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The Rules of the Game: What Rules? Which Game?

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Abstract

Douglass North is famous for, among other things, making institutions the centerpiece of studies of political economy. Institutions are, for him, the humanly constructed rules of the game, a *game form* in the language of game theory. An alternative conceptualization, associated with Schotter (1981) and Calvert (1995), and responsive to concerns articulated by Riker (1980), conceives of North’s game form as part of a more all-encompassing equilibrium of rational human behavior. Whereas North takes the rules of the game as exogenous and seeks to identify the equilibria that arise when agents, abiding by the rules, bring particular preferences to a situation, what Shepsle (1979) called a *structure-induced equilibrium*, Schotter and Calvert allow for the possibility of non-compliance with extant rules and, indeed, for moves that alter the game form altogether. In the present paper, these two approaches are developed more fully. Examples drawn from the US Congress are used to exhibit the ways in which rules arise, change endogenously, and are sometimes even violated. Rational, self-governing agents are not, as in North’s formulation, absolutely bound by exogenous constraints, and are often able to reformulate the ways they do their business.

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“The Rules of the Game: What Rules? Which Game?”

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1. Introduction

Imagine we are on Capitol Hill in early January of an odd-numbered year. A new Congress is about to convene, the even-year election having been concluded the previous November. But is it a new Congress? As we will see, this is a constitutionally controversial matter, one that lies at the heart of more abstract matters concerning the nature of institutions of self-governing groups.

For the House of Representatives, this is a settled matter. The previous House had adjourned *sine die* before the election and, from a constitutional perspective, is now an entirely new body. The newly convened House will operate under “general parliamentary law” until it has sworn in its members, elected a presiding officer, and adopted rules.

For the Senate, on the other hand, this is *not* a settled matter. For two-thirds of the senators, the election of the previous November in no way interrupted their respective careers. They are sitting senators who were not “in cycle” for the election – their staggered terms did not require them to face contract renewal in November. Under one constitutional view this Senate is the same collective body as the one that existed before the election; it never adjourned permanently and only a portion of its membership may have changed. More generally, the Senate of time t is the same as the one of time $t-1$. By induction, a current Senate is the same body as the one that convened in 1790! There is never a new Senate. This is the *continuing-body* theory of the Senate (Bruhl, 2010).

The continuing-body theory has interpretive consequences for rules, consequences that follow from three provisions. The first is Article I, Section 5 of the Constitution. This reads in part: “Each House may determine the Rules of its Proceedings... .” That is, each chamber is a self-governing group. The Constitution is otherwise modest in restricting internal features of each chamber.¹

¹ Article I, Section 5 lays out a short list of requirements. Each chamber is the judge of elections to it; a majority constitutes a quorum; it may compel attendance of its members and set penalties for violations; it may punish members for disorderly behavior; it may expel a member on a two-thirds vote; it must keep a journal of proceedings and publish it; and it may not adjourn for more than three days without the consent

The second provision is a standing rule, created by Article I, Section 5 authority. Rule V of *The Standing Rules of the Senate* states:

1. No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or parts proposed to be suspended, modified, or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.
2. The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

A third provision, also a standing rule of the Senate, prescribes how standing rules may be amended as permitted by Rule V. According to Rule XXII.2, if sixteen Senators sign a motion to bring debate on any measure to a close, then the presiding officer

...shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question: 'Is it the sense of the Senate that the debate shall be brought to a close?' And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn – *except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting* [emphasis added] – then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.²

of the other chamber. In addition, Article I, Section 2 specifies that the House shall choose a Speaker and other officers, while Article I, Section 3 designates the Vice President of the United States as the President of the Senate and implores the Senate to choose other officers including a President pro tempore who presides in the absence of the Vice President.

² As an aside, note that a vote on cloture that is not a rules change requires the support of three-fifths of the senators "duly chosen and sworn," not sixty senators. Of course, when the Senate possesses a full complement, the number is sixty. After the presidential inauguration in January 2009, however, there were only 97 senators "duly chosen and sworn" in the 111th Congress. Neither Barack Obama's seat from Illinois nor Joseph Biden's seat from Delaware had been filled. And the election result for the seat from

As a self-governing group, in sum, the Senate may formulate its own rules of procedure as well as rules governing the revision of those rules (Article I, Section 5 of the Constitution), but absent such rule-governed amendments to the rules (requiring majority support to pass, but two-thirds support to close debate as specified in Rule XXII.2 of the Senate's standing rules), the rules of one Congress continue to the next (as specified in Rule V.2 of the standing rules).

