

A Critical Review of Robert Cooter's *The Strategic Constitution*

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Robert Cooter's *The Strategic Constitution*¹ aims to provide an introductory, textbook-style treatment of constitutional design by "using models of strategic behavior developed for markets and adapted to politics" (pg. 5). It particularly draws inspiration from public choice theory,² contractarian approaches,³ and law and economics.⁴ Cooter defends this unorthodox approach to the study of constitutions on two grounds. First, he implies that economic analysis has universal applicability, and hence can facilitate comparative constitutional analysis and the construction of generalizable theory: "In Berkeley, Berlin, and Bombay," writes Cooter, "microeconomics is the same and law is different" (pg. 8). Second, Cooter wishes to remedy a perceived imbalance in constitutional theory: "From the viewpoint of a person who takes consequences seriously, constitutional theorists look too hard for the right words and not hard enough for the real causes. Constitutional theory needs more models and less meaning" (pg. 3). The strategic analysis of constitutions, posits Cooter, can operationalize abstract theorizing into policy prescription: by "predicting the consequences of fundamental laws, constitutional theory can inform the public, guide politicians, and improve the decisions of courts" (pg. 2). Constitution-drafters and political actors seeking to alter existing constitutions face real choices that bear significant social consequences – they thus ought to act strategically and to weigh the costs and benefits of particular constitutional designs. Economic analysis, argues Cooter, is uniquely suited to facilitate this endeavor.

In many ways, Cooter delivers on his promise. His use of public choice theory to justify treating mobility as a human right is particularly persuasive. Public choice theory posits that given diversity of individual preferences, there should be enough jurisdictions delivering divergent bundles of public goods to satiate diverse wants – "the optimal number of jurisdictions thus increases with population diversity" (pg. 129). In a Tiebout sorting model, individuals "vote with their feet" by moving to jurisdictions that deliver the local public goods they most value. Yet Cooter

¹ Cooter, Robert. 2000. *The Strategic Constitution*. Princeton, NJ: Princeton University Press.

² Public choice theory, which evolved from the work of Charles Tiebout, "uses economic models of rational behavior to explain the workings of political institutions," (pg. 7) as well as citizens' responses to various institutional configurations (voters usually select districts where institutional and public good provision best match their own preferences, thereby selecting institutions by "voting with their feet").

³ For Cooter, contractarianism has three components: "First, it captures the idea that state power derives from the consent of the governed [...] Second, contractarianism views the state as serving people, not as people serving the state [...] Third, by acknowledging that people are free by nature, contractarianism provides a rationale for constitutional rights of individuals" (pg. 273).

⁴ The economic analysis of law is traced back by Cooter to Ronald Coase's famous 1960 article, "The Problem of Social Cost," which outlines the Coase theorem, and to the work of prominent law and economics scholars such as Richard Posner, who apply "economic analysis based on formal theory" to law (pg. 6).

(in a move that he repeats throughout the book) notes that in the real world a significant market failure arises: mobility is costly, thereby throwing a wrench into the process of Tiebout sorting. Thus “the contribution of free mobility to the efficient supply of local public goods provides an economic justification for guaranteeing mobility as an individual right in a federal system” (pg. 130). In such treatments, the underlying humanism of seemingly cold, rational economic theory shines through and is thoroughly satisfying.

