1 Constitutional design of lawmaking

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1. Introduction
The economic analysis of constitutional law has not been one of the most researched topics within law and economics. The research program known as “constitutional economics” or “constitutional political economy” has primarily been developed by scholars emanating from public choice, i.e. “the application of economics to political science” (Mueller 1989, p. 1). James M. Buchanan, the most prominent proponent of constitutional economics, has described law and economics as a related subdiscipline that has remained, however, closer to orthodox economic theory because the standard efficiency norm remains central to it (Buchanan 1987a, p. 586). Scholars of constitutional economics have broadened the standard research program of economics. Standard economics is interested in the analysis of choices within rules, thus assuming rules to be exogenously given and fixed. Constitutional economics broadens this research program by analyzing the choice of rules using the standard method of economics, i.e. rational choice.

Buchanan defines constitutions in their most basic sense as “a set of rules which constrain the activities of persons and agents in the pursuits of their own ends and objectives” (Buchanan 1977, p. 292). Defined as such, quite a few rule systems could be analyzed as constitutions: a firm’s partnership agreement as well as a church statute. Although such rule systems have indeed been analyzed from the point of view of constitutional economics (for a firm’s constitution, see Gifford 1991 or Vanberg 1992), the rule system analyzed most often remains the constitution of the state. Two broad avenues in the economic analysis of constitutions can be conceived of: (1) The normative branch of the research program is interested in legitimizing the state and the actions of its representatives. In other words, it is interested in identifying conditions under which the outcomes of collective choices can be judged as “fair” or “efficient”. (2) The positive branch of the research program is interested in explaining (a) the emergence and modification of constitutional rules and (b) the outcomes that are the consequence of (alternative) constitutional rules (for a similar demarcation of the topic, see Mueller, 1996; Voigt 2011 is an up-to-date survey of the field).
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The entry is organized as follows: Section A is devoted to normative constitutional economics whereas section B deals with positive constitutional economics. The entry closes with an outlook.

A. NORMATIVE CONSTITUTIONAL ECONOMICS

2. Methodological Foundations
Normative constitutional economics has the potential to deal with a variety of questions, e.g. (1) How should societies proceed in order to bring about constitutional rules that fulfill some criterion like being “just” or “efficient”? (2) What contents should the constitutional rules have? (3) Which issues should be dealt with in the constitution – and which should be left to sub-constitutional choice? (4) What characteristics should constitutional rules have? And many more. Buchanan answers none of these questions directly but hopes to offer a conceptual frame that would make them answerable. The frame is based on social contract theory as developed most prominently by Hobbes. According to Buchanan (1987b, p. 249), the purpose of this contractarian approach is justificatory in the sense that “it offers a basis for normative evaluation. Could the observed rules that constrain the activity of ordinary politics have emerged from agreement in constitutional contract? To the extent that this question can be affirmatively answered, we have established a legitimating linkage between the individual and the state.”

The value judgment that nobody’s goals and values should a priori be more important than those of anybody else, i.e. normative individualism, is the basis of Buchanan’s entire model. One implication of this norm is that societal goals cannot exist. According to this view, every single individual has the right to pursue her or his own ends within the frame of collectively agreed upon rules. Therefore, a collective evaluation criterion that compared the societal “is” with some “ought” cannot exist since there is no such thing as a societal “ought”. But it is possible to derive a procedural norm from the value judgment stated. Buchanan borrowed this idea from Knut Wicksell (1896). Agreements to exchange private goods are judged as advantageous if the parties involved agree voluntarily. The agreement is supposed to be “efficient”, “good” or “advantageous” because the parties involved expect to be better off with the agreement than without it. Often, the exchange activities are considered to be taking place only between two parties, the seller and the buyer. Buchanan follows Wicksell, who had demanded the same evaluation criterion for decisions that affect more than two parties, at the extreme an entire society. Rules that have consequences for every single member of a society can only be looked upon as advantageous if every single member of that society has voluntarily agreed to them. This is the Pareto criterion applied to collectivities. Deviations from the unanimity principle might occur during the decision process on the
production of collective goods, but this would only be within the realm of the Buchanan model as long as the constitution itself provided for a decision rule below unanimity. Deviations from the unanimity rule would have to be based on a provision that was brought about unanimously.

