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CONSTITUTIONS AS EXPRESSIVE DOCUMENTS

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I INTRODUCTION

Two aspects of our title require clarification. One is the idea of a constitution; the other the notion of expressiveness. In each case, we shall try to clarify the concept by appeal to a contrast. In the case of a constitution, the contrast will be between a constitution as a legal document and the more general idea of a constitution as the rules of the socio-political game envisaged in the academic tradition known as Constitutional Political Economy (CPE) and associated with the work of James Buchanan and others (among whom we number ourselves). This contrast occupies Section II.

In section III, we attempt to clarify the notion of expressive activity, following earlier work on expressive voting. The relevant contrast here is with activity that is instrumental, in the sense that it is designed to bring about some further outcome – some outcome, that is, other than the expressing of an attitude, opinion or view on the matter in hand. The expressive case, by contrast, is that where the expression just *is* the end, in and of itself. Our most basic points are: first, if voting and other political behaviour is expressive in nature, this will carry implications at the constitutional level; and second that constitutions themselves may be seen, at least in part, in expressive rather than instrumental terms.

We continue the argument in support of the relevance of expressiveness in the constitutional setting in section IV, where we address the issue of how expressiveness operates in the setting of electoral politics, and also provide examples of the expressive dimension in existing constitutional documents.

The two distinctions we have invoked provide us with a simple two-by-two matrix of logical possibilities. In section V, we lay out that matrix explicitly, and use it to explore the role of expressive elements in constitutions. Our conclusion here is that, though we might regret the intrusion of expressive elements and considerations in written constitutions, we should also be alert to the role of the expressive in the definition and enforcement of constitutions in their more general sense. Indeed, written constitutions may serve to channel the expressive element in relatively innocuous directions.

II CONSTITUTIONAL DOCUMENTS AND RULES OF THE GAME

Within the CPE tradition, a central piece of the analytic scheme is the distinction between the in-period and constitutional levels of decision-making¹. The standard analogy is between deciding on the rules of a game (the constitutional level) and plays of the game within those rules (the in-period level). The distinction serves a function that is somewhat similar to that of John Rawls' veil of ignorance – but whereas Rawls' device is a thought experiment designed to inform our understanding of justice, Buchanan envisages the distinction between in-period and constitutional levels in behavioural terms. Disagreements about the appropriate rules of the socio-political-economic game are argued to be easier to resolve than disagreements within the game, precisely because agents are, in the former setting, less fully informed about their own particular positions and interests. Clashes of interest that would be unresolvable at the in-period level may be resolved by the application of rules that themselves secure unanimous agreement at the constitutional level. (See Buchanan's chapter in this Handbook)

So, for example, individuals who may turn out to be natural competitors in the in-period market-place might well agree, at the constitutional level, on the general property rights structure that would be best for the operation of the market order. Equally, individuals with very different in-period political objectives may nevertheless agree on the basic rules of the democratic political process. Agreement at the constitutional level grounds the rules of the game which then generate in-period outcomes.

To a significant extent, Buchanan's picture of political disagreement and the role of the constitutional move reflect his view that interests play the predominant role in motivating behaviour at all levels within the political process, just as they do within markets. This view is shared by most public choice scholars and other economists interested in political institutions.

We have argued against this view elsewhere², and shall sketch some of the relevant arguments below. The essential point in the present context is the implication that, if our critique of instrumental self-interested voting at the in-period level is right, then the force of the constitutional/in-period distinction is

weakened. Constitutional and in-period political decisions are basically alike in that both are heavily influenced by expressive considerations.

For the moment, however, we want to focus on the distinction between a constitutional document and the rules of the game in the CPE sense. It should be clear that there is no necessary connection between the rules of the game as envisaged by Buchanan, and any written document that is dignified by the name of constitution. Such written documents may or may not fully specify the general rules of the socio-political-economic game. Perhaps some such rules are embodied in other non-constitutional documents – ordinary laws and statutes for example. Perhaps they are not written anywhere, but depend rather on institutional habits, conventions and norms. More formally, a general constitution is defined by its content: it just is the rules of the game; however they are signified or embodied. In this sense the constitution literally constitutes the society as a society. By contrast a constitutional document is any document that bears that name. A constitutional document may seek to describe and codify the underlying constitution of a society, but it may be more or less successful in these aims, and it may also include other material of a different character.

