## Contents

**List of Contributors** vii  
**Preface** xii  
**Introduction** xiii  

### PART I: DELIBERATION AND CONSTITUTIONAL THEORY

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Author(s)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Deliberative Institutional Economics, or Does Homo Oeconomicus Argue? A Proposal for Combining New Institution Economics with Discourse Theory</td>
<td>Anne van Aaken</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Deliberative Institutional Economics: Mind the Gap! Comment on Anne van Aaken</td>
<td>Michael Wohlgemut</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>What Do We Learn by Asking Whether Homo Oeconomicus Argues? Comment on Anne van Aaken</td>
<td>Matthias Meyer</td>
<td>42</td>
</tr>
<tr>
<td>2</td>
<td>Constitutionalism and its Alternatives</td>
<td>John S. Dryzek</td>
<td>47</td>
</tr>
<tr>
<td></td>
<td>Democracy, Discourse and Constitutional Economics: Comment on John S. Dryzek</td>
<td>Viktor J. Vanberg</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>Deliberation as a Discursive Feature of Contemporary Theories of Democracy: Comment on John S. Dryzek</td>
<td>Axel Tschentscher</td>
<td>72</td>
</tr>
<tr>
<td>3</td>
<td>Constitutional Economics in Constitutional Jurisprudence</td>
<td>Axel Tschentscher</td>
<td>81</td>
</tr>
</tbody>
</table>
PART II: DELIBERATION AND SOCIAL CHOICE

4 A Dilemma for Deliberative Democrats
   Philip Pettit

   Collective Rationality: A Dilemma for Democrats with a Solution through Deliberation?
   Comment on Philip Pettit
   Natalie Gold

   Deliberative Constitutional Economics?
   Comment on Philip Pettit
   Christoph Luetge

5 Substantive and Meta-Agreement
   Christian List

   Economics and the Political Discourse:
   Comment on Christian List
   Rüdiger Waldkirch

   The Importance of Information – Remarks on the Constitutional Economics of Deliberative Theory:
   Comment on Christian List
   Detlef Aufderheide

6 Democracy and Argument: Tracking Truth in Complex Social Decisions
   Luc Bovens and Wlodek Rabinowicz

   Deliberative Democracy and Collective Truth-Tracking:
   Comment on Luc Bovens and Wlodek Rabinowicz
   Thomas Schmidt

   Where can the Insights from the Condorcet Jury Theorem Be Applied?
   Comment on Luc Bovens and Wlodek Rabinowicz
   Alois Stutzer
PART III: DELIBERATION AND SOCIAL ORDER

7  What is Meant by Consent?
   Andreas Suchanek  169

   On the Normative Notion of Consent:
   Comment on Andreas Suchanek
   Martin Rechenauer  181

   The Morality and Heuristics of Consent:
   Comment on Andreas Suchanek
   Jurgen De Wispelaere  187

8  The Consequences of Popular Participation in Constitutional Choice –
    Towards a Comparative Analysis
   Stefan Voigt  199

   Is There a Need for a Positive Constitutional Economics?
   Comment on Stefan Voigt
   Michaela Haase  230

   Constitutional Culture and Comparative Analysis:
   Comment on Stefan Voigt
   Horst Hegmann  237

9  Bargaining over Beliefs
   Robert E. Goodin and Geoffrey Brennan  241

   Final Remarks: Deliberation and Decision – Perspectives and Limitations
   Christian Kirchner  261
Discourse theory is frequently applied as the 'basic theory of the democratic constitutional state'.\(^1\) The impact of constitutional economics on jurisprudence then falls within the expansive theme of analysing the strategic ties of ideal speech communities.\(^2\) A large gap, however, demarcates the border between law and economics – a gap that cannot easily be bridged. The first obstacle arises with the different understanding of 'agreement' and 'consensus' within strategic and moral frameworks of legitimation: decision making and discourse do not overlap (1). A further complication arises from the misunderstanding of discourse as intellectual élitism (2). Finally, the ephemeral connection between law and economics is in fact very one-sided: economics holds legal significance only where economic rationality is normatively acknowledged by law (3).

1. The most fundamental and therefore first question between constitutional economics and discourse theory goes to their difference in legitimizing activity, namely: Is there any similarity at all between the 'agreement' among agents of rational choice and the 'consensus' of real persons in an ideal speech situation? True enough, both concepts are in some way related to the justificatory force of voluntary action by those affected (volenti non fit iniuria). They are also both hypothetical procedures when applied as instruments of justification out of the theorist’s armory. But what is the relevance of superficial similarities like these? The framework for voluntary action differs notably between the bargaining of self-interested strategists and the arguing of moral agents. Consensus, though sometimes named as the unifying element between contract and discourse theory,\(^3\) is quite distinct in strategic and moral frameworks. This becomes obvious when each of the positions is confronted with the implicit normative claims of the other.