3. Giving Efficiency Another Meaning
Normative constitutional economics thus re-interprets the Pareto criterion in a twofold way: it is not outcomes but rules or procedures that lead to outcomes which are evaluated using the criterion. The evaluation is not carried out by an omniscient scientist or politician but by the concerned individuals themselves: “In a sense, the political economist is concerned with ‘what people want’” (Buchanan 1959, p. 137). In order to find out what people want Buchanan proposes to carry out a consensus test. The specification of this test will be crucial as to which rules can be considered legitimate. In 1959, Buchanan had factual unanimity in mind and those citizens that expect to be worse off due to some rule changes would have to be factually compensated. This test would thus be equivalent to a modified Kaldor-Hicks criterion. In the meantime, Buchanan seems to have changed his position: hypothetical consent deduced by an economist will do in order to legitimize some rule (see e.g. Buchanan 1977, 1978, 1986). This position can be criticized because a large variety of rules seem to be legitimizable depending on the assumptions of the scientist who does the process. Scientists arguing in favor of an extensive welfare state will most likely assume risk-averse individuals, while scientists who argue for cuts in the welfare budgets will assume people to be risk-neutral.

4. Critical Evaluation of Normative Constitutional Economics
The possibility of hypothetical consent crucially depends on the information assumptions. Buchanan and Tullock (1962, p. 78) introduced the veil of uncertainty in which the individual cannot make any long-term predictions about her or his future socio-economic position. John Rawls’ (1971) veil of ignorance is more radical because the consenting individuals are asked to decide on proposed rules as if they did not have any knowledge of their individual fate. Rawls’ veil is thus more demanding on the individuals. Both veils assume a rather curious asymmetry concerning certain kinds of knowledge: on the one hand, the citizens are supposed to know very little about their own socio-economic position, but on the other, they are supposed to have at their disposal a consistent theory concerning the working properties of alternative constitutional rules (Reisman 1990, pp.23–30 describes the differences between the two conceptions of the veil).

In order to discuss the usefulness of the conceptual frame, suppose for a moment that it is impossible to legitimize a currently valid constitutional rule and that some constitutional economist has proposed an alternative rule for
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which she has ascertained a hypothetical consent. Further suppose that it is impossible to transform the hypothetical consent into majorities through which the constitution could be changed. Clearly, the non-legitimizable status quo would prevail over the legitimate constitutional rule.

B. POSITIVE CONSTITUTIONAL ECONOMICS

Positive constitutional economics can be divided into two parts: On the one hand, it is interested in explaining the outcomes that result from (alternative) rule sets. Here, constitutional rules are part of the explanans. On the other hand, positive constitutional economics is interested in explaining the emergence and modification of constitutional rules. In that case, constitutional rules are the explanandum.

B.A. CONSTITUTIONAL RULES AS EXPLANANDUM

5. Procedures for Generating Constitutional Rules

Constitutional rules can be analyzed as the outcome of certain procedures used to bring them about. Jon Elster’s (1993, 1995) research program concerning constitutional economics puts a strong emphasis on hypotheses of this kind. He inquires about the consequences of time limits for constitutional conventions, about how constitutional conventions that simultaneously serve as legislature allocate their time between the two functions, about what effects providing regular information to the public concerning the progress of constitutional negotiations has and about how certain supermajorities and election rules can determine the outcome of conventions (Elster 1995, p. 30). Some of William Riker’s articles (1983, 1984) can also be interpreted as an encouragement to search for hypotheses of this kind. He calls for an extension of traditional rational choice theory, pointing to the fact that in its traditional form it is incapable of taking into account dynamic and creative processes which structure the decision space of the actors.

