economic analysis of law would converge. Instead, the two fields of scholarship have traveled on separate paths, usually parallel and rarely intersecting. Political scientists have focused on how the power and preferences of constituents and the political environment determine political outcomes—legislative deals, agency projects, and other government actions.

Eric A. Posner is professor of law, University of Chicago. He thanks Jack Goldsmith, Daryl Levinson, Cass Sunstein, and Adrian Vermeule for helpful comments, and The Sarah Scafe Foundation Fund and The Lynde and Harry Bradley Foundation Fund for generous financial support.

They also have explored how political actors design institutions in order to influence political outcomes.¹

Legal-economic scholars focused initially on private law. They tried to understand the behavioral effects (and, from a normative perspective, the efficiency and distributive effects) of strict liability versus negligence, expectation damages versus specific performance, and property rules versus liability rules. They examined the effect of alternative bankruptcy systems on the cost of credit and the impact of tender offers on the management of corporations. They focused more on interactions among individuals than on the relationship between citizens and government. And when they turned their attention to the government, they were always interested first in the courts—the effect of courts on the law, the relationship between the courts and other branches of government, the ways that courts interpret statutes and common law precedents.

This lack of contact between the literatures should not be overstated. Many legal scholars contributed to the political science literature,² and many lawyers have imported insights from the political science literature. A few examples of the importation are relevant to the present discussion.³ First, legal scholars have for a long time thought of judges as enforcers of legislative deals, and argued about the implications—some taking the position that judges should enforce the deals as written, others that they should enforce them in a way that frustrates interest groups (Landes and Posner 1975, Easterbrook 1984; Macey 1986). This literature takes as its starting point the public choice insistence on the influence of interest groups in determining political outcomes.

Second, legal scholars have oftentimes analyzed particular statutes in public choice terms. Securities laws prevent new investment firms from challenging entrenched investment banks (Mahoney forthcoming). State takeover statutes reflect the political power of managers and directors of local corporations (Romano 1987). Bankruptcy law transfers resources from debtors and creditors to well-organized bankruptcy lawyers and judges, from unsecured creditors to secured creditors, and from future debtors to existing debtors (Posner 1997). Credit regulations transfer resources from poorly organized creditors to well-organized creditors (Letsou 1995). Health statutes transfer value from regulated industries to unregulated industries (e.g., Miller 1989).⁴ Provisions of the tax code reflect the relative power of interest groups (Rom 1988). The theme of these case studies is that statutes rarely generate value for the public in an uncomplicated way, or represent

1. For surveys, see Weingast 1996, Alt and Alesina 1996.

2. E.g., Tulluck 1967, Posner 1975, more recently, McChesney 1997.

3. For a further discussion of the influence of public choice on legal scholarship, see Farber and Frickey 1991.

4. Miller (1989) shows how the dairy industry lobbied successfully for anti-margarine legislation.

simple compromises between classes of interests (debtors versus creditors, capital versus labor); instead, they transfer resources from unorganized individuals and firms to organized groups, and often these transfers take the form of wasteful rules or programs that conceal the existence of the transfer from the public.

Third, recently legal scholars have joined political scientists in examining how alternative political institutions influence the behavior of judges and legislators. Eskridge and Ferejohn (1992) explore the joint influence of preferences and institutional constraints on legislative outcomes. The power of the president's veto to influence legislation depends on the distribution of preferences among the House, Senate, and president, and crucially, on the location on the preference distribution of simple and veto-proof majorities. Eskridge (1991) argues that the Supreme Court's statutory interpretation decisions are influenced by the Court's fear of being overridden by Congress.⁵

Even acknowledging these points of contact, exchange between legal scholars and political scientists has been less than one might have predicted at the dawn of law and economics and public choice. There are probably many reasons for this state of affairs, but one is certainly that when lawyers think about issues of government organization—the focus of political scientists—they usually think about these issues through the lens of constitutional or administrative law. A lawyer is less interested in the optimal degree of federalization than in the federalism constraints in the U.S. Constitution. The lawyer is less interested in the optimal size of government than in the limits on size imposed by the Constitution. The lawyer is not interested in the way Congress organizes itself into committees, or the way it chooses among voting rules, or supervises agencies, unless these actions impinge on constitutional constraints like the separation of powers. The reason for this way of thinking is that constitutional law is a prestigious, preeminent area of law scholarship, driven in part by the perceived ability of law professors to influence the Supreme Court as advocates and as scholars, and driven as well by the historical lawyerly preoccupation with the functioning of courts, which enforce the Constitution, rather than of legislatures, which strain against constitutional fetters.

