

Reasoning about Rules

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Abstract

The Reason of Rules stands as a key text in the development of Constitutional Political Economy. While the achievements of the book in further shifting attention towards the constitutionalist perspective and providing a wide ranging discussion of the demand for rules are acknowledged, I suggest that the account of rules provided there and which still forms the core of much constitutionalist discussion in the Buchanan tradition seems limited. This paper revisits the analysis of rules in order to offer a broader perspective that is still consistent with the central ambitions of *The Reason of Rules* and Constitutional Political Economy more generally.

Key words: Rules, Laws, Motivation.

1. Introduction

The distinction between rules and action under the rules and the related distinction between choice under rules and choice of rules are among the key distinctions that define the approach taken by Constitutional Political Economy (CPE), and the book that is most explicitly devoted to the analysis of rules within the CPE tradition is *The Reason of Rules*; indeed the term ‘Constitutional Political Economy’ as a name for the approach has one of its earliest outings as the subtitle of *The Reason of Rules*. It is natural, then, to look to *The Reason of Rules* as a key resource for a discussion of reasoning about rules.

Of course, *The Reason of Rules* was not the only, or the earliest, discussion of rules in the relevant literature. Within the wider Buchanan canon this theme and its implications were central to much earlier writing, particularly in the *Calculus of Consent* and the *Limits of Liberty*, and it is clear that *The Reason of Rules* should be read as an extension to and development of that earlier discussion as well as a generalization of the discussion in *The Power to Tax*. At around the same time, and very much within the public choice tradition, Ostrom’s presidential address to the 1984 Public Choice Society meetings built on Riker’s (1982) definition of institutions as systems of rules governing behaviour and decision making to emphasise that rules (unlike physical and even behavioural laws) can be changed by human action while also having prescriptive force in relation to human behaviour, both through incentive effects associated with risks of punishment and through more direct ideas of rule-following behaviour. Within the wider economic literature Friedman (1948) had established the general debate on rules versus discretion in economic policy-making in conditions of uncertainty and Kydland and Prescott (1977) had extended this discussion to cases involving commitment. In the more philosophical tradition, Rawls (1955) emphasized the distinction between the justification of a rule and the justification of an action under the rule and uses this distinction to discuss broadly utilitarian analyses of punishment and promise keeping, while Dworkin (1967) provides an analysis of the legal positivist account of law as a system of rules – including H.L.A. Hart’s (1961) distinction between primary and secondary rules.

Equally, of course, *The Reason of Rules* was not the final word on rules by either Brennan or Buchanan (although it might be taken as their final joint word). Buchanan’s focus on the

constitutional perspective and the ultimate significance of the agreement on rules persisted. For example, in one of his final publications:

“Politics, as observed and widely interpreted, readily becomes an arena of conflict, with winners and losers identified. By contrast, the setting for constitutional politics involves the search for agreed-upon rules that define ‘games’ from which mutual gains are anticipated by all participants. Failing some presupposition that members of the body politics agree on the ultimate rules, how can the polity, as a collective entity, be legitimized at all?” Buchanan (2013) p11.

Emphasizing, once again, both the role of rules as ‘rules of the game’ and the legitimizing force of agreement.

A brief résumé of the content and structure of *The Reason of Rules* can be provided simply by listing the chapter titles: the constitutional imperative, the contractarian vision, the myth of benevolence, modelling the individual for constitutional analysis, time temptation and the constrained future, politics without rules, rules and justice, distributive justice and distributive politics, and, finally, is constitutional revolution possible in democracy?

Although *The Reason of Rules* is a relatively brief book, it covers a lot of ground; and I cannot here provide a detailed commentary on even the major themes.¹ In one sense the book is more concerned with the place of rules within the broader contractarian and constitutionalist position than it is with the analysis of the nature of rules itself, and this is a limitation insofar as that basic analysis requires further attention. In focussing on that further attention, my aim is to supplement and extend *The Reason of Rules* rather than merely criticize; the aim is to provide a rather fuller and clearer account of rules as a core element of the political domain from a broadly economic perspective.² The remainder of this paper is

¹ In particular, I will say little about the discussion of the relationship between rules and justice that occupies chapters 7 and 8.

² Many aspects of that fuller account have existed in the literature for some time, see for example Kliemt, H. (1987) 'The Reason of Rules and the Rule of Reason', *Critica*, XIX, 43-86. Brennan, G. and Hamlin, A. (1995) 'Constitutional political economy: the political philosophy of *homo economicus*?', *The Journal of Political Philosophy*, 3(3), 280-303. Güth, W. and Kliemt, H. (2007) The Rationality of Rational Fools. in F. Peter and H. B. Schmid (eds) *Rationality and Commitment*. Oxford: Oxford University Press,

organised in four sections each representing a key step in such an account: the anatomy of rules, the operation of rules, the demand for rules and the supply of rules.

2. The Anatomy of Rules

By an ‘anatomy’ of rules I mean an account of the definitional structure of rules that provides a relatively clear understanding of the variety of senses of the idea of rules that we encounter in the social and political world and within the CPE tradition. It is important to be clear that there are different senses of ‘rules’ in play and how they relate to each other. The force of the use of the analogy with the rules of standard parlour games and sports is to establish the idea of a political constitution as the rules of the game of everyday politics, and this is appropriate just so long as we recognise the various senses of ‘rules’ and their potentially rather different relationships to a political constitution.