Similarly, Cooter’s recognition of the limits market analogy deserves much praise. He disarms unqualified calls for unregulated free market competition by citing Hirschman’s famous argument in *Exit, Voice, and Loyalty*⁵ that economic competition can contribute to the decline in the quality of public goods.⁶ In such situations, Cooter argues that subsuming the issue within a framework of competition amongst governments – which requires public, as opposed to private, provision of the good in question – “can produce a race to quality and efficiency” by transforming an individual’s “exit” option into an incentive to exercise one’s “voice” by bargaining over policy (pg. 129). Another example where Cooter undermines the hegemony of the market analogy is in his discussion of racial discrimination. Although economic theory predicts that “perfect competition eliminates discrimination by employers,”⁷ Cooter turns this conclusion on its head by developing “a model of discrimination based on power, not competition”: here, organizations with discriminatory preferences “can shift the cost of segregation to its victims” by using their disproportionate (or monopoly) power to “threaten employers who failed to discriminate,” thereby “excluding [the victims] from markets” (pg. 344). Such examples reveal Cooter’s ability to separate the application of economic analysis from the unqualified promotion of neoliberalism. This approach is confirmed by Cooter’s advocacy of “the material welfare school,” which “assumes that poor people get more welfare from additional income than do rich people. This normative ideal requires redistribution from rich to poor in order to maximize the sum of utilities” (pg. 263). Such an approach resists the tendency to advocate for constitutional designs that maximize “wealth” by shifting from the language of “wants” to the language of “needs.” Instead of treating constitutional rights as “commodities” – as sources of wealth that trade off with each other – Cooter treats rights as “sources of welfare” that “trade off with other sources of welfare, such as health care and housing” (pg. 258). As such, Cooter’s approach tends to reduce “the autonomy of citizens below the level

⁵ Hirschman, Albert. 1970. *Exit, Voice, and Loyalty*. Cambridge, MA: Harvard University Press.

⁶ Cooter writes: “In a celebrated example, Albert Hirschman observed that monopoly power by a Nigerian railroad forced aggrieved buyers to “voice” their complaints through politics. The development of competition from trucks, however, permitted buyers to “exit,” which caused railway services to deteriorate” (pg. 128).

⁷ For discrimination acts as an implicit tax on the employer: “In labor markets, discriminatory employers constrain themselves by refusing to hire or promote people with disfavored traits. The constraint imposes higher costs to obtain the same quality of labor” (pg. 341).

achieved by maximizing wealth” (pg. 268). In so doing, Cooter tempers neoliberal libertarianism with a preoccupation for the constitutional provision of a minimum level of socioeconomic security.

A final quality of Cooter’s book is its theoretical fertility. To take but one example, Cooter theorizes how the constitutional fragmentation of political power can be achieved in a variety of ways and engender an equally diverse set of institutional outcomes. Bicameralism promotes bargaining between political parties⁸ and weakens executive power;⁹ the separation of powers destabilizes political cartels¹⁰ and increases judicial discretion;¹¹ proportional electoral systems with multiparty competition improve minority representation¹² and party discipline;¹³ multiple unifunctional institutions (issue “factoring”) empower the median voter whereas bundling (or “splicing”) issues within multifunctional institutions satisfies a wider range political preferences by facilitating inter-issue bargaining.¹⁴ Cooter is economics’ Tocqueville, firing off fertile theory left and right.

Yet despite these obvious merits, significant issues in Cooter’s work remain. First, despite Cooter’s skepticism of neoliberal market analogies and his promotion of the material welfare school, his constitutional ideology seems to lie firmly with the 18th century American constitutional thought. This has two implications. First, Cooter implies that constitutions should privilege negative rights at the expense of positive rights: only “after providing security, legality, and liberty” can a constitution “look to the prosperity of its citizens” (pg. 12). Further, he seems to suggest that

⁸ Because it is less likely for any one political party to retain control of both chambers, Cooter argues that bicameralism induces minority-majority compromise: “Instead of minority rule or majority rule, bicameralism makes the majority and the minority cooperate in order to rule” (pg. 187).

⁹ Because bicameralism increases the likelihood that the president will be from a party that does not monopolize power in both chambers, Cooter argues that this requires the president to bargain with Parliament. This weakens the executive, for “a strong executive supplies more orders and fewer bargains, whereas a weak executive supplies more bargains and fewer orders” (pg. 189).

¹⁰ Cooter argues: “Separating powers transforms subordinates into equals and replaces orders with bargains. The decision to separate powers in the constitution is a choice for bargains over orders as the way to conduct government” (pg. 211).

¹¹ Cooter notes that because the legislature has to agree to override a court’s interpretation, bicameralism’s augmentation of transaction costs in bargaining renders the legislative repeal of court rulings less likely. Thus “the separation of powers in other branches affects the court’s discretionary power to interpret the law” (pgs. 225-226).

¹² “A system of proportional representation,” argues Cooter, “can guarantee representation in political bargaining to every minority group. Two-party competition, however, contains no such guarantees. When groups coalesce, some minorities may suffer permanent exclusion from the ruling coalition” (pg. 146).

