Review: The Strategic Constitution: On the Logic of Rules and Rights

Reviewed Work(s): The Strategic Constitution by Robert D. Cooter

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The Strategic Constitution: On the Logic of Rules and Rights

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When I was in law school ten years ago, the two classes that I anticipated most eagerly were antitrust and constitutional law. My antitrust class fulfilled my high expectations; my constitutional law class let me down. The reason was clear. Antitrust law was taught rigorously, with economics. In contrast, constitutional law was presented as a soup of history and political philosophy, with a dash of ethics thrown in for flavor. There was no unifying theoretical perspective.

This absence of theory was disappointing but understandable in light of the surprising paucity of law-and-economics scholarship devoted to constitutional questions. It is true that Buchanan's and Tullock's *The Calculus of Consent* was available (although ignored by my professor), but Richard Posner is certainly correct to observe that, "despite the fixation of American lawyers, and especially law students and law professors, on the Constitution, there is relatively little economic writing on the subject. And this is not for want of topics that economic analysis might illuminate" (1998, p. 675).

Fortunately, this paucity is today well on the way to being history. Using economics, especially (but not exclusively) basic game theory, Robert Cooter's *The Strategic Constitution* comprehensively analyzes

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constitutional issues. The result is impressive. Scholars seeking a stronger grasp of constitutional issues, and teachers seeking an economically sound theoretical foundation for teaching constitutional law, will find this book quite useful.

The book has the tone and coverage of a textbook. Save for the final chapter, each of the 15 chapters features several questions placed throughout—questions designed to test comprehension and to oblige the student to analyze constitutional issues as an economist. These questions are a nice touch. However, Cooter might have polished his style a bit more. One of my few complaints about the book is that it reads like lecture notes. Too many paragraphs begin with a distracting sentence in the following form: "I just showed X, and now I'll show Y."

Although the coverage of cases is too thin to enable this book to substitute for a casebook in a law school course on constitutional law, it can certainly serve as an outstanding supplemental text for such a course or as the principal text for an undergraduate course on constitutional law. The economics and game theory are accessible to careful noneconomists, and Cooter grounds his analysis in a sufficient number of actual cases to ensure that the book remains relevant throughout. Moreover, while the applications are drawn mostly from the United States, Cooter includes an ample dose of applications from other political cultures, especially the European Union.

Unlike most constitutional scholarship, the book does not reveal the author's political philosophy. Instead, Cooter offers positive analyses of a comprehensive range of constitutional topics. Among the broad topics covered are the division of government powers (both horizontally and vertically) and the dynamics of the intergovernmental competition that emerge as a consequence of different divisions, the choice between parliamentary and presidential government, the choice between proportional representation and winner-take-all representation, the nature and scope of administrative powers, the benefits and costs of judicial review, and the various considerations relevant to determining the type and scope of rights that a constitution should protect.

Throughout, Cooter draws on a rich body of scholarship—particularly law-and-economics and public choice. He combines many of the analytical tools available from this scholarship with several tools of his own invention. As a result, each chapter is full of useful graphs, tables, and (on occasion) equations. Another result is an unblinking constancy in identifying relevant tradeoffs and reminding the reader that no constitutional principle is free. Even the soundest such principle has its downside. Tradeoffs, even at the constitutional level, are unavoidable. And Cooter is a superb guide to the full panoply of these tradeoffs.

Consider, for example, the distinction between what he calls "median" democracy and "bargaining" democracy, a distinction that turns on the scope of a government's decision-making authority. A government with broad authority—authority to clean the streets, to redistribute wealth, to subsidize the arts—increases the likelihood that citizens (or their representatives) will bargain across issues: "I'll vote to clean your street if you vote to subsidize my Puccini." If transaction costs within the structure of such a government are sufficiently low to permit bargaining, all is well. But if transactions costs stymie bargaining, then the nasty problem of cycling emerges. The prebargain preferences of citizens are unlikely to yield any particular combination of clean streets, wealth redistribution, and art subsidies that is preferred to any number of other such combinations. Preferences are unlikely (as economists say) to be single-peaked. The cycling problem rears its head and roars. Any particular majoritarian outcome generated by a government with broad authority whose agents cannot easily bargain with each other will likely be no better than any other majoritarian outcome.