This part of constitutional economics does not offer a general perspective on the process of constitution-making (Elster 1993, p. 174). There is, however, a large number of case studies (see, e.g., the volume edited by Goldwin and Kaufman 1988; Voigt and Wagener 2002 contains some first-hand descriptions of constitution-making processes in Central and Eastern Europe). Ginsburg et al. (2009) is a survey of both the theoretical conjectures and the available empirical evidence. They expect constitution-making processes centered around the legislature to be positively correlated with post-constitutional legislative powers, whereas constitution-making processes centered around the executive would be negatively correlated with post-constitutional legislative powers. Interestingly, the first half of the conjecture is not supported by the data, whereas
the second half is. In a book-length work on the lifespan of constitutions, Elkins et al. (2009) report that public involvement in constitution-making is indeed correlated with a longer constitutional lifespan.

By and large, neither the Elster nor the Riker program has really caught the attention of constitutional economics, possibly because of huge methodological problems.

6. The Relevance of Preferences and Restrictions for Generating Constitutional Rules

Procedures are a modus of aggregating inputs and can therefore never bring about constitutional rules by themselves. It is therefore only logical to analyze whether a bunch of potentially relevant variables can explain the choice of certain constitutional rules. There are good reasons – and some empirical evidence – to assume that (1) the individual preferences of the members of constitutional conventions will directly enter into the deliberations and that (2) the preferences of all the citizens concerned will be recognized in the final document in quite diverse ways. This would mean that rent-seeking does play a role even on the constitutional level, a conjecture that is often excluded by representatives of normative constitutional economics.

McGuire and Ohlsfeldt (1986, 1989a, b) have tried to explain the voting behavior of the Philadelphia delegates as well as those of the delegates to the 13 state-ratifying conventions that led to the US Constitution. Their statistical results show that merchants, western landowners, financiers, and large public-securities holders, ceteris paribus, supported the new constitution, whereas debtors and slave owners, ceteris paribus, opposed it (1989a, p. 175).

7. Explicit Constitutional Change

The two approaches towards constitutions as explananda just sketched are rather static. A third approach focuses on explaining the modifications of constitutions over time. Constitutional change that results in a modified document will be called explicit constitutional change here, whereas constitutional change that does not result in a modified document – i.e. change that is due to a different interpretation of formally unaltered rules – will be called implicit constitutional change.

One approach towards explaining long-run explicit constitutional change focuses on changes in the relative bargaining power of organized groups. Due to a comparative advantage in using violence (see North 1981), an autocrat is able to establish government and secure a rent from that activity. As soon as an (organized) group is convinced that its own cooperation with the autocrat is crucial for the maintenance of the rent, it will seek negotiations with the autocrat. Since the current constitution is the basis for the autocrat’s ability to appropriate a rent, the opposition will strive to change it. In this approach, bargaining power
is defined as the capability of inflicting costs on your opponent. The prediction of this approach is that a change in (relative) bargaining power will lead to modified constitutional rules (Voigt 1999, chapter 6).

Explicit constitutional change can be sought by interest groups who try to convince legislators to change the constitution. If constitutional change is only sought in disequilibrium, the interest group seeking change must perceive its own relevance as having changed. Boudreaux and Pritchard (1993) analyze from an economic perspective the 27 amendments that have so far been made to the US Constitution. They begin with the conjecture that a lobby group interested in constitutional change principally has two possibilities of seeking its realization: It can either lobby for a simple law or it can lobby for constitutional change. The second option is, however, more expensive. The trivial prediction of rational choice theory is that the group will choose the option with the higher expected utility. In order to be able to make predictions about the option chosen, it is therefore necessary to specify the cost and benefit categories implied. Boudreaux and Pritchard specify two categories and predict a demand for constitutional change in cases in which the costs of maintaining an interest group over time are high, and today’s opposition is weak but expected to be strong in the future.

8. Implicit Constitutional Change
Implicit constitutional change has been defined as a changed constitutional interpretation that occurs even though the formal constitutional document remains unchanged. This means that the conceptual separation between choice of rules on the one hand and choice within rules on the other has been factually blurred. This possibility must be disturbing to the proponents of normative constitutional economics. To adherents of positive constitutional economics, it amounts to an analytical difficulty, because the identification of what is analyzed as the valid “constitution” either as *explanandum* or as *explanans* becomes more difficult. At the same time, the possibility of implicit constitutional change also becomes an object of inquiry. It can be asked which variables determine the scope and extent of the implicit constitutional change to be expected.