Chapter 1 of *The Reason of Rules* develops the basic idea of rules as the rules of the game, initially by reference to such games as the familiar ‘rules of the road’ coordination game. In this specific context, two possible candidate rules are discussed: ‘always drive on the right’ and ‘always drive on the left’. But the relevant underlying coordination game is already a well-specified game that has well-specified rules. A game theorist would say that the rules of the underlying game come in three parts: first an identification of the players, second a listing of the strategies open to each player, and finally a set of payoffs associated with each feasible combination of strategies. In this context, ‘always drive on the left’ and ‘always drive on the right’ are two of the many strategies available to each player in an iterated game, and so they will form part of the ‘rules of the game’ as defined by the game theorist; but this is not the sense of a ‘rule’ that Brennan and Buchanan intend. Rather they intend a ‘rule’ in this context to be something that might be adopted by the players as a mode of playing the game given the underlying ‘rules of the game’ as defined by the game theorist – the ‘rule’, in this sense, is -

pp. 124-49. The task of this paper may be seen as bringing these elements together and focussing them in a particular way.

as Brennan and Buchanan clearly indicate - essentially a particular mode of play, an attempt to signal behaviour and coordinate on a particular equilibrium of the game.³

This ambiguity between the 'rules of the game' and a 'particular mode of play within a game' persists in other settings and can potentially complicate the analogy with constitutional rules. For example, think of a simple Downsian model of electoral competition. Here, as before, the 'rules of the game' (in its one-shot form, for simplicity) in game-theoretic terms identify the actors (two candidates; many voters), list the strategies available to the actors (choice of platform position for the two candidates; vote for candidate 1, vote for candidate 2 for each voter), and identify the payoffs for each combination of strategies (identifying the winning candidate and platform). And these are the rules which we might normally identify as the constitutional rules governing the relevant election: rules on candidate and voter eligibility, rules providing for one voter one vote, rules specifying that the winner be decided by majority vote etc. But the 'mode of play' sense of 'rule' stressed by Brennan and Buchanan in the case of the rules of the road does not pick up these structural and procedural rules but rather a 'rule' that players might adopt to select from among the strategies available to them as a means of attempting to bring about a desirable equilibrium. In the context of the Downsian model such a 'rule' for candidates might be 'always position your platform at the location of the median voter'. It is this type of behavioural rule that is the direct analogue of the 'always drive on the left' rule in the rules of the road game. And, at least in the case of the election game, we do not normally think of this type of rule as an appropriate matter for constitutional or even legal determination. The distinction between the rules of the game and the possibility of a rule indicating a particular mode of play, together with their rather different links to the idea of a political constitution, warns us that considerable care needs to be taken in discussing these issues in more detail.

To clarify and generalize, I suggest that we might usefully recognize the variety of senses that we ascribe to rules by distinguishing among nine cases which may be represented in a three-by-three matrix. One dimension of this matrix adapts H. L. A. Hart's distinction between

³ The idea of rules as indicating a particular mode of play is discussed by Buchanan explicitly in Buchanan, J. M. (1989) *The Relatively Absolute Absolutes. Essays on the Political Economy*. Honolulu: University of Hawaii Press. Where he refers to this type of rule as 'game plans' and where he identifies the adoption of 'game plans' with personal constitutions that are a form of departure from the strict *Homo Economicus* position. See section 3 below for further related discussion.

primary and secondary rules by also identifying what I shall term tertiary rules. As in Hart's original, we may think of primary rules as those rules that directly grant rights or impose obligations – rules such as those defining property and theft, or defining the allocation of voting rights. Secondary rules then relate to the ways in which primary rules may be made, revised or rescinded – rules such as those identifying and limiting the powers and procedures of the legislature. Tertiary rules might then be identified as rules identifying particular 'modes of play' (or, perhaps, identifying specific modes of play to be avoided) intended to guide behaviour within the structure of primary rules – rules such as 'always drive on the right', or 'keep your promises'.

Of course, the specific and detailed distinctions between primary, secondary and tertiary rules are not always crystal clear. A secondary rule will often confer (procedural) rights or impose obligations and so be mistaken for a primary right; a tertiary rule may be legislated and enforced (as in the case of the rules of the road) and so be mistaken for a primary rule; but the fundamental ideas underlying the distinctions – that secondary rules focus on the processes of governing primary rules, and that tertiary rules guide behaviour within the set of primary and secondary rules seems both clear enough and useful.

At least some tertiary rules are often referred to as norms, conventions, customs, practices or habits⁴, and it might be possible to use a label such as 'norms' rather than 'rules' when speaking about cases such as 'keep your promises', in order to emphasise the distinction between rules (in the primary and secondary senses) and norms. But actually, I take part of the project of *The Reason of Rules* and the wider CPE enterprise to be treat rules and 'norms' of this type together emphasizing their common features, and so we will persist with the use of 'rules' attempting to distinguish between primary, secondary and tertiary rules as necessary.

The second dimension of the matrix that describes the anatomy of rules is provided by the form of the rule in question rather than its logical type, and again we may identify three forms of particular relevance: the constitutional, the legal and the informal. These labels should be relatively self-explanatory. A constitutional rule is one that is entrenched and protected

⁴ This list identifies a series of overlapping categories where there are few clear distinctions, but it is clear that items on this list form central elements of social and political theories in a variety of traditions.

within a constitutional framework (whether that framework is formulated in a document called a constitution or not); a legal rule is one that carries the force of law, but not constitutional protection, so that it lies in the domain of everyday politics; an informal rule is then a rule that carries no legal or constitutional force but nevertheless is recognized as a rule by relevant individuals.

RULES	Constitutional	Legal	Informal
Primary	1	2	3
Secondary	4	5	6
Tertiary	7	8	9

The interaction of these two dimensions yields the matrix shown, and the key point that I wish to stress is that all nine types of rule that are hypothetically identified by this classificatory structure are of some significance and interest both in reality and within the CPE enterprise, and that any attempt to compress or suppress this relatively rich and complex anatomy of rules will tend to distort reasoning about rules. It should be immediately clear that cells 1 and 4 are occupied: we are very familiar with both substantive/primary and procedural/secondary constitutional rules. Similarly, cell 2 represents the everyday law in allocating substantive rights and obligation. The remaining cells require some further comment.

