THE ORIGINAL CONSTITUTION AND ITS DECLINE: A PUBLIC CHOICE PERSPECTIVE

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Public choice offers an analysis of the Constitution that is broadly consonant with an important aspect of the Framers' own approach. The Framers' values were those largely of the Scottish enlightenment: they believed in progress of civilization—the accumulation of wealth and knowledge. In order to create a structure of society that would accomplish these ends, they relied on another Enlightenment axiom, namely that man is an object of natural science. By understanding the predictable manner in which individuals are likely to behave in given situations, the Framers could shape a constitution that would channel their behavior to meet their Enlightenment goals.

Public choice captures for our time much of the Framers' scientific approach to predicting human behavior. It also embraces the notion that man is an object of natural science. Indeed, its most important insight—that individuals will have similar motivations and goals whether acting economically or politically—ultimately rests on a nesting of the social sciences in the natural science of biology. Biology confirms the key premise of public choice that there can be no sharp division between *homo politicus* and *homo economicus*. There is only *homo sapiens* acting under the different constraints of politics and markets.[1]

Because of its continuity with the thought of the Framers, public choice is one of the most useful methodologies for unlocking the fundamental structure of the Constitution. In this essay, I will use the perspective of public choice to show how the mechanisms of limited government chosen by the Framers made

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1. *See* John O. McGinnis, *Constitutive Law and the Human Constitution: A Prolegomenon*, 8 J. CONTEMP. LEG. ISSUES 211 (1997). Discoveries in biology continue to refine the premises of public choice and economics by describing more precisely the circumstances in which individuals will depart from acting as rational maximizers. *See id.*

it the most wealth-producing document in human history. Next, I will suggest that public choice helps us understand why the Framers' charter for limited government has disappeared and been transformed into a license for the special-interest state. Finally, I will probe the paradox that public choice reveals to be at the heart of American constitutionalism: the very success of the Framers' handiwork assured its decay. Although many like to speak of a "living Constitution," the hard truth that public choice presents is that as soon as a good constitution is born, it begins to die.

I. PUBLIC CHOICE AND THE STRUCTURE OF THE ORIGINAL CONSTITUTION

Individuals need government to create public goods that the market and the family cannot or will not supply. Examples of such public goods include defense and the rule of law that makes property secure. But the same motivations that drive men to create items for exchange under the constraints of the market will lead them to try to use the state to take resources for themselves.[2] Thus, under a public choice view, the central dilemma of politics is that a government sufficiently powerful to supply public goods is also powerful enough to expropriate the property of its citizens.[3] On this understanding, the science of constitutions necessarily concentrates on discovering mechanisms that will make government provide a high ratio of public interest goods to expropriation of private interest goods.[4] The specific mechanisms chosen will depend on the culture and technology of the time.

The Framers' Constitution was successful precisely because it created a panoply of mechanisms suitable for its time that encouraged the creation of public goods while constraining the danger of expropriation. Indeed, the genius of the Constitution is its implicit recognition that although representative

2. This activity is frequently called "rent-seeking" in the public choice literature, particularly when the redistribution is in the form of monopoly profits from regulation and tariffs. *See* DENNIS MUELLER, PUBLIC CHOICE II 229-35 (1989).

3. *See* Barry Weingast, *The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 24-28 (1995).

4. It is clear that providing public goods is not sufficient to assure good government. Even organized crime syndicates typically provide safety against some kinds of crime in their neighborhoods, thus providing a public good. The difficulty is that the rents that crime kingpins obtain for their organizations far outweigh the public goods they provide.

democracy generally obtains a higher ratio of public goods to expropriation than monarchy or oligarchical hegemony,[5] it does not dissolve the dangers of theft by government. An elected ruling coalition, like any kind of ruler, may tax and regulate for the benefit of its members and, as in any political system, some groups will have natural advantages in obtaining the fruits of such redistribution and others will be natural targets of expropriation.

