

Constitutional Entrepreneurship: Without Romance

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Abstract Constitutional political economy offers a theory of government operation and the meta-rules, or constitutions, that govern the day to day operations of politics. Buchanan and Ostrom introduce the term “constitutional entrepreneur” to describe individuals creating cooperative arrangements, not only at the nation-state level but in firms, community organizations, and clubs. This paper examines the coordinating role of constitutional entrepreneurs seeking to overthrow the state at three levels of rules: pre-constitutional, constitutional, and post-constitutional. The literature on civil resistance, or nonviolent action, provides a rich picture of the actions taken by these three types of constitutional entrepreneurs seeking regime change. Combining scholarship on civil resistance with the theory of Virginia political economy offers an empirically grounded and realistic theory of the constitutional process.

The Constitutional process involves the “pre-constitutional” and “constitutional” phases of action. Nonviolent action as constitutional entrepreneurship accounts for actors moving from a stable government to a revolution. Exogenous changes may precipitate constitutional moments, but direct action from nonviolent social movements provides an endogenous move back to establishing the rules of the game. In many contexts, binding constitutional constraints are preferable to new institutions. However, citizens in countries lacking the rule of law and good government may seek to establish better institutions without the assistance of an agent outside of the system.

Keywords Constitutional Choice, Constitutional Bargaining, Institutional Political Economy, Political Exchange, Revolutions

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1 Introduction

Civil resistance is a mechanism for constitutional change. Individual agents using nonviolent action alter the cultural and political foundations of government. These revolutions are distinct from violent coups or civil wars, and this paper argues that civil resistance movements are a mechanism for everyday citizens to engage in constitutional craftsmanship. Tullock (1971) examines the bitter realities of revolution, while Buchanan examines the ideal conditions of constitution building. This analysis of civil resistance movements draws from both perspectives.

James Buchanan was a pioneer in constitutional political economy. He theorized that individuals, within constitutional economics, are choosing among constraints, rather than choosing within constraints (Buchanan, 1990). Especially in joint ventures, individuals desire constraints on behaviors to limit the possibility of adverse actions, but these constraints might also be desired to limit individual behaviors – for example, imposing penalties on oneself for deviation from a diet. Constitutional political economy examines relationships in society that may be cooperative, unlike ordinary politics which involves conflict. Through constitutional agreements, individuals can engage together in welfare-enhancing agreements, and Buchanan thought these constitutional arrangements could exist in clubs, trade unions, corporations, parties, universities, and associations.

Constitutional analysis using a cooperative framework lends itself to the normative justification of the state provided by contractarianism. This view purports to offer a defensible approach to morality, ensuring mutually beneficial, peaceful long-term cooperation (Moehler, 2020). Within his defense of contractarianism, Buchanan uses normative individualism- the view that values begin with individuals that are dignified equals, to advance his normative claims. He also stipulates a Pareto-criterion with some modifications. Rules are evaluated based on the

process or institutions that created them. New institutional rules should be Pareto improvements and thus approved by unanimous consent rather than simply passed by a majority because Pareto improvements make everyone better off. In fact, this unanimity test is the Achilles heel of constitutional political economy.

To make his theory work, Buchanan utilized a conception of hypothetical consent or conceptual consent as a basis for justifying constitutional rules and the state through individual voluntary agreement. Agreements do emerge- suggesting conceptual consent among parties until someone challenges the institution. These constitutional choices are made under a veil of uncertainty, meaning that individuals do not know how the rules will directly impact them in the future.

Constitutional political economy also builds on Hayek's work on the rule of law and the pretense of knowledge. Hayek's justification for impartial and general rules stated clearly in advance leans heavily on Kant's categorical imperative. In contrast, his empirical observation that rules emerge spontaneously through social convention draws from Hume. The tensions between Kant and Hume are so palpable that Chandran Kukathas (1989) questions the coherence of Hayek's constitutional framework.

This tension is resolved, in part, because Hayek emphasized epistemic constraints, social learning, political contestation, constitutional craftsmanship, and liberalism as essential components of democracy (Boettke et al. 2016). Representatives and citizens face intractable knowledge constraints when designing constitutional and policy rules. However, emergent processes like law, language, custom, and markets generate beneficial rules given knowledge problems. On the other hand, Hayek does not assume that existing rules are optimal and posits that emergent orders must change and adapt to given new circumstances. Polycentrism and political

contestation help point to improvements. Constitutional craftsmanship eases the tensions that arise. Additionally, liberalism narrowly defines the scope of issues that must be solved through a political and therefore coercive means.

Constitutional theory becomes less romantic and more predictive if some positive assumptions are relaxed. In James Buchanan's "Politics Without Romance," he challenges unrealistic assumptions regarding the functioning of government and the incentives guiding human action. He postulates homoeconomic agents and an asymmetry of assumptions regarding their behavior in markets and in government. By importing these assumptions from neoclassical economics, Buchanan enables researchers to examine human behavior across economic, political, and social institutions through a unified theory. However, this paper raises questions regarding the unanimity assumption, the two-stage nature of constitutions, and the nature of exchange in constitutional bargains.

This paper draws inspiration from the scholarly contributions of Gene Sharp, who has been called the Machiavelli of nonviolence. Sharp's research, while explicitly promoting nonviolence, is distinct from pacifism in several ways. First, he did not engage in moral persuasion or import normative views into his research on nonviolent action. Instead, he sought, through careful historical research, to examine various methods to fight the state without violence. By prioritizing social understanding rather than a normative justification, Sharp's ideas motivated several bloodless revolutions carried out by individuals who often did not maintain normative commitments to nonviolence. While Sharp was not an economist, his theory usefully deploys a means-end justification for turning to civil resistance. He provided detailed instructions for what he believed are the most efficacious methods for resisting governments.

Contractarians may appreciate this contribution to the framework of constitutional political economy. Civil resistance is a voluntary mechanism for social and political change. Social movements offer a means for political and ethnic minorities to express discontent with the status quo when their interests are not represented in politics. Emergent social movements contain epistemically rich information that enhances representative democracy among political equals. This fact may resolve some of the tensions in Hayek's thought regarding the pretense of knowledge and the rule of law. Empirical analysis of the workings of democratic society or even movements away from authoritarianism offers a richer picture of constitutional political economy.