There are a number of aspects to the distinction between these two senses of constitution that are worth noting – differences in terms of: enforcement processes; intended audience; processes of enactment; and processes by which the constitution (under whichever interpretation) may be reformed. We will briefly consider these in turn.

To the extent that they actually operate as constitutions, constitutional documents are normally intended to be interpreted and enforced through explicit legal procedures – procedures that involve specific legal institutions, and conceivably ones explicitly dedicated to that purpose (e.g. constitutional courts)³. The constitutional document has automatic standing in that setting. By contrast, the rules of the socio-political-economic game may be enforced in any number of ways, depending on the precise form the rules in question take. In a simple co-ordination game, for example, like that involving which side of the road to drive on, the emergent rule may be essentially self-enforcing – that is, enforced by the self-interest of individuals operating under appropriate

information regarding the convention (see Hardin's contribution to this Handbook). Other rules may emerge as social norms and be enforced by social esteem and disesteem. Or perhaps the esteem and disesteem may attach not so much to the observance of the norm itself as to acts of punishment: if it is common knowledge that punishing a violator of some prevailing norm is itself a source of esteem, then I might be induced to comply with the norm even if I care nothing for any disesteem I might incur from violating⁴. Often legal stipulations simply give expression to and support prevailing norms – a point made forcefully by Ellickson (2001).

A constitutional document is usually adopted or ratified by a process that involves discussion and, ultimately, some form of explicit endorsement. It has an intended audience – or several such. By virtue of its enforcement procedures, it is addressed to the courts – to the persons who will interpret and enforce it. But because of the (normal) requirement of popular endorsement – perhaps via a plebiscite - its intended audience also includes the voters whose support is sought.

In principle, the rules of the game have only the audience of players: the rules must seem appropriate to those who are subject to them. But that appropriateness may just be a matter of common practice – of habit, or imitation. Conceivably, none of the persons who abide by the rules need be aware that they are doing so, provided only that they do abide by them. Perhaps some rules fall into the Hayekian category of 'tacit knowledge': one can learn to observe such rules only by observation and imitation. The rules of 'bel canto' singing are arguably of this kind. Perhaps some politically relevant rules are also of this type.

A constitutional document normally lays down processes by which it may itself be altered. Sometimes those processes are especially restrictive, reflecting the high legal status that the constitutional document enjoys. Sometimes, more general constitutional provisions are just a matter of ordinary law. So, for example, although the UK is renowned for having an unwritten constitution, because it lacks documents that enjoy full constitutional status, many aspects of the rules of the political game are specified in ordinary legislation. Sometimes, elements of the constitution are laid down in historical documents – Magna

Carta, say – which are such that the very idea of amending them is either meaningless or at least deeply implausible. In all such cases, elements of the wider constitution may be written down somewhere, but their status is more like that of a convention, in the sense that reform cannot be secured merely by stipulation.

There is a good deal more that might be said about the possible differences between constitutional documents and more general constitutions. However, it should be conceded that in the CPE tradition it is typically assumed that a written constitution can embody the constitutional rules, and indeed should do so. That is the conceived function of constitutional documents, and to the extent that such documents do not specify the rules of the game that is seen to represent a “failure”. Equally, the inclusion of material other than the specification of the rules of the game is likely to be seen as at best ‘cheap talk’ and at worst a hostage to fortune in providing the basis for later interpretation of the ‘spirit’ of the constitution⁵.

We think this CPE view is excessively narrow. As a matter of fact, many constitutional documents embody a good deal more than the constitutional rules – and many a good deal less. Whether these facts are to be lamented is a matter we shall take up below.

III EXPRESSIVE AND INSTRUMENTAL CONSIDERATIONS

The second distinction we seek to put into play is that between expressive and instrumental activity. This distinction may be relevant in many settings, including the context of the rational account of voting behaviour, and our account takes off from that case. Specifically, our claim is that voting behaviour in large scale electoral contexts characteristic of Western democracies is properly understood more in expressive than in instrumental terms, and that this carries implications for the understanding of constitutions.

The point of departure for this claim is the observation that in large scale popular elections the individual voter cannot reasonably expect to determine the electoral outcome. The probability that the outcome will be decided by exactly one vote is vanishingly small. Yet only in that case is it true that all those on the

winning side were causally efficacious in bringing about the outcome. In all other cases, no individual's vote has any effect on the outcome: that outcome would be the same whether I voted or not and whichever way I happened to vote, if I did. Even if policy is influenced by vote shares – rather than just who wins – it is deeply implausible that a single vote will have any noticeable impact on policy. In short, an individual's vote is inconsequential.