We may begin with cell 7 where it might seem that constitutionally entrenched tertiary rules might be impossible in that anything that is entrenched in a higher constitutional law must be either primary or secondary in nature. But consider the rule adopted in a number of national constitutions that has the effect of making voting in certain elections compulsory. Such a rule certainly has the essential flavour of a tertiary rule in that it aims to establish the choice of a particular strategy as the 'norm'. Similarly, consider cell 8 and the case of the rule 'always drive on the right' which seems to provide a clear example of a tertiary rule that is frequently

given legal (but not constitutional) status. More generally, we might at least consider a range of tertiary rules which seek to pick out particular practices, forms of behaviour or modes of play as being appropriate in particular settings, as being candidates for legal enforcement or constitutional protection. And it is clear from the examples discussed that *The Reason of Rules* also takes this view although it does not clearly distinguish between tertiary and other rules.

Cells 5 might be thought to be uninteresting, since we might initially think that secondary rules – rules which set out the processes that are to govern substantial primary rules are, by definition, constitutional. But actually, even in the most constitutionalised societies, most of our everyday institutions are structured and defined as a matter of law (or informally – as in cell 6) rather than within a political constitution – so that while these institutions are indeed constituted by these legal or informal secondary rules, they are not afforded any genuinely constitutional protection. There is an important if rather subtle distinction here between the claim that rules are constitutive (of some institution, practice, game or structure) and the claim that rules are (or should be) constitutional in the specific sense of being embedded within a constitution that is given the status of higher law.⁵ We can recognize that many rules are constitutive without concluding that they are necessarily constitutional. This is important since while CPE is often taken to focus attention on the appropriate content of political constitutions, its remit should be seen as much wider than this: as providing an analysis of the constitutive role of rules whether those rules are constitutional, legal or informal in form.

Cells 3, 6 and 9 then relate to the informal sector - which we might term civil society rather than political society – but it should be clear that the distinctions between primary, secondary and tertiary rules still apply in the civil setting. Much of what is important in the CPE tradition, and the wider Public Choice tradition, concerns the boundary between civil and political society and the question of how extensive the powers of the state and law should be. For our present purposes, however, we need only note that a defining feature of the rules in the informal column is that they do not depend directly on the state as such – whether for their foundation, their recognition, their enforcement or their reform. Of course, this does not

⁵ Of course in countries such as the UK the constitution has no claim to the status of higher law, but even here there is some sense that those laws that have constitutional significance (such as the recently proposed change in the voting system, or the proposal for independence for Scotland) require special consideration, even if that sense is itself not based in law.

imply that they are not well founded, well recognized, enforced or reformed – merely that the life of these rules lies largely outside of the realm of the state.

Within this structure of rules we must also explicitly recognize the potentially complex, nested or hierarchical nature of many rules. This is, of course, already explicit in the distinction between primary and secondary rules where we may think (despite the linguistic difficulty) of many primary rules as being nested within the relevant secondary rules. But the issue is much broader than this: even within the class of primary rules we may have rules within rules and a complex hierarchy of rules and meta-rules. For example, in the tax setting familiar from *The Power to Tax*, and restricting our attention to simple models of income taxation, we might identify the lowest, most everyday level to be that of the individual income tax bill. The ‘rule’ that governs the calculation of an individual’s tax bill, we might suppose, requires just two inputs - that individual’s income and the current tax rate schedule. So we might legitimately identify the current tax rate schedule as a ‘first order rule’ in the income tax system. We might then point to second or higher order rules – of primary, secondary or tertiary kinds. An example of a higher order primary rule relating to income tax might be a requirement that income tax schedules should be progressive. An example of a higher order secondary rule relating to income tax might be that the power to vary tax rates be invested in a particular legislative process (itself defined by a number of further primary, secondary and tertiary rules). An example of a higher order tertiary rule relating to income taxation might be provided by the ‘norm’ of tax compliance and the accurate reporting of income.

Given the complex inter-relationships that exist among rules - whatever their individual locations might be in terms of the matrix discussed above - it is important to recognise and emphasize the logical distinction between higher order rules (or meta-rules) and constitutional rules. Just because a rule operates mainly or wholly via its effect on further, lower level rules, does not imply that this rule should be seen as ‘constitutional’ in the sense of being a clear candidate for entrenchment in a political constitution. As we have already seen, we may identify higher order rules or meta-rules that might be properly allocated to the legal or informal columns of our matrix rather than the constitutional column.

So how does the distinction between the constitutional, the legal and the informal arise? Within the terms of the Buchanan account as it develops from *The Calculus of Consent* and *The Limits of Liberty* to *The Reason of Rules*, the answer must surely lie solely in the extent of agreement. Although Buchanan often described himself as a liberal in the classical sense of that word, it is arguably more appropriate to describe him as a contractarian constitutionalist. His liberal principles gave him ideals (or personal values), but his deeper commitment was to the process of agreement as the only source of legitimacy. Of course, he also believed that, under appropriate conditions, the liberal ideals that he espoused would provide the basis for the agreements that would be reached by reasonable individuals, so that he expected that the process of agreement would yield a liberal outcome, but it was the process rather than the (expected) outcome that generated the claim of legitimacy. With this in mind, it is clear that the content of a legitimate constitution is determined, on Buchanan's account, simply by what can be agreed by (near) unanimity. While we might analyse potential reasons for people to agree to this or that set of rules or institutions, and such analytic arguments might play a role in informing individuals of the likely consequences of their constitutional choices, and persuading them of the appropriateness of a particular view, the ultimate test is agreement itself. If there is no unanimity, there is no legitimate constitution (or constitutional reform). And similarly, if there is no constitutional level agreement on the structure and process of law, there is no legitimate law.