Traditional constitutional law scholarship is doctrinal, philosophical, and historical. Doctrinal scholarship shows that apparently disparate cases fit underlying patterns, and asserts that these patterns reflect principles of constitutional law and exert control over future disputes. Philosophical scholarship provides moral justifications for central features of constitutional law, such as judicial review; or for particular judicial practices, like respecting original intent when reviewing statutes; or for the outcomes of particular cases. Historical scholarship uncovers the intentions of the

5 See Eskridge and Ferejohn (1998) for a useful survey.

drafters of the Constitution and its amendments, and shows how the meaning of constitutional provisions changes over time. Most constitutional scholarship draws on all three elements in an unapologetic effort to persuade the Supreme Court or, in any event, the community of constitutional scholars, that particular judicial practices and case outcomes are constitutionally compelled.

These practices, unlike those in many other areas of scholarship, will not exhaust themselves anytime soon; they are nourished on the never-ending stream of disputes that flow to the Supreme Court. There is thus no felt need for new sources of insight, and constitutional law scholars ignore a large empirical political science literature that challenges their assumption that courts decide cases on the basis of doctrine and principle (for example, Speath and Segal 1999; Epstein and Knight 1998; Baum 1997). Given this state of affairs, economics has no obvious role in constitutional law. One might think that constitutional law scholarship is trite, or dull, or futile, but it does not follow that an economic analysis of constitutional law can shed any more light on the concerns that motivate that scholarship.

But that is not the position taken by Robert Cooter in his book, *The Strategic Constitution*. Cooter argues that the economic tools wielded by political scientists have rich, unexplored applications to constitutional law. He argues that constitutional lawyers have focused too much on philosophy, interpretation, and history, and not enough on the basic strategic problems that constitutions are designed to solve. Economic analysis of these problems, Cooter argues, would make an important contribution to constitutional scholarship.

To be clear about Cooter's contribution, let me distinguish constitutional questions and "public policy" questions. Constitutional questions focus on the structure of government—the distribution of power, the hierarchy of authority, the elements of the power-wielding institutions, the determination of the occupants of offices, and so forth—rather than on how government should exercise whatever power the Constitution gives it. How the government should exercise its power is a question of public policy. As the title of his book indicates, Cooter is not interested in determining the desirable environmental or crime policy; he is interested in how the government should be designed so that it will choose to implement the desirable environmental or crime policy.⁶ Cooter hopes to open the eyes of constitutional law scholars to the opportunities offered by public choice and positive political theory.

6 As I note below, many questions of structure need not be constitutional; for example, a government could in principle be given the power to federalize or centralize itself, just as a large corporation could spin off divisions and small corporations can merge into a larger entity.

I. AN OVERVIEW OF THE STRATEGIC CONSTITUTION

The Strategic Constitution is a straightforward, if occasionally quirky, textbook. It has a nice logical structure, mostly, though it is odd to find the discussion of efficiency concepts in a chapter on voting and the presentation of the agency model in a chapter on administering, a narrower concept. It starts by discussing the basic processes of political action: voting, bargaining, and agency. It then moves to the division of sovereignty into independent governments: whether there should be many governments or few; whether governments should be local or national; and whether governments should delegate to agencies, and how. The book also analyzes the division of governments into separate branches: whether there should be no branches or many; how labor should be divided among the branches; and how the branches can be prevented from poaching on each other's turf. There is also a discussion of rights, focusing on property rights, speech rights, and civil rights. Later sections of the book build smoothly on earlier sections, reinforcing the earlier learning and showing the many ways in which it can be extended.

The theme of the book is that self-interested behavior by citizens and their representatives creates political problems that can be solved or mitigated through institutional design. These political problems—"political failure" in the jargon of public choice scholars (but not Cooter), by analogy to market failure—are government actions that are inefficient. A common example is the policy of creating price supports for crops, which are Pareto inferior to cash transfers to farmers. If the government switched from price supports to sufficiently generous cash transfers, then the farmers would be no worse off, while the market in farm goods would be less distorted, and consumers would be better off. The failure to switch from price supports to subsidies is a political failure. Notice that this view takes the political power of farmers as a given, and does not assume that transfers to farmers are objectionable.