Some commentators within the rational actor school of politics have considered that this fact shows that it is irrational to vote – and that, therefore, those who actually participate in democratic elections are irrational in at least this regard. Voting would, on this view, only become rational if the level of turnout fell to the point where the probability of being decisive became significant. But suppose we both hold to the presumption that individuals are rational, and accept that turnout levels are high enough to imply that no individual voter can reasonably expect to be decisive. Then we must explain voting behaviour (both the fact of voting, and the way in which the vote is cast) in terms that identify a motivation for individual action other than that of bringing about a particular electoral outcome.

The simplest and most natural explanation of voter behaviour in large scale elections under the rationality assumption is that voters desire to express an attitude or opinion with respect to one candidate, party or policy relative to others. Voters act not to bring about an intended electoral outcome (action we term “instrumental”) but simply to express a view or an evaluative judgement over the options (action we term “expressive”). In that sense, they are acting in the same sort of way that they act when they cheer at a football match, or when they express an opinion in the course of dinner party conversation.

Expressive desires or preferences are similar to instrumental desires or preferences in many ways, but they differ from their instrumental cousins in one key respect – their satisfaction can be achieved without necessarily involving particular further consequences. Thus, I can satisfy my expressive desire to voice my opinion that Z should happen, without believing that doing so will actually bring Z about, and, indeed, without any expectation that Z will happen. It is, in this case, the simple expression of the opinion that matters.

One might object that if voting is a private act, it is not clear how it can be given an expressive interpretation. After all, we usually express opinions in public, when others are able to hear us. We would offer two types of response to this objection. First, even if we accept that voting behaviour is private, we note that you can be your own audience, and that using the opportunity provided by voting to articulate and reinforce your own self-image can be an important aspect of building identity and self-esteem. To see oneself as the sort of person who votes republican, or indeed as someone who just votes, may be an important part of one's identity. Such essentially private expressions can also reinforce group memberships – identifying yourself (to yourself) as a member of a specific group or class. Even the example of cheering at a football game carries over – we certainly recognise the phenomenon of fans cheering for their team even when watching the game alone on TV.

The second line of response questions the private nature of voting. Of course, the actual act of voting may be private, but voting is also the topic of considerable debate. While it would certainly be possible for an individual to separate voting from the talk of voting (and there is some evidence that some people do so dissemble), surely the most obvious and psychologically plausible way to proceed is to suit the voting action to the expressive wish; so that if you wish to say, in public, that you voted for X, the obvious action is to vote for X, particularly given that voting in any other way will in any case be inconsequential.

Though expressive activity can be swept up under a general ascription of rationality, it should not be assumed that the substantive content of the attitudes or opinions expressed is necessarily the same as the interests or preferences that would be revealed if the actor reasonably expected to be decisive. There is no a priori reason to think that expressive views and instrumental preferences will be identical, or even strongly positively correlated. The critical question in the expressive case is: what will I cheer for? The critical question in the instrumental case is: what will be best for me all things considered? Of course it is very unlikely that the answers to these questions will always be different – but there are good reasons to think that in at least some relevant cases expressive opinion and instrumental interests will come apart.

A key aspect of expressive behaviour is that the individual will be free to express support for a candidate or policy without reference to the cost that would be associated with that candidate or policy actually winning. Imagine that I believe policy X to be 'good' in itself, but that the adoption of policy X would carry costs to me that would outweigh the benefits. I would not choose X if I were decisive but, faced with a large scale vote for or against X, I would be happy to express my support for X given that, in this context, the instrumental balancing of costs and benefits is virtually irrelevant. Equally, individuals may vote to articulate their identity – in ideological, ethnic, religious or other terms. Or because they find one or other of the candidates especially attractive in some sense that they find salient. In each case, the basic point is that the expressive benefit is not counterbalanced by consideration of the costs that would be associated with a particular overall outcome of the election. On this view, individuals will vote in line with their interests (that is, their all-things-considered interests taking account of all benefits and costs) only when those interests connect fully and directly with the relevant expressive factor.