The anatomy of rules outlined here may seem more complicated than that discussed in *The Reason of Rules*, and certainly nothing like the matrix presented above appears there. But I would suggest that the anatomy sketched here can be seen as broadly consistent with the discussion of *The Reason of Rules* with the benefit of making explicit some of the distinctions that are rather glossed over there, and of clarifying the very basic point that the question of which rules should be constitutionally entrenched is not answered merely by pointing to the fact that certain rules are constitutive of valuable institutions and practices, nor by pointing to the fact that there exists a hierarchy of rules with higher order rules or meta-rules operating largely via their influence on lower order rules. These facts are among the considerations that must be recognized in any argument for the constitutional entrenchment of particular rules but they are not themselves an argument. For that, we need to move beyond anatomy.

3. The Operation of Rules

So, how do rules work and how does our answer to this question vary across rules of different types? Clearly, to even approach an answer to this question, we need to place rules in the wider social context and the key ingredient here is the specification of the motivational structure of human agents. Chapters 3 and 4 of *The Reason of Rules* are largely devoted to this issue, critically discussing the idea of reliance on forms of benevolence and advancing an argument for modelling individuals along the lines of *Homo Economicus* –as a ‘rational, self-oriented maximizer’ (p65). The argument here consists of two distinct steps. The first step is to argue that the same motivational model should be used in analyzing behaviour under all institutional structures - including both market institutions and political institutions. The second step then argues specifically for the *Homo Economicus* model, on a mix of empirical, methodological and normative grounds. While I fully endorse the first of these steps, I have argued against the second step on a number of occasions.⁶ I will not repeat those arguments in detail here, rather I will offer some related comments and point to elements in *The Reason of Rules* (and Buchanan’s other work) which seem to both require and support movement beyond *Homo Economicus*.

How do rational, self-interested individuals respond to rules? The short answer is that they do not recognize the category as having any normative or behavioural significance, but rather they will look through the formulations of each particular rule to assess its standing with respect to their interests in the particular situation. This is simply to say that the mere fact that a rule exists (whatever the type or form of the rule) will have no direct or automatic implications for the rational, self-interested actor. There are apparently two routes by which a rule might enter into the calculus of *Homo Economicus*: either by influencing the expectation of the behaviour of others, or by directly engaging with the costs and/or benefits of alternative strategies in terms of the agents own interests. Assuming that our individual believes that all other individuals are also of the *Homo Economicus* variety, these two apparent routes rapidly collapse to one; since only if the rule impacts directly on the costs

⁶ Often with Geoffrey Brennan, see for example Brennan, G. and Hamlin, A. (1995) 'Constitutional political economy: the political philosophy of *homo economicus*?', *The Journal of Political Philosophy*, **3(3)**, 280-303. Brennan, G. and Hamlin, A. (2000) *Democratic Devices and Desires*, Cambridge, Cambridge University Press, Brennan, G. and Hamlin, A. (2008) 'Revisionist public choice theory', *New Political Economy*, **13(1)**, 77-88.

and/or benefits of at least some individuals can it enter the calculus of any individual, even via the expectation of the behaviour of others.

The obvious cases in which rules may be expected to do some real work in such a context are the case of coordination games and cases where rules are effectively enforced. In a coordination game – such as the ‘rules of the road’ game already mentioned – a tertiary rule of the form ‘always drive on the right’ can clearly act to render the coordination of all players salient and accessible. In effect, the tertiary rule can be thought of as pre-play communication between the players in circumstances where the nature of the game makes their statements in relation to the rule credible and so informs the choice of strategy within the game. But the case of enforcement is much more problematic, since it raises the question of how effective enforcement is possible outside of coordination games. Whether enforcement is via rewards or punishments, the mechanism providing the enforcement has itself to be modelled within the structure of the rule, and so within the structure of the expanded game; in particular, it has to be operated by individuals who are themselves of the *Homo Economicus* variety.

Ultimately, this implies that the larger model – inclusive of both the rule and its enforcement structure – must be seen as a self-enforcing system, which in effect implies that this larger structure is a form of a coordination game.⁷

So, we may easily agree that, in a world of *Homo Economicus*, tertiary rules may provide a useful means of ensuring coordination in coordination games. But we are left with a serious doubt as to how other rules work. And, if there is a difficulty in establishing how other rules work, this difficulty must carry over into the wider project of the addressing the issue of the choice of rules by individuals in such a society.

It is difficult to see how man-made primary and secondary rules can be accommodated within the world of *Homo Economicus*. Of course most situations that involve the interaction among individuals take on the structure of particular games as a matter of brute fact – they are, we might say, ‘natural games’ and such natural games can be described in terms of their underlying (natural) rules. In these cases the rules may be recognized by the relevant individuals players as defining the situation that they find themselves in, without any

⁷ For a detailed account of this argument and its wider implications see Hardin, R. (2003) *Liberalism, constitutionalism, and democracy*, Oxford, Oxford University Press.

implication that these rules are man-made or subject to reform. Such rules may provide the general environment, and will be recognized as describing what is feasible by the individuals concerned - but any movement from such natural rules to a position in which additional man-made rules can be seen to be effective in conditioning the behaviour of individuals is deeply problematic in a world of *Homo Economicus*.