Accordingly, the Framers' Constitution is structured to limit four major dangers of redistribution that are characteristic of a democracy: (i) that the majority will expropriate from the minority; (ii) that certain minorities will be the constant targets of expropriation, no matter what majority is empowered; (iii) that the elected representatives of democracy will use their office to redistribute resources and status to themselves; and (iv) that for structural reasons inherent in democracy, certain minority groups (most importantly special-interest groups) have peculiar power to use the government to expropriate resources for themselves. Let me briefly elaborate on these characteristic problems and the way that they are addressed in the Framers' Constitution.[6]

A. *Majoritarian Expropriation*

The first danger in any democracy is the most readily understood. Majorities use their power to take away resources and opportunities from minorities and redistribute it to themselves. This may be accomplished through the enactment of rent-seeking legislation.

The first and most important way the Framers addressed majoritarian expropriation was by deciding to establish a large national republic. In the famous theory of Federalist No. 10, Madison argued that a large republic would contain a sufficient number of factions so that no single faction could constitute an

5. *See* Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567 (September 1993) (discussing the superiority of democracy over such systems in this respect).

6. Sometimes a single constitutional provision will impose restraints on two or more categories of expropriation. For instance, the First Amendment protects against majority tyranny, restrains expropriation from particular minorities, and helps prevent the self-serving behavior of legislators.

oppressive majority.[7] Democracy on a large scale paradoxically constrains the power of majorities more than democracy on a small scale, because any long-term redistributionist scheme in favor of the current majority would tend to be frustrated by the insecure and shifting ground of ever-changing and multiple coalitions.[8]

Bicameralism is a second constitutional mechanism that makes it harder for majorities to effect redistribution. Intuitively, the manner in which bicameralism achieves this objective is clear: those pushing rent-seeking legislation must obtain a majority in not one but two legislative bodies.[9] The requirement of a greater consensus should favor legislation that provides public goods that benefit a substantial majority rather than redistribution in favor of a relative few.

The separation of powers is a third mechanism that restrains majoritarian rent-seeking.[10] The presidential veto does so in a manner similar to bicameralism. The majority not only must obtain the assent of two houses of Congress, but also that of the president. The separation of powers more broadly has some of the same effects as the large republic, because the tripartite division makes it hard for a current majority to hold control of the entire apparatus of the federal government at once. In part, the constraint stems from the different methods of selecting the officeholders in each branch and the varying durations of their appointments. For instance, the judiciary of any given era largely represents the choices of past presidents and therefore reflects past majorities more than current ones. In part, the constraint results from the difference in function among the branches of government. For instance, because the president is preeminently responsible for military matters, the majority that elected him may elect a majority in Congress with different views on domestic matters. This leads to a divided government less under

7. Although THE FEDERALIST NO. 10 begins by addressing the problem of factions generally, it goes on to advocate the creation of the national republic as a specific means to restrain a faction that constitutes a majority. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

8. *See* DAVID A. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 99-107 (1984) (discussing the importance of an extended democratic sphere in limiting the endurance of any single majority faction's control).

9. *See* Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 57 (1987).

10. *See id.* at 76.

the control of a majority coalition. These differences in function also mean that the branches will themselves acquire different institutional interests even when controlled by similar majorities, thus ensuring a perpetual struggle in a kind of state of nature at the heart of *Leviathan*—a struggle that inhibits the development of permanent or tyrannical majoritarian control.[11]

A fourth mechanism restraining majoritarian control is federalism, but, because that is the principal means for restraining special interests, I will address that mechanism in discussing constitutional restraints on powerfully expropriated minorities.

B. *Expropriation from Minorities*

The Framers also addressed the potential of expropriation from targeted minorities. Although this concern is interconnected with the problem of majority tyranny, it is conceptually distinct. Anyone who does not belong to a majoritarian coalition is at risk of majoritarian expropriation at some point in time. Some groups, however, are at peculiar risk of being excluded constantly from any majoritarian coalition. Mechanisms such as the large republic, bicameralism, and separation of powers may thus guard against the entrenched power of a monolithic majority, but not necessarily against the enduring vulnerability of certain minorities.