Another theme of the public choice literature, noted above, is that well-organized interest groups lobby legislatures for laws that transfer resources away from the public. Through campaign contributions, the organization of voters, the provision of information and advice, and the implicit promise of well-paying positions after government service is over, interest groups extract legislative and regulatory concessions that the public, unorganized and ignorant, does not discover and so cannot punish at the voting booth. Political failure occurs because the interest groups "pay for" laws that benefit them less than they harm the public.

Cooter explores these and many other topics, including the hypothesis that party platforms converge to the sentiments of the median voter; the problem of vote cycles, where policy A defeats B, B defeats C, and C defeats

A; the economic approach to bargaining, and its application to coalition government; the principal-agent model and its application to (among many other things) the delegation of power to agencies and judicial review; the tradeoffs among different voting rules, like unanimity and majority rule; the practice of creating separate governments (like school boards) with authority over discrete areas of administration; the behavioral consequences of block grants and matching grants; the Tiebout theorem, which states the conditions under which competition among local governments leads to efficient production of local public goods; referenda; the regulation of agency behavior through the use of procedural rules; the costs and benefits of separating the legislature, executive, and judiciary; the economic theories of property rights and racial discrimination; and much more. Interspersed throughout are both real world and fanciful examples, a smattering of history, some nods to political philosophy, and comparisons to non-American government institutions such as the British Parliament and the European Union.

This is done well, but it should be obvious that Cooter cannot, and does not, treat any of these topics in depth. At his best Cooter gives readers the essential insight, and this is enough to draw them in, stimulate their curiosity, get them thinking about their own applications, and lead them to further research. But he has some lapses.

One problem is that when complex topics are not treated in depth, writing can become abstract, banal, or opaque. For example, Cooter spends three paragraphs on whether it makes sense for governments to “enforce civility,” by which he appears to mean enforcing morals laws rather than merely preventing harms (pp. 320–21). Shades here of the great conflict between Mill and Stephens, but Cooter’s conclusion is lame:

Apparently political philosophers and many citizens think that the state should do much less to cultivate moral consensus than it did in the past. Perhaps the state should provide a framework to prevent one person from harming another, then let the economy and morality look after themselves. In much of the world, the mercantilist spirit has declined in economics and morality. (P. 321)

This queasy semi-normative/semi-positive statement about other people’s possible beliefs also gives you a flavor of the raggedness of the writing in some places, and Cooter’s occasional tendency to toss together a salad of philosophical, historical, and economic ideas without explaining them or relating them to each other.

Or consider Cooter’s comparison of what he calls the “wealth-maximizing” state and the “welfare-maximizing” state. The former uses cost-benefit tests to evaluate projects and does not redistribute wealth. The latter also redistributes wealth using taxes and transfers on the basis of the supposed

declining marginal utility of income. Cooter concludes that in “practice, the state that adopts the public goal of maximizing welfare reduces the autonomy of citizens below the level achieved by maximizing wealth” (p. 268). This waffle among the normative, positive, and empirical is supported by neither theory nor evidence. No doubt people have different intuitions about these matters, but the widespread intuition that poverty impinges on autonomy more than moderate taxes on high incomes cannot be dismissed out of hand, and if Cooter disagrees with it, he should explain why. Here, as in the first case, he falls off the wagon and indulges himself with normative analysis though he maintains the pretense of empiricism.

These lapses are rare for such a large and ambitious book. But the book has another problem that is more general. That is the problem of scope and theme.

The title of the book suggests that the book is about the rational choice theory of constitutionalism. The question is why the government should be constrained: what constitutional rules best prevent political failure? But most of the book does not deal with this question. The passages on constitutional rights focus on policy questions such as the desirability of taxing pornography or subsidizing the purchase of houses by minorities, and they say little about why constitutional rights should constrain the government from taking actions that constrain speech or benefit or harm racial groups. The discussions of federalism, administration, and separation of powers are most naturally interpreted as advice to a government about how to organize itself rather than advice to a constitutional assembly about how to constrain the government that it creates. Understanding the costs and benefits of alternative rights regimes and alternative governmental structures is of course a necessary part of answering the constitutional question of why the government should be constrained in these respects, but a complete answer would explain what goes wrong when the government has the ability to do whatever it wants.

