

Government, Clubs, and Constitutions^{*}

Peter T. Leeson[†]

Abstract

This paper analyzes “constitutional effectiveness”—the degree to which constitutions can be enforced—in the system of government vs. the system of clubs. I argue that clubs have residual claimants on revenues generated through constitutional compliance, operate in a highly competitive environment, and permit individuals to sort themselves according to their governance needs. These features make their constitutional contracts self-enforcing. Government lacks these features. So its constitutional contract is not. Institutional augmentations that make government more club-like, such as federalism, democracy, and limited government scope, improve government’s constitutional effectiveness. But constitutional effectiveness remains superior in the system of clubs.

^{*} I’m very grateful to Pete Boettke, Chris Coyne, and an anonymous referee for comments and suggestions. I also thank the Becker Center on Chicago Price Theory at the University of Chicago, where I conducted part of this research, the Mercatus Center at George Mason University, and Fund for the Study of Spontaneous Order for financial support.

[†] Email: PLeeson@GMU.edu. Address: Department of Economics, George Mason University, MS 3G4, Fairfax, VA 22030.

1 Introduction

James Buchanan pioneered the economic theory of government, the economic theory of clubs and the economic theory of constitutions (Buchanan 1965; Buchanan and Tullock 1962).¹ Oddly, almost no one has attempted to connect these theories.² This paper does that. It analyzes “constitutional effectiveness”—the degree to which constitutions can be enforced—in the system of government vs. the system of clubs.

I argue that clubs have residual claimants on revenues generated through constitutional compliance, operate in a highly competitive environment, and permit individuals to sort themselves according to their governance needs. These features make their constitutional contracts self-enforcing. Government lacks these features. So its constitutional contract is not.

Institutional augmentations that make government more club-like, such as federalism, democracy, and limited government scope, improve government’s constitutional effectiveness. But constitutional effectiveness remains superior in the system of clubs.

Assuming individuals care about constitutional effectiveness, this begs the following question: Why don’t societies use the system of clubs instead of the system of government to supply governance? The answer is perhaps they should.

2 Two Tales from the State of Nature

Buchanan (1975) offers a useful starting place for thinking about the emergence of collective decision-making organs and the constitutional contracts that bring them into existence. Following Hobbes ([1651] 1982) he asks us to begin our thinking with a state of nature in which no such organs exist. In the state of nature each individual is responsible for protecting his own property rights and producing the goods he desires.

This state is insecure. Persons’ property is constantly exposed to expropriation by others. This cripples individuals’ ability to cooperate for mutual gain. The relationships required to

¹ Each of these theories has been important to political economy’s advance over the last 50 years. Sandler and Tschirhart (1997) survey the development and application of the economic theory of clubs. Voigt (1997) surveys the development and application of the economic theory of constitutions. For an overview of Buchanan’s unique political economy and a discussion of its importance, see Boettke (1998).

² Boudreaux and Holcombe (1989), who consider how developers sell memberships in constitutionally governed residential communities, are the only exception I found.

finance and produce goods with strong “publicness” attributes that no person finds profitable to produce individually are impossible.

According to Buchanan, individuals who find themselves in this state have a mutual interest in signing a “disarmament contract.” This contract is an agreement between each person in the state of nature to forbear preying on others. Individuals also have a mutual interest in appending this contract to share in the financing of public goods.

The disarmament contract confronts a prisoners’ dilemma. Each person has an incentive to renege on its terms after he signs. Individuals overcome this dilemma by forging a modified version of this contract—a “social contract.”

The social contract endows one or several members of society with coercive authority to enforce the disarmament’s terms and to ensure that individuals contribute to public goods, per their agreement. This governance-creating contract is called a constitution. The person(s) who the constitutional contract endows with the power to enforce its terms on the others has a monopoly on the legitimized use of force. The monopoly governance organ he controls is called government.

In Buchanan’s analysis, contracting in the state of nature creates the system of government. However, with a few tweaks it’s possible to tell a similar story, but one that results in the “system of clubs” instead.³ That story is as follows.⁴

Insecure in their property and unable to enjoy the public goods they desire in the state of nature, individuals demand governance services.⁵ Some of them, perhaps the strongest ones, offer to sell property protection, and thus some delineation of rights, to others.⁶ The kind, quality, and price of that protection varies.