This paper begins by reviewing the literature on the reason for constitutional craftsmanship and constitutions. It examines the term constitutional entrepreneurship and explains entrepreneurial mechanisms for changing meta-rules. Then the paper describes what constitutional political economy can gain from the literature on nonviolent action. It reconsiders pre-constitutional and constitutional entrepreneurship in light of insights from civil resistance movements and nonviolent constitutional entrepreneurship. The paper challenges static notions of constitution building. It relaxes the unanimity requirement. Then it considers constitution building without a veil of uncertainty. Finally, the paper examines what this theoretical contribution means for constitutional analysis, the power problem, foreign assistance, and nation-building.

2 Buchanan's Constitutional Political Economy

2.1 The Power Problem

A mythical illustration of the need for restraints involves the Ulysses pact. Ulysses, the captain of the ship, asks the sailors to tie him to the mast of the ship so he could enjoy the sirens' song without being overcome by the dangers of his own weak will. The power to restrain rulers represents one version of the power problem. An alternative story (Jasay, 1985) is that rather than

being afraid of himself, Ulysses realized that the sailors would overthrow the entranced leader if he was not restrained when in his stupor. This new version of the story suggests the power problem faced by constitutional rule-makers. Certainly, many constitutional architects aim to build a constrained government that embodies a commitment to freedom, but rulers also view the constitution as a device granting legitimacy given unstable sources of power. The task of the ruler, in this view, is to craft a document that satisfies a majority by agreeing to constraints in an environment of contestation, instability, and high costs for failure.

Franklin D. Roosevelt's 1932 platform included shrinking the federal government, sound fiscal policy, stable currency, and economic liberty. After gaining power, Roosevelt did the opposite. The constitution was not strong enough to prevent government growth in a crisis, and Roosevelt was rewarded politically for doing what he did. Rather than wanting to be tied to the mast, Roosevelt really wanted legitimacy. This illustrates the power problem of government: citizens provide government with authority to carry out the public's wishes, but without a device to constrain that power, it can be used against the citizens. James Buchanan believed that constitutions are that device to solve the power problem.

Buchanan's theory of the constitutional moment describes a deliberation where all citizens seek consensus on meta-rules under which to play out politics in future periods. Even Buchanan (2011) raised skepticism about this ideal theory later in his life, saying, "The interesting but romanticized constitutional convention open to all persons and groups in the putative body politic does not often meet historical standards for accuracy." Nevertheless, he questioned whether the spontaneous generation of law would lead to better outcomes. He posits that hypothetical consent or conceptual consent may be a way around this problem, but this approach suffers from many of his own critiques of benevolent and omniscient planners.

The constitutional level is distinct from day-to-day politics within Virginia Political Economy (Thomas & Thomas, 2014). After constitutional rules are formed, actors within the game respond to incentives like price takers in a market. However, at the constitutional level, Buchanan embraces the radical uncertainty of G. S. Shackle (Buchanan & Vanberg, 2002), while pointing back to Knight's acknowledgment that uncertainty moves economics out of the equilibrium paradigm into the world of entrepreneurial exchange. Whereas politicians respond to given incentives with known utility functions, actors at the constitutional level face uncertainty regarding distributional payouts. The outcomes of general rules are unknown. This dynamic creates a "veil of uncertainty" that works much like the "veil of ignorance" in the works of John Rawls. The veil of ignorance stipulates that decision makers do not know in advance their status or ethnicity when choosing among institutional frameworks. Thomas and Thomas (2014) argue that public choice analysis at the constitutional level is only capable of making pattern predictions, unlike analysis of day-to-day political exchange within a given overarching system. Finally, the process requires creativity and innovation by constitutional entrepreneurs engaging in constitutional craftsmanship. The constitutional process is also distinct because it requires unanimous consent and does not lend itself to hypothetical consent or conceptual consent, which is more reasonable for later periods of political exchange.

Martin and Thomas (2013) outline three discrete arenas of constitutional rule-making: "pre-constitutional rules, such as informal linguistic and cultural institutions; constitutional rules, the traditional focus of constitutional political economy; and post-constitutional rules, which are contained within the framework established by the constitution and further constrain or direct policies enacted at the lower tier." As they go on to explain: "These three levels of rules form a sort of nested game. Constitutions are adopted or changed within a broader social and cultural

context. Similarly, post-constitutional rules are formed against the background of an existing constitutional structure. Policies are the outcome of collective action shaped by post-constitutional rules.”

Much of the literature on constitutional change focuses on post-constitutional changes or nongovernmental constitutional organizations. Salter and Wagner (2018) argue that Buchanan’s strict two-stage scheme of analysis obscures the problem of constitutional drift. Salter (2020) articulates how changes in the de facto and de jure constitution occur in a dynamic ecological system. Martin and Thomas (2015) show that over time the rules of the game can change, leading to the conclusion that meta-rules are not binding constraints. Rajagopalan and Wagner (2013) demonstrate that in developing countries, like India, constitutions are amended regularly.

Other research questions assumptions baked into classical constitutional political economy. Wagner and Salter (2019) question the consensual aspect of constitutions. They claim that traditional public choice relating to politics as exchange takes place within the interpretation of constitutional rules. Novak (2022) observes that historic constitutions excluded populations, like the indigenous. Therefore, constitutions may lack the impartiality principle within Hayek’s conception of the rule of law. It also challenges Buchanan’s principle of constitutional political economy that individual values should be counted equally.

There is also a growing literature demonstrating that constitutional rules can be provided privately by schools (Thomas et al., 2010), pirates (Leeson, 2009), prisoners (Skarbek, 2014), cryptocurrency providers (Berg et al., 2018), or even by sovereign citizens (Salter, 2018). The work in nonmarket decision-making by Vincent and Elinor Ostrom provides numerous examples of constitutional formation within nonstate polycentric orders. Constitutional craftsmanship outside of the state provides useful insights for examining political rules.