Now imagine the following choreographed exercise.³ At the opening of a new Congress, the Majority Leader, who, according to Senate rules, possesses priority in recognition, rises in the well of the Senate and announces, "As the Senate is not a continuing body, its first order of business, under Article I, Section 5 of the Constitution, is to select standing rules for the new Congress in accord with general parliamentary procedure. I move the re-adoption of the standing rules of the previous Congress, with two exceptions. Rule V.2 is deleted. And the special treatment given to cloture as applied to amendments to standing rules in Rule XXII.2 [italicized in the previous paragraph] is removed."⁴

After this motion is read, chaos breaks out in the chamber. The presiding officer, the Vice President, gavel the chamber to order and recognizes the Minority Leader who, with great agitation, seeks recognition. "I rise to make a point of order. The Senate *is* a continuing body and thus is governed by the rules today that were in effect in the last session, not by general parliamentary procedure. This is clearly stated in Rule V.2. Thus it is possible to revise the rules only in compliance with Rule XXII.2, even if the objective is to revise said rule." The key question to be ruled upon by the presiding officer is whether the previous Senate can bind its successor (as Rule V.2 would seem to do).

Since the Majority Leader has invoked a constitutional basis for moving to adopt rules, the presiding officer would normally yield to the norm of not ruling on a constitutional point himself; instead he would entertain a motion to table the point, thus allowing the fate of the Minority Leader's intervention to be determined by the full Senate. If the motion to table the Minority Leader's point succeeds, the Majority Leader's motion then becomes the unfinished business

Minnesota had not been resolved. So, for a few weeks only fifty-nine affirmative votes were required for cloture. Throughout the rest of the 111th Congress, the Senate was not always at full force, but the ranks were never so depleted as to reduce the cloture number below sixty. Note also that the cloture number for a rules change is two-thirds of *those present and voting*.

³ I thank David Rohde for first bringing this possibility to my attention.

⁴ The most important feature of general parliamentary procedure is that decisions are taken by a simple majority, subject to a quorum being present.

before the Senate. (If it fails, then the Majority Leader's motion is effectively off the agenda.) A second key question arises – if the motion to table succeeds, is the subsequent unfinished business (the Majority Leader's motion to adopt rules) to be debated under the old Senate rules or according to general parliamentary procedure? The presiding officer rules that if the point of order is tabled, the Senate will proceed immediately to the Majority Leader's motion under general parliamentary procedure. The Minority Leader then appeals the chair's ruling, arguing that it makes no sense to consider the Majority Leader's motion under general parliamentary procedure since this is precisely what the Majority Leader's rules-change motion aims to establish but has not yet done so; the motion must, in the humble opinion of the Minority Leader, be taken up under existing Senate rules. When the motion to reverse the presiding officer's ruling is put to a vote, a majority votes to sustain the ruling. (Senate majorities rarely overturn rulings of the presiding officer.) The objection is thus tabled, and the Majority Leader's motion is taken up under general parliamentary procedure. A simple majority then approves his motion. *Voila!* A revision of the rules – in effect a reduction in the threshold to end filibusters on amending the rules – has been accomplished by a simple majority. And a precedent has been set that the Senate is not a continuing body.

This is just a story (though at this writing machinations are underway to revise the filibuster rule in the Senate for the 113th Congress). But it illustrates several points that will be the focus of this paper:

- Self-governing groups create the rules according to which their proceedings are governed.
- Self-governing groups may change their rules – suspend, amend, override, even disobey.
- Let me repeat this last point. Self-governing groups may even flout the rules to which they have previously agreed (as they did in regard to Rule V.2 in the illustration just given).

2. Two Views of Institutions⁵

Douglass North (1990: 3; also see Mantzavinos, North, and Shariq, 2004) is famously associated with characterizing an institution as a *game form*. It is “the rules of the game in a society or, more formally, ... the humanly devised constraints that shape human interaction.”

⁵ This is more fully developed in Shepsle (2006 a, b) and independently developed in Munger (2010).

North urges us to think flexibly about this definition: institutions range from informal constraints like taboos, customs, conventions, codes of behavior, and traditions to formal rights, responsibilities, and constraints like those found in contracts, official procedures, and modern constitutions. An institution specifies the players whose behavior is bound by its rules; the actions the players must, may, must not, or may not take (Crawford and Ostrom, 1995); the informational conditions under which they make choices; their timing; the impact of exogenous events; and the outcomes that are a consequence of these choices and events. The game form is transformed into a game when players are endowed with preferences over outcomes.