³ My analysis of the system of clubs vs. the system of government bears some important similarities to Ostrom, Tiebout, and Warren’s (1961) discussion of a “polycentric political system” vs. “gargantua,” Foldvary’s (2002) discussion of “cellular democracy” vs. “mass democracy,” and Frey’s (2005) discussion of “functional, overlapping, competing jurisdictions” vs. traditional federalism. The system of clubs may be seen as a more radical or extreme form of the polycentric political systems these authors describe in the case of municipalities or jurisdictions. The system of clubs system doesn’t seek to “mimic the market” in governance. It seeks to establish a genuine market in governance. On the limits of governance “quasimarkets” and the benefits of genuine governance markets, see the discussion below and Boettke, Coyne, and Leeson (2011).

⁴ My tale bears some resemblance to Nozick’s (1974). However, in Nozick, for reasons that, as I discuss at the end of this paper, I believe are similar to ones operating implicitly in Buchanan’s tale, the system of clubs leads to the system of government via an invisible-hand process.

⁵ I sketch the system of clubs very briefly. For an excellent, detailed discussion of such a system and the incentive compatibility of the contracts that underlie it, see Friedman (1989).

⁶ Like Buchanan’s tale, mine assumes that individuals in the state of nature have sufficiently secure rights to their persons and “wills” to enter into contracts. Buchanan’s (1974) primary objection to “anarchist” systems,

Some persons may offer full-time police protection for individuals who enter “disarmament contracts” through them. Others offer only part-time protection to such persons. Some persons offer disarmament contracts that prohibit a range of activities besides violent conflict. Others offer “night watchman” disarmament contracts that prohibit no more than this.

The other persons in the state of nature may contract with such protection providers. Or they may enter the protection business themselves and offer different kinds of disarmament contracts to others instead. Some persons may choose not to enter into any disarmament contract at all and remain unprotected.

Protection sellers also offer conflict resolution services to their customers. Some may offer to adjudicate customers’ conflicts through courts. Others might offer to referee duels. Further, persons who don’t sell protection services may sell adjudication services to others “*à la carte*.” Some persons may choose to sell adjudication services specifically for conflicts that emerge between protection sellers and their customers, or between customers who’ve entered disarmament contracts with different parties.

Similarly, to satisfy the demand for non-protection related goods with strong “publicness” attributes, some persons offer contractual arrangements to others for the financing and provision of various public goods. Some private protection sellers may bundle these goods in the disarmament contracts they offer. In other cases specialist providers of such goods may offer contracts for their services.

Individuals’ different governance demands—demands for protection and non-protection related public goods—drive the particular contracts that are offered and emerge. Some of these contracts may create communal property arrangements for customers and involve redistributing income from richer signatories to poorer ones. Other governance contracts may create governance arrangements that look very individualistic. Nearly any and all kind of governance

such as the one I describe, is that these systems presuppose an initial definition of property rights from which such a system arising out of private contracting could emerge. This is peculiar. First, as indicated above, his system of government also assumes some initial definition of rights. How else are persons in the state of nature entering a social contract to create government? Second, this assumption, which we both make, doesn’t seem terribly unreasonable. The initial distribution of rights is determined by physical strength or “cunning” in the state of nature. That state isn’t one without any rights distribution. It’s one in which rights are distributed by “might.” One objection to such a distribution is that it entails the strongest (or most cunning) person having all the rights and everyone else none. But this objection is mistaken. The costliness of violently appropriating resources currently in others’ hands means that even the strongest man finds it in his interest to pass some of those resources—and thus rights to them—back to their original holders. See, for instance, Leeson and Nowrasteh (2011).

contract, each with its own characteristics, is possible. I leave it to the reader's imagination to fill in the many alternative governance configurations to the few described above.

Each of these governance contracts creates a "club."⁷ Buchanan's (1965) theory of clubs explains how individuals can supply goods with a high degree of "publicness" privately. Club goods are excludable but non-rivalrous (or only rivalrous past some congestion threshold). Thus it's profitable to supply them privately if sellers can induce a sufficient number of individuals to share their cost. Buchanan developed the theory of clubs with goods like swimming pools in mind. But the same underlying logic applies to all goods of this type, including governance itself.

The process I describe that gives rise to the system of clubs from the state of nature is similar to the one Buchanan describes that gives rise to the system of government from that state. In both accounts governance emerges from contractual agreement out of individuals' mutual interest in supplying it collectively. But there's a crucial difference in our accounts.

In Buchanan's account everyone enters the *same* constitutional contract. That contract creates a monopoly governance supplier, making it the single source of legitimized force in society. There's one constitution and one collective decision-making organ. Governance is monocentric.