Another possible theme of the book is the rational choice theory of political organization. In this frame of reference, the advice is broader, directed not only to constitutional assemblies but to existing governments that might want to reorganize themselves. But if this is the purpose of the book, its challenge to constitutional scholarship is weaker and its reason for being becomes obscure. Why should constitutional or legal scholars be interested in questions of political organization? Why not leave these questions to political scientists? The book invites legal scholars to cross the disciplinary boundary and start writing political science without explaining what would be gained from merging the disciplines.

It seems likely that Cooter began the book with the first theme in mind but found himself pursuing the second. The book begins by criticizing traditional constitutional theory for being overly concerned with

interpretative issues and philosophical details (p. 3). It promises that a rational choice focus on consequences will improve constitutional theory. But then the bulk of the book turns out to be political and legal advice, not constitutional advice. Cooter does not respect the line between constitutional theory and public policy, and this failure is an interesting puzzle, worth pondering. To pursue this theme, I examine in more detail two gaps in Cooter's book: constitutional rights as constraints on government action, and the "supply side" of constitutional law

II. WHAT ARE CONSTITUTIONAL RIGHTS?

Constitutional rights differ from ordinary rights. A legal right to property entitles individuals to government protection from attempts by other individuals to take or destroy their property. A constitutional right to property means that the *government* cannot take or destroy individuals' property, and if it does so, in ideal circumstances property owners may obtain a remedy from one of the government's arms, the judiciary. Ordinary rights protect individuals from other individuals; constitutional rights protect individuals from government. An economic theory of ordinary rights explains how alternative rights affect the distribution of wealth or solve market failures. An economic theory of constitutional rights explains how alternative rights solve political failures.⁷

This is easy enough to say, but constitutional rights are puzzling for the rational choice theorist, as an example will demonstrate. Consider an individual whose use of his land pollutes a river. The public policy question is whether taxation or some other form of regulation is a justified response, and this question the economist is prepared to answer. The constitutional question is whether giving the government the freedom to tax or regulate this property owner and similar owners—which is probably the correct response on public policy grounds—would result in a political failure, the failure by the government to tax or regulate the owner in the right way. The constitutional question is at *first sight* puzzling, because by hypothesis the government has good reason to regulate the landowners; if so, why take this power away?

One possibility, a possibility that Cooter hints at but does not analyze in detail (pp. 272–73), is that in the absence of a right to property, the government will not engage in efficient pollution regulation but instead transfer resources from some individuals to others. If the government routinely engages in such transfers, and does so in order to reward its supporters

7 My distinction between constitutional and ordinary rights is very rough. The Thirteenth Amendment bestows a right that is good against both governments and private citizens. And a citizen might have a right against a government that fails to protect the individual's ordinary rights. But the distinction is clear enough for present purposes.

and punish its opponents, then individuals will devote all their time to lobbying the government to let them keep their property or take someone else's, and such rent-seeking behavior is wasteful, inefficient, in the clear sense that nearly everyone would be better off if no one engaged in rent seeking.⁸

The problem with this argument is that concerns about rent seeking could justify a prohibition on all regulation, good or bad. Consider again a plan to regulate people who pollute a river. If a person's "property right" includes a right to pollute the river, then the rent-seeking theory implies that the government should not be able to prohibit the pollution, at least not without compensating the polluter. But how does one determine whether the person has that property right in the first place? If the property right is itself a matter of government determination, then people will rent seek about that. If the property right is determined by judges, then rent seeking will be displaced into litigation. If litigation is pointless because judges can be predicted to apply a cost-benefit analysis, then democratic decision making is replaced with judicial fiat, and citizens' interests and values are replaced with a controversial normative theory based on a stylized and widely criticized procedure for aggregating preferences. Rent seeking disappears, but so does government—both in the sense of democratic participation in the determination of policy and in the sense of the freedom to choose policies that reflect values other than those incorporated in cost-benefit analysis (cf. Farber and Frickey 1991).