The game-form view of institutions, one to which I adhered in earlier work on the role of institutional structure on political outcomes (Shepsle, 1979), is silent on three significant matters. First, this approach says little about the sources of institutions. Institutional arrangements are taken as given with the objective of tracing the implications of these rules for behavior and outcomes. Attention is riveted on the subsequent play of the game governed by these rules and the outcomes that arise from this play, not on the origins of the rules. Second, there is little consideration given to the durability of rules. Because they are taken as exogenous, they are not, themselves, part of the play of the game. They are assumed to endure.⁶ Third, the constraints entailed in the rules are regarded as *self-enforcing*. There simply is no provision made for *deviating* from the rules. An agent, at any node in the game tree to which he or she is assigned, has a fixed repertoire of alternatives as specified by the branches emerging from the node, and must choose from among these. It would never occur to a Majority Leader of the U.S. Senate, as he stares into his shaving mirror in the morning, to contemplate announcing, contra Rule V.2, that the Senate is not a continuing body.

The equilibrium view of institutions – an alternative perspective associated with the work of Schotter (1981) and Calvert (1995) – does not focus primarily on institutional origins either, but it does have something to say about their durability and prospects for departures from their strictures. According to this approach the game form itself is an equilibrium.⁷ What North took as exogenous, Calvert, Schotter, and Greif view as the endogenous product of a more primal environment. There are really two parts to equilibria of interest: the one induced by a particular body of rules (*institutional or structure-induced equilibrium* – Shepsle, 1979) – this is the one on

⁶ This is a slightly unfair characterization of North's approach; his formulation allows organizations like firms to invest in organizational elaborations in order to enhance their profits.

⁷ For a treatise, weaving together game theory and economic history to develop an elaborate theory of endogenous institutions, see Greif (2006). Greif is one of the exceptions in focusing on institutional origins as well as on equilibrium properties – at pp. 137 ff. and Chapter 7. Greif's approach differs slightly from Calvert-Schotter, mainly at the level of nuance, so I will group the three together for present purposes.

which North focuses – and the one arising in the primal environment where rules are chosen and maintained (*equilibrium institution* – Shepsle, 1986). The combination of these two elements is what Calvert, Schotter, and Greif have in mind as an institution – it is “an equilibrium of behavior in an underlying game...It must be rational for nearly every individual to almost always adhere to the behavioral prescriptions of the institution, given that nearly all other individuals are doing so” (Calvert, 1995: 58,60). Or as Greif (2006, 136) observes, “...institutionalized rules and the beliefs they help form enable, guide and motivate most individuals to adopt the behavior associated with their ... position [in the game] most of the time.”

This means that the rules themselves are part of the equilibrium. Perturbations in the primal environment may undermine the existing rules equilibrium, possibly providing opportunities to change them. If, for example, an exogenous change in constituency preferences – caused, say, by the bursting of a housing bubble, a technological development, a natural resource discovery, or an environmental disaster – were to generate a change in the composition of legislators, this, in turn, may provide the circumstance for changing institutional rules – say, the elimination of the filibuster in the Senate.⁸

Many institutions provide avenues for precisely this to take place – they provide the means to suspend or revise existing rules. This has already been mentioned for the Senate – Rule XXII describes how the Senate may amend its standing rules. The House, on the other hand, devises routine procedural routes around its standing rules, either by a suspension-of-the-rules motion (requiring two-thirds support of those present and voting) or by the majority adoption of a special rule brought to the floor by the Committee on Rules (Doran, 2010). These, respectively, suspend the standing rules and move directly to a vote or replace them with a specially crafted procedure, in either case only provisionally to take up a specific measure.⁹

There is a second methodological possibility this broader view of institutions permits. The North view of institutions does not countenance departures from the rules. They are assumed to be obeyed, although this remains implicit. In the Calvert-Schotter-Greif formulation, on the other hand, deviation is entirely possible. The Senate majority leader *can* announce that the Senate is not a continuing body, even though Rule V.2 declares that it is (so long as a majority is prepared to support this departure). The Senate is a self-governing group and can depart from its rules as it

⁸ Greif (2006, Chapter 7) emphasizes the effects of perturbations in the primal environment on beliefs (about the efficacy of following equilibrium behavior and the prospects of others doing so) as a potentially disequilibrating result.

⁹ Whether the successful use of an institutionally permissible method of rules revision produces the same institution or a new one is a terminological matter. It certainly changes the game form.

wishes. The more comprehensive equilibrium view of institutions associated with the Calvert-Schotter-Greif approach does not *assume* that compliance with the rules necessarily occurs, and therefore allows for deviation.

3. Endogenous Procedures to Change Rules

There are multiple mechanisms by which rules change. That some such mechanisms exist at all is partially due to the self-awareness of institutional designers at a constitutional moment that they are not omniscient. Mechanisms are provided *ex ante* to fill unanticipated gaps and to adapt to changing circumstances. They are also provided to deal with circumstances that could be imagined but are too unlikely or too convoluted to accommodate at the constitutional stage.

