The Nature of Constitutions

Abstract: Following Thomas Hobbes, public-choice economists have theorized that constitutions arise from agreements among subordinates to establish private rules for their own transactions with each other. They then supposedly delegate to a sovereign the obligation to enforce these rules. The sovereign then violates the constitution by instituting wrong-headed rules to govern the subordinates' relations with each other. Instead, it seems more realistic to see constitutions as arising from subordinates' agreements with each other to resist excessive appropriations. An advanced constitution is a substitute for this original type of agreement, which only works well when the subordinates' numbers are small, as in some hunter-gatherer societies. An advanced constitution also limits a sovereign's appropriations, arises only from subordinates' threats of the sovereign, and marshals the sovereign's own instruments of force against him

MARK F. GRADY*
School of Law, George Mason University, Arlington, VA 22201, USA
(mgrady@gmu.edu)

MICHAEL T. McGUIRE
Neuropsychiatric Institute, University of California, Los Angeles, Los Angeles, CA 90095, USA

Key words: despotic, egalitarian, constitution, public choice, constitutional political economy, appropriation.

Introduction

What is the nature of constitutions? This is one of the most basic questions that can be asked of modern legal systems. It is also one of the most debated issues in political philosophy, public choice economics, and legal theory. In this article we propose a constitutional theory based on biology. It at first seems odd to suppose that nonhuman animals possess constitutions, but nonhuman primates do possess political orders, as Frans de Waal and others have demonstrated. Moreover, hunter-gatherer societies of human possess similar political orders, which have been studied by anthropologists and others. These primitive political orders provide a useful lens through which we can get fresh insight about the essential features of advanced human constitutional orders. Viewed in this way, the basic purpose of a constitution is prevent politically powerful individuals from excessive appropriation of their subordinates. The origin of a constitution is an agreement among subordinates to resist excessive appropriation. An advanced constitution enlists the sovereign's own resources of force and violence to enforce

this type of agreement. One reason why economists have found it difficult to theorize about constitutions is their models generally concern situations in which parties have agreed with each other. Although there is a contractual element to a constitutional process, a larger element is force. Force and violence is endemic to the biological world of which humans are of course a part. Biology in many ways offers a better perspective on the uses of force than does economics.

Natural Limits on Sovereign Appropriation

Many economic analysts have failed to create a clear distinction between constitutional law and private law. A biological approach to this issue clarifies the scope of each domain and yields a functional distinction between them.

Sovereigns have a biological incentive to appropriate their subordinates (see Vehrencamp (1983) and Grady & McGuire (1997)). Nevertheless, this incentive is limited by several factors that we will analyze. The most important limit is the exit values of the subordinates. Subordinates typically have some possibilities for exiting the group that the sovereign rules, either as individuals or as a secessionist group. Typically, exiters will prefer the latter approach because they thereby retain group benefits, such as the ability to exchange with each other.1 Nevertheless, the members of a secessionist group must realize that they will probably be subject to sovereign appropriation in the new group, so they should be willing to secede only if the current level of sovereign appropriation exceeds the expected level in the seceded group, which they might estimate as some average level of appropriation. Sovereigns can be expected to object to exit, especially group secession, unless the size of the group has reached a point where the marginal return to an additional group member is negative. In this latter situation, a sovereign may favor secession, because it effectively increases the surplus from which he can make his appropriations. In the range where the increment to group benefits from an additional group member is still positive, a self-interested and despotic sovereign can be expected to punish exit attempts, by individuals and especially by secessionist groups.

Among monkeys, dominant animals generally object to secession, and their objections usually lead to a great deal of fighting between the secessionist and the parent groups. Moreover, the process is gradual. A great deal of organization and

compliance among subordinates is required. Subordinates, when organizing against a leader, will ostracize other subordinates who do not follow the program.

Another limit on sovereign appropriations is the opportunity cost to the sovereign of further appropriations. We can think of this cost in three ways. A powerful subordinate may have some positive probability of overthrowing and displacing the current sovereign. The current sovereign may avoid defense costs and a diminished expected flow of appropriations by restraining his appropriations against this individual and even sharing with him some of the sovereign's own appropriations from others. Almost indistinguishably, the two powerful individuals can collectively appropriate their joint subordinates. This situation sometimes yields shared government, as under the Roman Triumvirate and Yeroen's alliance with Luit in de Waal's chimpanzee studies. Nevertheless, dominant animals typically have short lives (see Rowell 1974), and incremental appropriations can shorten them.