Suppose a constitution in the sense of constitutionalism exists and the government branches are legislature, executive and judiciary. If all government representatives have at their disposal a certain latitude concerning the interpretation of the constitution, it can be argued that all branches can bring about implicit constitutional change. If an independent judiciary exists, it seems plausible to assume that it has most latitude in causing implicit constitutional change because it has the power to judge the constitutional conformity of the actions of the other two government branches. It can now be argued that the judiciary is subject to a number of constraints, among which those laid down in the original constitutional document play a rather marginal role. Instead, the current preferences of the other branches are more relevant restrictions.
There are various factors that determine the latitude that justices have to bring about implicit constitutional change. Cooter and Ginsburg (1996) show that it depends on the number of chambers whose consent is needed to pass fresh legislation. The higher its number, the more difficult it will be for the other branches to correct implicit constitutional change by changing the constitutional document explicitly. They further show (ibid.) that it depends on the existence of a “dominant disciplined party”. If such a party exists, it will be more difficult for the justices to bring about implicit constitutional change. Other variables that influence the amount of implicit constitutional change include the following: (1) If implicit constitutional change can only be prevented by changing the document explicitly, the necessary majority becomes a factor. The more inclusive it is, the more difficult it will be to prevent such change. (2) The possibility of referendums should be another explanatory variable. If the population at large can overturn the justices, they have an incentive not to deviate too drastically from the preferences of the median voter. (3) The extent of implicit constitutional change should be higher in common law systems than in continental law systems, because, in the first group, decisions by justices become directly applicable law.

**B.B. CONSTITUTIONAL RULES AS EXPLANANS**

In the previous part of this chapter, constitutional rules were analyzed as *explananda*. Such an analysis is of interest only if it can be shown that constitutional rules are themselves relevant to bringing about certain results or patterns that concern economists or social scientists in general; in other words, if constitutions matter. Possible *explananda* include fiscal policy variables (such as government revenue, expenditure, debt), governance variables (such as corruption), but also per capita income, its growth rate and factor productivity. In this area, empirical studies have proliferated over the last decade. Only a small fraction is mentioned here (Voigt 2011 is a more complete survey).

**9. The Horizontal Separation of Powers in General**

Brennan and Hamlin (1994) develop a “revisionist view” of the separation of powers. To make their point, they draw on standard monopoly models used in economics and distinguish between a horizontal and a vertical separation of powers. Starting out with a monopoly, the introduction of the horizontal separation amounts to two (or more) suppliers competing for demand and thus to the introduction of duopoly (or oligopoly). The equilibrium price will then be below the monopoly price and consumer rent will subsequently increase. A vertical separation of powers also entails a division of the original monopoly, albeit in a different way: Now, single functions of the process are divided; there is, for example, one monopolistic firm that produces certain goods and a second
monopolistic firm that distributes it. Brennan and Hamlin call this functional separation of powers as well. The (individually) maximizing strategies of the vertically separated firms will at best lead to the monopoly price, but usually the price will be even higher and the accruing consumer rent will thus be lower than in the original monopoly. Brennan and Hamlin argue that the separation of powers doctrine as conventionally understood is equivalent to the functional separation of powers and will therefore not protect citizens from exploitation by the governed. The horizontal separation of powers could, instead, have beneficial results. In order to unfold, it needs to entail an “exit” option for citizens, as well as the absence of strong externalities between competing states.

Persson et al. (1997) argue that politicians have two possible routes to enriching themselves to the detriment of citizens, the first based on the misuse of power, the second on exploiting information advantages. The authors show that both possibilities can be reduced by implementing checks and balances between the legislature and the executive. This was one of the first models dealing with the (horizontal) separation of powers. However, it falls short of the traditional notion going back to Montesquieu, since it is based on two government branches only and does not take a third branch (the judiciary) into consideration.