2.2 Constitutional Entrepreneurship

Entrepreneurs exercise judgment in an environment of radical uncertainty where it is impossible to specify the possible outcomes. Action requires a sense of unease, a vision of a better state, a plan to change the environment, and an expectation that action will lead to the desired outcome (Mises, 1966). To this end, entrepreneurs serve as coordinating agents, experimenting with various combinations of human and physical capital that add value. Entrepreneurial activity happens in a changing environment with competing subjective evaluations and epistemic heterogeneity. Minority entrepreneurs utilize their cultural experiences to generate novelty and create value (Storr, 2004). Although entrepreneurs coordinate activity, the outcome of their efforts may be disequilibrating.

A subset of the literature on entrepreneurship applied the theory of market entrepreneurship to nonmarket activity. David Lucas (2021) offers a helpful taxonomy within four levels to describe the types of nonmarket entrepreneurs. Political and social entrepreneurs work within existing rules and norms to arbitrage resources and exchange to benefit themselves. This is the level of resource allocation. Political entrepreneurs may also seek to change the rules within the broad institutional framework. Public entrepreneurs work at the level of governance as well as political entrepreneurs who straddle between governance and resource allocation. Constitutional and institutional entrepreneurs strive to change the formal institutional environment or the general rules of the game. Cultural entrepreneurship involves changes to customs, norms, and religion that are embedded within an individual's mental models. We might also include pre-constitutional entrepreneurship as working at the highest embeddedness level of Lucas's taxonomy.

Political entrepreneurs have five primary motivations (Kuhnert, 2001). First, in the Hobbesian sense, these individuals seek power. Second, they want to prove themselves to be

superior to others. Third, individuals seek mastery and self-improvement over time. Fourth, they seek differentiation from others. Finally, political entrepreneurs experience joy in creating.

Constitutional entrepreneurship is subset of political entrepreneurship. Constitutional entrepreneurs are individuals seeking to create or change constitutional rules leading to new cooperative arrangements. These constitutions or meta-rules could be international, country, state, county, city, or township in scope. Constitutions may also exist within firms, clubs, or even criminal enterprises. The key characteristic is that each organization creates rules that govern the generation of rules by setting constraints on what rules may be created or agreeing on a predefined process for generating rules. Constitutional entrepreneurs identify opportunities at various times to create these agreements and change the structure of governance. Members of historically repressed ethnic minorities may particularly benefit from constitutional entrepreneurship, especially in cases in which constitutions were created without their consent.

To put a finer point on the definition of constitutional choice, Ostrom and Kiser (1982) differentiated between constitutional choice and collective choice. This analysis, like Buchanan's, was not limited to national Constitutions or the founding of a country, though their research is useful in this context. Their theory could apply to collective decision-making within firms, common-pool resource management organizations, or political bodies. The general distinction was that collective action areas involve entrepreneurship to organize rules and sanctions. Superior to the collective choice arena is the constitutional choice level where the rules about rules and the organizational structure are decided. Political entrepreneurs may engage in collective or constitutional entrepreneurship at different points in time. Ostrom's framework allowed for creative thinking and experimentation by the actors on the ground seeking to solve problems.

Buchanan includes the market process within his definition of constitutional entrepreneurship saying, “[a]ny entrepreneur who organizes cooperative arrangements of whatever sort is, in a real sense, also a constitutional entrepreneur” (Buchanan & Vanberg, 1996). Within firms, actors draft rules, delegate responsibilities, and set organizational objectives within a legally binding environment. However, Buchanan rightly mentions that constitutional arrangements in markets allow ease of exit and explicit voluntary consent. No analogous mechanism enables individuals to participate in a political constitutional moment. Finally, Buchanan says, constitutional selection faces rational-ignorance problems that must be overcome.

Constitutional construction meets the planning problem of rational constructivism outlined by Hayek. This critique manifests in two problems. First, knowledge changes over time in an unspecified path. Second, problems to be addressed will change intertemporally, and members of society face a continual search for good rules. Political constitutional selection is therefore not analogous to markets because they lack exit options, and sufficient knowledge transmission, leading to rational-ignorance problems. Therefore, Buchanan (1997) states, “market-type constitutional competition is superior,” an argument that goes unchallenged in this paper. Given this problem, Buchanan and Vanberg (1996) conclude that a “metaconstitution” enabling the “free movement of persons, resources, and ideas” should be set at “the level of international accords.” This view is shared by Mises (2005) and Hayek (1939). Ethnic minorities gain greatly from freedom to vote with their feet when institutional rules discriminate against them.

There are a few key differences between market entrepreneurship and political entrepreneurship (Holcombe, 2002). Market entrepreneurship is voluntary, while political entrepreneurship often involves distributional exchanges with negative externalities. Buchanan’s constitutional entrepreneurship seeks to sidestep this problem by supposing unanimous consent at

the constitutional level. The strongest two challenges to this idea are the following. First, constitutions create an action arena for forceful exchanges, rather than eliminating coercion from politics. Second, Buchanan acknowledges that the unanimity assumption is often absent in constitutional moments. Because constitutional moments in the real world lack the characteristics of voluntary deliberation, this paper argues that we should relax this assumption. Once the unanimity assumption is relaxed, opportunities for zero-sum exchanges at the constitutional level are ever-present and constitutional innovations are not always welfare-enhancing.

The Schumpeterian theory of entrepreneurship is especially useful for constitutional entrepreneurship. Rather than political entrepreneurship, seeking to create valuable marginal changes to satisfy preferences within the polity, the constitutional entrepreneur engages in creative destruction. By redesigning the system of government, constitutional entrepreneurs compete with the existing governance structure for support from the polity. If the entrepreneur's critiques of the government and vision for reform are successfully adopted in the marketplace of ideas, social movements gain a better position to incorporate these ideas into their revolutionary proposals. All entrepreneurship involves a high degree of risk and uncertainty. However, entrepreneurs are motivated by a vision of a better state, ideology, and culture. Buchanan's veil of uncertainty is useful because a high degree of uncertainty exists in all complex systems. However, we might ease this assumption if the "veil of uncertainty" means that participants in constitutional design do not come to the table with a certain degree of knowledge or at least ideas about what will advance their individual interests and how they might persuade other members of the group to agree.