A second way to think about the sovereign's marginal cost of appropriation arises in the situation in which a subordinate could be useful in appropriating other subordinates for the sovereign's benefit. A sovereign would rationally limit his appropriations against such a "Sheriff of Nottingham" and would probably share the agent's appropriations with the agent himself. This second type of situation where the subordinate is the sovereign's agent is not totally distinct from the Triumvirate-type situation where the relevant parties are co-principals.

A third cost of appropriating subordinates arises when they are useful managers of group activities. A sovereign might not want to appropriate a successful hunting leader if the appropriation could drive such a valuable individual to exit. A special type of manager is a law enforcer; some subordinates will have special talents in this area, and they are especially valuable to the sovereign because effective private law enforcement increases group benefits, which make up the pool from which his own appropriations must come. Again, a sovereign faces a special opportunity cost in appropriating such an individual, because the appropriation might either induce the law enforcer to exit or to reduce her law enforcement activities. Again, this type of cost can verge into the Sheriff-of-Nottingham situation if the law enforcer is simultaneously an appropriation agent for the sovereign.

For present purposes the most significant limitation on a sovereign's appropriations is an effective agreement among subordinates to resist excesses. A constitution is a substitute for this type of agreement. Because these agreements are so important to the concept of a constitution, they will be analyzed in a separate section. Nevertheless, the sovereign role is a dualism. Sovereigns have a biological incentive to appropriate their subordinates, but they also have an incentive to keep the peace among subordinates and to enforce and even create private law, because group peace and the rule of law increase social benefits, which then become available to the sovereign as a pool for his appropriations. At a limit, if group benefits are zero, even the most powerful sovereign can appropriate nothing. At the other extreme, the sovereign of a group that earns large rewards from its interactions can appropriate a large amount before he drives members to exit.

The Sovereign's Self-Interest in Enforcing Private Law

Imagine a group of individuals living on an island from which no escape is possible, ruled by an absolute despot. Would this despot wish to have his subjects ruled by private law? The paradoxical answer is that this sovereign possesses a purely selfish incentive to create and enforce the most efficient private law for his subordinates. The type of law that the despot wants is the kind that maximizes benefits achieved by the group; this is an efficient type of law.

Suppose that the sovereign knows that much of his realm is suitable for agriculture (and that his subjects are capable of agriculture). He would probably wish to assign private property rights to some of his subordinates. If they did not farm on private property, their output would be less, because collective farming is usually less efficient. High agricultural output increases the social surplus available for appropriation.

The despot would also wish to have and to enforce an efficient law of tort. If one of his subjects tried to disseise another with force, the despot would wish to deter the tortfeasor. Otherwise, he might see a situation in which all of the benefits of group life would be dissipated in struggles to defend property or to acquire it through irregular means. These dissipating struggles would reduce the appropriation base.

The despot would also wish to have a law of contracts. This law would allow his subjects to specialize and further increase the benefits of group life, all of which would be available for the despot's appropriation.

In short, even despots have an incentive to create and to enforce efficient private laws because these laws increase wealth, which is the pool from which the sovereign makes his appropriations. In order to get this result, we do not have to assume that the despot is benevolent.

The history of the Soviet Union undercuts this analysis; nevertheless, the Soviet Union seems not to have been a very stable despotism, and it foundered because it did not yield enough wealth to be stable.

Agreements to Resist Excessive Sovereign Appropriations

1. Theory of Subordinate Resistance

Subordinates have an incentive to resist appropriations by dominant individuals, such as the sovereign. An extreme despot might wish to appropriate so much that subordinates are driven exactly to their exit margin. Nevertheless, a sovereign might stop before this point because of other natural limits on appropriation described above. Subordinates for their part might wish to allow a sovereign some appropriations that correspond to his special abilities as a law enforcer relative to other individuals contending for the office of sovereign. Suppose Rex is a better peacekeeper than Duke, who is the next most dominant animal in the group. In fact, suppose that Rex by virtue of his better peacekeeping abilities, could save the group $200 a year in terms of avoided injuries from fights that Rex could break up, but Duke could not. The subjects would have an interest in allowing Rex to appropriate at least $200 if that amount would keep Rex from abdicating. This amount would be a rent that Rex would earn from his superior law enforcement ability.