Within the rational actor tradition, the 'veil of insignificance' characteristic of the voting context (the phrase is originally Hartmut Kliemt's) has been used to explain why voters will typically be rationally ignorant about the political options open to them. However, the issue goes beyond mere rational ignorance. Even a fully informed voter – perhaps *especially* a fully informed voter – would have negligible reason to vote for the candidate who, if elected, would yield the voter the highest personal pay-off. That is what being 'insignificant' means.

If this is right, then the propensity of rational choice political theorists to extrapolate directly from market behaviour based on all-things-considered interests to electoral behaviour is based on a mistake. Further, an account of democratic political process grounded on interest-based voting is likely not only to misrepresent political behaviour but also to misdiagnose the particular problems to which democratic politics is prone and against which constitutional provisions have to guard.

Three final points: first, it is important to distinguish the expressive idea from a range of other ideas associated with individual motivation. The expressive idea is importantly distinct from, for example, the ideas of altruism or moral

motivation. This point is subtle, because it may be that, in particular cases, expressive behaviour tends to be more altruistic or more moral than behaviour that is undertaken on the basis of all-things-considered interests. But, there is nothing in the expressive idea itself that makes this true of necessity – expressive behaviour in other cases may be cruel or malign rather than benevolent. The core of the expressive idea lies in the structure of expressing an opinion without reference to the consequences, rather than the particular content of the opinion expressed.

Second it is important not to confuse the point that certain individual behaviour is inconsequential and hence expressive, with the point that the aggregate of all such behaviour does carry consequences. Clearly, whatever motivates voters, the electoral outcome is determined by the aggregation of all votes. The issue is not whether voting in aggregate has consequences: it is rather whether those consequences necessarily explain how individuals vote – whether the connection between consequences and individual action is the same here as in contexts where each individual gets what she individually chooses.

Third and relatedly, we should be careful to distinguish the content of an expression from the fact that it *is* an expression. In particular, the content may be consequentialist, even though the expression itself remains ‘expressive’. So for example, if A writes a letter to the editor of the local paper expressing the view that a particular policy is a bad one in consequential terms, the norm that A expresses is consequentialist, but the letter-writing remains an expressive activity. In the same way, if A votes (cheers) for policies that satisfy consequentialist norms, that fact does not make A’s voting itself an instrumental act.

IV THE CONSTITUTIONAL RELEVANCE OF EXPRESSIVE BEHAVIOUR

The second part of our claim is that expressive political behaviour carries implications for the understanding of constitutions. We advance this claim in each of two senses. First, the recognition of expressive behaviour within electoral politics will carry implications for the design and evaluation of constitutions. This was a major theme of Brennan & Hamlin (2000). The second

sense applies the expressive idea to the constitutional process itself and was the subject of Brennan & Hamlin (2002) – where we argued that the shift to the constitutional level does not do the work normally claimed of it in the CPE tradition once appropriate account is taken of the expressive nature of mass political behaviour. There are two parts to this argument. First, as argued above, the over-concentration on an instrumental analysis of politics has caused a misdiagnosis of a central problem of democratic politics. Under an interest based view of voting the central problem is identified as the principal-agent problem, so that the essential role of a constitution is to structure the relationship between voters and their political agents so as to ensure maximum responsiveness to voters' interests. By contrast, the recognition of the expressive dimension of politics shifts attention to the problem of utilising institutional design to identify the real interests of voters given that their expressive voting behaviour may not reveal them.

Second, if this is so at the level of in-period politics it will be no less so at the constitutional level of choice. This is most obvious where a draft constitution is subject to ratification by popular vote. In a popular ratification process, not only is the individual voter almost certain to be insignificant, there is also the fact that the draft constitution is likely to include a range of elements that will induce voters to engage expressively. Ideas of nationality, identity, justice, democracy and other 'basic values' that might be articulated in the constitution are likely to excite expressive reactions that are not necessarily or directly related to the all-things-considered interests of the individual. And knowing this, those who are responsible for drafting the constitution will face clear incentives to design the constitution in such a way that will encourage the voters to cheer, regardless of whether this design will best serve the interests of the voters.

Even where the constitution is not subject to a formal ratification by popular vote, there are likely to be other mechanisms at work, through the process of political representation, or via the popular media, which exert an essentially expressive pressure on the content and form of the constitution.

Written constitutions, we argue, are often best seen as symbolic and expressive statements of the political mind-set of the time and place. Of course, this is not to deny that written constitutions may include statements that bear directly on

the rules of political process. But there remains an issue of how such statements are to be interpreted. The CPE tradition has identified the constitutional specification of rules as the outcome of self-interest, operating in the distinctive setting where no-one knows which 'self' one will turn out to be. But constitutional statements about rules are, we think, more plausibly understood as the result of expressive preferences over such rules.