10. **Form of Government: Presidential versus Parliamentary Systems**

The degree of separation of powers is greater in presidential than in parliamentary systems, since the head of the executive (the president) does not depend on the confidence of the legislature (parliament) to survive. Persson et al. (1997, 2000) argue that it is easier for legislatures to collude with the executive in parliamentary systems, which is why they expect more corruption and higher taxes in those systems than in presidential systems. They further argue that the majority (of both voters and legislators) in parliamentary systems can pass spending programs whose benefits are clearly targeted at themselves, implying that they are able to make themselves better off to the detriment of the minority. This is why Persson et al. (2000) predict that both taxes and government expenditures will be higher in parliamentary than in presidential systems.

Persson and Tabellini (2003) derive the following results: (1) Government spending is some 6% of GDP lower in presidential compared with parliamentary systems. (2) The size of the welfare state is some 2–3% lower in presidential systems. (3) The influence of form of government on the budget deficit is rather marginal; the binary variable explains only a small proportion of the variation in budget deficits. (4) Presidential systems seem to have lower levels of corruption. (5) There are no significant differences in the level of government efficiency between the two forms of government. (6) Presidential systems appear to be a hindrance to increased productivity, but this result is significant only at the 10% level.
These results are impressive and intriguing. Although government spending is less in presidential systems, and such systems suffer less from corruption than parliamentary systems, parliamentary systems have an advantage over presidential systems in terms of productivity, if only at a low level of significance. In a study replicating and extending the Persson and Tabellini estimates, Blume et al. (2009b) pour some water into the wine. It turns out that their results are not robust, even to minor modifications. Increasing the number of observations from 80 to 92 makes the presidential dummy insignificant in explaining variation in central government expenditure. This is also the case as soon as a slightly different delineation of presidentialism is used. If the dependent variable is changed to total (instead of central) government expenditure, the dummy also becomes insignificant. Persson and Tabellini’s estimates of the effects of form of government on “graft” are based on data from 1997/98. If data for the period 1996 to 2004 are used instead (or the number of observations is increased, or a slightly different definition of presidentialism used, or a combination thereof), the dummy becomes insignificant. For total factor productivity, Persson and Tabellini did not find the presidentialism dummy significant. Interestingly, if a slightly different delineation of presidentialism or estimates of total factor productivity for 2000 (instead of 1988) are used, presidentialism becomes significantly (negatively) correlated with total factor productivity.

The differences in these results clarify an important point: to date, many of the effects supposedly induced by constitutional rules are not very robust, but crucially hinge upon the exact specification of the variables, the years considered, the control variables included, and so on. What this suggests is that further research needs to be as specific as possible in trying to identify possible transmission channels, as well as needing to take into consideration the possibility that small differences in institutional details can have far-reaching effects.

11. Unicameral versus Bicameral Systems

Presidentism increases the separation of powers by separating the executive from the legislature; bicameralism does the same by dividing the legislature. Although bicameralism is a frequently found constitutional setting (according to Tsebelis and Money 1997, it can be found in approximately one-third of all legislatures), its economic effects remain underresearched. In their survey paper on bicameralism, Cutrone and McCarty (2006) note that it “has not received the scholarly attention that other legislative institutions have”. Similarly, Bradbury and Crain (2002) find that, in contrast to the 19th century, when it was subject to heated discussion, bicameralism “receives scant attention in modern political economy”.

The differential effects of unicameral and bicameral legislatures were first analyzed from an economic point of view by Buchanan and Tullock (1962, chapter 16). In their analytical frame, the optimal decision rule leads to a
minimum of interdependence costs, which are defined as the sum of decision-making costs and those external costs that an actor has to bear in case his individually most preferred outcome is not the outcome of the collective choice. They conjecture that, in comparison with unicameral systems, bicameral systems have higher decision costs, and then go on to state that “[o]n the other hand, if the basis of representation can be made significantly different in the two houses, the institutions of the bicameral legislature may prove to be an effective means of securing a substantial reduction in the expected external costs of collective action without incurring as much added decision-making costs as a more inclusive rule would involve in a single house” (ibid., pp. 235 f.). The larger the majority required to reach a certain decision, the lower the external costs connected with that decision because the number of opponents is negatively correlated with the required majority. On the other hand, it will become increasingly difficult to reach a decision at all, because the decision costs are positively correlated with the required majority. One possibility for keeping external costs down is to require a supermajority (say of three-quarters or five-sixths) in the single-house system. Supermajorities in a single-house system and simple majorities in a two-house system can thus be considered as alternatives. Buchanan and Tullock conjecture that – given identical external costs – decision costs will be lower in a bicameral than in a unicameral system.