---


\(^2\) For the perspective of constitutional economics as discussed below cf. Coleman (1988).

a) Let us first consider a Buchanan-style bargaining situation of social choice where 'Law' is but one public good among others. The ideal of 'ordered anarchy' presents itself within a scenario of maximum threats: 'natural distribution' draws the lawless baseline for strategic cooperation, not even excluding murder or slavery. In real life, contractual agreement frequently perpetuates the disadvantage of social groups and individual participants by treating as 'voluntary' what in fact is an action without alternatives. From the perspective of discourse theory, however, such bargaining with unequal power directly violates the right to equal communicative standing. No agreement under such circumstances could be called 'discursively voluntary' in a sense bestowing legitimacy on the outcome.

b) Taking the reverse perspective we have to consider a Habermas-style ideal speech situation of discourse theory where 'Law' is – at least in its communicative connotations – predetermined as a necessary presupposition of discourse theory ('Diskurstheoretische Notwendigkeit von Normen'). The 'ideal speech situation' presents itself within a scenario absolutely free of force or threats: everyone competent to speak and act is allowed to equally participate in non-coercive discourse. From the perspective of social choice theory, however, the difficult conditions of an 'ideal speech situation' entail illegitimate presuppositions: they are twisting the baseline of consent in favor of a liberalistic interpretation of rights. Leaving no place for power, consent under such circumstances fails to mirror the difference in interests among the participants. Discourse becomes as prejudiced as the 'veil of ignorance'.

c) Taking note of the fundamental incompatibility between rational choice and discourse theory, we can conclude that there is no relevant similarity between the 'agreement' among self-interested agents and the 'consensus' in an ideal speech situation. Decision making and deliberation might both have their place in real world procedures, but they remain distinct, not overlapping concepts.

2. Some constitutional economists regard the contrafactual ideals of discourse theory as a dubious form of intellectual élitism. Were such élitism a consequence of discourse theory, the cost of acknowledging this framework of thought would indeed be high. However, taking discourse theory as some form of modern Platonism fails to understand the distinction between ideal and real discourse. There is, to cut things short, no connection of discourse theory with Platonism at all. The 'ideal' in 'ideal speech situation' bears no similarity to the ideals of Platonism. To

---


the contrary: discourse theory is firmly rooted in Kantianism, expanding the epistemeology of 18th century enlightenment into the communicative reflexivity of contemporary transcendental philosophy.\textsuperscript{10} If anything, the resulting framework for public deliberation in real discourse tends to be egalitarian, not intellectually élitist.

3. To show, as has been tried in section 1 above, that approaches of rational choice and discourse ethics do not conceptually overlap within a common notion of 'legitimacy by consent' does not necessarily exclude any relevance of economics to law. However, a number of shortcuts from the realm of economics to the normative world of legal system are clearly inadmissible.

a) Efficiency and optimality do not straightforwardly fit into the legal framework. Take the optimization criterion according to Kaldor-Hicks or the Pareto criterion as examples.\textsuperscript{11} The Kaldor-Hicks criterion would leave the legislator hardly any choice at all if adopted as a constitutional principle.\textsuperscript{12} To use the Kaldor-Hicks criterion as a legal norm, therefore, entails quite distinct consequences from using it non-legally as a criterion of economic or political advantage. Even the less intrusive Pareto criterion will hardly ever blend seamlessly into normative systems. If a legislator, for example, were constitutionally required to use every feasible Pareto improvement, the laws could always be challenged on the ground of sub-optimality: a tax code standing scrutiny today might be called unconstitutional tomorrow in a changing economic environment. It is not surprising that constitutions hardly ever mention optimality or efficiency – and if they do, it is in the form of non-binding principles or goals. Regarding efficiency and optimality, the normative order of a legal system deliberately takes a counterfactual standpoint: norms claim validity no matter how costly their implementation might be.\textsuperscript{13} Efficiency is usually incorporated \textit{indirectly} by allowing non-state actors to follow their self-interest within the framework of private law guarantees, most prominently, by designing contracts according to contract law and in conformity with the standards set by torts law. In public law, deregulation and privatization utilize this effect by expanding the self-interested organization of the private sphere without directly incorporating efficiency into the legal system.

b) Does constitutional economics lend itself more easily to jurisprudence than traditional economics? The starting point for an answer could be the distinctions between realist versus counterfactualist and subjectivist versus objectivist kinds of economic analysis, as suggested by \textit{Jules Coleman}.\textsuperscript{14} Placing constitutional economics of the \textit{Buchanan} school into the realist-subjectivist view on efficiency means that transaction costs are defined by the framework within which the notion of optimality is employed (realist view) and that what is efficient cannot be deter-

\textsuperscript{11} Pareto superiority, Pareto optimality, Kaldor-Hicks efficiency; see Coleman (1988), pp. 143 ff.
mined independent of actual agreement (subjectivist view). In other words: whatever free participants of cooperation actually agree on in light of the circumstances is by definition efficient.