The Framers saw property owners in particular as such a minority, because property owners possessed resources that could in fact be redistributed. Accordingly, the original Constitution prohibited the States from impairing contracts, thus preventing creditors from being the targets of expropriation during difficult financial times.[12] The Bill of Rights prohibited the federal government from taking private property without just compensation.[13] The Constitution's restriction on direct taxes restricted income and wealth taxes and forced the government to rely on excises and tariffs—taxes that could not be as easily targeted at the wealthy.[14]

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11. *See* John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers*, 56 LAW & CONTEMP. PROBS. 293, 303 (Autumn 1993).

12. U.S. CONST. art. I, § 10, cl. 1.

13. U.S. CONST. amend. V.

14. Direct taxes such as income and wealth taxes were prohibited unless they were made proportionate to the number of citizens in each state. *See* U.S. Const. art. I, § 9, cl. 4 ("No

The First Amendment may also be viewed as a restriction designed to protect certain groups that might otherwise be targeted for their religious or secular views. Majority oppression of secular or religious expression can also be understood as a form of expropriation.[15] Individuals exercising their rights of self-ownership generate opinions both secular and religious for their own benefit. The First Amendment prevents the majority from suppressing these opinions and thereby expropriating that benefit to sustain the majority's preferences for a culture of its choosing.

C. *Expropriation by Rulers*

One particular group is always in an advantageous position for rent-seeking in a democratic republic—the representatives themselves. The rulers are agents of the people, but it is costly for people to monitor their behavior. Therefore a central question for a representative democracy is how to restrain the representatives from using their special powers to gain resources or status for themselves rather than to advance the public interest. Many constitutional provisions are designed to prevent this kind of rent-seeking. The most elemental is the Twenty-seventh Amendment, which was actually proposed as the second amendment in 1789, and ratified two hundred years later. The Twenty-seventh Amendment assures that there will be an election before a pay raise takes effect, thus giving the people a chance to prevent their representatives from directly taking more resources from the state for themselves.[16]

The private rewards that rulers seek at the expense of the public may be those of status as well as wealth. The war powers provisions are in large measure designed to address rent-seeking in the form of using the government to obtain status for oneself and one's descendants—in this case the president's ability to acquire renown by putting the public to the expense and danger

Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").

15. Indeed, James Madison expressly considered religious and secular opinions as a form of property. *See* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 64-68 (1996).

16. U.S. CONST. amend. XXVII.

of unnecessary war.[17] Although the Constitution gives the president military authority as commander-in-chief, it also provides checks and balances (such as giving Congress the power to declare war) to restrain such rent-seeking.

Other provisions reduce agency costs and so restrain rent-seeking by making it easier for citizens themselves to monitor and oppose expropriative activity by their representatives, replacing them if need be. The First Amendment's protection of the rights of petition and assembly reduces agency costs by assuring that citizens can freely exchange their complaints against the rulers among themselves, and act in concert once their opinions are known.[18]

D. *Expropriation by Special-Interest Groups*

The last kind of expropriation restrained by the Constitution is that engaged in by minority groups.[19] In one sense, this can be seen as a generalization of category (iii): rulers turn out to be only one of the groups that has disproportionate power in the democratic process. In another sense, it can be seen as the converse problem of category (ii): just as there are some minorities that seem to lose out again and again in the democratic process, there are others that have systematic advantages.[20]

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17. *See* William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 84 CORNELL L. REV. 695 (1997) (suggesting that the Framers' concern about the president's thirst for fame is the key to understanding the war powers provisions).

18. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1147, 1152 (1991) (suggesting that the original purpose of the First Amendment was to permit popular majorities to bring pressure to bear on potentially unrepresentative legislative majorities).