In my account individuals enter a variety of different constitutional contracts—as many as "the market will bear." These contracts create a multitude of governance suppliers, generating many, competing sources of force in society. There are multiple constitutions and collective decision-making organs. Governance is polycentric.⁸ This difference between the system of government and the system of clubs turns out to be critically important.

The skeptical reader, for whom the process Buchanan describes that leads to the emergence of the system of government sounds eminently reasonable but the process I describe that leads to the emergence of the system of clubs sounds like science fiction, will be relieved to learn that the latter has the stronger claim on historical reality.

As Buchanan recognizes, individuals have never forged a system of government through a social contracting process like the one he describes. However, they have forged systems of

⁷ In the system of clubs I've described, governance rules and organs are consciously selected but must pass a market test. This take on privately created order helps to resolve the difficulties Buchanan (1977) expresses about inefficient privately created order in Hayek (1973). It enables the "good" kind of constructivism that Buchanan wants to ensure is possible without falling prey to the problems of the "bad" kind of constructivism that both Buchanan and Hayek are keen to avoid.

⁸ I borrow this term from Ostrom, Tiebout, and Warren (1961).

clubs through a contracting process not unlike the one I describe. Terry Anderson and P.J. Hill (1979, 2004) document such a process in the 19th-century American West. Miners, adventurers, and settlers reached the western United States before the U.S. government did. To satisfy their demand for governance they created land clubs, mining clubs, and wagon trail clubs that governed property rights, mining camps, and wagon trails. Each club had its own constitutional contract.⁹

Both government-creating and club-creating constitutional contracts create governance. And both confront the same obstacle: constitutional enforcement. Clubs and governments enforce contracts between their customers or citizens. But what enforces contracts between them and their customers or citizens? Unlike “ordinary” contracts, contracts with governance suppliers—constitutional contracts—must be self-enforcing.

Below I show that my tale from the state of nature isn’t only more historical than Buchanan’s. It’s more logical. In the system of government the question, “Who guards the guardians?,” goes unresolved. In the system of clubs it doesn’t. There’s a simple reason for this. In the system of clubs constitutional contracts tend to be self-enforcing. In the system of government the constitutional contract doesn’t.

3 Self-Enforcing Constitutions: Government vs. Clubs

Three features of the system of clubs, which are either absent or only weakly present in the system of government, account for constitutional self-enforcement in the former but not the latter. First, in the system of clubs governance suppliers are residual claimants on revenues they generate through constitutional compliance. Clubs have owners. They earn the profits flowing from individuals’ patronage of their clubs. Thus their interests are tied directly to their clubs’ success in attracting patrons. This success depends on their clubs’ constitutional effectiveness.

If club owners (or their agents) violate their clubs’ constitutions, they lose patrons. Club owners capitalize this loss. In contrast, if club owners ensure constitutional compliance, they capitalize the benefits of satisfying their patrons. Residual claimancy in the system of clubs

⁹ The literature on private governance arrangements—some club-like, others less so—is large and growing. For instance, see Benson (1990), Ellickson (1990), Friedman (1979), and Leeson (2007a, 2007b, 2008a, 2009a, 2009b).

aligns club owners' and club members' interests. In doing so it makes clubs' constitutional contracts self-enforcing.

In the system of government the monopoly governance supplier isn't a residual claimant on revenues he generates through constitutional compliance. He's a residual claimant on revenues he generates through increasing citizens' productivity. When citizens produce more, government earns more revenue. Thus government has some incentive to enhance citizens' productivity. But that's not the same as having an incentive to comply with the constitutional contract citizens agreed to.

Consider two cases. First, suppose the constitutional contract citizens desire, and thus agree to, isn't productivity maximizing. They dislike large wealth disparities. So they agree to a constitutional contract that involves significant income redistribution. Or they may value leisure highly. So they create a constitutional contract that gives them more leisure at the expense of providing for the quantity/mix of public goods that maximizes their productivity. Such a society is materially poorer than one that doesn't redistribute income or requires individuals to contribute more to public goods. But citizens prefer it.

Government doesn't. It can't tax utility. Thus, if government is a revenue maximizer, it prefers a materially richer society. Its incentive is to violate the constitutional contract citizens agreed to, for example by supplying more public goods than the constitution calls for, because this raises resident productivity.