Cooter offers a narrower but related argument for constitutional rights in a discussion of the just compensation requirement of the Fifth Amendment. He argues that in the absence of just compensation, politicians would take large amounts from a few people rather than taxing many people, while it is familiar that low taxes imposed on a large base distort behavior less than high taxes (or takings) imposed on a narrow base (p. 288). This is slightly different from the rent-seeking concern; the concern is instead that in the absence of constitutional restriction, inefficient transfers would occur. But more needs to be said. If politicians target individuals randomly, then people would buy insurance against takings, and so a wide base would be effectively created through private contracting. The real concern is that politicians will target their enemies, or the enemies of their supporters, or unpopular groups. The just compensation requirement and the public use requirement (p. 289) make it difficult for politicians to transfer wealth from their enemies to their friends.

But this is not the end of the analysis. Politicians do not pay takings compensation out of their own pockets; they pay out of general revenues. The takings rules do not prevent politicians from imposing high taxes on

⁸ Most notably Richard Epstein has advanced this view. See Epstein 1985. Aranson, Gelhorn, and Robinson (1982) make a similar argument about the delegation doctrine.

everyone, then redistributing revenues to political supporters in the form of grants, tax breaks, or narrowly directed projects. Implicit in the theory of takings is that governments would have more trouble making such transfers in this way than by taking property from unpopular individuals (Farber 1992; Levinson 2000).

It is not clear why this should be so. Perhaps raising taxes and then making grants are more visible to the public than a taking is, and so the public is alerted that the government is up to no good, and can object. The Constitution insists that public actions be visible in order to mobilize public opposition to inefficient transfers. But this argument raises more questions than it answers. It remains puzzling why the public would care if just a few people were being forced to pay for programs that benefit everyone else; whether the public can be made to pay attention to political shenanigans that it would otherwise ignore; and why a constitutional rule would be necessary when a public that seeks transparency has every incentive to demand laws that require it. A contrary view is that either government can be trusted to act properly, in which case constitutional rights are idle, or it cannot be trusted to act properly, in which case constitutional rights, even if properly enforced by courts, are either too weak to restrain the government or so strong that government is put in the hands of the judiciary, which itself ought not to be trusted. If this contrary view is correct, then public choice can offer little to the constitutional law literature.

Cooter's discussion of free speech suffers from similar problems. He argues that a constitutional guarantee of free speech is justified because such a guarantee maximizes the value of speech. He notes that speech transmits ideas, ideas are public goods, public goods are already undersupplied because suppliers do not benefit from the positive externalities, and any legislation that restricts such speech necessarily reduces the (already suboptimal) supply (p. 311).⁹

This argument is unsuccessful, and not just because it is wholly conjectural. Lots of speech is bad, including pornography, incitements to violence, disclosure of bomb recipes, and revelation of trade secrets. It is possible that if the First Amendment were abrogated, and the government regulated speech on a cost-benefit or pragmatic basis, more good speech and less bad speech would be supplied. Britain has no constitutional guarantee of free speech, and it has stricter libel laws than the United States does, but it is hard to argue that more "good" speech occurs in the United States than in Britain.¹⁰

But the important reason that Cooter's argument fails is that it is not about constitutional law at all. It is a public policy argument that certain

9. Farber (1991) makes a similar argument.

10. Observe also that clean air and national defense are public goods but there is no constitutional obligation to regulate pollution or establish a military

kinds of speech not be regulated because of their positive externalities.¹¹ If speech is valuable and the political system works well, the government will encourage good speech (for example, with copyright law) and discourage bad speech (pornography law). Cooter needs to explain why a constitutional right to free speech exists, a right that appears to prevent legislatures from evaluating and regulating most kinds of speech, and courts from making cost-benefit judgments when evaluating government actions that interfere with speech.

Cooter's constitutional analysis of free speech, such as it is, is hardly a paragraph long. He mentions that the right to free speech is necessary because "abridgment of political speech undermines democracy by diminishing political competition" (p. 312). This is finally a constitutional argument because it asserts that free speech prevents political failure. But like Cooter's constitutional argument about takings, his constitutional argument about speech is inscrutable. Regulating speech might enhance political competition—by giving opportunities to people who are usually silenced, by reducing the influence of deep pockets, and by removing from political debate arguments that cause turmoil rather than deliberation. Alternatively, governments might find it in their interest to preserve freedom of speech rather than silencing its critics, in which case a constitutional right backed by judicial review is unnecessary. This is the experience in Britain. Cooter does not defend his constitutional argument against these well-known objections.