¹³ Cooter writes that in most proportional electoral systems, voters do not select individual candidates but “choose among alternative lists. On any party’s list, a voter may like some candidates and dislike others. In drawing up a party’s list, the leadership typically balances the intrinsic appeal of candidates to voters and the loyalty of candidates to the party. The party leaders will sacrifice some popularity to increase loyalty. Thus proportional representation tends to strengthen party loyalty” (pg. 180).

¹⁴ Cooter writes: “Broad jurisdiction splices independent issues together like the strands of a rope. In contrast, narrow jurisdiction factors politics into independent issues [...] splicing facilitates bargaining across issues, and successful bargaining across issues satisfies the preferences of voters more completely than allowing the median voter to prevail on separate dimensions of choice. But, if bargaining fails, splicing increases the probability of cycling and the need for agenda control” (pg. 121).

positive rights are most infeasible precisely in the regions of the world where they may be most needed: “A rich country can implement both kinds of rights [positive and negative], whereas a poor country can implement liberty rights and not welfare rights” (pg. 267). It is undoubtedly true that positive rights requiring expansive public commitments are more expensive than negative rights necessitating state abstention from interfering with individual autonomy. Yet this is precisely where economic analysis should empower political actors – in the tradition of Hirschman’s “possibilism”¹⁵ - by unearthing creative ways to balance economic needs with fiscal constraints, rather than engendering a sense of helplessness by foreclosing possibilities. Second, Cooter’s “strategic” approach centers on the analysis of bargaining, which in turn requires the diffusion of authority amongst multiple veto players as opposed to its concentration. As such, Cooter aligns with the American tradition’s preoccupation with how best to limit government authority. Yet this position assumes state capacity to implement policies, provide public goods, and deliver services – an assumption that may be tenuous at best in the fragile states of parts of Africa, Asia, and Latin America. By assuming the presence of governing effectiveness, Cooter’s book fails to shed light on one of the most salient issues facing contemporary constitutional drafters.

Secondly, Cooter’s economic language carries normative undertones that he fails to adequately acknowledge. Consider, for example, his treatment of “transaction costs,” a leitmotif in his work. Transaction costs are continually treated as undesirable – an institutional design that increases transaction costs is only desirable insofar as it offsets such costs by providing something of greater value, such as better representation of voter preferences. But transaction costs may, in some cases, actually be inherently desirable. Cass Sunstein’s theory in *Designing Democracy*,¹⁶ for example, advocates for constitutional designs that increase the transaction costs of bargaining because this promotes careful and exhaustive reason-giving before passing laws that may bear significant social consequences. Here, Cooter’s economic lexicon fails to recognize the dual nature of a concept fundamental to his own analysis.

And while we are exploring the many meanings that may be associated with particular economic terms, we may similarly question Cooter’s treatment of economics as a universally applicable framework of social inquiry. This may well be true at the macro-structural level when considering the economic impact of a tariff, but it surely is a tenuous assumption indeed at the interpersonal level – which is exactly the level of abstraction where Cooter settles for most of his book. Bargaining involves interpersonal relationships, which implicates cultural understanding and

¹⁵ Hirschman, Albert. 1971. *A Bias For Hope*. New Haven, CT: Yale University Press.

¹⁶ Sunstein, Cass R. 2001. *Designing Democracy: What Constitutions Do*. New York, NY: Oxford University Press.

social norms concerning dispute resolution. If anything is context-specific, surely culture is, and its crucial role in inter-group and interpersonal dynamics mediates, blunts, and frustrates any attempt to posit that a mechanism works the exact same way regardless of time and place. Law and economics concepts may be leveraged to partially remedy cultural heterogeneity – for example, a culture that strongly disfavors bargaining and conflict may be said to place an implicit tax upon institutions that tend to prolong contentious political debates – but this is a possibility unexplored by Cooter.

