

Law and Economics  
Session 20  
Constitutional Law

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- What is Constitutional Law for?
- Is Con Law about morality, or does economics have something to add?
- We will see that constitutions are “social contracts” that set rules for how policies are made and how government officials may act.

# The House and the Senate

- Article I, Section 1: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”
- Historically, the bicameral legislature was a way for small states to have outsized influence beyond their populations.
- It still has that effect today:
  - California: 38 million people, two senators
  - Wyoming: 0.54 million people, two senators
  - Wyoming residents have 76 times more political representation in the Senate than California residents.

# Why Representative Democracy?

- Article VI, Section 1: “The United States shall guarantee to every State in this Union a Republican Form of Government”
  - That is, the United States will be a representative democracy, rather than direct democracy or a dictatorship.
- Why?

- This paper studies three modes of social decision-making:
  - ① Direct democracy: The public decides through referendum
  - ② Representative democracy: A politician subject to reelection decides
  - ③ Judicial power: An unaccountable judge decides.
- This paper dissolves the logic of the Constitution and Federalist Papers down to a couple of equations.

- Two periods, 1 and 2
- Two possible government actions,  $a$  and  $b$
- Action  $a$  is “popular”: It is the correct action with probability  $p > 1/2$ 
  - With probability  $1 - p$ , action  $b$  is correct
  - A lower  $p$  means it is more technical and less familiar
- Society gets a payoff of 1 for each period that the correct action is implemented.
- Under direct democracy, voters choose  $a$  in both periods.

- Under representative democracy or judicial power, an official chooses the action.
- We assume the official *knows* which action is correct (that is, preferred by society).
- He prefers the correct action with probability  $\pi > 1/2$ 
  - He prefers the incorrect action with probability  $1 - \pi$
- The official gets utility  $R$  from being in office, and utility  $G$  from selecting his preferred action.
- Utility from the first period:

$$U = \begin{cases} R + G & \text{(makes preferred choice)} \\ R & \text{(makes non-preferred choice)} \end{cases}$$

- In the second period, he would always chooses his preferred action, so he gets  $R + G$  if retained for a second period, discounted by  $\beta < 1$ .

# Judicial Power versus Representative Democracy

- Under judicial power, official always chooses preferred action.
- In representative democracy, official removed for choosing  $b$ .
- When will the official pander to voters?
  - That is, go along with the popular action  $a$  even if he prefers  $b$
- He compares the payoff to choosing his disfavored action now, plus the payoff next period

$$R + \beta(R + G)$$

to the the payoff from choosing his preferred action now and being removed from office:

$$R + G$$

- That is, pandering occurs when

$$R + \beta(R + G) > R + G$$

$$\beta(R + G) > G$$



# Expected welfare by system with pandering

- Under direct democracy (DD), the voters always choose  $a$  and the expected welfare is

$$W_{DD} = p + p = 2p$$

- Under judicial power (JP), the judge always chooses his preferred action and the expected welfare is

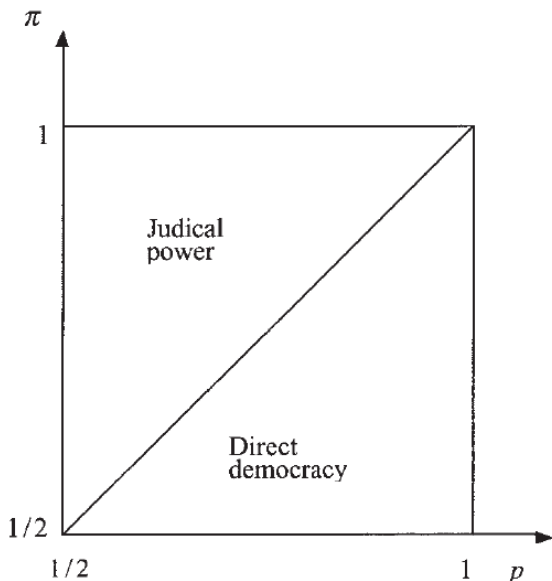
$$W_{JP} = \pi + \pi = 2\pi$$

- Under representative democracy (RD) with pandering ( $\beta(R + G) > G$ ), the official chooses the popular action in the first period and his preferred action in the second period. The expected welfare for voters is

$$W_{RD} = p + \pi$$

- Note that RD is strictly dominated by either DD or JP, depending on whether  $p$  or  $\pi$  is higher.

# The choice between JP and DD under pandering



# Voter learning without pandering in RD

- Without pandering ( $\beta(R + G) < G$ ), under RD the official chooses his preferred action in the first period.
- Posterior probability that politician has the same preferences as voters given observed choice  $a$ :

$$\frac{\rho\pi}{\rho\pi + (1 - \rho)(1 - \pi)}$$

- Posterior probability that politician has the same preferences as voters given observed choice  $b$ :

$$\frac{(1 - \rho)\pi}{\rho(1 - \pi) + (1 - \rho)\pi}$$

- We have

$$\frac{(1 - \rho)\pi}{\rho(1 - \pi) + (1 - \rho)\pi} < \pi < \frac{\rho\pi}{\rho\pi + (1 - \rho)(1 - \pi)}$$

→ Official who chose  $a$  is more likely than a randomly chosen new candidate to have the same preferences as voters.