Miller and Hammond (1989) inquire into the effects of bicameralism and the executive veto, sometimes considered the third chamber, on stability in the sense of reducing the probability of cycling majorities à la Condorcet or Arrow (1951). They conclude that bicameralism and the executive veto increase stability. The stability-enhancing effect of bicameralism depends on some preference difference between the two chambers. Levmore (1992) changes the focus of the analysis somewhat when he conjectures that a bicameral system might be better than a corresponding qualified majority in a unicameral system at reducing the power of the agenda setter. Bicameral systems are often interpreted as a check against overly active legislatures.

In sum, then, it is argued that bicameralism protects minorities, reduces cycling, and curbs the power of the agenda setter.

12. Direct Democratic versus Representative Institutions
Representatives of normative constitutional economics ask on what rules the members of a society could agree behind a veil of uncertainty. If they agree on a democratic constitution, they would further have to specify whether and to what extent they want to combine representative with direct democratic elements. In order to make an informed decision, the citizens would be interested in knowing whether there are systematic relationships between these institutions and the patterns that they are interested in.

In real-world societies of a size too large to efficiently vote directly on all issues, representative and direct democracy are complementary institutions. In
these societies, a different degree of direct democratic institutions is combined with representative institutions. With regard to direct democratic institutions, referendums are usually distinguished from initiatives. The constitution can prescribe the use of referendums for passing certain types of legislation, in which case agenda-setting power remains with parliament, but citizen consent is required. Initiatives, in contrast, allow citizens to become agenda setters: the citizens propose a piece of legislation that will then be decided upon, given that they manage to secure a certain quorum of votes in favor of the initiative. Initiatives can be aimed at different levels of legislation (constitutional versus ordinary legislation), and their scope can vary immensely (e.g. some constitutions prohibit initiatives on budget-relevant issues).

Matsusaka (1995, 2004) estimates the effects of the right to an initiative on fiscal policy among all US states except Alaska. States with the right to an initiative have lower expenditures and lower revenues than states without that institution. With regard to Switzerland, Feld and Kirchgässner (2001) deal with the effects of a mandatory fiscal referendum on the same variables. They find that in cantons with the mandatory referendum, both expenditure and revenue are lower by about 7% to 11% compared with cantons without mandatory referendums. Matsusaka (2004, chapter 4) also deals with the question of whether initiatives have any effect on the distribution of government spending between the state and the local level and finds that initiative states spend 13% less per capita at the state level than noninitiative states, but that initiative states spend 4% more on the local level.

Finally, do direct democratic institutions have any discernible effect on productivity and thus on per capita income? Feld and Savioz (1997) find that per capita GDP in cantons with extended democracy rights is some 5% higher than in cantons without such rights. Frey and co-authors argue that one should not look only at the outcomes that direct democratic institutions produce, but also at the political processes they induce (e.g. Frey and Stutzer 2006). Kirchgässner and Frey (1990) speculate that the readiness of voters to incur information costs would, ceteris paribus, be higher in democracies with direct democratic institutions, because the voters participate more directly in the decisions (ibid., p.63).

Blume et al. (2009a) is the first cross-country study to analyze the economic effects of direct democracy and their findings only partially confirm the previous results. They do find a significant influence by direct democratic institutions on fiscal policy variables and government efficiency, but no significant correlation between direct democratic institutions and productivity or happiness. Institutional detail matters a great deal: while mandatory referendums appear to constrain government spending, initiatives seem to increase it. The actual use of direct democratic institutions often has more significant effects than their potential use, implying that – contrary to what economists would expect – the
direct effect of direct democratic institutions is more relevant than its indirect effect. It is also noteworthy that the effects are usually stronger in countries with weaker democracies.