The key challenge for constitutional entrepreneurs and political entrepreneurs generally is providing selective incentives to avoid the collective action problems outlined by Olson (1965). Tullock posited that the selective incentive problem would lead to a reproduction of institutions

with new actors in violent revolutions (Tullock, 1971). Since then, researchers identified mechanisms for nonviolent social movements to provide selective incentives that may enable social movements to transform meta-institutions (Novak, 2021). Altering these incentives requires sustained action by constitutional entrepreneurs. In reality, the “constitutional moment” is the result of the long and dynamic process of experimentation, social learning, failure, and even some bargaining.

3 Civil Resistance as Constitutional Entrepreneurship

The literature on constitutional entrepreneurship largely focuses attention on post-constitutional entrepreneurs or constitutional entrepreneurs acting within a space of private governance. This paper focuses attention on pre-constitutional and constitutional entrepreneurship as a mechanism for state-building. Rather than focusing on constitutional moments within a well-defined theory focused on supporting a contractarian justification for the state, the literature on nonviolent action provides a framework for applied political economy within an entangled political economy framework. The entangled political economy framework emphasizes social relationships and how these relations interact when the public, social, and private sectors are intertwined and overlap (Novak, 2018). By relaxing or removing the veil of ignorance assumption, the unanimity assumption, and the two-stage model of analysis commonplace in constitutional political economy, the constitutional moment may be analyzed using the traditional exchange paradigms in public choice.

Constitutional entrepreneurs may be violent or nonviolent. Tullock (1971) outlines the incentives faced by actors engaged in violent regime change. He argues that revolutionaries respond to selective incentives, usually future government positions, to induce action. These

incentives lend to a theory of institutional persistence. He also argues that while the public goods story does not drive individual behavior, it will present itself in accounts by journalists, historians, military recruiters, and soldiers' autobiographies. Tullock's analysis, while distinct from the theory offered for nonviolent action, shares an emphasis on individual action, selective incentives, and collective action problems.

The constitutional entrepreneurs analyzed here utilize tools commonly referred to as civil resistance, direct action, civilian-based defense, polycentric defense, nonviolent action, or within the category of nonviolent action, dual sovereignty, and parallel government. Nonviolent action is a category of tactics used to achieve a variety of ends including civil or economic rights, regime change, anti-occupation, or racial equality. Our analysis focuses attention on regime change or anti-occupation campaigns resulting in the creation of a new political system. Examples include the Sudanese Revolution in 2019, the Civil Movement for Democracy in Thailand in 2014, the 2011 Jasmine Revolution in Tunisia, Iceland's Pots and Pans Revolution in 2009, and the 2005 Rebellion of the Forajidos in Ecuador.

3.1 Nonviolent Entrepreneurs

Introducing nonviolent entrepreneurs as a mechanism for constitutional change enables a greater understanding of how meta-rules change. These individuals strive to create cultural and political change without the use of violent methods. They work through social movements and influence the ideas and behaviors of others through moral persuasion, entertainment, selective incentives, access to social networks, insider knowledge, and identity (Novak, 2021). These methods require leadership, careful planning, and a shared commitment to avoiding detrimental behaviors. Leaders anticipate beneficial results from deploying nonviolent tactics to counter and

even integrate into the political structure. Even with these features movements suffer many of the same issues as Tullock argues, but when violent revolution and peaceful resistance both materialize, peaceful resistance still seems better at achieving change and overcoming collective action problems. Civil resistance generally requires less effort and risk than participation in a drawn-out civil war.

Examining the nonviolent entrepreneur as the animating agent for constitutional change situates the study of nonviolent action within the Austrian and public choice framework and these theories have a vast literature on entrepreneurship. Despite the relevance of Virginia Political Economy and the Austrian School to the study of nonviolent action, the literature largely focuses on the formal or political mechanisms for constitutional change or violent revolution. Likewise, the literature on nonviolent action within political science, history, sociology, and conflict studies fails to engage with public choice except for Tullock's 1971 paper "The Paradox of Revolution," which explicitly narrows the analysis to violent revolution. This paper seeks to identify important contributions from these each of these strands of academic thought to deepen the analysis of revolutions and constitutional change.

Nonviolent action is an overarching category of mechanisms for political, economic, or social change used by individuals within states or organizations. The category of methods is distinct from violent action because change is sought through non-cooperation like strikes, civil-disobedience, boycotts, persuasion, and protests, rather than physical force. These methods facilitate a dynamic game between the social movement and the government where the movement tries to assert its importance and diminish the government's authority while the government tries to quell the movement, remain in power, and assert legitimacy. The government's dual goals may run in opposition meaning that efforts to assert legitimacy may diminish their ability to quell the

resistance. If governments respond to social movements with too much repression, they lose legitimacy and respect from the people. However, if they allow social movements to act unhampered, they increase the risk of revolution. Nonviolent entrepreneurs aim to exploit this vulnerability through carefully curated tactical methods over time.

Leadership plays a crucial role in successful civil resistance movements. Leaders serve a coordinating function, identifying new methods of arranging social, human, and physical capital to create revolutionary change. They are also uniquely alert to the preferences of citizens, especially regarding their discontent with the government. Countries withholding civil rights experience a deficit in this knowledge because speaking out against the regime is often curtailed. Constitutional entrepreneurs assist in rapidly disseminating this knowledge as well as creating value in alternative institutions throughout a trial-and-error process that involves a great deal of experimentation and learning.

Constitutional entrepreneurs engage in self-interested exchange. They exhibit a certain degree of uncertainty, ignorance, and creativity. However, each constitutional entrepreneur seeks to form coalitions, increase their circle of influence, and gain power to advance their vision of a better state. Coalitions often form by harnessing solidarity among ethnic, racial, sexual, or other identity-based categories. They may utilize altruistic and cooperative tendencies in the population, but they know that their success depends on appealing to the self-interest of others. Civil resistance leaders often use humor and entertainment to resist the government because those methods are more likely to engage citizens than activities resembling hard labor or militarism.