Now suppose the constitutional contract citizens desire, and thus agree to, is productivity maximizing. In this case, too, government has an incentive to break the constitutional contract. Government doesn't internalize the full cost of taxation. Tax distortions are borne partly by government, but also partly by citizens. Thus the tax rate that maximizes revenue—the one government desires—is always higher than the tax rate that citizens would unanimously consent to (McGuire and Olson 1996).¹⁰ That means it's higher than what citizens agreed to in the constitutional contract.

The system of government has a residual claimant. But from the perspective of constitutional effectiveness, it's a claim on the residual of the wrong thing. The residual

¹⁰ If "government" is just a synonym for unanimous consent, then of course the tax rates would be the same. But if every governmental decision/activity requires unanimous consent, individuals remain in precisely the situation in which they started in the state of nature. They haven't created a third-party enforcer, and thus a government, at all.

government claims doesn't co-vary with satisfying citizens and thus constitutional effectiveness. It covaries with maximizing tax revenue. This gives government an incentive to violate the constitutional contract.

The second reason the system of clubs facilitates constitutional self-enforcement is that it's highly competitive. In that system individuals have a multitude of constitutional, and thus governance, options available to them, including not contracting into any collective decision-making organ at all. The large number of competing governance organs and freedom of entry into this market exposes each club's owners to the pressures that competitive markets expose traditional producers to.

The threat of consumer exit, with a competing club's assistance if necessary, constrains the club's owners in how they wield the authorities their customers have endowed them with constitutionally. If club owners break their end of their constitutional contract, club customers exit. This threat makes constitutional compliance compatible with club owner incentives. It aligns the interests of the club's agents and principals.

Exit isn't free. It's costly to leave a situation in which one has "put down roots." Thus there remains some range over which owners may exploit customers. However, the more "poly" governance is, the smaller this range is, and thus the stronger the self-enforcing power of constitutional contracts is, and vice versa. The system of clubs maximizes governance's "poly-ness." There are as many governance organs as individuals demand. Thus the system of clubs minimizes the exploitation that's possible because of exit costs and maximizes the self-enforcing power of constitutional contracts.

The system of government minimizes governance's "poly-ness." It limits governance provision to a single organ. Thus the system of government maximizes the exploitation that's possible because of exit costs and minimizes the self-enforcing power of its constitutional contract.

The third reason the system of clubs facilitates constitutional self-enforcement is that it's highly assortive. Since there are no artificial limits on the constitutional contracts and associated governance organs that individuals may develop and join in that system, the governance organ that each person would ideally prefer tends to govern him. By "artificial limits" I mean there are no systemically created barriers to creating a different, competing collective decision-making organ.

There are of course economic limits. For example, it's not possible to develop a club wherein choices are costless or unicorns adjudicate commercial disputes. Also, there are good economic reasons why, even if I prefer a slightly different governance "package" from one provided by a currently existing club with many customers, I may still choose to join that club rather than creating my own competing one. Network effects can create increasing returns to membership in an existing governance organ. These effects may exert some naturally limiting influence on the number of governance organs that evolve in the system of clubs. This influence's extent depends on how strong network effects are for governance. I discuss this issue more below.

Assortiveness facilitates constitutional self-enforcement in the system of clubs by enabling club customers to threaten coordinated punishment of constitution-violating club owners. Because of that system's assortiveness, clubs tend to consist of persons who share preferences and goals. Such persons are more likely than persons with divergent preferences and goals to share ideas about what kinds of agent behaviors constitute constitutional violations and what kinds don't. This permits them to threaten constitution-violating club owners with coordinated punishment, such as collective exit.

Coordinated punishment is more severe than uncoordinated punishment. It imposes a higher cost on "bad" club owners. Knowing that constitutional violation will lead to not just one or a few persons punishing them, but rather all of the club's customers, club owners find constitutional compliance incentive compatible for a larger range of potential opportunistic behavior.

The system of government isn't assortive. Government artificially (i.e., through non-economic forces) limits the ability of individuals who have different interests and objectives to sort themselves into collective decision-making organs that reflect those differences. In establishing a monopoly governance organ government precludes such sorting completely. Every person, regardless of interests or objectives, falls under the same governance organ's purview.

The absence of assortiveness in the system of government undermines assortiveness' ability to facilitate constitutional self-enforcement in that system. When citizens' interests and objectives vary, ideas about what constitutes a constitutional violation, and how to respond such a violation, are likely to vary too. This makes it harder for citizens to coordinate punishments of constitution-violating agents. Knowing that punishments for constitution violations are unlikely

to be comprehensively collective, and thus will be less severe, agents of government are willing to engage in a wider range of such violations.