13. Individual Rights and Economic Growth

Many constitutions contain an elaborate catalogue of basic rights, which are often separated into positive or negative rights. Negative rights can further be delineated into rights establishing freedom from state or third-party interference (such as torture, imprisonment without trial, etc.) and freedom to do something (assemble with others, criticize the government in public, etc.). Examples of positive rights are rights to food, housing, paid jobs, and so forth. Negative rights create a protected domain that not even the state is allowed to trespass. For democratically organized states, this implies that negative rights limit the possible scope of majority decision making: if rights are really basic, even large majorities are bound by them and cannot simply ignore them. Negative rights can thus protect minorities against current majorities and can be thought of as “veto rights”, as they give their holders the right to behave in a certain way, even if a huge majority would like the right holders to behave differently.

When it comes to basic rights, the congruence between formally granted rights and their actual enforcement is especially crucial. It is even plausible to assume that the degree of factual enforcement is a function of other constitutional characteristics. For example, a greater separation of powers – be it horizontal, vertical, or a combination thereof – would appear conducive to a high degree of factual enforcement. In the literature, basic rights are usually sorted into three categories: (1) economic rights, which include primarily private property rights broadly defined; (2) civil and political rights, which include unrestricted travel, the possibility of participating in political life, freedom from government censorship, and so forth, although it is not uncommon for political rights to be explicitly separated from civil rights; and (3) social or emancipatory rights, which endow the individual with positive rights vis-à-vis the state. Blume and Voigt (2007) propose a fourth category, namely, basic human rights, which includes the absence of torture, the absence of political killings, the absence of people who disappear, etc.

There is a sizable literature inquiring into whether economic rights have a significant effect on economic growth, Knack and Keefer (1995) being a pathbreaker on this topic. Their paper, for the first time, uses data from the International Country Risk Guide and Business Environment Risk Intelligence as proxies for the security of property rights and finds that the security of these rights is significant for explaining both investment and growth. Around the same time, the Economic Freedom Index first appeared (Gwartney et al. 1996), as did the Index of Economic Freedom, which was produced jointly by the Heritage Foundation and the Wall Street Journal. These data sets gave rise
to an entire cottage industry, focusing on the interrelations between various aspects of economic freedom and prosperity.

Two follow-up questions suggest themselves. (1) What about the effects of constitutional entrenchment on other variables, such as government spending or corruption? After all, a long list of positive rights means that resources will be needed for their implementation. This should be reflected in the structure of the budget and – most likely – also in the overall level of government spending. (2) What factors determine whether constitutionally guaranteed rights will be factually enforced?

C. OUTLOOK

John Neville Keynes proposed a tripartite division of political economy, introducing the “art of political economy” besides the more standard positive and normative branches. This art deals with the possibilities of reducing differences between “is” and “ought” (Keynes 1955). It almost suggests conceiving of an “art of constitutional political economy” analogously. This art would itself have to have a positive foundation: Knowledge about the potential to modify constitutions intentionally is primordial for such a third branch. If one thinks that constitutional economics is potentially relevant for real-world constitution writers, then one must be disappointed with the degree to which insights from this research program have entered into the newly written constitutions of Central and Eastern Europe. In order to become more relevant, it seems essential to work on the third branch.

A central presumption of both the branches presented in Sections 2 and 3 is that constitutional rules constrain human behavior and that they can therefore be relevant to explaining it. Representatives of the New Institutional Economics would broaden this presumption and claim that institutions in general constrain human behavior. It thus almost represents a plea for the integration of constitutional economics into the New Institutional Economics. Whereas Brennan and Hamlin (1995) argue that one can conceptualize the “new institutionalism” as a subordinate research program, one can also argue exactly the other way round: If one does not start with the assumption that constitutional design is possible to a large extent and if one is furthermore critical of the assumed hierarchy of rules, and rather points to the complex interdependence between informal constraints and formal rules (North 1990) or between internal and external institutions (Kwit and Voigt 1995), one would tend to conceptualize constitutional economics as part of the New Institutional Economics.

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