Splitting the different issues to be settled collectively into different governmental jurisdictions—"factoring," as Cooter calls it—helps to avoid the cycling problem by reducing each collective decision to a single issue: how much of some specific collective good should be produced? If voters are choosing only how clean their streets should be, the likelihood that voters' collective preferences will be single-peaked is higher than if voters are simultaneously choosing the cleanliness of their streets and how much opera to subsidize. Therefore, in general, single-issue collective decisions are more likely than multi-issue collective decisions to be settled by the preferences of the median voter. But factoring collective issues into separate and distinct collective-choice opportunities makes bargaining across these different issues very difficult. Whatever gains from trade could be captured by such bargaining are lost.

The relevance for framers of constitutions is obvious. If the framers believe that the gains from trade available from collective-decisionmakers' bargaining across different issues are high, then those issues should be spliced together. If, in contrast, the framers believe that the gains from political trades are low, or that too many citizens won't be represented at the bargaining table, then the issues are best divided into single ones. But no matter how the splicing/factoring decision is finally struck, the result will not be without its costs. Cooter's detailing of these sorts of constitutional tradeoffs throughout the book is both masterful and useful.

The book's substantive flaws are few. One is Cooter's confusing use of the term "liberty" in Chapters 10 and 11. Cooter puts "liberty" on an indifference-curve graph and argues that citizens trade off liberty against other goods and services in the same way that they trade off other commodities against each other. He does recognize that liberty is plausibly best considered to be a public good and, as such, the demand for it is found by vertical summing all the different citizens' individual demands for liberty. He also recognizes that some people regard liberty as a merit good that is worth more to society than to individuals.

It is true (as the bumper sticker says) that "freedom isn't free." Resources and effort are required to protect it. And poorer people are more likely than wealthy people to attach a higher marginal value to spending a dollar on food or clothing than they attach to spending that dollar on protecting liberty. The result, Cooter says, is that "rich people will pay more for liberty than will poor people" (251) and that "liberty has little value to desperately poor people" (271).

Is this result correct? Evidence abounds that poor people, given the opportunity, often are willing to pay enormous sums for liberty. A former colleague of mine escaped as a young, poor man from the Soviet Union by traveling for days in underground sewer pipes. Desperately poor Cubans regularly risk their lives for a chance to set foot on American soil. Such people pay very high prices for liberty.

It might be responded that such émigrés seek prosperity rather than liberty. Perhaps. But because liberty is necessary for prosperity, it is ultimately confusing to model liberty and wealth as substitutes for each other. People do not trade one off against another in the way depicted by Cooter.

When Cooter asserts that liberty has little value to poor people, he presumes that poor people's basic human needs will somehow be supplied (by the state). But this presumption is not necessarily valid. North Koreans today are starving to death not because they have an excess supply of liberty for which they are paying too much, given their poverty. Rather, they are starving to death because they have too little liberty. That is, they are desperately poor precisely because they are denied the liberty necessary to permit a sufficient level of productive activity to flourish.

A second flaw mars Cooter's discussion of government financing of political campaigns—a discussion that is uncharacteristically unclear. He begins by correctly pointing out that rational investors regard investments in lobbying no differently than investments in oil wells and microprocessors. If investing a dollar buying a drink for a Senator promises a higher expected return than investing that dollar in expanding a factory, then the Senator will get his drink and the factory's expansion will have to wait. In equilibrium, an additional dollar invested in lobbying yields the same expected rate of return as every additional dollar invested elsewhere.

Cooter then expands his analysis:

> Since one form of investment easily substitutes for another, the supply of funds for lobbying is highly elastic in the long run. To appreciate the consequences of this fact, think of lobbyists as supplying legislation, and think of investors as demanding legislation. An increase in the price lobbyists charge for legislation should cause a large decrease in demand for legislation by investors. Furthermore, an increase in the price charged by lobbyists for legislation should cause a decrease in total expenditures on lobbying. (65)

I struggled to make sense of this passage. He seems to be saying that the fungibility of funds available for interest groups to spend on lobbying means that the long-run *demand* for legislation (or for its almost-necessary input, lobbying) is elastic. This quoted passage sets the stage for Cooter to conclude that government financing of political campaigns will reduce the total cost of producing and securing legislation. The reason is that government financing of campaigns will lessen politicians' needs for private campaign funds, thus making politicians less beholden to interest groups. Lobbyists will then have a tougher row to hoe because they will have more difficulty buying or influencing politicians. With their jobs more difficult, lobbyists who are in the business of securing legislation for interest groups will demand a higher price for any amount of legislation they help to generate. The supply curve for lobbying services will shift back. Because, in Cooter's view, the demand for legislation is elastic, this reduction in supply of lobbying will substantially reduce the quantity of legislation purchased by interest groups. The total dollar value of resources interest groups spend lobbying for legislation will fall.