19. The writings of the Framers do not demonstrate as much of an awareness of this problem as of the first three types of rent-seeking. But in the writings of both Hamilton and Franklin, there is some recognition of a general tendency of centralized governments to spend more than is necessary to provide public goods that citizens want in their localities. *See* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 181, 183 (1995).

20. Thus, under this view, the Constitution should be as concerned with guarding against the power of the concentrated minorities as it is with protecting discrete and insular minorities. The famous presumption in favor of enforcing provisions animated by the latter concern at the expense of the former is wholly misplaced. *See* United States v. Carolene Products, 304 U.S. 144, 152-53 (1938); Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 428 (showing that legislation at issue in *Carolene Products* was itself an exercise in expropriation by special interest groups). The enforcement of structural and rights provisions are equally necessary to sustain a political process in which groups have neither undue advantages nor disadvantages.

The most important minorities in category (iv) are concentrated interest groups that can have disproportionate influence in the public process. It is now well known that small, cohesive interest groups may have disproportionate influence in the political process because they can capture the benefits of the resulting transfers for themselves. In contrast, members of diffuse groups have fewer incentives to lobby for benefits, because there is no way to limit the benefits to those who contribute effort and money to lobbying.[21] Thus, one of the fundamental problems of politics in a democratic society is that concentrated interest groups have more influence with legislators than diffuse groups, even if the diffuse groups are a numerical majority. Public choice theory suggests and observations confirm that political entrepreneurs will therefore favor legislative programs with concentrated benefits and diffuse costs.[22]

It is important to recognize the symbiosis between category (iii) rent-seeking (by legislators) and category (iv) rent-seeking (by powerfully situated minorities), because of its pervasive effects throughout American history. Legislators and special-interest groups can engage in joint expropriation and then divide the spoils for themselves. Special-interest groups seek to contract with politicians for durable legislation because the stream of rents they receive directly depends on its durability.[23] But because special-interest groups are not themselves a majority, they face the problem that future legislatures may repeal their favorable legislation. One way of making certain that legislation endures is to entrench the coalition that provided the rents in the first place or at least to entrench selected champions of the legislation who can bargain to preserve the rents in changing coalitions.[24] Hence, special-interest groups will work particularly hard for the reelection of their supporters. Such behavior in turn facilitates rent-seeking

21. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 132-67 (1965).

22. *See* MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 90 (1981) (suggesting that concentrated interests and costs are more likely to generate political and lobbying activity by organized groups).

23. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 526 (1992).

24. *See* David N. Laban, *Transaction Costs and Production in a Legislative Setting*, 57 PUB. CHOICE 183 (1988).

by legislators, because they gain a group dedicated to preserving the office that is the source of their power and perquisites.

Important features of the Constitution restrain this special-interest expropriation. Bicameralism and the veto power make rent-seeking harder for concentrated interest groups as well as for majorities, because the interest groups need to expend resources to win the support of a greater number of actors. Nevertheless, some economists have come to believe that constitutional federalism was historically the most important factor in restraining special-interest groups and was responsible for substantial economic growth by checking their ability to promote wealth redistribution.[25]

The advantage of federalism under this view is that a properly designed dual system of government can limit the total amount of rent-seeking by such interest groups more than can a unitary state.[26] Rent-seeking from the national government is limited by giving it only limited powers, including limited powers of taxation. Rent-seeking from state government is limited by putting those governments in competition with one another for capital, including human capital.[27] The bridge between the two mechanisms is that the limited powers of the national government sustain the conditions for competition among the state governments. Through the Commerce Clause and creation of a common currency, the national government was to sustain a free-trade zone that would facilitate the exchange of goods and services among the former colonies.[28]

25. *See* Weingast, *supra* note 3, at 18-21. Other economies such as that of Britain in the Eighteenth Century and present day China similarly benefited from federalism. *Id.* at 6-8, 23-24.