The strange fact is that this book on constitutional law neglects the constitutional dimension of rights and instead treats them as matters of public policy. Nowhere is this more true than in Cooter's discussion of civil rights. There isn't even the pretense of a constitutional argument. Instead, Cooter discusses Becker's (1973) discrimination thesis. He explains why Congress might want to prohibit discrimination, or not, or tax it in certain ways, but he does not explain why a constitution should constrain government from enacting discriminatory laws.

What would a constitutional explanation look like? We can derive one from Cooter's comments on property and speech rights. Just as property rights expose politically motivated transfers, and speech rights enhance political competition, so do constitutional civil rights ensure that oppressed groups participate in the political process. This argument might sound familiar, and that is because it is not much different from the jurisprudence of legal process (e.g., Ely 1980). This is unfortunate and odd. Unfortunate, because legal process theory is ancient history. Odd, because legal process theory focuses on oppression of minorities while public choice theory emphasizes oppression by minorities who have managed to organize themselves. Whatever the reasons for the strange convergence of public choice

11 Farber's (1991) argument appears to run into the same trouble

and legal process—the living and the dead—it contains a warning for the public choice theorist. In the absence of plausible public choice theories of constitutional rights—and there are no such theories, not in Cooter's book and not elsewhere in the literature—one must worry that future efforts will follow Cooter into the abyss of legal process jurisprudence. It may be that public choice, and rational choice in general, have nothing distinctive to say about constitutional rights.

III. HOW ARE CONSTITUTIONS ENFORCED?

The question *What is the optimal constitution?* is the motivation and preoccupation of the book. It can be thought of as a “demand side” question: *What constitution would we choose if we had the option, and if we could expect a competent and independent judiciary to enforce it?* There is a corresponding “supply side” question: *How can we be sure that the constitution that we choose will be obeyed and enforced.* Cooter devotes only a few pages to this question.¹² Yet the demand side question cannot be answered in isolation from the supply side question.

Constitutional scholars have long understood this point. The legal process school was propelled by concern about the legitimacy and independence of an unelected supreme court in a democratic state, and it supplied a famous answer. The political branches will respect the court as long as its actions are “neutral”: principled, apolitical, based on process rather than substance. The thesis that the Court should enforce the original intent of the framers had historical antecedents, but flowered during the heyday of legal process, because it seemed to explain how the Court could remain neutral despite political pressures on all sides.

No one has been happy with the legal process approach to the supply side question. There are three reasons. First, no account of the meaning of neutrality has obtained widespread support. Second, the process approach does not explain the behavior of the court. The court has apparently made *dramatic, political interventions, and although these interventions may be consistent with the correct conception of neutrality, few constitutional theorists appear to hold this view.* Even in routine cases the party of the president who appoints a justice is a good predictor of that justice's vote (Spaeth and Segal 1999). Third, the process approach does not explain why justices would be interested in enforcing neutral principles rather than their own

12 He briefly acknowledges the problem of enforcing the Constitution on pp. 8–9, where he compares the Constitution to the rules of Monopoly. There is no sanction for the Monopoly player who moves seven spaces when the dice say six, just as there is no sanction for a court that refuses to enforce legitimate statutes. But this is hardly an answer to the question: *People don't cheat at Monopoly because if they do, others won't play with them.* But this logic can't be extended to politics without considerable elaboration (see below).

political commitments within the constraints imposed by the political process. If process theory makes overly ambitious demands on the intellectual and moral resources of the justices, it cannot be accepted as a plausible guide to action.

Cooter's rational choice approach provides a framework for reexamining the problem of judicial independence. The rational choice framework assumes that judges who fail to enforce the Constitution, or at any rate deviate too much from constitutional requirements, will be sanctioned, or perhaps that people who are likely to do this are not going to be chosen as judges in the first place.

As to the first claim, observe that the Supreme Court consists of nine people, not just one, and these people usually have diverse political commitments. Further, the Supreme Court justices, while nominally protected by tenure, enjoy no guarantee that they will escape rebuke. Congress and the president not only have the authority to legislatively reduce the court's jurisdiction; they also can put extraconstitutional pressure on the court. Historical examples of both means are rare but dramatic: Jackson's refusal to enforce *Worcester v. Georgia*; Lincoln's suspension of habeas corpus; Roosevelt's court-packing plan. If justices fear losing their power to the other branches, they will act with care.