Suppose, however, that instead of contenting himself with a $200 appropriation, Rex appropriates $1000 per year from the group. Even if this level of appropriation leaves the group members in better positions than they could achieve through exit, they still might wish to resist $800 of Rex's appropriations. One option for the group would be to overthrow Rex and to install Duke in his

place. Although in the end the group members may find this option better than others, it does entail costs. They must eliminate Rex, which is a costly act, because Rex is the most dominant animal in the group; he may kill or wound some of the revolutionaries. Moreover, the time that they spend plotting is time that they cannot devote to other activities. Next, even if the group eliminates Rex, they will still need a law enforcer. Duke may not be as good at law enforcement (in this example he is definitely worse), so there is an additional cost on this ground. Worse, Duke might appropriate the same amount or more from the group than Rex did. In fact, if Duke is a better peacekeeper than Earl (the third most dominant animal), by a difference of $1000, the revolutionaries would be wise to accept from King Duke the same level of appropriation that they found insupportable from Rex. If the group of subordinates is going to find itself in this situation, it would do better to keep Rex. Hence, revolution may not be a good option. Its advisability depends on Rex's comparative advantage at law enforcement, the expected costs of revolution, and the group's expectation of how much a successor will appropriate, which will be influenced by *the successor's* comparative advantage at law enforcement relative to the abilities of the successor's own probable rival.

Short of overthrowing Rex, his subjects can agree among themselves to resist Rex's appropriations when they become excessive. To simplify, suppose (unrealistically) that Rex foregoes nothing of value to himself when he enforces the law between group members. The group members might offer Rex $200 plus their cost of revolution. Rex might demand from the group this amount plus whatever the difference is between Duke's comparative advantage at law enforcement and Earl's. In other words, individuals could disagree about how much the current sovereign is worth relative to the probable alternatives. At the limit of some murky range, however, all subordinates might see some additional appropriation as more than the sovereign is worth. Rather than overthrow this despot, however, the group could simply agree among themselves to resist excessive appropriations from him.

Several circumstances will determine how effective this agreement will be. First, agreements of this type are easier to enforce the smaller the group and the more stable its members are. The members must agree that when Rex excessively

appropriates one of their number all will come to his defense. This is obviously a collective action problem that will be easier for the group to solve when the group members are few in number and permanent, so that each decision to defend another earns a stream of benefits over some significant period of time. Large or unstable groups will find it difficult to enforce this type of informal agreement. The agreement will also be more enforceable the less dispersed is the group. Suppose the group and sovereign always occupy the same extremely small island. In this situation, it is more probable that the sovereign's excessive appropriations will take place in the presence of the whole subordinate group or some significant subset. This is the setting in which collective resistance works best. If the sovereign can isolate a group member and appropriate him when other subordinates are absent, he can throw the group back onto its revolution option, which is by hypothesis worse, because if it were better, the revolution would have probably already occurred.

This simple theory predicts that small geographically concentrated groups will probably be less despotic than large dispersed groups. If we think of historical groups of humans, the larger groups, such as Mayans, Incas, and Iroquois, seem to have possessed more despotic societies than smaller groups of hunter-gatherers, a subject to which we now turn.

2. Human Agreements to Resist Excessive Appropriation

The anthropologist Christopher Boehm has theorized that egalitarian human societies result from combinations among potential subordinates (see Boehm (1993)). He notes that "egalitarian society" has become one of anthropology's best known sociopolitical types. Indeed, many anthropologists have sought to explain why this type of society is so common in traditional human groups. Boehm surveyed anthropological studies of traditional societies. Of the 200 societies included, about half possessed no ethnography indicating the type of dominance behavior. Nevertheless, 48 of these societies had especially good studies bearing on the particular focus of Boehm's study: intentional sanctioning of dominant behavior. Boehm put these sanctions into the following categories: public opinion, ridicule and criticism, disobedience, and "extreme sanctions," such as assassination. Within the "criticism and ridicule" category, Boehm reported that when an Iban

chief gives someone a direct command, he is sharply rebuffed. The Kalahari San cut down braggarts, and Mbuti Pygmies shout down a leading hunter who has become overassertive. He gives many similar examples. Under "disobedience," Boehm reports that Arapaho, having lost respect for a chief, allowed him to remain as chief, but paid no attention to him. Among the Bedouin, a would-be "king," trying to impress Europeans, was publicly ignored. Many traditional societies have relied on more extreme sanctions, such as assassination of dominant individuals or desertion of them. In certain parts of Arnhem Land, Australian aborigines traditionally eliminated aggressive men who tried to dominate them. A !Kung community may execute extremely aggressive men. The Yap and Coeur d'Alene depose leaders who do not please them. The Caraja desert a bad chief. The Mizo of Assam and the Herero desert a chief who is unduly harsh.