26. Interestingly, there may well be important trade-offs in recourse to federalism as a method of restraining rent-seeking. By creating dual governments, the Constitution creates two sources of potential oppression that can be used against minorities who are neutral targets of expropriation. One key constitutional change over the course of American history has been the decision to enlarge gradually the powers of the federal government to deal with oppression of certain minorities by the state, thus choosing to protect against category (ii) rent-seeking at the expense of category (iv) rent-seeking.

27. *See* Richard A. Epstein, *Exit Rights for Federalism*, 55 LAW & CONTEMP. PROBS. 147, 150 (1992).

28. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8 (providing Congress with power to regulate interstate commerce); *see also* Richard A. Posner, *The Constitution as an Economic Document: A Symposium Commemorating the Bicentennial of the United States Constitution*, 56 GEO. WASH. REV. 4, 17 (1987) (viewing the Commerce Clause as a charter for free trade); David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1077 (1996) (stating that the original purpose of the Commerce Clause was to promote free trade).

Indeed, historically the structure of federalism had substantial success in restraining redistribution. In the Nineteenth Century, when the States rather than the federal government were responsible for general economic and social regulation, the States did not enact entitlements similar to those of the modern federal government because they were in competition with one another. Medicare and social security—in their current form as vast inter-generational transfers—would not have been possible because no state could have afforded to impose high payroll taxes on its productive workers and businesses, because such workers and businesses would have moved elsewhere to avoid payment.

Viewing the Constitution from the perspective of these four categories of restraints on redistribution has at least four advantages. First, it provides a unified theory of the structural and individual rights provisions of the Constitution. Second, it helps us understand the reason that differing interpretations are offered for a single provision. For instance, those emphasizing the self-governance rationale for the First Amendment are understanding it primarily as focused on preventing rent-seeking by rulers (category iii). Those emphasizing self-expression are understanding it primarily as protecting non-conformist minorities against the expropriation of some of their self-ownership rights (category ii). Third, the theory illuminates the trade-offs a constitution makes in attempting to prevent different categories of rent-seeking. For instance, although the First Amendment may inhibit expropriation in categories (ii) and (iii), it may facilitate expropriation in category (iv) by making it easier for interest groups to organize and lobby. Finally, the theory allows us to chart the course of constitutional history by measuring the efficacy and continuity of the restraints in various eras. It is this last area of inquiry that I want to explore further here, because public choice helps us understand why we have the crisis of government that besets us today—the rise of the special-interest state.

II. PUBLIC CHOICE AND THE DISSOLUTION OF THE ORIGINAL CONSTITUTION

The constitutional transformation that began in the Progressive Era and culminated in the New Deal has eviscerated many of the restraints that impede majoritarian and

special-interest rent-seeking. The roots of this change go back far in American history—at least as far back as the Progressive Era. The Sixteenth and Seventeenth Amendments passed in that Age paved the way for the subsequent centralization of power in the New Deal and the rise of the special-interest state.[29]

The Sixteenth Amendment, by permitting direct taxes on income, removed important inherent limitations on the federal government's taxing power. As Hamilton had recognized, the kinds of taxes freely permitted in the original Constitution—duties and excises on articles of commerce—had "prescribe[d] their own limit."[30] Income and wealth taxes, which did not impose their own natural limits to the same degree, were restricted instead by the constitutional requirement that such taxes be proportionate to the citizens of each state.[31] With the passage of the Sixteenth Amendment, however, the federal government was no longer restrained from tapping into this latter source of revenue and thus became far more capable of redistributing resources to interest groups.[32]

The Seventeenth Amendment mandated the direct election of senators in contrast to the original Constitution's direction that they be selected by state legislators. This Amendment weakened the restraints on special interests in at least two ways. First, because senators became independent of state legislators, they no longer had a particular respect for state sovereignty.[33] To the contrary, after the Seventeenth Amendment, senators became like members of the House of Representatives, who had a natural inclination to encroach on state sovereignty, because the States were a competing power center for servicing constituents and interest groups. As a result, the protection of state powers on which federalism depended lost a crucial institutional defense within the federal government.[34] Second,

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29. The constitutional changes of the Progressive Era were themselves facilitated by the accumulation of government power necessitated by the Civil War and Reconstruction.