The position developed in *The Reason of Rules* seems, at least initially, to hold that while individuals are not rule-followers in terms of their basic motivational structure, they are nevertheless rule-makers.⁸ Perhaps a quote often attributed to President Taft, holds a clue: ‘no tendency is quite so strong in human nature as the desire to lay down rules of conduct for other people’. The point here is that when considering rule-making, we look primarily to the benefits offered by constraining others. But again, how can we hold the view that there will be any such benefits unless we assume that others are, at least to some extent, influenced by the rules as rules? Without rule-followers, it seems difficult to motivate rule-making.

We may think of the broadly contractarian enterprise in relation to rules as facing two logically distinct aspects, one relating to the ex-ante (or constitutional) consent to a rule that is associated with rule-making, and the other relating to the ex post (or in-period) compliance with a rule that is associated with rule-following. These two aspects will often come apart, so that when it is rational and self-interested to consent to a rule it may nevertheless not be rational and self-interested to comply with it.⁹ A link between consent and compliance may be provided by commitment, but this is not among the resources that are available to *Homo Economicus* in the relevant circumstances.

At this point we should recognize that *The Reason of Rules* retreats somewhat from the position on *Homo Economicus* in its closing sections. When discussing the possibility of a shift towards a more constitutionalist and rule-based approach to politics in chapter 9, Brennan and Buchanan write:

⁸ It might initially seem that a third category of ‘rule-enforcer’ is also required, but it seems more appropriate to view rule-enforcement as a special case of rule-following, since the enforcer is simply required to follow further, higher-order rules of various kinds.

⁹ The standard prisoners’ dilemma provides an example where rational, self-interested individuals may consent to a tertiary rule, but then fail to comply with that rule. For a discussion of various forms of contractarianism that provides a more detailed discussion of the relationship between consent and compliance see Hamlin, A. (Forthcoming) Contractarianism. in J. D. Wright (ed) *International Encyclopedia of the Social and Behavioral Sciences* 2ed.: Elsevier.

‘Nonetheless, anyone who diagnoses the plight of modern democracy in terms of the existence of a social dilemma described by a set of nonoptimal rules must give up in despair, become a revolutionary, or go beyond the models of utility maximization, nontautologically defined. To hold out hope for reform in the basic rules describing the socio-political game, we must introduce elements that violate the self-interest postulate.’(p146)

They go on to indicate that widely shared moral norms (a ‘civic religion’ that recognizes a notion of ‘public good’) might provide the only plausible basis for reform of the rules, indicating that only those who share in such a civic religion might have any reason to engage as rule-makers. This shift in position still does not seem to recognize that the move away from *Homo Economicus* might also be required in order to provide a basis for individuals as rule-followers, and that without some grounds for believing that individuals are, at least to some extent, rule-followers, there can be no real reason for rule-making that goes beyond the case of coordination. But, of course, if we are to move away from *Homo Economicus* towards a degree of civic religion in one respect, the strong argument for motivational symmetry in all settings implies that we must recognise a degree of civic religion in all contexts.

In fact, the emphasis in the following section of chapter 9 is to argue that the assumption of a degree of civic religion does not undermine the constitutionalist argument of the book in general, since there need only be a degree of civic religion, and we need not assume that all individuals are wholly virtuous in the relevant sense. Indeed, as Brennan and Buchanan conclude:

‘It is precisely here in the argument, or so it seems to us, that a categorical distinction must be made between choices confronted within or under an existing set of rules, and choices confronted among alternative sets of rules themselves’ In the first of these two settings, that of postconstitutional or in-period choice, the relative costs of choosing courses of action that further the shared “public good” may simply be too high relative to the increment in “public good” promised to result from such action, to shift behavior significantly away from economic self-interest. In the second choice setting, by contrast, the costs of furthering “public good” may be significantly lower, so much so that the same person who behaves

in accordance with narrowly defined self-interest within a given set of rules may well behave in accordance with precepts of shared norms when making genuinely constitutional choices.’ (p147-8)

I have quoted this statement at length since it seems to me both to strongly endorse a basic view of motivation that is significantly broader than the ‘official’ - and more usually cited - *Homo Economicus* model of chapter 4, with the added point that which specific aspect of motivation is actually effective will depend on the circumstances of choice, and to strongly link the non-*Homo Economicus*, *civic* religion element of motivation with genuinely constitutional choice.¹⁰

If we consider the prospects for introducing an element of rule-following into the model, we might start by making the assumption that it is part of the basic psychological makeup of at least many individuals that they gain some payoff from complying with known rules. Consider, for example the simple choice between action A and action B. In the absence of any recognized rule, this choice will be determined by the simple utility associated with each action and its consequences, say $U(A)$ and $U(B)$. Now introduce a rule of the form ‘choose A whenever faced with the choice between A and B’, and assume that the individual gains utility from rule compliance and/or suffers a utility loss from rule breaking, so that the overall utilities associated with actions A and B in the presence of the rule are now $(U(A)+R)$ and $(U(B)-P)$ where R and P are the psychological reward and punishment associated with compliance and non-compliance respectively. Now, if this is plausible, it is easy to see that the introduction of a rule can make a behavioural difference – in this case it might be that in the absence of the rule the individual chooses B but that the introduction of the rule shifts

¹⁰ The juxtaposition of *Homo Economicus* and favourable references to broader motivational ideals is itself a theme in much of Buchanan’s work. For example, in his Nobel Prize address, in a section headed *Homo Economicus*, he argues that all that is required is that economic self-interest is a positively valued part of individual motivation and that only ‘over zealous’ theorists have suggested that self-interest is the sole motivation see Buchanan, J. M. (1987) ‘The constitution of economic policy’, *The American Economic Review*, 77(3), 243-50. Similarly reference to the need for a personal constitution involving rule-following, habits and ethical commitments can be found in works from at least *The Limits of Liberty* onwards, including *The Reason of Rules* and, perhaps most explicitly in Buchanan, J. M. (1989) *The Relatively Absolute Absolutes. Essays on the Political Economy*. Honolulu: University of Hawaii Press. Despite the fact that Buchanan himself is repeatedly hospitable to motivations that go beyond *Homo Economicus*, it is nevertheless the case that he also repeats the benefits of the *Homo Economicus* model, and this model is still taken by many to provide the standard or mainstream CPE position.

behaviour to the choice of A. It is also plausible to claim that this way of introducing rule-following is fundamentally consistent with the basic idea of a self-interested rational individual, all that is being added to the basic model is the idea that rule-compliance is itself a source of individual utility.