3. Nonhuman Agreements to Resist Excessive Appropriation

Subordinate nonhuman primates generally resist excessive appropriation through one or more of four ways:

a. *Dispersion.* Subgroups of subordinate animals go off together outside the range of control of a dominant animal and engage in excessive eating, sex, and so forth.

b. *Disregard.* Subordinate animals reduce the amount of time in which they interact with dominant animals. This is a form of exclusion.

c. *Dominance displays.* Most interpretations of dominance displays are that a subordinate is challenging a dominant animal. However, there is another view. Subordinate challenges keep the dominant animal occupied, acknowledge his or her dominance, and thereby prevent excessive appropriation.

d. *Attack.* Subordinate animals sometimes join in ostracizing a dominant animal from the group or in captive situations sometimes physically attack the dominant animal.

Constitutional Law Distinguished from Private Law

As we will see, many analysts have failed to create a clear distinction between constitutional law and private law. A biological approach to this issue clarifies the scope of each domain and yields a functional distinction between them.

A basic error of many contractarians has been to suppose that subjects or citizens have hypothetically agreed to a reasonable set of private-law rules. Private-law rules are those that govern citizens' or subjects' relations with each other. These are the basic rules of society and include the law of property, contract, and tort. As we have seen, there is little sense in supposing that subordinates have agreed to these rules. A malevolent despot has the same interest in promoting efficient private-law rules as does the most enlightened democracy. Private-law rules do not present a constitutional problem. Thinking that they do deflects attention from the very real problem of sovereign appropriation. The issue of whether a sovereign has excessively appropriated its subjects could be sensibly analyzed within a contractarian framework, but most contractarians have not done so. In short, many analysts have confounded the nonproblem of private law with the real problem of excessive sovereign appropriation and have thereby failed to clarify either.

Even Thomas Hobbes supposed that private law presented a large problem for civil society. Indeed, Hobbes laid this shaky foundation for subsequent contractarians. He famously began his analysis with a consideration of the state of nature. In a critical error, Hobbes assumed that before formal governments existed people were reasonably equal in endowments.[2] From this rough equality of mental and physical assets, each had an equal hope of acquiring the same ends, which were scarce. Hence, individuals fell into competition with each other, which resulted in the "war of every man against every man." (Hobbes (1668), pp. 76-78.) For Hobbes, war did not consist only of actual battles, but also threats of battle.[3] In such a state, opportunities for production, investment, learning, and exchange were limited, because each individual possessed "continual fear and danger of violent death." In order to relieve themselves of eternal conflict, individuals have an incentive to organize themselves into a "commonwealth," which is a hierarchy that "tie[s] them by fear of punishment to the performance of their covenants and observation of th[e] laws of nature . . . ." (Hobbes (1668), p. 106.) They institute this commonwealth by giving a monarch or an assembly the right to represent them. (Hobbes (1668), p. 110)

It seems reasonable to suppose that human beings in the state of nature were no more equal than chimpanzees, who have strikingly fewer capabilities for

distinguishing themselves from each other. Nevertheless, chimpanzees routinely organize themselves into political hierarchies in which the leader becomes a peacekeeper as well as an appropriator of subordinates. (See de Waal (1982, 1989, 1996).) As we have already noted, once a leader of a group becomes self-interested in the amount of spoils available to him, he also becomes interested in organizing his subordinates to maximize group wealth, as by enforcing efficient private-law rules. Contrary to Hobbes, these efficient private law rules exist in the state of nature. Hobbes asserted that good private law rules depended on the existence of a "commonwealth" or some other ideal form of government; nevertheless, the foregoing analysis shows no necessary connection between the two. If a hunter-gatherer society evolved long enough, it should acquire wealth-maximizing private-law rules even in the absence of any political structure that would deserve the name of "commonwealth."

Because Hobbes thought that worthy private-law rules could not arise in the state of nature, he had to posit a commonwealth, created by the hypothetical contract among subjects or citizens as the foundation for these rules, which he analyzed in detail. Correspondingly, when it came to the natural limits that might exist for the sovereign's appropriations, Hobbes found hardly any. For instance, he asserted that no subject had the right to defend another against any government imposition, just or unjust, though he did admit the right of any subject to defend at least his own person against violent force, whether wielded by the commonwealth or by another subject.4 His analysis constantly emphasized that the constitutional problem was the legitimacy of private law. Nevertheless, despite Hobbes, the real constitutional problem is the legitimacy of the sovereign's appropriations, as practically every real constitution framer has recognized.