30. *See* THE FEDERALIST NO. 21, at 142 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. *See id.*

32. *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 33 (1993).

33. *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 557 (1997) (noting that the Seventeenth Amendment greatly increased independence of senators from state legislators).

34. *See* Roger G. Brooks, *Garcia, The Seventeenth Amendment, and Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189, 198 (1987) (discussing the Seventeenth Amendment's crippling effect on senators' interest in protecting the States).

because legislators were superior to the general public at monitoring the behavior of senators, the Amendment increased monitoring costs and entrenched senators in office.[35] The increase in average tenure in the Senate made it easier for interest groups to strike long-term deals and made redistributive legislation more valuable.[36]

Thus, these two Amendments set the stage for the expansion of the federal government beyond its constitutional limitations. Because the federal government had so much potential revenue at its disposal, interest groups now had strong incentives to organize to obtain increased federal spending. To be sure, the United States Supreme Court initially resisted some of these new federal programs by suggesting that Congress could not use its spending power to invade areas reserved to the States,[37] but in the end it abandoned this limitation, giving the federal government essentially plenary spending authority.[38]

The lack of institutional interest on the part of the Senate also emboldened regulatory rent-seeking by interest groups such as labor unions and farmers. In the New Deal, national regulatory regimes of broader scope than ever before were enacted, thus gravely weakening regulatory competition among the States. Although the United States Supreme Court struck down some of these initial schemes as beyond Congress's power under the Commerce Clause,[39] public pressure and a series of appointments by President Roosevelt ended resistance. By the early 1940s, the United States Supreme Court had abandoned the constitutional limitations that prevented the federal government from directly regulating manufacturing and the conditions of labor, thereby greatly increasing special-interest power to obtain regulatory rents.[40] Congress now had both plenary regulatory and spending power.

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35. *See* Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 ORE. L. REV. 1007, 1041, 1048 (1994).

36. *See id.*

37. *See* United States v. Butler, 297 U.S. 1 (1936).

38. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 548-98 (1994) (upholding an unemployment scheme—an area where Congress had not previously been held to have regulatory authority).

39. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 297-310 (1935).

40. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (describing this process).

Closely related to these developments was the tempering of the separation of powers. As noted before, the requirement that legislation receive the endorsement of the two Houses of Congress as well as the president's assent makes rent-seeking by majorities and special interests more difficult. Thus, interest groups sought to avoid these strictures by having Congress delegate large reservoirs of power to executive branch agencies.[41] Once the power was delegated, interest groups had only to pass over one hurdle—that of the agency—to obtain rent-seeking regulation. At the same time, the United States Supreme Court discarded the non-delegation doctrine that had once policed these blank checks.[42] The plenary, regulatory power the federal government enjoyed was no longer subject to the checks of the separation of powers.

The demise of federalism and the weakening of separation of powers has eviscerated most of the constitutive restraints against category (iv) rent-seeking. The result is predictable: the post-New Deal era has been open-season for interests groups seeking to use the government as an engine for redistribution of resources to themselves. As a result, most budget outlays now constitute transfer payments to individuals rather than payments for public goods.[43] The need to raise debt to pay for such entitlements does not impose a very substantial constraint on such activity because the incidence of the debt can be diffused over the entire population (and future generations if possible).[44] Hence, budget debts and deficits mount. Our whole fiscal predicament is the natural consequence of the special-interest state that our current Constitution establishes. Excessive regulation is a consequence of the same structural pathology.

One striking confirmation that the special-interest state is the constitutional problem of our time is that the essential projects

41. *See generally* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORN. L. REV. 1 (1982).

42. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248-49 (1994).

43. *See* Michael A. Fitts & Robert P. Inman, *Political Institutions and Fiscal Policy: Evidence From the U.S. Historical Record*, 6 J.L. ECON. & ORG. 79, 80 (1990) (describing shift to transfer payments from public goods).

44. The scenario is thus a specific example of the well-known paradox of vote trading. *See* William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1236 (1973) (stating that "[t]his paradox of vote trading has the property, that, while each trade is individually advantageous to the traders, the sum of trades is disadvantageous to everybody, including the traders themselves").

of the political right, center, and left, are aimed at dissolving the special-interest state. The characteristic proposal of the left is campaign finance reform: their theory is that by curtailing the amount of money in politics, the power of special interests will be decreased. The characteristic proposal of the right has been supermajority rules: by erecting more substantial barriers to debt, tax, or spending legislation, proposals supported by minority interests will be filtered out. Some centrists such as those supporting Ross Perot urge term limits. The argument for terms limits is that they will break up the joint racketeering between special interests and career politicians, whereby politicians win continuous reelection by distributing favors to these groups.

III. PUBLIC CHOICE AND THE RED QUEEN PROBLEM OF CONSTITUTIONALISM

I have strong views on which one of these proposals is most likely to succeed as a solution to the special-interest state.[45] But let me close by showing that a common objection to all such fundamental constitutional amendments—that we should not tinker with the Framer's design—is obviously misplaced from a public choice perspective. Mancur Olson has shown that once organizations become effective at influencing the government, they have staying power and thus the number of special-interest groups grows until the next social upheaval cleanses society of their negative impact.[46] Thus, stable societies like our own accumulate more and more special-interest organizations over time. Olson's theory shows that a successful constitution *must* periodically update its restraints on interest groups to remain successful, because its very success sows the seeds of its own destruction by making the political landscape more fertile for the interest groups that aim to eviscerate its restraints. As the Queen of Hearts in *Through the Looking Glass* must run to remain in place, so must a constitution change over time, if it is to impose constant restraints on rent-seeking.

Moreover, the structures that were set up to restrain these interest groups necessarily become outdated. As the costs and

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45. *See generally* John O. McGinnis & Michael A. Rappaport, *Supermajority Rules as a Constitutional Solution* (1997) (unpublished manuscript, on file with author).

46. *See* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 40 (1982).

benefits of various activities change, peoples' beliefs and attitudes change concomitantly. For instance, decreasing information and transportation costs have eroded individuals' attachments to their States.[47] In the contemporary United States, with its social mobility and common culture, it is hard for us today to imagine what Robert E. Lee felt when he declined to assume the generalship of the Union armies on the grounds that he must fight for his "native state" of Virginia.[48] Thus, federalism is intrinsically a less plausible mechanism against rent-seeking than it was during the Framers' time.

This brings me to my final point. Although the Federalist Society venerates Madison, Hamilton, and the other Framers, respect for their constitutional design should not be confused with a claim that it remains perfect. Public choice, like any science based on biology, reflects the truth in Heraclitus's claim that "All is flux."[49] Whatever the benefits of originalism as a doctrine to cabin judges, as political scientists and as citizens we cannot be unthinking adherents of the original design if we are to preserve the original goal of the Framers—a limited government that produces a high ratio of public goods to expropriation. Indeed, the greatest lesson of public choice is that to preserve the Framers' work, we periodically must become wise Framers ourselves. Our task is to discover mechanisms of limited government that are appropriate to our own era, in the way that the Framers chose mechanisms that were suitable for the Eighteenth Century.

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47. I discuss this point at greater length in John O. McGinnis, *Federalism: A Funeral Oration*, 12 J.L. POLITICS (forthcoming 1997).

48. *Id.*

49. PLATO, CRATYLUS 402a (John Burnet ed., Oxford Press 1st ed. 1902) (quoting Heraclitus) (translation by author).