3.2 Pre-Constitutional Entrepreneurs

The distinction between pre-constitutional rules and constitutional rules is theoretical rather than temporal (Martin & Thomas, 2013). The theory suggests that constitutions are built on top of pre-existing informal institutions, like language and culture. Therefore, pre-constitutional entrepreneurs seek to convert, refashion, or conserve cultural conventions, informal norms, or values. Social icons, religious leaders, moral philosophers, and dissidents may be examples of pre-constitutional entrepreneurs in the literature. Civil resistance campaign members seek to alter these informal institutions as a component of their broader efforts at social change.

Dr. Martin Luther King Jr. is one such example who sought to overturn formal laws enforcing segregation, but first, he confronted the social institutions of white supremacy with direct action. Nicoara (2018) defines individuals acting within the Estonian Singing Revolution as “norm entrepreneurs” as they sought to revive the forbidden cultural practices of Estonia. I suggest they might also be called pre-constitutional entrepreneurs in the Martin and Thomas framework. In Estonia, pre-constitutional entrepreneurs sought to reintroduce the Estonian language, songs, stories, and symbols. This change to informal norms led to Estonian independence from the Soviet Union, while King’s efforts changed constitutional interpretation within an established legal order.

Vaclav Havel (Havel & Keane, 1975) when discussing the varieties of dissidents defines these individuals as people who are willing to live with the truth outside of society. Writers, artists, academics, and members of the clergy carve out spheres of influence outside of the authoritarian government’s control. By engaging in a sort of Millian experiment in living or speaking about such alternatives, these individuals shift the culture in a new direction. He emphasized the role of parallel structures, like schools, publishing houses, trade unions, and foreign organizations, in changing cultural institutions. These organizations create a parallel economy that changes the

structure of the polis. Bottom-up self-organizing structures are a powerful nonviolent method for living authentic lives and experimenting with alternatives to authoritarianism.

In *Cultures of Peace*, Elise Boulding (2000) describes Anabaptist cultural influences in Switzerland and America. The Quakers, Mennonites, and Brethren modeled friendly relationships with Native American populations that included trade, mediation, and mutual aid. She claims that the Anabaptist culture, particularly in Pennsylvania, influenced the writing of the US Constitution, even though these minorities often continued to speak their native German language. Additionally, their religious societies provided a model of peaceful abolition and created organizations dedicated to the eradication of slavery. Later, Anabaptists secured constitutional rights for conscientious objection, religious schooling, and First Amendment protections against compulsory flag salutes. They continue to seek constitutional changes regarding exemptions from jury duty in capital cases and rights to opt-out of taxation dedicated to defense spending. The constitutional changes sought by Anabaptists have spillover effects for individuals with a variety of backgrounds, but these constitutional changes resulted from parallel institutions and separatist societies that enabled pre-constitutional entrepreneurs to realize the potential gains from meta-rule changes.

The theoretical focus on pre-constitutional entrepreneurs introduces a process of constitutional change. Pre-constitutional entrepreneurs may work on shifting cultural beliefs for years, decades, or even generations. Therefore, examining the constitutional moment in a two-period temporal model simplifies the reality of a complex ecology of plans. The two-period model assumes away the endogenous role of the pre-constitutional entrepreneur in identifying venues for changing beliefs and ideologies in a beneficial manner. Introducing the pre-constitutional entrepreneur into the model of constitutional craftsmanship enables research on the

experimentation, social learning, failure, and even political bargaining required before the constitutional moment.

3.3 Constitution Building as Exchange

Relaxing the unanimity assumption for constitutional reform provides a richer picture of the construction of meta-rules, and it enables greater pattern predictions. First, instead of assuming consent, constitutional support may be measured on a spectrum. Larger civil resistance movements provide greater support for founding documents and therefore move closer toward Buchanan's ideal of unanimity. Empirical analysis demonstrates that nonviolent campaigns are larger than violent campaigns. One explanation is that violent campaigns select for strong men, while nonviolent campaigns enable participation from a more diverse group in the polity, particularly women and people with physical disabilities (Chenoweth and Stephan, 2011). On the other side is Tullock's (1971) analysis of violent revolutions which will have less support. These theoretical insights cohere with empirical work demonstrating that sustained civic participation by large social movements is a key factor in identifying a successful transition to democracy (Pinckney, 2020).

Constitutional entrepreneurs may establish a parallel government to compete with the existing base of power. Establishing a parallel government is a method of nonviolent action seeking to establish new governance systems or replace an existing system. This process may be gradual, utilizing evolutionary emergence. As the parallel structure grows and gains widespread support, it takes over existing government functions and delegitimizes the old regime. Over time this process replaces the old system of governance with new institutions as citizens discontinue their use of inferior governance services.

The British lost favor in the American colonies, as an independence movement formed from 1765 to 1775. Colonists realized that redress could not be found through British constitutional provisions. Instead, they formed new political institutions including provisional legislatures and committees. These networks of parallel governance gained citizens' approval and fewer citizens relied on British courts or paid taxes to the crown. By early 1775, hundreds of committees enforced the Continental Association through grassroots organizations, deliberation, and parallel governance measures. By the time British troops arrived for the battles of Lexington and Concord in April 1775, a nonviolent revolution was well established; shifting governance responsibilities away from the British and to local control of courts, policing, public goods, and rulemaking (Conser et al., 2016).

This process resembled market exchange more than the idealized constitutional moment, involving conscious deliberation at a discrete time and place. Constitutional entrepreneurs at the local level created alternative governance services for their community members. Citizens preferred colonial courts to the British alternatives, so these courts gradually replaced the judges appointed by the Crown. Governance alternatives fostered a growing sentiment among the population that the British government provided less value than they paid. From 1765 to 1775 the colonists utilized nonviolent means such as petitions, protests, marches, demonstrations, boycotts, and labor protests to challenge British authority. Additionally, colonists used forms of noncooperation to erode the British government's pillars of support. Citizens refused to serve as jurors in British courts. Sheriffs and justices of the peace quit working for the British. Crowds blocked courthouses that enforced the Coercive Acts. These acts of voice and exit took place over a ten-year period, laying the foundation for both the rejection of the old government and the growth of new institutions. The high school history version of the American revolution focuses myopically

on the signing of the Declaration of Independence and the US Constitution while ignoring the emergent process of building alternative governance structures and shifting cultural beliefs. It also focuses on the Revolutionary War rather than highlighting the peaceful efforts to create a self-governing society.