One conspicuous instance of these is a constitutional clause that describes the method by which the constitution itself may be amended. This is the role played by Article V of the U.S. Constitution. At the constitutional convention of 1787, many of its participants made clear that they sought a less-than-unanimous procedure, given the unanimity strait-jacket into which the Articles of Confederation had placed the existing regime, but one that may not be exploited easily.

Bodies of rules, likewise, often possess amendment procedures. Rule XXII of the Senate's standing rules is, as we have seen, one such instance. Suspension of the rules, special rules from the Committee on Rules, and motions to waive points of order (that would otherwise be in order) are examples drawn from the U.S. House which temporarily eliminate a constraint on procedure. Other sources of institutional change include interpretive courts, escape clauses (in treaties and labor-market agreements), nullification arrangements, emergency powers (see Loveman 1993 on "regimes of exception"), devolution, redistricting, and expansion (contraction) of (s)electorates.

Without going into further detail, it should be clear that rules are provisional in the sense that they do not possess permanent status. They continuously face a Nash conjecture – is it in any agent's interest to deviate from behavior required or expected of them by the existing institutional arrangements? Such arrangements may possess self-altering procedures (Article V of the Constitution); they may be altered in the primal environment (as happened to the Articles of Confederation); and they may be disobeyed (as we shall see).

4. Institutions as Constraints, Except When They're Not: Examples from the U.S. Congress

From the discussion thus far, it is evident that self-governing groups have a commitment problem. Rules may serve a variety of purposes and confer conspicuous advantages, but by its

very nature a self-governing group cannot commit to sticking to them. There is no bond to post, no hostage to give. Like the all-powerful Hobbesian state, itself, a self-governing group can break any promise it makes. Its members may *choose* to obey its rules and follow its procedures, but then again they may choose otherwise in any particular situation. Lest one think this merely an abstract problem with no practical significance, I offer next a set of illustrations of rule-breaking.

- *The Senate as a continuing body* (Riddick, 1981: 991-995). The Senate has only rarely made changes in its rules. One of its most controversial, though not apparent at the time, occurred in 1806 when, in an effort to clean up a cluttered set of rules, the Senate (possibly inadvertently) eliminated the method of calling the previous question, which would have permitted a simple majority, a quorum present, to shut off debate. Thereafter, until 1917, the only way to close debate – on *any* matter, including rules changes – was by unanimous consent. In 1917, in the wake of inaction on a Wilson administration proposal to arm merchant ships to deal with attacks by the German navy (a proposal blocked by “a small group of willful men” as President Wilson declared), and the subsequent public outcry, the Senate agreed to introduce Rule XXII providing a method to bring closure to debate. This prevailed for some thirty years. But from 1949 onward, at the opening of almost every Congress, a resolution to revise the rules, especially the filibuster rule, was introduced and debated, only to be blocked because a super majority was unwilling to close debate. In 1959, the Senate went a step further (backward?), not only retaining the existing super-majority requirement for closing debate, but also adding a proviso on the continuation of rules from one Congress to the next unless revised by procedures laid out in the current rules (essentially language identical to that of Rule V.2 cited earlier). Further efforts to revise the rules over the next sixteen years consistently ran up against Rule V.2 and Rule XXII.2; resolutions to proceed to consider a revision were defeated by a failure to bring debate to a close.

In 1975, however, there was a modicum of success. The 1975 revision resulted in a reduction in the cloture requirement to “three-fifths of those duly chosen and sworn” for ordinary motions, and “two-thirds of those present and voting” for rules revision (both requiring a quorum to be present). What is of relevance to the present discussion about institutions is the method by which this was accomplished.¹⁰ S. Res. 4, introduced by Walter Mondale (D MN) and James Pearson (R KS), sought to reduce the cloture

¹⁰ The full details are found in Gold (2008).

requirement for all measures to three-fifths of those present and voting, a quorum present. To expedite matters Pearson offered a motion with three parts:

1. That the Senate proceed to the consideration of S. Res. 4.
2. That under the rulemaking powers found in Article 1, Section 5 of the Constitution, debate on this motion to proceed be brought to an immediate conclusion.
3. That on the adoption of this motion, the presiding officer put the question on the motion to proceed without further debate.

Majority Leader Mike Mansfield (D MT) raised a point of order against Pearson's motion, citing Rule V.2 and the continuing nature of Senate rules. He claimed that quite apart from his own views on the filibuster, Senate rules prohibit the procedure provided by the Pearson motion. Vice President Rockefeller submitted the point of order to the full Senate. Before a vote was taken on whether to table the point or not, he was asked whether, if the point is tabled and the Senate proceeds directly to a consideration of S. Res. 4, Rockefeller will then follow the procedure outlined in Pearson's motion. Rockefeller responded that his interpretation of events would lead him to affirm these procedures because the Senate's act in tabling the point of order, in effect, gives him the green light to do so.