If the Supreme Court seeks to prevent interference from other branches, it needs to know what behavior will call forth interference. A violation of the original intent thesis? But the other branches have no reason to care whether their actions violate the intentions of the framers. A failure to protect a minority? But if the other branches wish to exploit minorities, they will not tolerate a court that protects them. A violation of morality? But the other branches either act consistently with their interpretation of moral requirements or have resolved to ignore them. None of these traditional accounts of the Court's interpretive role seems likely to guarantee its independence.

These arguments, taken from the mainstream of constitutional scholarship, expect too much of the Court and the political process, and one can think of two less lofty, more realistic, strategies that the Court might use in order to secure its independence. The first is to appeal to the public. If the Court has public support, then Congress and the president may fear that if they challenge its authority, they will be sanctioned by the public or by interest groups that rely on judicial independence. Roosevelt's court-packing plan created a public uproar because people feared excessive concentration of power in the executive branch and viewed the Court as a counterweight.

The Court of 1937 benefited from public support despite the fact that many of its opinions were unpopular, but a reasonable working hypothesis is that a more popular Court will obtain greater public support than a less

popular one. How does a Court acquire popularity? And in such a way that can be explained with rational choice?

One possibility draws on the old idea, never satisfactorily cashed out, that the Court enforces evolving norms. Suppose that when individuals interact with each other, they need to coordinate in various ways. For example, suppose that when men and women search for spouses or romantic partners, they have two basic strategies—"traditionalist," according to which sex is deferred until a household is established, and "modernist," according to which sex is not deferred. When safe and reliable contraceptives are unavailable, women and men probably prefer traditionalism; but when they become available, both probably prefer modernism. But whatever individuals might think ideal, it is more important that they coordinate with their partners than not—in other words, that individuals enter relationships with common expectations.

Game theorists model this situation as a coordination game, in which people do better when identical strategies are chosen, though one group or the other might do better under different equilibria. Some people prefer modernism, others traditionalism, but both groups prefer one or the other to coordination failure.

But if norms vary by place, and change over time, then conflict will occur. Technological change—in this case, the invention of reliable contraceptives—always spreads through society unevenly, producing variation in social practices that are sensitive to technology. Citizens from regions with traditional contraceptive norms come into conflict with citizens from regions with modernist contraceptive norms. These conflicts need to be resolved, but state legislatures will attempt to enforce local norms, and Congress may be unable to resolve the conflict by choosing one norm or the other. One conjectures that many of the extratextual rights invented by the Supreme Court—the right to use contraceptives, to have abortions, to vote, to travel, to marry, and so forth—are solutions to coordination games. As long as people pay attention to what the Court says, perhaps because they believe that the Court can make good guesses about which norms are most widely established, a Court's announcement of a right is self-enforcing. It will lead to more people choosing identical strategies in anticipation that others are doing the same.

On this view, the Court has power because, or as long as, it resolves conflict among multiple equilibria in coordination games played by citizens across the country.¹³ The political branches do not challenge the Court as long as they believe that citizens respond to what the Court says. Citizens respond to what the Court says usually because the Court is right, or close enough to people's true behavior, so that adaptation in response to its

¹³ This idea is closest to Strauss's (1996) in the constitutional literature. See also Posner 2000.

declarations does not produce severe dislocation. The Court has real power because when norms are ambiguous, it can choose among them; but the power is limited because when norms are unambiguous, people will not shift their behavior just because the Court asks them to, and the political branches will accordingly be less deferential. Constitutional history consists of swings between moments of activism, when the Court rides on a reputation for correctly identifying norms, anticipating trends, removing ambiguity, and resolving conflict; and passivity, which occurs after the Court suffers a blow to its reputation because it has overreached.

Another strategy for maintaining independence is to exploit political differences among members of the other branches (cf. pp. 197, 227–29). Imagine that the Democrats control the presidency but have a slight minority in each house. Bill X passes with the help of a few defecting Republicans. The Court strikes down the law on constitutional grounds. The Democrats, the main supporters of the bill, might want to retaliate against the Court by increasing its membership, stripping it of jurisdiction, or cutting its funds. But the Republicans, including the one-time defectors, are unlikely to support this attempt. An independent Court serves their interest in counteracting the power of the Democratic president. Indeed, each party might prefer an independent Court as a bulwark against dominance by the other party, even if that means that the first party cannot achieve political hegemony itself.