The two-period model resembles the fictional tale of Rip Van Winkle, who falls asleep 20 years before the Revolutionary War. When he awakens from his slumber, he is shocked to realize that the world is radically different. The face of King George III at the Village Inn is replaced by a portrait of President George Washington. Pamphleteers shouted in the streets about the ideals of liberty, and the people talked of elections. Rip's assertion that he was a loyalist of the crown sounds like the rantings of a madman or a traitor.

In reality, the revolutionary colonial period included a more gradual process of changing attitudes, beliefs, and rules. Colonists shifted loyalties as shared perceptions of political possibilities were uncovered. Early Americans lived through unimaginable revolutions brought about by their own hands. This individualist turn helps theorists unpack how these revolutions took place through deliberate actions.

Mart Laar, the first President of Estonia after the Soviet occupation, says that constitution building is the most underrated aspect of rebuilding society. In Estonia, a successful civil resistance movement, the Singing Revolution, ousted the Soviets in 1991. At 32, Laar was the youngest head of state in Europe at the time, and his government was filled with new and often young officials. As part of the constitutional process, Estonia stipulated that former Soviet and KGB officials had to wait 10 years before acting in government. Additionally, the dominant political coalition campaigned on sweeping away the old regime, with campaign posters showing people sweeping the front of their homes. This time of rapid change and cultural upheaval can be frightening, and

Laar (2010) remarks that Estonia reformed faster than the IMF recommended. In his words, the IMF's advice is like saying that England decided to switch driving on the left side of the road and decided that the process should be gradual with trucks switching first, followed by small cars. He claims that the constitutional moment is a brief window of opportunity to rebalance power, privatize industry, deal with corruption, and create new institutional rules.

Estonia's success, in large part, is attributable to the constitutional craftsmanship of people like Mart Laar. A historian by training, Laar understood the importance of limited government and institutions. He claims the key to crafting the Estonian Constitution was agreement on a few key features of government. It was a time when nothing worked, everything was unstable, and hope and national unity prevailed. During this time, Estonia privatized most industries, established private property rights, radically reduced the size of the government, opened trade, and integrated with the west. Laar reports that the most remarkable changes were establishing democratic and open institutions, civil society, freedom of the press, and the rule of law. The Estonian experience in constitutional craftsmanship is illustrative because it shows that radical, emancipatory, projects can take place through people power, nonviolence, leadership, and good ideas.

However, banning former government officials from the constitutional process shows that in the real-world unanimity requirements rarely happen and might even be ill-advised. One might also argue that within constitutional political economy each group must define who has standing in the constitutional moment. Each group must exclude outsiders to form a consensus and establish legitimacy for the rules within the group. Estonians might argue that their exclusion of former Soviet invaders was simply an effort to reestablish Estonian sovereignty and reclaim their indigenous practices, rather than an effort to exclude a minority population.

Careful readers may also notice tensions between the gradual transition in America and the rapid change advanced by Laar. However, the Estonian Singing Revolution followed a long process of reviving Estonian culture through sustained efforts by pre-constitutional entrepreneurs. Once the constitutional moment arrived, the society was ready for rapid change.

The ecological process view enables a richer understanding of consent during constitutional moments. Gradually, loyalties shift from one institutional system to a new framework. In some instances, this process takes place rapidly because of preference falsification (Kuran, 1989). Other ideological revolutions take more time to develop. Regardless of the time horizon, a subset of the population remains favorable to the old manners of governance, if only the previous ruling elite. The job of constitutional entrepreneurs is to create a bundle of institutional arrangements that fosters regime change. Additionally, different mechanisms of revolutionary change require greater or lesser popularity. Nonviolent revolutions compared to violent revolutions generate greater numbers of participation and therefore greater levels of support for the new constitution (Chenoweth & Stephan, 2011).

4 Unromantic Constitutional Change with Real People

Citizens living under regimes with poor institutions have few options to escape. First, they could move, but voting with their feet presents challenges because governments across the world impose immigration restrictions. Second, they could violently overthrow the state, but the selective incentive problem (Tullock, 1971) and empirical evidence suggest that the new institutions may not overcome the challenges of the past, and the transition will make everyone poorer, and cost lives. Third, liberal governments may invade to impose democratic and capitalistic institutions on the given territory, but research suggests that these grand plans often fail to meet the desired

objectives (Coyne, 2008). Fourth, they might acquiesce to the current regime because they see no alternative to the brutality and poverty surrounding them each day. Finally, they might engage in a civil resistance campaign, but this strategy may also fail.

In fact, only 50% of nonviolent revolutions from 1900 to 2019 succeeded at the goal of regime change. However, violent regime change campaigns have a 26% success rate over the same time period (Chenoweth, 2021). Only 36% of US military operations resulted in polity IV scores of at least 4, the most basic form of democracy, twenty years after the engagement based on 2003 polity scores (Coyne, 2008). Trends of economic freedom scores tend to increase over the past few decades, but waiting for democracy, freedom, and wealth may mean that current citizens will not live to see significantly better circumstances.

Of the 50% of nonviolent revolutions that succeed, many do not experience significantly higher polity IV or economic freedom scores a decade after the change. Burkina Faso in 2014, Ghana in 2000, Kyrgyzstan in 2010, and Georgia in 2003 show significant improvements in their polity scores after recent nonviolent revolutions, while Yemen in 2012, Venezuela in 2002, Thailand in 2006, and Egypt in 2011 scored much worse. As the title of this paper suggests, scholars should not be too romantic about the effects of nonviolent revolutions. Instead, each alternative should be analyzed comparatively. When placed alongside violent coups or foreign occupation, doing nothing is often superior. Nonviolent resistance holds up reasonably well in comparison, but immigration holds the greatest opportunity for citizens to live with successful institutions.