The leading constitutional economist James Buchanan has followed Hobbes in stressing as a problem the constitutional legitimacy of private law rules. Even more explicitly than Hobbes, Buchanan has claimed that the problem of sovereign appropriation is inextricably linked to the legitimacy of private law rules. In his justly acclaimed work *The Limits of Liberty* (1975), Buchanan formalized and extended Hobbes's analysis. Buchanan argues that it is useful to conceive of civil society as the result of three steps: (1) a natural distribution of resources; (2) a constitutional contract that is negotiated between the members of society; and (3) a

post-constitutional regime in which contract between society members becomes possible because of the constitutional contract (see Buchanan (1975), p. 31). The natural distribution of the resources is simply the one that results from the original, supposed Hobbesian anarchy in the state of nature. The parties' attacks against each other and their defenses yield de facto private property and a distribution of it among them (see Buchanan (1975), pp. 23-25). This natural distribution then becomes the basis for Buchanan's "constitutional contract." (see Buchanan (1975), p. 24). The parties realize that they can save their costs of attack and defense against each other if they all agree to a constitution that allocates legal property rights among them and then de-legitimizes their further appropriations of each other (see Buchanan (1975), p. 24). Moreover, besides a law of property, the members of society can also agree to a law of contract, which is in any event implied by their agreement to outlaw forcible appropriations of property. In this new world, created by the constitutional contract, the parties save the costs of attack and defense and acquire the benefits of trade. Buchanan writes as if the problem of sovereign appropriation logically derives from the problem of knowing how to make the structure of private law legitimate. Nevertheless, as will be argued more thoroughly in the next section, it is impossible to get a theory of sovereign restraint from a theory of how private law becomes legitimate. As we have already seen, the legitimacy of private law is not a large problem in any event. Even the most extreme despot has an incentive to enforce private law rules that maximize social wealth: that way he can appropriate more. Efficient private law rules do not depend on a constitutional contract, as Buchanan claims they do; instead, they depend only on the evolution of a hierarchical structure of society that gives some individuals the power to appropriate wealth from others. This hierarchical structure will normally follow either from a disparity of endowments in the state of nature or simply from the differing fortunes of different individuals who possessed substantially equivalent endowments.

Buchanan's own theory of sovereign restraint is modest; most despots could evade its requirements. Buchanan writes that "the government" might arbitrarily reassign private rights in a way that "violates the basic terms upon which the social structure operates." (Buchanan (1975), p. 83.) In this situation, Buchanan

reasons, "[T]he is no requirement that its actions be 'honored' with ethical sanctions." (Buchanan (1975), pp. 83-84.)

The role that Buchanan envisions for the sovereign is "enforcing agent for individual rights." Nevertheless, he argues that a sovereign might overstep and alter the system of private rights, which would deprive individuals of their private rights.[5] This is a basic theme that runs through the whole public choice literature, which Buchanan and Gordon Tullock founded. The basic constitutional danger is supposedly the sovereign (or as Buchanan says "the government") that does evil by altering the structure of private rights.[6] Yet, an overreaching sovereign is far less likely to appropriate by altering contract rules or even rules of private property. A more direct route is simply to raise taxes. A sovereign that took private property for its own use would not violate private property rules as they are conventionally understood. (Such a sovereign might violate a public right defined by a real constitution; a Hobbesian constitutional contract does not define in any detailed way restraints on the sovereign power to take private property for sovereign purposes.) Private property rules govern behavior by private individuals. To argue that the sovereign is subject to the same rules has no basis in the constitutional contract that Buchanan describes, because it is a bargain between private individuals. Nevertheless, a theme that runs through the public choice literature is that we can spot a despotic government by how little it respects and enforces private rights. This is a mistake. A despotic government could fully enforce the most just or efficient private property rights, but then tax away a huge fraction of the social surplus yielded by these rights and spend the revenues on fancy yachts. Even a despotic democratic majority would be unlikely to appropriate through altering private rights, which is something that will be discussed in the next section.

The Uncertain Trumpet of Public Choice Economics

> A necessary step in the process of genuine constitutional revolution is a consensual redefinition of individual rights and claims. Many of the interventions of government have emerged precisely because of ambiguities in the definition of individual rights. Buchanan (1975), p. 178.