Senator James Allen (D AL), the master parliamentary expert of the era, pointed out to Rockefeller the inconsistency of his interpretation. How can the Senate follow the procedure provided in the Pearson motion when it hasn't even agreed to that motion yet? The current rules would require that Pearson's motion, like any other, be taken up under *existing* rules, in particular under the direction of Rule XXII.2, since the Senate is a continuing body according to Rule V.2 (citing the reaffirmation of this position in the last rules revision in 1959). Gold (2008: 61) puts it thus: "In other words, how can the Senate be bound by the terms of a motion it refused to table but has not yet adopted?" Rockefeller stood his ground, stating that by tabling the Mansfield point of order, the Senate is expressing its willingness to proceed in this manner. Gold continues, "Although Pearson's motion runs contrary to the Senate rules, Rockefeller will abide by it because, when it tabled Mansfield's point of order, the Senate expressed its will that he do so."

For the rest of this story, the reader should consult Gold. For our purposes, the interesting thing to note is that, even though the rules specify that the Senate is a continuing body – that the rules of the Senate in Congress t carry over to Congress $t+1$ – and, therefore, that

its rules for amending the rules must follow the procedures laid out in those existing rules rather than general parliamentary procedure at the opening of a new Congress, a majority, by sustaining the “illegal” interpretation of the presiding officer (at least in Senator Allen’s opinion), may choose to violate its own rules.¹¹

- *Byrd’s breaking of the post-cloture filibuster in the Senate.* The 1975 reform in the filibuster rule – Rule XXII.2 quoted earlier (a compromise worked out with Mondale and Pearson) – made it easier to bring debate on a measure to a close. This provided incentives for the invention of clever parliamentary tactics. The master, as noted, was James Allen of Alabama, who invented the *post-cloture filibuster*. According to the filibuster rule newly in place, once cloture is secured each senator is limited to one hour of speaking time. But it did not obviate the need to dispose of amendments to the measure that had already been introduced or limit the number of those amendments (so long as an amendment was germane and had been introduced before the cloture vote). Additionally, it did not limit the reading of amendments, quorum calls, or roll call votes. In short, there was still no limit on how much time could be devoted to a measure, *even after cloture had been voted*. This procedure was actively utilized by Allen, bringing the Senate to a standstill on many occasions. It reached its zenith (nadir?) in 1977 when Howard Metzenbaum (D OH) and James Abourezk (D SD), in advance of cloture, submitted hundreds of amendments to a natural gas deregulation bill, which the Senate was compelled to take up after cloture had been voted. This filibuster by amendment lasted thirteen days, and still neither senator (nor other senators) had used his one hour of permitted speaking time.

Robert Byrd (D WV), in his first year as Majority Leader, aimed to break this device by closing the loopholes in Rule XXII that permitted it. If he had tried to do this by introducing a rules revision, it would have been necessary, first, to secure cloture on any measure he proposed (a rules change, recall, required two-thirds support) and, second, to overcome a post-cloture filibuster on his measure to end post-cloture filibusters. This posed a tactical dilemma.

Byrd chose a course of action in the debate on the natural gas deregulation bill that, by reasonable interpretation, violated existing Senate rules. By existing rules, a post-cloture motion can be ruled out of order by the presiding officer only in response to a point of order; he does not have independent authority to do so. And any ruling on a point of order by the presiding officer can be appealed and debated, consuming more time. This is what

¹¹ Whether the Senate *should* be regarded as a continuing body is analyzed by Bruhl (2010).

made Allen's post-cloture filibuster tactic so effective. Byrd's heresthetical maneuver was to secure a ruling from the presiding officer, Vice President Walter Mondale, that, post-cloture, any amendment introduced before cloture had been voted, but deemed *defective*, could be ruled out of order without the necessity of a point of order. (Why this ruling was not challenged, I do not know.) Having secured this ruling, Byrd began calling up the amendments that were being used by Metzenbaum and Abourezk to obstruct consideration of the unfinished business before the Senate. Mondale would rule one out of order as defective and, before an appeal of his ruling could be made, Byrd, using his priority right of recognition as Majority Leader, would call up another amendment. This way, the Majority Leader, in cahoots with the Vice President, disposed of the many amendments being used for obstructionist purposes. The parliamentary dance choreographed by the Vice President and the Majority Leader was clearly not sanctioned by the rules.