4 Enhancing Government's "Clubness"

One criticism of the foregoing analysis is that it treats constitutional contractors as *naïve*. Sophisticated constitutional contractors would surely insist on including provisions in their contract with government that might improve constitutional self-enforcement in the system of government. In the real-world system of government individuals include such provisions in the constitutional contract. Three such provisions are especially important: federalism, democracy, and limited government scope.

We can understand these provisions as attempts to make the system of government more like the system of clubs—as attempts to enhance government's "clubness." They may improve constitutional effectiveness in the system of government. But, for reasons described below, constitutional effectiveness in the system of clubs remains superior.

1. Federalism

Sophisticated individuals entering a constitutional contract that creates government may insist on including a provision that creates federalism. They may write into the constitutional contract that beneath the central government there must be smaller sub-governments, each of which has considerable autonomy from the center in its governance-related decisions. To facilitate this, each sub-government shall have its own constitutional contract—limited only by the rules set down in the constitutional contract with the central government—with the individuals that reside within its domain. Those constitutional contracts may differ in the kind of protection they supply, and thus in how they define rights, the means by which they supply protection, and the mix and quantity of non-protection related public goods they provide.

A federalism provision attempts to mimic the competitive and assortive features of the system of clubs that facilitates constitutional self-enforcement in that system. Charles Tiebout (1956) articulated the mechanism whereby this could help produce constitutional effectiveness. If a sub-government violates its constitutional contract with its citizens, they may move to an area governed by a different-sub government that doesn't. The threat of competition between sub-governments improves constitutional effectiveness in each.

Further, since under federalism individuals have more than one choice about protection and public good arrangements, they're able to sort themselves better by the constitutional contracts they desire. This facilitates their ability to coordinate punishment of sub-governments that violate their constitutional contracts, encouraging sub-governments to comply with their constitutions.

There are (at least) two limitations to a federalism provision's ability to improve constitutional effectiveness compared to the system of clubs. First, unless the constitutional contract with the central government permits as many sub-governments—each with its own constitutional contract—to develop as individuals desire, the degree of competitiveness and assortiveness under the system of government, and thus competition's ability to facilitate self-enforcing constitutional contracts under this system, remains lower than it is under the system of clubs in which there's no constraint on the number (or variety) of governance organs that may operate.

If the constitutional contract with the central government permits an unlimited number (and variety) of sub-governments, its ceases to be a monopoly collective decision-making organ. Such a system of "government" is for all intents and purposes the system of clubs. To remain a government in any meaningful sense government must limit the number of sub-governments. In doing so it limits the extent to which competition and assortiveness can facilitate constitutional effectiveness compared to the system of clubs.

The same is true regarding sub-governments' autonomy. Allowing sub-governments complete autonomy would undo the central government's monopoly on the legitimized use of force. Thus government must limit sub-government autonomy. But in doing so it limits the variety of governance organs that may exist compared to the system of clubs.

The second reason that including a federalism provision in the constitutional contract is at best of limited help in facilitating constitutional effectiveness is that, for the reasons described in the previous section, individuals' constitutional contract with the central government isn't self-enforcing. Thus there's no way to make the central government comply with the provision in the

constitutional contract according to which it permits sub-governments. If the central government finds it in its interest to renege on the federalism provision, it remains able to do so.¹¹

2. Democracy

Sophisticated persons entering a constitutional contract that creates government may insist on including a provision that creates democracy. They may write into the contract that they reserve the right to popularly depose existing agents of government and put new ones in their place.

A democracy provision attempts to mimic the residual claimant-on-constitutional effectiveness feature of the system of clubs that facilitates constitutional self-enforcement in that system. John Ferejohn (1986) articulated the mechanism whereby this could help produce constitutional effectiveness.¹² If agents of government violate the constitutional contract with citizens, citizens may remove them from their position as agents of government. The threat of removal connects government agents' interests to constitutional effectiveness, making it more likely that agents will comply with the constitutional contract.

Public choice theory elaborates a long list of limitations on such a democracy provision's ability to improve constitutional effectiveness in the system of government. Perhaps foremost among these is the logic of special interest groups. The behaviors that maximize government agents' chances of reelection often differ from the behaviors that are consistent with constitutional compliance.

Popularly elected agents of government improve their chance of reelection by concentrating benefits on the well-organized, well-informed signatories of the constitutional contract at the expense of poorly organized, uninformed signatories. Unless the latter individuals requested such redistributions in the constitutional contract, including a democracy provision needn't lead agents of government to comply with that contract's terms.