This view, however, bears advantages as well as disadvantages from the legal standpoint. On the one hand, evaluating the efficiency of legal instruments with regard to the actual agreement of real persons within a given legal framework is more adequate than counterfactual-objectivist views (of traditional economics and public policy) in capturing the demands of jurisprudence, because it neither ignores the transaction costs imposed by law, nor assumes an unlimited potential for agreement without regard to the activity of real persons. On the other hand, constitutional economics thus understood is indeterminate as a criterion for evaluating the efficiency of legal precepts: no matter what kind of rule is adopted, the resulting action of free utility maximizers is by definition efficient under this rule. Hence, if the aim of constitutionalism is to shift focus from particular states of affairs to the institutional frameworks that give them their content and meaning\(^{15}\) the theory renders 'efficiency' of action meaningless and solely relies on the comparative advantage of different institutional settings.

Coleman presents three criticisms: (a) some transaction costs are unduly subsumed under the institutional setting, (b) the missing argument about why agreement ought to be voluntary, and (c) a paradox unfolds between the subjectivist view of efficiency and the need for an objective criterion to determine the comparative advantage among different institutional settings.\(^{16}\) The last of these criticisms is of particular concern to jurisprudence. The criterion to compare institutional settings is probably the most pressing question jurisprudence asks of constitutional economics. If the answer comes down to something like 'institutional frameworks are efficient relative to rules of institutional decision making',\(^{17}\) jurisprudence is sent right back to its own devices because 'rules of institutional decision making' are procedures of legislation and adjudication, even of constitutional amendment, and all of them are legal rules in themselves. While realist-objectivist viewers of efficiency might at least claim that one set of court rules is advantageous compared to another, constitutional economics in Coleman's interpretation cannot provide this kind of answer. Whatever the lawmaker adopts within the given legislative procedure is by definition efficient; and on the meta-meta-level: whatever the people adopt as a constitution is by definition efficient. The efficiency calculations of decision making do not entail specific guidelines for the deliberation of lawmakers. In other words – taking up the result of the first section above – decision making and deliberation are not overlapping concepts, they are distinct.

c) What remains of constitutional economics in constitutional jurisprudence? The value of economics in law lies in applying the economic paradigm (self-interested utility maximization, methodological individualism) to legal provi-

\(^{17}\) Cf. Coleman (1988), pp. 153 ff., who himself does not share this 'realist' view (p. 150).
The legal framework gives incentives and creates additional transaction costs. Therefore, changes of that framework do make a difference for the range of activities rational utility maximizers are freely engaging in: legal regulation can inhibit such activity (criminal law) or enable it (law of contracts). Making a difference means that some sets of rules can be of comparative advantage over other sets of rules; in the terms of constitutional and new institutional economics: 'institutional settings' differ. However, the ruling principle to determine comparative advantage of institutions is not necessarily that of efficiency or optimality. With many (if not most) institutions such principle or criterion is not even rooted in economic considerations. For example, the indiscriminate use of 'efficient allocation of resources' as a criterion to judge the comparative advantage of institutions does not at all capture all rationales available for legal rules. Sometimes the effective — even if exceedingly costly and therefore not efficient — achievement of basic safeguards (human rights, minimum welfare standards) prevails over all other considerations. The rationale is no longer that of self-interested utility maximization, but of universal morality.

Constitutional economics leads to the most basic insight that institutional frameworks, by imposing transaction costs, are responsible for the scope of legal activity that is actually available. This has at least some bearing on law and jurisprudence. Reducing regulation will typically decrease transaction costs and, therefore, seems to be one of the recommendable meta-rules for lawmakers trying to improve the institutional framework by broadening the options for individual activity. Also, submitting issues to the sphere of private rather than public law tends to decrease transaction costs. Both themes have been taken up by lawmakers and jurisprudence theorists under the titles 'deregulation' and 'privatization'. Furthermore, both themes are good examples for the incorporation of economic rationales as guiding principles in law. Thus, law and jurisprudence are opening small windows for economic analysis.

References

Alexy, R. (1991) Theorie der juristischen Argumentation: Die Theorie des rationa-
len Diskurses als Theorie der juristischen Begründung, 2nd ed., Frank-
furt a.M. (Suhrkamp).
Alexy, R. (1995) 'Diskurstheorie und Menschenrechte', in: Recht, Vernunft, Dis-

Cf. Kirchner (1996), pp. 72 ff. regarding the Chicago school of economic analysis of law.