Most public choice economists and modern libertarians have argued as if the problem of despotism arises from ambiguities in private rights. These critics seem

to reason from the premises of a legal system that never existed. In real-world legal systems, private rights and obligations exist among private persons; sovereign rights and obligations exist among sovereigns. Moreover, sovereign obligations that run against the purely selfish interests of the sovereign arise only from real constitutions often imposed on the sovereign by threats of violence from their subordinates, not in any event from Hobbesian bargains among subordinates. The subordinates do not have to agree that they do not want to be excessively appropriated. If anything, they need to agree among themselves to resist the sovereign's appropriation, which Hobbes saw as a criminal conspiracy.

Suppose a sovereign declared a monopoly in the production of some good or service and then sold this franchise to one of his subjects. Although this sovereign act could be despotic, it would not be a violation of any private right, at least as private rights have been conventionally understood. Our common-law private rights arose in a context in which the sovereign wanted individuals to have property rights and contract rights, because efficient private rights expanded the pool from which the sovereign could appropriate a surplus. The sovereign himself did not have any interest in restraining his own appropriations except that excessive appropriations might lead to revolution or reduced revenues, both of which are nonlegal limitations. The basic structure of private and sovereign rights *before constitutions* is easily inferable from this basic setup. In general, private restraints on trade reduce social wealth, so we might expect the sovereign to oppose them unless they in some way facilitated appropriation, as by creating a pool of rents that could be efficiently taxed. On the other hand, we would expect no general rule of when the sovereign itself can franchise a monopoly. Franchising monopolies is obviously one method by which a sovereign can efficiently appropriate his subjects. In effect, he relies on the market as his tax collector. Hence, we will not be able to identify despotic creations of monopolies by examining and clarifying private rights as they have been given to us by tradition. Moreover, we will find no principled or reasoned development of limitations on the sovereign power to create monopolies, because these limitations have come from threats against sovereigns by their subjects in constitutional confrontations. If subjects are concerned to limit sovereign appropriations through monopoly franchises, it would make good sense for them to consider the limitations that they might have the power to impose on

the sovereign. The limitations that they might impose would probably not depend on philosophical principle, but on how effectively they can form an alliance around some asserted constitutional principle. For instance, it might be possible to limit a sovereign from creating most monopoly franchises, even while allowing the sovereign to retain the power to create a few, such as a monopoly over the production of nuclear bomb fuel or nerve gas.

In our modern world where sovereigns tend to be democratic majorities, sovereign appropriations sometimes have the appearance of private controversies. In this situation, it is still better to see them for what they are. Suppose a local democratic majority restricts the use of a private individual's buildable land to wetlands. Professor Buchanan and many others would argue that the government had altered the content of private rights. A problem with this view is that it relies on no private-law tradition. The private law of property was developed to deal with private disputes. Under this law it is clear that it violates an owner's property right for a neighbor to walk onto to the property and pick apples, to build a giant spite fence that casts a shadow on the land, to build an alkaline factory on his own property that send noxious gases across the line, and so forth. It was not a traditional private-law dispute for a neighbor somehow to insist that a land owner refrain from building. There is thus no developed body of private law that shows how this type of imposition might violate the owner's property rights. Rather than create such a law, which would have no application in private disputes, it seems better to examine the question in terms of whether it is an impermissible sovereign appropriation. That a particular appropriation has no private analogue should not influence the analysis.

The Purpose of Constitutions

1. The Common and Different Interests of Sovereigns and Subjects

Contrary to the suggestions of many public-choice theorists, the purpose of constitutions is not to clarify private rights, but to restrain sovereign appropriations. From a biological point of view, the incentives of subjects and sovereigns are exactly the same. All want more resources for themselves and for their kin. Nevertheless, some individuals are stronger or better placed than others and can thereby appropriate their fellows. The sovereigns will have a self-interest in seeing

that the subjects organize their affairs efficiently; in this way the sovereigns can appropriate more from them. The subjects also have an interest in organizing their affairs efficiently, so over a vast range of legal and practical matters, subjects and sovereigns have the same interests. Generally speaking, private law fits into this area of common interest. The main difference is that sovereigns can appropriate their subjects and want to do so, whereas the subjects wish to resist these appropriations. Both sovereigns and subjects act from common motives.

Originally, a constitution is simply an agreement among subjects to resist sovereign appropriations. An advanced constitution enlists the sovereign's own instruments of force and violence against the sovereign. This type of constitution comes into being only from a violent revolution waged by the subjects against the sovereign or by their realistic threat of one.