The claim that written constitutions are to be understood as largely symbolic and expressive will hardly be controversial in many circles. The preambles and opening sections of most written constitutions are almost exclusively concerned with what we would term expressive issues – issue of identification, morality, justice and so on. We will illustrate the point by reference to just two current constitutions; but there is no shortage of such examples. The constitution of the Republic of Ireland (1937) opens:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution.

The Irish constitution thereby establishes a political context that is explicitly religious and historical, that invokes past 'trials' and 'struggles', and that commits to seeing 'the unity of our country restored'.

The constitution of Poland (1997) opens:

Having regard for the existence and future of our Homeland,
Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate,

We, the Polish Nation - all citizens of the Republic,

Both those who believe in God as the source of truth, justice, good and beauty,

As well as those not sharing such faith but respecting those universal values as arising from other sources,
Equal in rights and obligations towards the common good - Poland,
Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values,
Recalling the best traditions of the First and the Second Republic,
Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage,
Bound in community with our compatriots dispersed throughout the world,
Aware of the need for cooperation with all countries for the good of the Human Family,
Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland,
Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies,
Recognizing our responsibility before God or our own consciences,
Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities.

Here, the Polish constitution identifies a re-emergent national identity, linked to earlier republics and to the Christian tradition.

These examples may be supplemented by reference to recent attempts to write a new preamble for the Australian constitution as discussed by McKenna (2004). The people appointed (and self-appointed) to this task have been mainly poets/authors, rather than constitutional lawyers. What at first caused McKenna surprise – as a political scientist – was the ‘moving, highly personal, even intimate’ quality of these contending preambles. McKenna’s initial response was skeptical:

While I admired [a particular draft] preamble as a piece of creative writing, my training in political science had me wondering how the High Court might find his attempt to emulate the Book of Genesis useful in interpreting the constitution. [p29]

Yet McKenna’s more reflective judgement is different – “I came to see their fanciful nature as positive” [p29]. We would suggest that this change of view marks a shift from the instrumental to the expressive perspective. What is most striking to us is McKenna’s view that the fact that “Since its inception in 1901,

the federal constitution has not figured greatly in explaining our identity or character” speaks to a certain kind of failure. Here is McKenna’s perspective:

We are a nation forged through remembering the human sacrifice and horror of war, a people whose most profound political instincts lie outside the words of our constitution. While we live under a written constitution, the values and principles of our democracy remain largely unwritten – truths embodied in the practice of daily life – truths we have yet to distil. If Australians can be said to have a constitution in any real sense it is an imaginary constitution. One comprised of scraps of myth and wishful thinking that bears little relation to the text of the document itself..... Finding the right words to express the uniqueness of this land and the depth of our relationship with it could serve to promote a sense of popular ownership of the constitution. If the constitution touches ordinary Australians, if it speaks to the living and not to the dead, then the people are more likely to vote for it. [p 32]

For McKenna, then, a reasonable claim on a written constitution is that it should express the common identity of the citizenry, and the source of the citizen’s attachment to the nation. McKenna is surely not alone when he looks to the constitution to deliver an expression of national unity, or when he assesses the extant constitution in those terms. And this suggests that a written constitution that operates as an expressive document is not necessarily a mark of failure, so much as a recognition that a written constitution may do more (and less) than lay out the rules of the political/social/economic game.

V INSTRUMENTAL AND EXPRESSIVE CONSTITUTIONS

We now return to our initial pair of distinctions – between the expressive and the instrumental, on the one hand; and between the written and the general rules of the game, on the other. These distinctions cross-cut in the manner illustrated in Matrix A, and identify four possible scenarios. We now wish to explore this matrix a little more fully.