Finally, in seeking to provide a theory of constitutional design that transcends longstanding debates within political theory, Cooter fails to recognize the limitations and indeterminacies of his own approach. How are we, for example, to evaluate the relative value of a representative government – one which, under Cooter’s theory, should include a larger legislature, multiple parties, and bicameralism – over a government that can act more quickly and decisively - say, by reducing the size of the legislature, curtailing the number of parties, and strengthening the executive? A government that is united and that acts decisively (such as that of the United Kingdom) may be more accountable to the people (for how could the Prime Minister’s party persuasively shed responsibility for its actions by blaming an opposition relegated to mere symbolic acts of protest?) but may reduce the opportunities for reason-giving and short-circuit important public debates about policy. Economics is seemingly helpless in the face of such inherently normative value judgments. Thus Cooter’s effort to transcend normative constitutional theory leaves the reader begging for the latter’s triumphant return.

Book Review (reviewing Robert D. Cooter, *The Strategic Constitution* (2000)) [Book Review]. Richard A. Epstein. *Ethics* 113:695 (2003).
Review of the Book *Stored Tissue Samples. Ethical, Legal, and Public Policy Implications.*, Robert F. Weir, 2000. [REVIEW] A. H. Vedder - 2000 - *Bioethics* 14:80-82. *Against Originalism: Getting Over the U. S. Constitution.* Austin W. Bramwell - 2004 - *Critical Review* 16 (4):431-453. *Analytics.* Added to PP index 2014-03-23. *The strategic constitution.* R Cooter. Princeton University Press, 2002. 750. 2002. *Bargaining in the shadow of the law: A testable model of strategic behavior.* R Cooter, S Marks, R Mnookin. *The Journal of Legal Studies* 11 (2), 225-251, 1982. 731. 1982. *Decentralized law for a complex economy: the structural approach to adjudicating the new law merchant.* RD Cooter. *University of Pennsylvania Law Review* 144 (5), 1643-1696, 1996. 675. 1996.
2000. *Structural adjudication and the new law merchant: a model of decentralized law.* RD Cooter. *International Review of Law and Economics* 14 (2), 215-231, 1994. 349. 1994.

" Robert D. Cooter has written a marvelous book. The Strategic Constitution is truly a tour de force, applying economic analysis to virtually the full range of constitutional issues that arise in a democracy and doing so in a way that is both engaging and sprinkled with humor. . . . The book deserves to be standard reading for those with a serious interest in the fit between constitutions and democratic values. "The Strategic Constitution comprehensively analyzes constitutional issues. The result is impressive. Scholars seeking a stronger grasp of constitutional issues, and teachers seeking an economically sound theoretical foundation for teaching constitutional law, will find this book quite useful."---Donald J. Boudreaux, *American Law and Economics*. Book Review (reviewing Robert D. Cooter, *The Strategic Constitution* (2000)) [Book Review]. Richard A. Epstein. *Ethics* 113:695 (2003). "Review of the Book *Stored Tissue Samples. Ethical, Legal, and Public Policy Implications.*, Robert F. Weir, 2000. [REVIEW] A. H. Vedder - 2000 - *Bioethics* 14:80-82. *Against Originalism: Getting Over the U. S. Constitution.* Austin W. Bramwell - 2004 - *Critical Review* 16 (4):431-453. Analytics. Added to PP index 2014-03-23. Given these high stakes, Robert Cooter argues that constitutional theory should trouble itself less with literary analysis and arguments over founders' intentions and focus much more on the real-world consequences of various constitutional provisions and choices. Pooling the best available theories from economics and political science, particularly those developed from game theory, Cooter's economic analysis of constitutions fundamentally recasts a field of growing interest and dramatic international importance. *The strategic constitution.* RD Cooter. Princeton university press, 2020. 764. 2020. *Bargaining in the shadow of the law: A testable model of strategic behavior.* R Cooter, S Marks, R Mnookin. *The Journal of Legal Studies* 11 (2), 225-251, 1982. 745. 1982. *Decentralized law for a complex economy: the structural approach to adjudicating the new law merchant.* RD Cooter. *University of Pennsylvania Law Review* 144 (5), 1643-1696, 1996. 692. 1996. "Structural adjudication and the new law merchant: a model of decentralized law. RD Cooter. *International Review of Law and Economics* 14 (2), 215-231, 1994. 351. 1994.