2. Magna Carta

In the Anglo-American tradition the first significant constitution was the Magna Carta. This document was obviously not a Hobbesian bargain among equals, nor did it define or refine private law rights. It resulted when King John's leading subjects threatened him with death if he did not reduce his appropriations of them. Because it was an early constitution, it is unsurprising that the document is basically a list of all of the significant ways in which John did appropriate his subjects and a stipulation that he should be more moderate in the future. Most of the provisions limited the King's right to collect ancient feudal fees. The second provision (cap. 2) of the 1215 version is a good example.7 In the political structure of the time, the barons seeking the Charter were sovereigns and appropriators in their own right. A significant result was to allow them to keep a greater proportion of their own appropriations. Some of the provisions limited the King's ability to appropriate common people. For instance, cap. 28 provided:

> No constable or any of our bailiffs shall take any man's corn or other chattels unless he pays cash for them at once or can delay payment with the agreement of the seller.8

Appropriations by the King inevitably subtracted from the pool available to his barons.

3. The Glorious Revolution

The Stuarts, who took possession of the English Crown in 1603, substantially increased sovereign appropriations (see generally North & Weingast (1989) and Ashton (1960)). They demanded loans that they did not repay. They sold monopolies (see Ekelund & Tollison (1981). They condemned private property without paying just compensation (see North & Weingast (1989), p. 813). They consolidated their power over the judiciary by using the Star Chamber, which could reverse decisions against the Crown, and by firing independent judges, such as Chief Justice Coke (see North & Weingast (1989), p. 813). These appropriations ultimately led to civil war and the temporary abolition of the monarchy. In 1641 the opposition abolished the Star Chamber, and the courts began to impose limits on the Crown's power to create monopolies. Later, after the Glorious Revolution, when Parliament installed William and Mary as the new monarchs, it also created a number of limitations on sovereign appropriations. Parliament itself shared sovereignty with the monarch; Parliament gave itself the exclusive power to raise new taxes; Parliament abolish prerogative courts that enforced royal proclamations; and it created new tenure protections for the judiciary (see North & Weingast (1989), p. 816).

4. The American Revolution and the U.S. Constitution

The U.S. Constitution was also created by a revolution against the English sovereign. The Declaration of Independence recited the same times of excessive sovereign appropriations that laid the groundwork for English constitutional crises. The American Declaration of Independence took the British constitution as a new baseline for its definition of excessive appropriation. Here are some of the American revolutionaries' complaints against the British sovereign:

> For cutting off our Trade with all Parts of the World:
>
> For imposing Taxes on us without our Consent.
>
> ...
>
> He has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People.

The American Constitution itself grew out of a weak revolutionary government. The Framers' purpose was to create a limited government that possessed checks and balances that would make sovereign appropriation difficult (see McGinnis (1997)). The basic purpose of this Constitution is to use the sovereign's own instruments of force to limit sovereign appropriations.

Conclusion

The public-choice theorists have developed a theory of government failure that is mismatched with reality. These theorists have been constrained by the structure of economics, which is basically a theory about consensual arrangements. Possibly for this reason, they have been attracted to contractarian theories of the constitution. Nevertheless, these theories fail to explain an important feature of group life that has been well described by biologists: dominant animals, including human animals, often seek forcibly to appropriate weaker animals. When weaker animals band together to resist these appropriations, we have the beginning of a constitutional order. In addition, public-choice theorists have largely failed to recognize that even a tyrannical despot has an interest in having his subordinates governed by efficient rules. Public-choice economists have largely supposed that government fails when government subverts private-law rules. This is an unlikely method for a sovereign to appropriate subjects. A more direct method is forcibly to appropriate them. Accordingly, real constitutions and their more informal precursors have focused on limiting forcible sovereign appropriations. Seeing these forcible appropriations as the sovereign's self-interested perversion of private law rules is an awkward and unrealistic model.

References cited

Ashton, Robert. 1960.The crown and the money market, 1603-1640. Oxford University Press, Oxford.

Boehm, Christopher. 1993. Egalitarian behavior and reverse dominance hierarchy. Current Anthropology 34:227-254.

Buchanan, James M. 1975. The limits of liberty: between anarchy and Leviathan. University of Chicago Press, Chicago.

de Waal, Frans. 1982. Chimpanzee politics: power and sex among apes. Johns Hopkins University Press, Baltimore.

de Waal, Frans. 1989. Peacemaking among primates. Harvard University Press, Cambridge.

de Waal, Frans. 1996. Good natured: the origins of right and wrong in humans and other animals. Harvard University Press, Cambridge.