In effect, this strategy for the introduction of rule-following makes rules salient for the individual, and the internal psychological rewards and punishments associated with rule compliance and non-compliance provide an element of rule-enforcement that does not rely on any further or external apparatus. For these reasons, this modest step may be sufficient to ground at least some element of genuine rule-following behaviour and so provide the basis for the consideration of rule-making behaviour.

But note that this is a rather different move to that mentioned above in relation to the possibility of a 'civic religion.' There, the departure from *Homo Economicus* is both more marked and more substantial in that it introduces an essentially normative and social element into the individual's response to rules whereas the mere recognition of the possibility of internal psychological rewards and punishments retains the internal focus of *Homo Economicus*. One clear advantage of the move to civic religion is that it provides direct grounds for distinguishing good rules from bad rules, while the move to simple rule-compliance seems to treat rules as rules whatever their detailed form or content. In this way, the move to civic religion bears more directly on the issue of rule-making, rather than rule-following. It may be that the two moves work together, with the simple addition of internal psychological rewards associated with rule compliance being sufficient to ground rule-following behaviour and the additional element of a civic religion providing the normative component of rule-making behaviour. I will return to this point in discussing the supply of rules below.

4. The Demand for Rules

In fact, much of the material in *The Reason of Rules* that is specifically focussed on rules is concerned not with how rules work, but on why rules might be desirable if they work – what we term here the demand for rules. Of course, any full account of why rules, of any type,

might be desirable might be expected to depend upon an analysis of how they work and their consequential benefits but, as we have seen, exploration of that issue is rather curtailed in the main body of *The Reason of Rules* by the initial specification of *Homo Economicus* motivations. There is therefore something of a leap of faith from the diagnosis of social dilemmas of the general form of multi-person prisoners' dilemmas, or situations which take on the general structure of principal-agent problems, to the suggestion that the adoption of rules of one sort or another can resolve, or perhaps dissolve, such dilemmas and problems. To put the same point in other words, much of *The Reason of Rules* focuses on the demand for effective rules, on the assumption that effective rules are available, without really grounding that assumption.

Within this constraint, the analysis of *The Reason of Rules* seems compelling. Issues of free riding, of inter-temporal and inter-personal commitment, and of the limited empowerment of political agents certainly can be resolved (or dissolved) if we have the ability to reconfigure the rules that define the original situations as dilemmas and problems. But to state the case in that way is to emphasize the limited nature of the achievement. Of course it is an achievement to point to the structural nature of the dilemmas and problems and to characterize the essentially political nature of these cases in terms of the underlying 'rules of the game' (whether primary, secondary or tertiary). But the further contribution involved in arguing for the possibility of constitutional reform or the more general reform of rules as a potentially effective means of escaping from these political problems is limited unless and until we make good on the assumption that such effective rules are available. This implies a focus on the supply of rules rather than the demand for rules, and I turn to that topic in the next section. But before doing so I want to return to the anatomy of rules outlined above and make some further comments on the demand for rules of different types.

Begin from the existence of a range of natural games, as suggested in the last section. These games simply describe social settings and the set of feasible actions and payoffs available within those settings. They might be considered to reflect aspects of a state of nature and might include games which take the form of the prisoners' dilemma and other such games. Now it is clear that, faced with such games, individuals can imagine a better world. And such imaginations might be based around the introduction of effective primary, secondary or tertiary rules. The case for tertiary rules is clear enough: in the prisoners' dilemma case, for

example, the widespread adoption of the tertiary rule ‘always cooperate’ would (if only it were feasible) certainly represent an improvement. The case for primary and secondary rules is rather different. New primary and secondary rules do not provide an improved mode of playing an existing natural game, rather they hold out the prospect of changing the nature of the game being played from a natural game to an artificial game, or otherwise constructing a new artificial game. There may still be some need for tertiary rules (whether informal, legal or constitutional) within the artificial game so created, but the distinction between transforming games from the natural to the artificial by means of the creation or reform of primary and secondary rules, and playing natural (or artificial) games more effectively by means of tertiary rules should be clear enough.

I want to suggest that this distinction maps (at least approximately) on to the further distinction between the two basic problems of politics as identified within the CPE tradition. On the one side we have dilemmas such as the prisoners’ dilemma, but also other structural forms in which individual incentives do not lead to mutually desirable outcomes, so that this class of social dilemmas is marked by the distinct absence of invisible hand mechanisms. On the other side we have problems of a broadly principal-agent type, where the chief concern is the allocation and limitation of power. My point here is simply that tertiary rules are most often appropriate for cutting through dilemmas, while the transformation of natural games into artificial games by means of establishing or reforming primary and secondary rules will typically involve the creation of a principal-agent type problem just because the creation of novel primary and/or secondary rights will typically involve the granting of substantive or procedural power to individuals within society.