Matrix A – Four possibilities

Account of electoral preference

Type of 'constitution'	Instrumental	Expressive
Written Constitution	1	2
Rules of the Game	3	4

The previous section focussed on expressive considerations in the context of written constitutions, and so may be placed in box 2 in Matrix A, this in contrast to the more usual focus within the CPE tradition which clearly lies in box 1. But another aspect of much CPE analysis is that it tends to ignore the distinction between the written constitution and the more general rules of the game. And this is understandable in the instrumental setting. That is, we see no great issues at stake in the contrast between box 1 and box 3 in our matrix. As long as we retain the instrumental perspective, the precise nature of the constitution – written or unwritten, constructed or emergent, formal or informal – may not matter much. What matters behaviourally is that there are rules and that these rules are recognised by the players. Of course, within Buchanan's normative scheme, the constitutional rules must be seen as "agreed" among the citizenry in some sense. But agreement does not imply a particular form of constitution, and so the main thrust of our point remains. The source of a particular rule, and exactly how it is documented, or otherwise identified, does not seem to bear on either our acceptance of the rule, or our behaviour under the rule.

Once we admit the relevance of the expressive perspective, however, additional considerations come into play. For example, in drawing out the contrast between box 2 and box 4 in our matrix, the distinction between constitutional rules that are explicitly constructed and those that emerge by more implicit or tacit processes seems quite significant. As we have already argued, the explicit process leading to a written constitution (or constitutional amendment) is likely to be subject to considerable expressive pressures precisely because of the nature of the involvement of individual citizens in that process. But in the case of emergent constitutional rules, the involvement of individual citizens is at a different level. Rather than the constitution being a matter for voting (and

therefore the expression of views), rules emerge as the by-products of the cumulative actions of many individuals where each action is motivated by reference to some end other than the setting of a constitutional rule. Thus, the individual actions that contribute to the formation of the emergent rule can be expected to reflect the all-things-considered interests of the individuals concerned rather than the issues that will cause them to cheer. Note that both written and emergent rules derive from the individual actions of a large number of individuals – it is the nature and motivation underlying individual actions that differs, not the number of people involved⁶.

This distinction between emergent rules (deriving ultimately from interested actions) and explicitly constructed and collectively endorsed rules (deriving from expressive actions) provides not just an example of how cells 2 and 4 in matrix A may differ, but also an interesting observation in its own right. However one must be careful when considering what the observation shows. One interpretation would be that emergent rules are more likely to serve the interests of the population than are constructed rules, so that constitutions that evolve are generally to be preferred to those that are designed. Indeed one might go so far as to claim support for a Burkean/Oakeshottian position in relation to evolved institutions⁷. While we recognise this interpretation, we think that it goes a step too far. We would prefer to emphasise the different roles that are played by constructed and emergent rules/institutions, and thereby recognise the value of constitutions of both kinds. As we have seen, a written constitution provides an excellent opportunity for expressing ideas of identity and culture that may play a very positive role in reinforcing society's view of itself, in shaping the political climate, and supporting the perceived legitimacy of the prevailing order.

A written constitution may also provide a useful codification of political procedures. But there is some danger, we believe, in asking a written constitution to perform the function of fully defining the rules of the socio-political-economic game (rather than codifying rules that have already emerged). This danger derives from the expressive nature of the constitution-making process. There is a clear risk that constructed rules will have more to do with rhetorical appeal than with practical efficacy, more to do with symbols than

with reality, more to do with their ability to raise a cheer than with their ability to serve interests. On the other hand, these very same features seem likely to establish an enthusiasm for and loyalty to the prevailing constitutional order that purely evolved rules may lack.

If our general position here is correct, it should be possible to exploit the strengths of both written and unwritten elements of the constitutional order. The issue is not so much whether it is best to have a constitution in written or unwritten form, but rather how to manage the mix in the most appropriate way.

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NOTES

¹ See, for example, Buchanan and Tullock (1962), Brennan and Buchanan (1985), Buchanan (1990).

² Brennan & Lomasky (1993); Brennan & Hamlin (1998); Brennan & Hamlin (2000), see also Schuessler (2000).

³ Of course many constitutions fail to operate. Such failure can take many forms.

⁴ For more detailed discussion of the roles of esteem and disesteem see Brennan and Pettit (2004)

⁵ For a constitutional study undertaken in that spirit, see Brennan & Casas Pardo (1991).

⁶ In Brennan & Hamlin (2002) we sketch an alternative resolution that reserves constitution setting powers to a small constitutional convention that is insulated as far as possible from the pressures of the people, while still being representative of their interests. See also Crampton and Farrant (2004) and Mueller (1996).

⁷ We explore aspects of conservatism more explicitly in Brennan and Hamlin (2004), where we identify a bias in favour of the status quo as a central analytic component of conservatism, while acknowledging that scepticism and a distrust of constructivism are also conservative themes.