3. Limited Scope

¹¹ If government initially permits sub-governments to form and later decides it would like to reel back federalism, it may find it hard to do so. Sub-governments may resist government action that tries to do this. For this reason federalism is the most effective way to enhance government's "clubness" among the ways I consider.

¹² See also, Barro (1973). For a slightly earlier treatment of similar themes, see Hamilton, Madison, and Jay ([1788] 2008).

The final provision I consider that sophisticated persons may insist on including in a constitutional contract that creates government is one that limits government's scope. They may write into the contract that government is authorized to undertake only a few basic activities, for example providing institutions of law and order, such as police and courts, and perhaps a few other basic public goods, such as roadways and education.

A limited-scope provision attempts to mimic the effect of the assortiveness feature of the system of clubs that facilitates constitutional self-enforcement in that system. Friedrich Hayek (1960) articulated the mechanism whereby this could help produce constitutional effectiveness. If government's activities are limited to only the very few things that command the widest assent, it's easier for individuals to determine whether government is complying with or violating the constitutional contract. Further, since individuals share interests with respect to these activities, they're more likely to perceive the same behaviors as either complying with or violating that contract. Thus they're better able to coordinate punishment for the latter.

Like federalism and democracy, a limited scope provision is limited in its ability to improve constitutional effectiveness in the system of government. The reason for this is one of those given above in my discussion of federalism. Since a limited scope provision is itself part of the constitutional contract, there's nothing to enforce it. Individuals may include a limited scope clause in the constitutional contract. And government may ignore it. The limited scope provision isn't itself self-enforcing. Thus it's difficult to see how it could improve self-enforcement of the constitutional contract more generally.

5 Parting Shots

This paper has stated the obvious: constitutions are more likely to be effective when the individuals charged with executing them have an incentive to do so. That happens when governance suppliers are residual claimants on revenues generated through constitutional compliance; when they supply their services in a competitive market; and when individuals can sort themselves according to the kind of governance services they desire. The system of clubs has these features.

Constitutions are unlikely to be effective when the individuals charged with executing them have little incentive to do so. That happens when governance suppliers aren't residual claimants on revenues generated through constitutional compliance but are residual claimants on

revenues generated through resident productivity instead; when the supply of governance is monopolized; and when individuals can't sort themselves according to the kind of governance services they desire because only one constitutional contract is available. The system of government has these features.

Including provisions in the constitutional contract that make government more club-like may improve government's constitutional effectiveness. But not much. Unless these provisions are themselves self-enforcing, they aren't helpful.

The bottom line is this: constitutional rules, which determine what their executors are *supposed to do*, are no substitute for incentives, which determine what their executors *will actually do*.¹³ The system of clubs, which provides the correct incentives for constitutional self-enforcement, exhibits superior constitutional effectiveness whether the constitutional contract that forms government contains rules intended to facilitate its self-enforcement or not.

My analysis begs the following question: Rather than attempting, and inevitably failing, to mimic the system of clubs' desirable features with the system of government, why don't societies use the system of clubs to supply governance?

There are three kinds of answers to this question. The first kind argues that societies don't currently do this. But if they care about constitutional effectiveness they should.

The second kind of answer argues that societies use the system of government instead of the system of clubs because, while the system of clubs may exhibit superior constitutional effectiveness, it can't supply the kind of governance people desire. The "publicness" characteristics of "governance goods" make this so. These goods are non-excludable. Private action can't profitably provide them. Therefore the system of government must.

Although this is the most common kind of answer to the question posed above, I find it the most puzzling. With the possible exception of certain kinds of defense services designed to protect massive territories, the benefits of which we're technologically incapable of excluding some persons from, every supposedly non-excludable governance good is in fact excludable. Police, courts, and other kinds of law enforcement services are certainly excludable. So are non-protection related governance goods. Education, healthcare, welfare insurance, lighthouses,

¹³ Thus the emphasis on rules in much of the important scholarship in constitutional political economy is incomplete. In addition to answering the question of what rules we'd like to have (see, for instance, Brennan and Buchanan 1985), we must answer the question of what rules are *incentive compatible* and thus self-enforcing. The latter is a subset of the former.

parks, roads, radio waves, and waterways are excludable. So is air space. It's costly to exclude non-payers from these goods. But providing them privately isn't just possible. It's reality. Clubs have provided them privately for centuries (see, for instance, Coase 1974; Benson 1990; Beito, Gordon, and Tabarrok 2002).