In this way, while imagining tertiary rules as a means of resolving existing dilemmas seems costless – in the sense that the new rule, if they were to be introduced and effective, would not generate a further problem; imagining the creation of artificial games is typically a matter of balancing the benefits associated with the new game form with the costs associated with the creation of new concentrations of political power.

5. The Supply of Rules

While a crude rendering of Say's law assures us that supply generally creates its own demand, there is no reciprocal assurance that demand creates its own supply; for supply to be forthcoming we require both feasibility and the ability to supply at an appropriate cost. As Brennan and Eusepi put it:

‘...it is an axiomatic feature of the prisoner's dilemma structure that all would be better off if all co-operated. And we might loosely describe that fact as constituting a prima facie case for appropriate ‘rules’. But the ‘rules’ terminology here is loose, unless it can be established that there exists some feasible institutional arrangement that will actually deliver the co-operative outcome. Unless there is some prospect of a supply of rules (understood as arrangements that agents will actually follow in sufficient numbers to make the rule-governed outcome a tolerable approximation to the actual outcome), the demand for rules is just wishful thinking, along the lines of the pauper's ‘demand’ for a castle, or (more to the point, perhaps) the public economist's ‘demand’ for a benevolent despot.’ (Brennan and Eusepi, 2013, p28).

In the remainder of their paper, Brennan and Eusepi focus on the distinction between the ‘marginal’ and the ‘total’ versions of Buchanan's contractarian constitutionalism. The marginal version (represented by *The Calculus of Consent*) assumes that we start from a position in which we have well-established rules (in all of the categories identified in the anatomy provided above) and institutions and are asking the question of how we might use the existing rules to effect marginal improvements in the set of rules. The total version (represented by *The Limits of Liberty*) tackles the more demanding task of how a set of rules and political institutions might be established *de novo* – whether there is a possibility of constructing a sustainable political system between the extremes of anarchy and dictatorship. It is interesting that Brennan and Eusepi do not consider *The Reason of Rules* and its place relative to the marginal/total distinction, since its ambition seems to combine the marginal and total perspectives in attempting a general account of rules. Brennan and Eusepi argue that the total version of Buchanan's project in *The Limits of Liberty* ultimately depends upon a combination of ethics and habits on the part of the individuals involved, and this mirrors the argument in section 3 above that Brennan and Buchanan also ultimately rely on a departure

from *Homo Economicus* by means of the introduction of a civic religion in *The Reason of Rules*.

But even if we accept that some departure from *Homo Economicus* is a necessary step in the analysis of the supply of rules,¹¹ it is still not obvious how the argument goes, and whether it can be expected to yield a structure of rules that we might recognise as broadly liberal in nature.

Consider the case of tertiary rules and, for concreteness, focus on the standard one-shot prisoners' dilemma as illustrated below, where Row and Column are the two players, the payoffs to each choice of strategies is shown in the form (Row's Payoff, Column's Payoff) and where $C > A > B > D$ is the condition required to ensure the prisoners' dilemma structure with defection being the dominant strategy while mutual cooperation would be unanimously preferred to mutual defection.¹²

Now, there is nothing in the form of the prisoners' dilemma that specifies that the players are self-interested, or that the payoffs are specified in terms of personal utility or own-interest satisfaction. But assume, initially, that this is the case. How would a move away from *Homo Economicus* and towards either the incorporation of internal psychological rewards and punishments associated with rule compliance and non-compliance or the recognition of a shared civic religion change the game? Take the civic religion case first and, following Brennan and Buchanan, assume that the individuals retain a clear sense of self-interest, so that their civic religion modifies, rather than completely overwhelms, their initial, self-

¹¹ In this context and given what I have described as the rather uneasy juxtaposition of *Homo Economicus* and non-*Homo Economicus* motivations in Buchanan's own work, it is interesting that at least two of Buchanan's major co-authors have developed arguments for motivational structures beyond *Homo Economicus* that would render rule-following and hence rule-making feasible. In addition to the references already cited in relation to Geoffrey Brennan see Brennan, G. and Lomasky, L. (1993) *Democracy and Decision*, Cambridge, Cambridge University Press. It is clear the Buchanan was involved in the development of the expressive voting argument at the time of the publication of *The Reason of Rules*, see Brennan, G. and Buchanan, J. M. (1984) 'Voter Choice: Evaluating Political Alternatives', *American Behavioral Scientist*, **28(2)**, 185-201. For key references relating to Viktor Vanberg see Vanberg, V. (1994) *Rules and Choice in Economics*, London and New York, Routledge, Vanberg, V. (2008) Rationality, Rule-Following and Emotions: On the Economics of Moral Preferences. in F. Forte and H. Kliemt (eds) *Money, Markets and Morals*. Munich: Accedo. I have also already noted the rule-following element in the work of Elinor Ostrom as displayed in Ostrom, E., Gardner, R. and Walker, J. (1994) *Rules, games, and common-pool resources*, University of Michigan Press. Since my primary focus here is on *The Reason of Rules*, I do not pursue the Vanberg and Ostrom formulations here but note that the argument sketched here is broadly consistent with their formulations.

¹² It is also standard to require that $A > (C+D)/2$ in defining the prisoners' dilemma, and that is appropriate here.

interested ranking of alternative outcomes. It seems reasonable that, for both individuals, the evaluation of the outcome associated with mutual cooperation should improve relative to the case of pure self-interest, so that A becomes A^* where $A^* > A$. It also seems reasonable to assume that the evaluation of free riding should fall to C^* where $C^* < C$. The situation with B and D is less clear, and might depend on the more precise specification of the civic religion. But let me simply stipulate that the new payoffs B^* and D^* are such that $D^* > D$ and $B^* < B$, as might be the case if the civic religion focussed on the agents own action and rewarded cooperation and punished defection.