Ekelund, Robert B. & Robert D. Tollison. 1981. Mercantilism as a rent-seeking society. Texas A&M University Press, College Station.

Grady, Mark F. & Michael T. McGuire. 1997. A theory of the origin of natural law. Journal of Contemporary Legal Issues 8:87-129.

Hirst, Derek. 1986. Authority and conflict: England, 1603-1658. Harvard University Press, Cambridge.

Hobbes, Thomas. 1994. Leviathan: with selected variants from the Latin edition of 1668. Hackett Pub. Co, Indianapolis.

Holt, J.C. 1992. Magna Carta. 2d ed. Cambridge University Press, Cambridge.

McGinnis, John O. 1997. The original Constitution and its decline: a public choice perspective. Harvard Journal of Law & Public Policy 21:195-209.

North, Douglass C. & Barry R. Weingast. 1989. Constitutions and commitment: the evolution of institutions governing public choice in seventeenth-century England. Journal of Economic History 49: 803-832.

Rowell, Thelma E. 1974. The concept of social dominance. Behavioral Biology 11:131-154.

Vehrencamp, Sandra L. 1983. A model for the evolution of despotic versus egalitarian societies. Animal Behavior 31:667-682

---

1. Among most primate groups, adolescent males migrate to other groups, usually to those that have a male relative, while females remain in their natal group. This process seems to be hardwired; it is dangerous because survival rates during migration are low. Second, among field living primates fission occurs frequently. Matrilines stay together during fissions, but males may go with one group or another and not stay with their mothers.

2. He wrote:

Nature hath made men so equal in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he. (Hobbes (1668), p. 74.)

3. Hobbes wrote:

   For war consisteth not in battle only, or the act of fighting, but in a tract of time wherein the will to contend by battle is sufficiently known. (Hobbes (1668), p. 76.)

4. Hobbes's detailed argument on this point is instructive:

   To resist the sword of the commonwealth in defence of another man, guilty or innocent, no man hath liberty, because such liberty takes away from the sovereign the means of protecting us, and is therefore destructive of the very essence of government. But in case a great many men together have already resisted the sovereign power unjustly, or committed some capital crime for which every one of them expecteth death, whether have they not the liberty then to join together, and assist, and defend one another? Certainly they have; for they but defend their lives, which the guilty man may as well do as the innocent. There was indeed injustice in the first breach of their duty; their bearing of arms consequent to it, though it be to maintain what they have done, is no new unjust act. And if it be only to defend their persons, it is not unjust at all. But the offer of pardon taketh from them to whom it is offered the plea of self-defence, and maketh their perseverance in assisting or defending the rest unlawful. (Hobbes (1668), p. 143.)

5. Buchanan wrote:

   If "the government," which is conceived as an enforcing agent for individual rights, itself captures powers to change the legal structure, individuals are deprived of their rights and their existence becomes equivalent to that described in Hobbesian anarchy. Much of what we observe in the 1970s can pessimistically be described in precisely these terms. Buchanan (1975), p. 84.

6. Buchanan expanded on this theme:

   [M]y analysis lends potential support to modern-day anarchists, who deny the legitimacy of much of the action implemented by the governmental-bureaucratic apparatus. Legitimacy is "earned" by government's adherence to the terms of the legal structure that allows individuals' claims to remain within a set of reasonable renegotiation expectations, at least for most members of the community. If government oversteps these bounds, it is not "legitimate" in the strict definitional sense of the term, and its acts may be regarded as "criminal." Buchanan (1975), p. 84.

7. Magna Carta, cap. 2 provided:

   If any of our earls or barons, or others holding of us in chief by knight service shall die, and at his death his heir be of full age and owe relief, he shall have his inheritance on payment of the ancient relief, namely the heir or heirs of an earl £100 for a whole earl's barony, the heir or heirs of a baron £100 for a whole barony, the heir or heirs of a knight 100s. at most for a whole knight's

fee; and anyone who owes less shall give less according to the ancient usage of fiefs.

8. See also Magna Carta, cap. 27: “If any free man dies intestate, his chattels are to be distributed by his nearest relations and friends, under the supervision of the Church, saving to everyone the debts which the deceased owed him.” This provision would have blocked an escheat to a sovereign, whether the King or another. It probably also distributed wealth to the Church, which was another of King John’s threatened revolutionaries.