# Expected welfare without pandering

- We still have

$$W_{DD} = p + p = 2p$$

$$W_{JP} = \pi + \pi = 2\pi$$

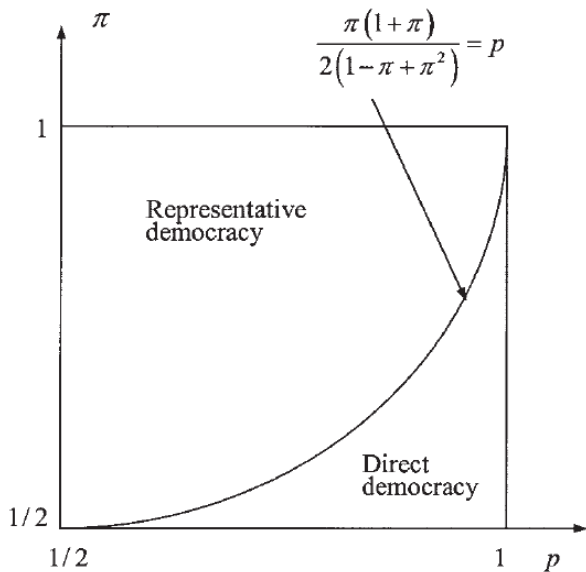
- The expected utility from RD is

$$\pi + p\pi + [p(1 - \pi) + (1 - p)\pi]\pi$$

- This is preferred to DD when

$$\begin{aligned} \pi + p\pi + [p(1 - \pi) + (1 - p)\pi]\pi &> 2p \\ p &< \frac{\pi(1 + \pi)}{2(1 - \pi + \pi^2)} \end{aligned}$$

# The choice between RD and DD without pandering



- The bill of rights says that “Congress shall make no law abridging the freedom of speech.”
- Types of communication that are outlawed:
  - Fraud
  - Libel
- So what does “Freedom of Speech” mean any way?

# “Efficient Speech” Approach

- You can treat speech like any other activity that may impose externalities.
- Allow a speech action if the benefits of that speech outweigh the costs of preventing it.

- Let's say there is a protest in Central Park. How loud can the volume be on the speakers?
- This is the same as the musician/sleeper problem from the Coase Theorem section.
  - Except higher volume may have positive externalities by persuading people about government malfeasance.



# Presumption in Favor of Free Speech

- Incumbent government officials have strong incentives to outlaw dissent.
- The presumption in favor of free speech is socially beneficial because it makes it more difficult to outlaw dissent.
  - This makes elections more competitive and therefore makes government officials more accountable.
- In particular, this is why regulations of the content of speech are usually invalid, while regulations about how speech is communicated are often upheld.

- The Comparative Constitutions Project has collected the Constitutions of 188 countries and scored them on a range of measures.

# Oldest and Newest Constitutions

Country	Year Enacted
United States	1789
Norway	1814
Belgium	1831
Netherlands	1848
New Zealand	1852
Canada	1867
...	...
India	1949
...	...
Israel	1958
...	...
Morocco	2011
Hungary	2011
Libya	2011
Syria	2012

# Length of Constitution (in words)

Country	Length in Words
Jordan	2270
Libya	3207
Monaco	3814
Iceland	4089
Oman	4619
New Zealand	4736
...	...
United States	7762
...	...
Israel	17053
...	...
Papua New Guinea	58490
Malaysia	64080
Nigeria	66263
India	146385

- Index ranges from 0-7:
  - “captures the presence or absence of seven important aspects of executive lawmaking: (1) the power to initiate legislation; (2) the power to issue decrees; (3) the power to initiate constitutional amendments; (4) the power to declare states of emergency; (5) veto power; (6) the power to challenge the constitutionality of legislation; and (7) the power to dissolve the legislature.”

# Executive Power

Country	Executive Power Index
Israel	0
Libya	1
North Korea	1
United States	1
Switzerland	1
Marshall Islands	1
Maldives	1
Solomon Islands	1
United Kingdom	1
...	...
India	4
...	...
Spain	7
France	7
Jordan	7

- “The formal degree of power assigned to the legislature by the constitution... The index score is simply the mean of the 32 binary elements, with higher numbers indicating more legislative power.”

# Legislative Power

Country	Legislative Power Index
Brunei	0
Solomon Islands	0.05
Canada	0.05
...	...
United Kingdom	0.14
...	...
Israel	0.19
India	0.19
...	...
United States	0.38
...	...
Sweden	0.52
Slovenia	0.52
Bulgaria	0.52
Haiti	0.62



- “additive index ranging from 0-6 that captures the constitutional presence or absence of six features thought to enhance judicial independence. The six features are: (1) whether the constitution contains an explicit statement of judicial independence; (2) whether the constitution provides that judges have lifetime appointments; (3) whether appointments to the highest court involve either a judicial council or two (or more) actors; (4) whether removal is prohibited or limited so that it requires the proposal of a supermajority vote in the legislature, or if only the public or judicial council can propose removal and another political actor is required to approve such a proposal; (5) whether removal explicitly limited to crimes and other issues of misconduct, treason, or violations of the constitution; and (6) whether judicial salaries are protected from reduction.”

# Judicial Independence

Country	Judicial Independence Index
Jamaica	0
Grenada	0
Bosnia and Herzegovina	0
Norway	0
Iceland	0
Switzerland	0
Syria	0
...	...
United States	3
...	...
India	4
Israel	4
...	...
Peru	6
Bulgaria	6

- “In our ongoing book project on human rights, we analyze a set of 117 different rights found in national constitutions. The rights index indicates the number of these rights found in any particular constitution.”

# Number of Rights by Country

Country	Judicial Independence Index
New Zealand	0
Brunei	2
Israel	6
Australia	11
Lebanon	13
France	13
...	...
United States	35
...	...
India	42
...	...
Portugal	86
Ecuador	86
Yugoslavia	87
Bolivia	88