A more charitable interpretation of the second kind of answer to the question of why societies use the system of government, and not the system of clubs, to provide governance is that while the system of clubs may succeed in providing some level of the public goods governance demands, it doesn't supply the efficient level.

It's true that nearly all goods produce some positive or negative spillovers. Internalizing all of these is impossible. Thus some inefficiency in the system of clubs is inevitable. But as Buchanan's work constantly reminds us, it doesn't follow from this recognition that government can do better. Political activity is riddled with external economies (Friedman 2008).

Political decision making generates costs that fall predominantly on persons other than the political decision maker. Think of voters, or legislators, or judges. The omnipresence of externalities in political decision making is one of its hallmarks and what distinguishes it from decision making in the market. Thus the notion that the system of government can get society closer to the efficient level of public goods, let alone get it to *the* efficient level is, well, absurd. Markets fail. But both theory and evidence give us good reason to think that government fails much worse.

The third kind of answer to the question posed above is the one I think Buchanan offers, albeit implicitly: the system of government, at least in the social contract theory that gives rise to it, *is* the system of clubs. It's just a special case.

I've focused on the cost of a monopoly governance organ: constitutional ineffectiveness. However, a monopoly governance organ also provides some benefits. For example, when governance is polycentric, provision must be made for, and resources must be spent on, somehow integrating, or at least making governance operable in the context of, different constitutional rules associated with each governance organ. To address conflicts between a customer of club A and a customer of club B, clubs A and B must reach some agreement *ex ante* about how they will handle such conflicts.

In the world we live in this problem also exists. Nations don't share constitutional rules or governance organs. So they have to make provisions for dealing with, for instance,

international criminals. Extradition treaties are one way they do this. Because of federalism, in the United States this problem also exists, and is solved, between states and even municipalities.

The obstacle that competing governance organs pose is readily surmountable. Indeed, it's surmounted all the time. Still, it's not free to do so.

If the network-type benefits of having everyone in society under the same constitutional contract and governance organ are sufficiently large, we might expect individuals to be willing trade off some constitutional effectiveness to capture these benefits. In this case the system of clubs will look like the system of government. Given the choice individuals will contract with one governance organ instead of many.

Similarly, precisely because of their "publicness," public goods aren't profitable to produce unless multiple persons share the costs of producing them. If such goods are totally non-rival, it makes sense for every person to be a member of the same club that produces them. Here, too, we get a situation in which economic considerations whittle the potential polycentrism in the system of clubs down to the monocentrism that exists in the system of government. In practice the two systems look the same.

Unlike the second answer to my question about why society doesn't organize via the system of clubs instead of the system of government, I find this answer intelligible. But it's wrong for two reasons.

First, while network-type benefits in governance are certainly positive (I wouldn't anticipate many clubs with only a handful of people if the system of clubs were permitted to flourish), I'm skeptical about how large they are given the ease with which international trading partners, for example, resolve contractual disputes worth tens of millions of dollars despite being from completely different legal systems (see, for instance, Benson 1990; Leeson 2008b). Most important, given the diversity of rules and means of conflict resolution we observe even under the limited federalism that exists in the United States, I'm doubtful whether, if given the choice, individuals really would choose to live under a more homogenous set of rules to capture network-type benefits.

Second, virtually all public goods, though non-rival to a point, become rivalrous past that point when congestion sets in. Thus there's a positive cost to admitting another person to a club providing such a good. This cost means that the optimal club size—the size contracting individuals would choose—is finite. If society is sufficiently small, a single public goods

provider may still result. But for any reasonable sized population, this suggests that multiple clubs would emerge.