		Column	
		Cooperate	Defect
Row	Cooperate	(A,A)	(D,C)
	Defect	(C,D)	(B, B)

Under the revised specification replacing A , B , C and D with A^* , B^* , C^* and D^* , it should be clear that whether or not we have resolved or dissolved the prisoners' dilemma is still an open question. It may be that $A^* > C^*$ and $D^* > B^*$ so that cooperation is now a dominant strategy for both players, or it may be that we are still in a prisoners' dilemma if the original rankings persist despite the shift towards a civic religion. To put the point in another way, it is just as straightforward in principle to identify the possibility of a prisoners' dilemma with players who share a civic religion as it is with players who are narrowly self-interested. The introduction of a shared civic religion may, in practice, resolve some prisoners' dilemmas into situations which operate as invisible hand mechanisms, but this will depend on the specific case-by-case details and the precise form and strength of the civic religion relative to self-interest.

Notice that in this case the introduction of a shared civic religion effectively substitutes for a rule – the modification in the payoffs directly reforms the game so that it is no longer a

prisoners' dilemma, even though there is no effective tertiary rule in place. Of course, we could tell the story otherwise, perhaps by invoking a civil religion that simply requires individuals to follow tertiary rules in relevant situations, in which case the civic religion requires the relevant rule to be in place. As these two cases make clear, the relationship between a civic religion and the need for rules and rule-following behaviour is neither simple nor direct.¹³

Turn now to the case of incorporating internal psychological rewards associated with rule compliance. Clearly in this case we need a rule of the form 'always cooperate in prisoners' dilemmas', but once such a rule is in place, its effects on the payoffs to individuals is essentially similar to the case already discussed, so that again whether or not the introduction of the rule and its associated psychological payoffs resolve the initial dilemma depends on the exact strength of the relevant rewards and punishments.¹⁴

The major difference between the two cases is then that the argument from psychological payoffs to rule-following clearly depends on the introduction of a rule, whereas the argument from civic religion may, depending on the detailed specification of the content of the civic religion, bypass the need for a rule by substituting a direct appeal to the relevant civic religion. Seen in terms of an argument for the significance of rules, therefore, the strategy of recognizing internal psychological reward and punishments associated with rule compliance and non-compliance might seem the more straightforward strategy. This fits with the idea that the major role of ideas such as civic religion might be in the setting of rule-making rather than rule-following.

None of this should be surprising. There is a parallel here with the more familiar argument in relation to rule-making that the shift to the constitutional setting of the choice of rules from the in-period setting of decision making under rules leads to a shift in the perspective of the

¹³ Of course, if we were to admit of an expressive dimension to rationality it would be possible to argue that in at least some cases individuals might wish to establish a rule to express their commitment to that rule rather than to enforce compliance.

¹⁴ The strategies of recognizing psychological rewards and individual motivations that go beyond self-interest both amount to transforming the apparent payoffs in games such as the prisoners' dilemma. An alternative strategy is to transform the assumption of agency and move away from an individualistic calculus towards a calculus based on teams or group identification. See, for example, Sugden, R. (2000) 'Team preferences', *Economics and Philosophy*, **16(02)**, 175-204. Gold, N. and Sugden, R. (2007) Theories of Team Agency. in F. Peter and H. B. Schmid (eds) *Rationality and Commitment*. Oxford: Oxford University Press, pp. 280-312. I will not pursue that strategy further here.

individual which will tend to emphasize the general value of the rule to all individuals rather than the specific value of the rule to the individual in terms of narrow self-interest. In that case the argument depends not on the introduction of civic religion or other non-*Homo Economicus* motivations, but rather on the operation of uncertainty. When considering a rule, the individual is supposed to be uncertain as to how that rule may affect her own interests over the longer period – so that she will tend to focus on the more general and therefore impersonal properties of the rule. Now, of course, the uncertainty argument here still begs the question of why the individual should expect the rule to be effective if she believes that she lives in a world of *Homo Economicus* types; both the uncertainty argument and the civic religion argument for more impersonal, social and explicitly normative perspective on rules in the rule-making arena gain additional traction if we build a degree of rule-following behaviour into the model via the incorporation of internal psychological rewards and punishments associated with rule compliance and non-compliance. Note also that the uncertainty argument and the civic religion argument also share the feature that they point to tendencies rather than categorical shifts in perspective. In each case, the argument is that the individual is somewhat more likely (rather than certain) to adopt the relevant rule than they would be in the base case.

These various lines of argument are best seen as working together. In the absence of any idea that might ground the expectation that at least many individuals will act as rule-followers in relevant circumstances, the uncertainty argument alone cannot get off the ground. But once we have a degree of rule-following, the uncertainty argument and the civic religion argument complement each other with the uncertainty argument serving to amplify or enhance the civic religion argument. In this way, enlightened self-interest operating via the uncertainty argument may work with the grain of the civic religion in providing the grounds for rule-making behaviour, depending of course on the more detailed specification of the content of the civic religion.

Whatever the details (and the details are important) it seems that something like the combination of these ingredients are going to be required to carry forward the project of contractarian constitutionalism associated with Buchanan. *The Reason of Rules* provides a good starting point for this project, but the more detailed account of the anatomy of rules provided here, together with the required greater emphasis on the supply of rules indicates

that there is much that remains to be done before we could plausibly claim to have a clear account of the variety of types and forms of rules that we observe, or a clear account of the processes of rule-making, or a clear account of the distinctions between constitutional, legal and informal rules. The CPE tradition, including *The Reason of Rules*, has done much to shift attention from policies and outcomes to institutions and rules, but reasoning about rules remains a complex challenge.

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