Civil resistance is used in liberal democratic governments and dictatorships. When examining one hundred of the largest civil resistance campaigns since WWII, Chenoweth (2021) found that only 25% were in democracies. Constitutions outline release valves for democracies to

resolve social tension. However, the Black Lives Matter protests and the Women's March demonstrate that even established democracies may utilize the tools of civil resistance to unearth deep cleavages in the polity. Identity based movements like these are viewed by participants as a means of political expression within a system which excluded the group from the constitutional moment.

4.1 Realistic Assumptions for Real-World Problems

Boettke and Snow (2014) suggest additional research is needed to understand constitutional craftsmanship resulting in truly democratic and free societies. They say incorporating the Virginia School with the Bloomington School's focus on civil society and polycentrism offers a path for this research. Ostrom's mixed-methods approach equips social scientists to examine rational choice, methodological individualism, social learning, and culture. Additionally, the Bloomington school's empirical methods allow researchers to examine real-world democratic decision-making and problem-solving.

Hayek's challenges to constructivism apply to the theorist in constitutional political economy who steps outside of history or social constraints and imagines a new set of rules to govern the whole of society. The status quo is an epistemically rich environment and a substantial constraint to widespread changes. Alternatively, Hayek advocated for large changes in society and believed that a free society required dynamism and even creative destruction. These perceived tensions require additional scholarship in the mechanisms of truly dynamic and democratic forms of self-governance.

Civil resistance movements and parallel institutions offer an important mechanism for realizing this vision. Since the literature on nonviolent action is primarily grounded in sociological

or historical case studies, it offers empirical support to the theory. Rather than making simplifying assumptions or assuming dynamic models, we can observe real-world constitutional moments to prove that the theories of civil resistance and collective action are possible. Additionally, the social cooperation seen within nonviolent action is ripe for scholarship on collective action problems in an environment of social learning. Examples of parallel institutions include the American colonies as previously discussed, the Irish Independence movement in the 1870s, Gandhi's satyagraha movement, Kwame Nkrumah's pan-African movement in 1940s Ghana, Poland's Solidarity movement, Catalan's independence movement, and the Zapatista movement in Mexico.

Actors within civil resistance movements embody many of the ideal conditions for constitutional construction. Because these methods do not use force as a mechanism for change, actors must solve the constitutional problem through cooperation. This requires deliberation and discussion. Constitutional craftsmanship in this environment demonstrates the possibility of leadership without a sword. Since these relationships are not backed by violence, they more closely resemble Buchanan's ideal that the values of each individual must be weighed equally than they align with Tullock's position on violent revolution.

4.2 Actually Solving the Power Problem

Nonviolent action utilizes the pluralistic dependency model of power. This model views political power as constitutive of various pillars of support. These pillars include economic and human resources, administration, military capacity, police, prisons, courts, knowledge, and skills. Each of these resources is dependent upon or relates to acceptance of authority, cooperation, submission, obedience, and assistance provided by subjects, including citizens and government officials. Power, therefore, is not stable, monolithic, or given. Instead, political power rests on submission

to authority by a complex, dispersed, and fragile network of social and cultural connections. If preferences change within this network, actions can be taken to limit or end the existing structure. For constitutions to be self-reinforcing, they require social power often derived from clever institutional design, efficient rules, and beliefs conferring authority on the system.

Parchment constitutions may serve as a focal point for governance. By establishing a written document outlining acceptable limits, means of legal recourse, and processes for generating rules, citizens and rulers set expectations that may informally limit deviant behaviors. Constitutions with popular support will confer greater legitimacy on the government, especially as the meta-rules approach unanimous agreement. Buchanan's contractarian framework may serve as a normative aspiration for legitimacy and may also approximate regime stability. However, the binary and idealized moment of the unanimous agreement to the rules of the game at a discrete time fails to describe the historical creation of states or the ongoing support for governments lasting more than a few generations.

The pluralistic dependency model, instead, examines the acceptance of rules or constitutions as one of many factors conferring regime stability. Additionally, this theory enables researchers to consider the marginal contribution of obedience, cooperation, submission, and assistance to regime stability. Because Constitutions rarely garner unanimous support within a given territory, a theory that enables researchers to measure degrees of support is more useful for predicting changes over time.

The pluralistic dependency model shares a bottom-up feature with Vincent Ostrom (1997). Vincent Ostrom viewed a formal agreement between citizens and the sovereign as a "pure fiction of the mind that cannot meet standards of empirical warrantability and public reproducibility" (Ostrom, 1997 p.285). Instead, he argued that a Tocquevillian science of association governed our

agreements and relationships. He cautioned that systems focused too heavily on the carceral state, punishment, and dominance will be plagued by corruption and resistance. Secret societies will develop, and the people may overturn the existing order. No society, he thought, could cope with deep disagreements because Vincent Ostrom's theory of power emphasized social accountability, culture, and mutual understanding.

Vincent Ostrom also thought that viewing conversation and coordination through the transaction cost lens is naive. He cautioned economists against seeing social capital and human relationships as merely costly inputs into a production function. If economists view social capital, deliberation, trust building, and problem solving as costs in the production function, they will seek to minimize these costs and break down the bonds that tie society together. This view shifts society from citizens governing together into a command-and-control system. Networks of self-governing individuals are a prerequisite for sharing authority, freedom, and peace (Ostrom, 1997 p.287).

4.3 Foreign Assistance and Nation Building

This paper offers an endogenous source of meta-institutional change. The overlooked role of nonviolent action for constitutional entrepreneurs counters the claim that because people are maximizers, existing institutions are efficient (Leeson, 2020). If institutions are stable, there are no hundred-dollar bills laying on the sidewalk. The literature on preference falsification (Kuran, 1989) demonstrates that institutions perceived to be stable may be fragile and highlights the role of entrepreneurship in identifying the real subjective evaluations of the institutional environment. Additionally, preferences may change, altering the optimal institutional arrangements (Stringham & Hummel, 2010).