This analysis does not hold up. It's true that if demand for legislation were indeed elastic (as Cooter contends), a decrease in the supply of lobbying would lower the total dollar amounts spent to purchase legislation. But Cooter is mistaken to conclude that the fungibility of funds available to be spent lobbying for legislation implies an elastic demand for legislation. The principal factor determining the elasticity of demand for legislation is the ability of its buyers to get good substitutes. This ability is limited. Court rulings, executive orders, and administrative regulations can achieve many of the same ends as legislation, but their effectiveness is curbed by the constitution. In the U.S., all national legislative power is vested in Congress, giving legislation enacted by Congress a distinct and substantial advantage over substitute edicts issued by other agencies.

Because legislation has few good substitutes, its demand might very well be inelastic in the relevant range over which it is supplied. If so, a decrease in the willingness of suppliers of legislation to supply it will (contrary to Cooter's claim) bring about only a relatively small reduction in the quantity of legislation demanded and a substantial increase in its price. The total cost of securing legislation will rise.[1]

Whether or not the demand for legislation is elastic depends also upon competitiveness within the legislature. If legislators behave as a unit—that is, in the same way that each business firm is assumed to behave when economists talk of firms' maximizing profits—then the legislature, being a monopolist, will so restrict the supply of legislation that the amount produced will be on the elastic portion of the demand curve. In this case, a further reduction in the supply of legislation will indeed reduce the amounts spent to purchase it.

Unfortunately, this situation does not promise citizens great benefits from turning the financing of political campaigns over to government. The reason, of course, is that sitting legislators will ultimately determine which candidates do and do not receive government funds for their campaigns. Whatever prospect elections held for breaking the monopoly

1. I ignore here the question of whether reducing the amount of resources spent pursuing legislation is normatively desirable.

power of the legislature will be much reduced. Cooter himself, throughout his book, praises democracy because it permits competition for political power. This competition would be in graver peril if successfully colluding legislators gained the additional power to dictate the eligibility of political aspirants for campaign funds.

The danger of putting campaign-finance decisions in the hands of government would be less if there were sufficient competition within the government to supply legislation—that is, if legislators consistently failed to act in unison to exploit the monopoly power that the legislature, as a body, possesses. For a variety of reasons, this scenario is quite unlikely. But if it were to exist, the resulting higher supply of legislation might well be in the inelastic portion of the demand schedule. Any reduction, then, in the supply schedule of legislation might well *increase* the total amount of resources spent to secure legislation.

One final and more general point on campaign financing. Cooter's prediction about the effect of government financing of campaigns rests on the fact that access to government funds raises politicians' costs of relying upon private sources of campaign funds. Although Cooter does not express his analysis in this way, I believe that a fair interpretation of his argument is that government financing of campaigns, by freeing politicians from the need to pander to interest groups, makes it more attractive for politicians to pursue the public welfare.

I'm not persuaded that government financing of political campaigns will reduce the direct influence of interest groups on legislative outcomes. But even if this happy effect does come to pass, it still will not be certain that the amounts spent by private interest groups to influence government policy will fall. Perhaps they will rise.

If politicians do become more animated by the public welfare, the precise content of this welfare must be defined and discerned. It does not loom outside the doors of the legislature, still and patient, available for all to see. Its precise contours are vague, shifting, and often contentious. In a world in which politicians truly have little incentive to do anything other than vote in ways that are consistent with their understanding of the public welfare, interest groups will surely spend enormous amounts of resources trying to give content to "the public welfare."

Public crusades to change popular opinion on this matter and that issue will likely become more prevalent. Such a shift of interest-group lobbying from K Street and Capitol Hill to Main Street and citizens' living rooms might well be desirable. But it could well be very costly. Cooter's conclusion that government financing of political campaigns will likely reduce the amounts that private interest groups spend on buying legislation does not stand up.

Mine are minor complaints about an outstanding book. It's high time that the skills of a first-rate economist are brought to bear on the full range of constitutional issues. Robert Cooter has given constitutional scholars and students good cause to celebrate.

Reference

Posner, Richard A. 1998. *Economic Analysis of Law*, 5th ed. New York: Aspen Law and Business.