In 1979, Byrd succeeded in amending Rule XXII formally, putting a one hundred hour cap on post-cloture activity, thereby allowing for only limited post-cloture obstruction. Note that Byrd did *not* do this initially, instead circumventing (breaking?) existing Senate rules.

- *(Non) right of recognition and disappearing quorums in the House.* Perhaps the world record for rule innovation by rule violation is held by Thomas Brackett Reed (R ME), Speaker of the House in the late nineteenth century who earned the sobriquet, "Czar."

In the Fifty-first Congress, the Republicans held a slim majority. After an ordinary legislative day on January 21, 1890, a minority motion to adjourn was offered. On a voice vote, the Speaker declared it defeated. Congressman Bland (D MO) appealed for a teller vote. As reported by Mary Parker Follett (1902: 191), the appeal for a teller vote, in which proponents and opponents of a measure present themselves to tellers in the well of the House chamber for a precise count, is regarded as appropriate when it is possible the presiding officer has mistaken the relative size of the opposing sides based on a voice vote. Indeed, she opined that it is "an inherent privilege of all legislative bodies" to check the accuracy of a presiding officer's count. But Reed believed, Follett reported, that "it was apparent to all" that Bland's motion was "purely dilatory." Reed refused to entertain the request, thus flouting a privilege typically accorded rank-and-file members, with neither precedent nor rule in his support (but see below). Subsequently, whenever someone rose

to seek recognition, the Speaker queried, “For what purpose does the gentleman rise?” and refused recognition if he judged the purpose obstructionist.¹²

The first session of this Congress had opened in December, 1889, with limited attendance. The majority party, given its slim advantage, was unable to provide a quorum on its own, the latter necessary to conduct business. This proved a tempting opportunity for the minority Democrats to obstruct the majority. With increasing frequency they demanded quorum calls, requiring a time-consuming roll-call vote, but refused to answer to the Clerk’s call of their names. When the majority members’ responses to the Clerk’s call did not constitute a quorum, the minority would demand another quorum call. On January 30, 1890, the yeas-and-nays were called on whether to consider a contested election case. The vote stood at 161 yeas, 2 nays, and 165 (Democrats) present but not voting. The objection of “no quorum” was made by minority members (who had demanded the roll call in the first place, but then did not answer to their names when the roll was called).¹³ Instead of ordering a call of the roll, Speaker Reed instructed the Sergeant-at-Arms to lock the doors to the chamber, instructed the Clerk to record those in attendance but not responding to their names as present, ordered the Clerk to continue as chaos prevailed, and then announced the final tally in favor of the yeas with a quorum participating. One of the minority members appealed the Speaker’s decision, but this was tabled by a majority of a quorum (not a majority of the House), and the final tally stood.¹⁴ Reed announced that, now that a quorum had been determined by the House, he would no longer tolerate quorum calls that were purely dilatory, even if they were in order according to the rules.

Follett (1902: 194) describes Reed’s accomplishments as follows:

His two most important parliamentary decisions were: first, that a vote is valid if a quorum be actually present, though the quorum may not vote; and secondly, that motions obviously and purely dilatory, designed only to block the doing of business, need not be entertained.

¹² Recognition is deemed within the discretionary power of the presiding officer. But the discretion has more to do with *who* is recognized than with the purpose for which recognition is sought. Reed expanded this authority by his heretical maneuver. On recognition in the House generally, see Deschler (1975).

¹³ Why the Democrats didn’t all simply vote no and defeat the motion (they appeared to have the votes at this time) is unclear to me. Perhaps they desired not to oppose directly a constitutional obligation of each chamber to judge elections. See Follett (1902 [1974]), pp. 192 ff.

¹⁴ Reed reportedly asked of one minority member who personally objected that Reed had named him “present and counting toward a quorum” whether he really wanted to insist he wasn’t present, and observed that if he did that very insistence would constitute evidence that he was.

Follett (1902 [1974]: 194-216) provides a passionate defense of Reed's actions, citing occasional idiosyncratic uses of these tools by previous speakers, their use in state legislatures and in the House of Commons, and possible interpretations of the Constitution consistent with these actions. Nevertheless, at the time they were deployed, these practices were not part of the Standing Rules of the House of Representatives. On February 14, 1890, several weeks *after* Reed's preemptive strikes, they were formally incorporated into the rules. Once again, then, we see that rules are constraints, except when they're not.