Seeking stability above institutional reform poses a large risk in the development context. Countries with government predation, corruption, poor institutions, and lacking the rule of law have much to gain from institutional change. Gradual change often means that rents will continue to flow to agents with the power and will to take what they may in terms of wealth, political rights, and freedoms. However, growth disasters often accompany civil wars and violent conflict. Even nonviolent resistance often causes a temporary decline in GDP. Therefore, there are no easy answers for citizens facing repression or would-be reformers.

Despite these real challenges, on average civil resistance works better than violent overthrow of the government. The give and take mechanism of civil resistance fosters democratic governance. Five years after the struggle, failed nonviolent campaigns were five times more likely to transition to democracy than failed violent attempts (Chenoweth & Stephan, 2011). Rather than destroying the social relations of a society through civil war or a coup, nonviolent action facilitates greater civic participation and cooperation while altering power imbalances between the people and the state.

Foreign assistance in regime change often manifests in troops and weapons. International organizations and foreign governments instead might support civil resistance methods, even though foreign aid is not a necessary or sufficient condition for success. Long term aid efforts to enhance election monitoring, think tanks, and independent media often accompany positive changes. Civil resistance training assists movement organizers, especially before peak periods of mobilization. Foreign governments assist in condemning repression, but sanctions often make it challenging for resistance movements to access necessary supplies. Indirect forms of support often work better than funding to combat units, which risk escalating violence against civilians and make regime change less likely. Often foreign governments support brutal regimes and withdrawing this

support enhances resistance efforts. Governments that avoid tied funding that influences the agenda of resistance movements enable citizens to participate more directly in self-governance (Chenoweth & Stephan, 2021).

Efforts to export democracy and freedom through the barrel of a gun usually result in failure. Exogenous efforts at institutional change rarely work (Boettke, et al. 2015). Merely reorienting a society with a foreign government's constitution rarely mimics the institutional structure of the original constitution, as in numerous cases of countries adopting a constitution similar to the US Constitution. Instead, foreign governments should take measures to support civil resistance movements against dictatorships, which includes refraining from counterproductive actions. Gaining an understanding of nonviolent action provides alternate means of change that help caring outside actors reconsider the benefits of violence by shifting the conversation from normative justifications to combat evil to a reasoned analysis of viable alternatives.

5 Conclusion

From 2000 to 2019, seventy-five violent and nonviolent campaigns to expel foreign occupation, regime change, self-determination, or separatism succeeded at these objectives (Chenoweth & Shay, 2020). Only seven of those campaigns were violent. The use of physical force for regime changes and sparking a constitutional moment is becoming uncommon relative to bloodless revolution. Unfortunately, the constitutional political economy literature rarely focuses on nonviolent revolutions. This paper is both an attempt to illustrate the connections between the Virginia School of Political Economy and nonviolent action as well as a call for further research on this topic.

Given the volume of civil resistance worldwide, studying the nature of these movements and their effects on the constitutional process is imperative for development economics. Governments in poor countries are unstable, which is both a threat and an opportunity. Countries facing regime instability usually lack foreign direct investment, large export flows, and high economic growth. They also have poor institutions. The unstable nature of their institutions might also signal a greater possibility of positive constitutional reform.

While this paper largely remains silent on the normative justifications for constitutions or the liberal democratic order, it offers a theory of constitutional entrepreneurship with realism of assumptions and analytic tractability. Understanding the process of formulating constitutions is important for analyzing societal and institutional change over time. Attempts at foreign regime change support the view that romantic visions of constitutional reform often result in disaster for the people living under newly formed governments. Providing a realistic theory of regime change is essential for crafting processes that are truly polycentric, self-governing, and democratic.

Sujai Shivakumar's (2012) experience with crafting constitutions in a development context demonstrates the importance of incorporating polycentric processes for constitutional development. His caution to focus on the substance of constitutions, rather than the form, is particularly beneficial. The understanding that developing countries like Somalia or Nepal utilize decentralized forms of democratic deliberation enabled these societies to develop rules fostering the growth of polycentric governance. Instead of examining the form of successful institutions in the west as a blueprint for success, his work encourages the development community to build on the institutions that are already in place.

The idealized story of the American constitutional moment focusing on the constitutional convention leads public choice scholars down the wrong path. In fact, American independence

involved building parallel institutions over a decade before these institutions gained hegemonic control as a result of winning the Revolutionary War in 1783. The process of building state capacity and consolidating power in the federal government continues in the US, although the US lacked large state capacity or consolidation of power when it defeated the British forces, the most powerful military in the world at the time. Despite this history, development efforts too often focus on building state capacity, instituting Western forms of constitutional government, and centralizing power.

Since public choice and constitutional political economy focus on understanding institutions that lead to better outcomes, it is imperative that scholars understand the real-world mechanisms for institutional change. While the paper offers a story of constitutional change that deviates from the theory presented by contractarians, the aim is not to overturn the normative basis for contractarianism. In fact, the hope is that a better understanding of societal change enables contractarians to advocate for development efforts that better comport with their normative commitments.

Additional empirical research on the choices nonviolent constitutional entrepreneurs make could enhance our understanding of how good institutions are created. For example, public choice scholars are well placed to research what factors contribute to successful transitions from dictatorship to democracy. Examining how civil society interacts with the newly formed government could lead to possible connections between people power and institutional quality. Textual analysis of constitutional changes might enable scholars to unpack the role interest groups play in crafting meta-institutional rules. Additionally, further research should be done to understand the interactions between foreign governments and international organizations with civil resistance movements in generating constitutional rules.

Answers to these questions will both advance our understanding of constitutional political economy and development as well as assist newly formed governments in constitutional craftsmanship. The literature is clear that institutions are the key to convergence in international growth rates. Developing and testing theories that reveal ideal conditions for civil resistance movements to create economic freedom, the rule of law, and civil rights is an underrated project in the development literature, given the importance of institutional quality and the frequency in which nonviolent revolutions take place in the real world. The hope is that this paper invites scholars of constitutional political economy to engage with the literature on nonviolent action and that scholarship on civil resistance would learn from the public choice literature.

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