If this view is correct, the Court's enforcement of the Constitution depends on the contemporary distribution of political power among the parties. When the government is unified, the Court will defer to the existing legislature and interfere with earlier legislation that violates the existing legislature's preferences. When the government is divided, the Court will be more likely to interfere with legislation, though it may be careful to avoid asserting principles that violate the preferences of *both* parties. There are testable implications here (Ramseyer 1994).¹⁴

If either of these two theories are correct—if the Supreme Court retains its power by solving coordination games or by exploiting divisions among the other players in the political establishment—then two things follow. First, constitutional jurisprudence unavoidably would contain an element of incoherence. At the same time that the tools of legal reasoning drive the Court toward logic and consistency, the need to respond to shifting political fortunes and public moods drives the Court in the other direction. Second, many constitutional theories would become implausible. Originalism would be unsustainable except in the unlikely event that the public and the politicians care about, or even know, what the framers

14 Cooter's discussion (pp. 231–34) mainly points out that a Court's power to implement its policy preferences via constitutional interpretation decreases with the ease with which the political branches and the public can amend the Constitution.

believed. Moral values could not be a resource for decision making except when those moral values are widespread, but in any event the Court would be doing empirical sociology not moral philosophy. Remedying defects in the political process would bring the Court into conflict with the establishment that draws its power from those defects. The demand side theory most consistent with supply side realities is the old idea that the court should enforce evolving standards, but only if those standards are widespread enough, they are not implemented by the political branches because of political failure, and they are self-enforcing in the manner characteristic of solutions of coordination games.

IV. CONCLUSION

Rational choice offers a framework for evaluating an array of fundamental questions of political organization. Cooter's is the best effort so far to supply lawyers with the rational choice tools most useful for analyzing legal aspects of political organization.¹⁷ Some of these tools may be useful for understanding problems of constitutional law, and some interesting work is already coming out of positive political theory, on the relationship between the president, Congress, and the judiciary. But in Cooter's hands the tools of rational choice prove inadequate for dealing with constitutional rights. One reason for this failure may be that rational choice theory simply cannot justify constitutional rights, and rational choice thinkers ought to criticize them rather than defend them. But this makes rational choice, and Cooter's book, of limited value to traditional constitutional law scholars, who will debate constitutional rights until the sun burns itself out.

Rational choice may have something to offer to the supply side question of constitutional law, a topic that is undeveloped in Cooter's book. Thinking about political order as an equilibrium phenomenon produces an image of the Court as a player in a complex game, a player that maintains its power by resolving conflict and easing coordination rather than enforcing the political values of the eighteenth century or the moral ideals of the twenty-first. The Court, like the other players in this game, secures its independence by exploiting divisions between the other branches of government and the parties that control them, and appealing to the public when necessary. Constitutional lawyers may be able to use these insights because the Supreme Court from time to time gives attention to the question of its own capacity and legitimacy, and appears to permit such considerations to influence its decision. But a great deal more work needs to be done before

17. Two other valuable books on the topic are Farber and Frickey 1991, which is less technical, less complete about methodology, more focused on legal problems, more philosophical and critical, and a bit dated, and Mueller 1996, which is not directed to a legal audience, but nonetheless has much of value for legal scholars.

one can have confidence in the value of supply side theories for understanding demand side problems.

One reason why public choice has not so far shed much light on constitutional problems may be that the assumption that constitutional rights and other provisions are solutions to political failures—the assumption that underlies the literature—is in tension with public choice rightly understood. Public choice implies that the Constitution itself should be understood as an outcome of a political game, and this suggests that public choice theorists should devote their energies to understanding the ratification and amendment of the Constitution in public choice terms. If this is the case, the public choice project is essentially historical and it may be that current constitutional problems are controlled by a document unlikely to provide desirable solutions. The interest group bargains were not made with an eye to resolving political failures in the distant future. But the more plausible conclusion is that the Constitution has to be continually modified if it is not to be abandoned. If the Constitution has evolved over time, the original document can have little interest for the public choice theorist interested in modern political failures except as a starting point that has continued to exert influence on efforts to modify government in response to changing needs. It is this view that motivates a search for a model of the supply side of constitutionalism, which, as I have argued, may be open to further illumination from rational choice theory.

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