- *Violating scope of the differences.* The U.S. Congress is a bicameral legislature. The presentment clause of the Constitution requires that each chamber pass a bill in identical form before it may be presented to the President for his signature. When different versions of a bill pass each chamber, these differences must be resolved. One approach is to "message" between the chambers. One chamber accepts the other's version, but with an amendment in the nature of a substitute, i.e., they strike everything after the enacting clause in the other chamber's bill and substitute the language from their own bill. This is messaged back to the other chamber, which may accept it (and we're done), or accept it with amendments of their own and send it back the other way. This ping-pong-like process works satisfactorily on relatively simple bills. But a multi-hundred page bill with many complexities cannot practically be handled in this manner. A conference committee is convened, consisting of a delegation from each chamber, that fashions a compromise between the two versions. This compromise is sent back to each chamber under a closed rule (no amendments) and is voted up or down there. If both chamber approve, then the bill is sent along for the President's signature.

There are, however, restrictions on what the respective conferees can agree to. Known as the scope of the differences, conferees are effectively required to produce a convex combination of the two chamber-approved bills. This means

- Any negotiated outcome must lie within the interval defined by the two bills.¹⁵
- Any initial agreements in the two bills must be reflected in the conference report.
- No matter contained in neither initial bill may be introduced into the report.

The normal practice is to observe these constraints, except when they are not observed. Imagine an agriculture appropriations bill in conference, where the conferees are drawn

¹⁵ This is unambiguous when the difference is quantitative, but requires judgment when it is not.

primarily from the committees in each chamber with original jurisdiction.¹⁶ A particular subsidy may have been kept low in the chamber-specific versions in order to secure passage; a majority of legislators in each might oppose a higher support level. In conference, the conferees, with ties to agricultural constituencies and interests, would prefer a level higher than in either chamber's bill. Nominally, they are limited by the scope of the differences. But, in fact, they are limited by what they can get away with when each chamber votes on the conference report in its entirety under a closed rule. While it is possible for a legislator in one of the chambers to offer a point of order against a conference report for violating the scope of the differences, if it succeeds then the entire bill is placed in jeopardy. This has the practical effect of permitting violations in the rules, so long as they are not so egregious that a majority in the chamber is willing to take on the risk of sinking the whole bill by sustaining a point of order against it.

5. Rule Breaking: Some Further Considerations

With these illustrations in mind, let me raise a few additional theoretical issues. Violating a rule in a given instance is one thing; formally changing a rule is another. A revised rule subjects all future considerations to the new constraint. But legislators, lacking omniscience, may be quite uncertain what future considerations might fall within the purview of the new rule. Reducing the threshold for cloture in the Senate, for example, means that *any* measure subsequently taken up will have an easier route to a final-passage vote than under a more stringent threshold. Sometimes, senators are prepared to take this leap – the filibuster criterion was, in fact, changed in 1917 and 1975. But many attempts in the intervening years failed. Why? Perhaps because many a senator anticipated he or she might actually benefit from a more stringent cloture threshold, not always but often enough and on issues of great enough significance to the senator compared to those on which he or she would be disadvantaged. Indeed, for this very reason the imaginary scenario with which I introduced this paper – in which the Senate Majority Leader's heresthetical maneuver resulted in abolishing the super-majority requirement altogether – might not succeed. Many in the majority may be loathe to participate in the Majority Leader's procedural ploy.

Pervasive uncertainty about the contents of the future domain of a revised rule is often sufficient to deter rules changes – better the devil you know, and all that. But it is not necessary. Even if legislators know that many, even most, will be beneficiaries of the change, so long as they

¹⁶ For appropriations measures it is almost always the full agriculture subcommittee on Appropriations from each chamber.

remain uncertain about the identity of beneficiaries, they may still balk at making changes. Uncertainty about future incidence produces a *status quo bias* (Fernandez and Rodrik, 1991). This status quo bias means that permitting the occasional “breach” or temporary “reinterpretation” of the rules may be superior to tampering with standing rules (or a constitution for that matter) directly.

This is a variant of time inconsistency in which the circumvention of a particular rule on a particular occasion is a temptation too attractive to resist at the time. It is not unusual for majorities simultaneously to agree to standing rules *ex ante*, but also to leave loopholes that may be exploited in particular circumstances. In providing these loopholes, and anticipating their use from time to time, it is not accurate to assert that collective choice on standing rules suffers from time inconsistency; rather it identifies how the collectivity anticipates the occasional circumvention. But a toleration for actually *breaking* rules, as some of the examples given earlier illustrate, is a horse of an altogether different color. That is, arranging a procedure for *suspending* rules in a particular circumstance, and providing some regulation of its use (e.g., a super-majority requirement), is one thing. But permitting a simple majority to sustain an outright violation – indeed, as in the Reed example, a simple majority of a *quorum* – damages the rules-as-constraints vision of institutions. It is the time inconsistency of “remote majoritarianism” (Krehbiel, 1991) with a vengeance.