References

- Anderson, T.L., Hill, P.J. 2004. *The Not So Wild, Wild West: Property Rights on the Frontier*. Stanford University Press, Stanford.
- Anderson, T.L., Hill, P.J. 1979. An American experiment in anarcho-capitalism: the not so wild, wild west. *Journal of Libertarian Studies* 3, 9-29.
- Barro, R.J. 1973. The control of politicians: an economic model. *Public Choice* 14, 19-42.
- Beito, D.T., Gordon, P., Tabarrok, A. 2002. *The Voluntary City: Choice, Community, and Civil Society*. University of Michigan Press, Ann Arbor.
- Benson, B.L. 1990. *The Enterprise of Law: Justice without the State*. Pacific Research Institute, San Francisco.
- Boettke, P.J. 1998. James M. Buchanan and the rebirth of political economy. In: Holt, R., Pressman, S. (Eds.), *Economics and its Discontents: Twentieth Century Dissenting Economists*. Edward Elgar, Aldershot, pp. 21-39.
- Boettke, P.J., Coyne, C.J., Leeson, P.T. 2011. Quasimarket failure. *Public Choice*, forthcoming.
- Boudreaux, D.J., Holcombe, R.G. 1989. Government by contract. *Public Finance Review* 17, 264-280.
- Brennan, G., Buchanan, J.M. 1985. *The Reason of Rules: Constitutional Political Economy*. Cambridge University Press, Cambridge.
- Buchanan, J.M. 1977. Law and the invisible hand. In: Buchanan, J.M. (Ed.), *Freedom and Constitutional Contract*. Texas A&M University Press, College Station, TX, pp. 25-39.
- Buchanan, J.M. 1975. *The Limits of Liberty: Between Anarchy and Leviathan*. University of Chicago Press, Chicago.
- Buchanan, J.M. 1974. Review of *The Machinery of Freedom: Guide to a Radical Capitalism*. *Journal of Economic Literature* 12, 914-915.
- Buchanan, J.M. 1965. An economic theory of clubs. *Economica* 32, 1-14.
- Buchanan, J.M., Tullock, G. 1962. *The Calculus of Consent: Logical Foundations of Constitutional Democracy*. University of Michigan Press, Ann Arbor.
- Coase, R.H. 1974. The lighthouse in economics. *Journal of Law and Economics* 17, 357-376.
- Ellickson, R.C. 1991. *Order without Law: How Neighbors Settle Disputes*. Harvard University Press, Cambridge, MA.
- Ferejohn, J. 1986. Incumbent performance and electoral control. *Public Choice* 50, 5-25.

- Foldvary, F.E. 2002. Small-group, multi-level democracy: implications of Austrian public choice for governance structures. *Review of Austrian Economics* 15, 161-174.
- Frey, B.S. 2005. Functional, overlapping, competing jurisdictions: redrawing the geographic borders of administration. *European Journal of Law Reform* 5, 543-555.
- Friedman, D. 2008. Order without the state: theory, evidence, and the possible future of. Conference paper, *Dominations and Powers: The Nature of the State*, Wisconsin Center for Liberal Democracy, University of Wisconsin-Madison, March 29, 2008.
- Friedman, D. 1989. *The Machinery of Freedom: Guide to a Radical Capitalism*. Open Court, La Salle, IL.
- Friedman, D. 1979. Private creation and enforcement of law: a historical case. *Journal of Legal Studies* 8, 399-415.
- Hamilton, A., Madison, J., Jay, J. [1788] 2008. *The Federalist Papers*. Oxford University Press, Oxford.
- Hayek, F.A. 1973. *Law, Legislation, and Liberty, Volume 1: Rules and Order*. University of Chicago Press, Chicago.
- Hayek, F.A. 1960. *The Constitution of Liberty*. University of Chicago Press, Chicago.
- Hobbes, T. [1651] 1982. *Leviathan*. Penguin Classics, New York.
- Leeson, P.T. 2009a. The calculus of piratical consent: the myth of the myth of social contract. *Public Choice* 139, 443-459.
- Leeson, P.T. 2009b. The laws of lawlessness. *Journal of Legal Studies* 38, 471-503.
- Leeson, P.T. 2008a. Social distance and self-enforcing exchange. *Journal of Legal Studies* 37, 161-188.
- Leeson, P.T. 2008b. How important is state enforcement for trade? *American Law and Economics Review* 10, 61-89.
- Leeson, P.T. 2007a. An-arrgh-chy: the law and economics of pirate organization. *Journal of Political Economy* 115, 1049-1094.
- Leeson, P.T. 2007b. Trading with bandits. *Journal of Law and Economics* 50, 303-321.
- Leeson, P.T., Nowrasteh, A. 2011. Was privateering plunder efficient? *Journal of Economic Behavior and Organization*, forthcoming.
- Nozick, R. 1975. *Anarchy, State, and Utopia*. Basic Books, New York.

- Ostrom, V., Tiebout, C.M., Warren, R. 1961. The organization of government in metropolitan areas: a theoretical inquiry. *American Political Science Review* 55, 831-842.
- Sandler, T., Tschirhart, J. 1997. Club theory: thirty years later. *Public Choice* 93, 335-355.
- Tiebout, C.M. 1956. A pure theory of local expenditures. *Journal of Political Economy* 64, 416-424.
- Voigt, S. 1997. Positive constitutional economics: a survey. *Public Choice* 90, 11-53.