6. Conclusion

Through a series of examples drawn from historical experiences in the House and Senate, I have tried to contribute what I believe are novel points about our treatment of institutions. Institutions as constraints has been a workhorse in the positive political theory and political economy fields – Baron-Ferejohn bargaining games, Shepsle-Weingast amendment games, Romer-Rosenthal agenda games are some examples. Collective practices are taken as fixed exogenously, providing a strategic context in which agents interact. In taking practices as fixed, equilibrium is established where deviations from the game form are ignored (or repressed) and compliance is taken for granted. The game form is given *ex ante* and there is no choice on whether to play it as opposed to some alternative game form. This is not a bad starting point, since even if practices are endogenous choices, these choices must be informed by what (equilibrium) consequences are anticipated. As an application of backward induction, the equilibria associated with various alternative institutions must be determined before agents can rationally select which one to impose.

The institutions-as-equilibria approach, however, allows a deeper appreciation of institutional life by taking on board the possibility that departures from the rules are possible. Self-governing groups, in a manner like the Hobbesian state, cannot commit to enforcing their rules always and everywhere; thus, individual agents may find circumstances in which it does not always pay to comply with existing rules. Prospective departures, however, are not all of the same type. I have identified four different senses in which departures from a given body of rules are possible.

First, an institution is, as Calvert and Schotter remind us, embedded in a primal environment. If the institution initially is in equilibrium, then an environmental perturbation may be sufficient to provide incentives for agents to “move against” the institution. A regime in place may be replaced by an alternative arrangement, peacefully (e.g., the Articles of Confederation regime) or violently (e.g., the *ancien regime* in France).

Second, a body of rules may contain its own mechanisms for revision. Article V of the U.S. Constitution and Rule XXII of the Senate’s standing rules are examples. Election rules, as well as those governing redistricting and reapportionment, might also be regarded as self-referential mechanisms of change. Unlike departures of the first type (in the previous paragraph), where the impetus for change comes from the primal environment, mechanisms of change here are prearranged by forward-thinking designers at a constitutional moment.

Third, rules may be temporarily suspended in accord with institutionally specified regulations. Suspension and special rules in the House, unanimous consent agreements in the Senate, escape clauses in treaties and contracts, and emergency powers in constitutions are examples. They share in common the belief that once the issue at hand is resolved, a return to “normal order” is expected.

Finally, rules may be broken. Declaring the Senate not a continuing body in direct contradiction of a standing rule or direct violations of the scope-of-the-differences requirement for conference reports were mentioned earlier. The U.S. South for a generation found “massive resistance” to Supreme Court edicts to integrate public schools attractive. A collectivity may have the means to reverse outcomes based on rules violations or to punish deviations, but may lack the will to do so.

All of these departures from rules raise concerns with the institutions-as-constraints approach. Rules may, as North states, consist of “humanly devised constraints.” But what humans devise, they can revise. Thus, institutions are constraints except when decisive coalitions

decide they are not. The examples given earlier suggest that clever institutional politicians are on the prowl for heresthetical opportunities to bend, evade, even break the rules, especially when the stakes are large.

A second concern revolves around the difference between revising rules and breaking them. Revising is forever (or at least until the next round of revision). Breaking is issue- and time-specific. The policeman looks the other way when a motorist travels 40 miles per hour in a 35 miles-per-hour zone; he neither enforces the rule nor attempts to have it revised. Likewise, legislative majorities often ignore scope-of-the-differences violations in conference reports. Small departures, some of the time, appear to keep an institution intact. It remains equilibrium-like, i.e., it persists despite occasional violations and is resistant to revision.

Lest I be accused of committing the fallacy of the two opera singers – in which a judge gave a role to the second opera singer immediately after having heard only the audition of the first – let me note a difficulty with the rules-as-equilibrium approach. There may be no such equilibrium in the primal environment. Riker (1980) makes this point in the context of majority rule in what has been coined the “inheritability hypothesis.” When majority preferences over outcomes are cyclic (almost always in multidimensional spatial contexts), and institutional arrangements map into unique social outcomes, then collective preferences over institutions *inherit* the cyclicity of collective preferences over outcomes. In such cases, we have two diametrically opposed circumstances – the potential disequilibrium in the primal environment on the one hand, and the structure-induced equilibrium of a well-functioning institution on the other. What we observe in many empirical settings, however, seems to be something in between, neither the chaos of the former nor the stability of the latter. Institutions are revised occasionally, rules are violated with some frequency, policy outcomes change over time but often exhibit only small variations around some central tendency. The puzzle is how to account for this in-between state of affairs. Maybe what we are looking for is a theory of friction, but whatever it might be, it is something toward which more thinking needs to be directed.

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