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A COMMENT ON VANBERG

RULES, DISPUTE RESOLUTION, AND STRATEGIC BEHAVIOR

Alec Stone Sweet

Until very recently, *autolimitation*, both a symptom and cause of a profoundly important *judicialization* of European politics, was all but unknown. Comparative political scientists did not study law and courts, and public law-political scientists were not much interested in comparative law (Kommers (1976) is a notable exception). To my knowledge, the first works germane to the topic of this comment were produced by Landfried (1984, 1985) on West Germany, and by Keeler and Stone (1987) and Stone (1989a, 1989b) on France. The appearance of special issues of *West European Politics* (Volcansek, 1992) and of *Comparative Political Studies* (Shapiro and Stone, 1994) devoted to European judicial politics, combined with the spread of constitutional rights and courts to the democratizing states of the former Soviet bloc, pushed this agenda forward. If the study of pan-European and global constitutionalism is today a growth industry (e.g. Tate and Vallinder, 1995), rigorous theorizing on the political impact of constitutional law and constitutional courts remain a scarce commodity.

Georg Vanberg is the first to elaborate a formal model of legislation in the shadow of constitutional adjudication. Vanberg's contribution to the study of constitutional politics – by which I mean the relationship between legislators (governments and members of parliaments) and constitutional judges (members of constitutional courts) in the making of public policy and the construction of constitutional law – is potentially seminal of a new wave of research. Vanberg's piece can also be profitably read by many who do not work primarily in the rational choice-institutionalist, or game-theoretic, tradition. He focuses not only on the crucial, policymaking core of constitutional politics, but has largely (if not quite enough) resisted temptations to narrow the domain of inquiry to facilitate the task of model-building.

In the first two sections, I shall discuss constitutional politics as legislative bargaining, and argue that Vanberg's model of these politics is misspecified at key points. Although I reference the results of prior research in this area, and bring to bear certain empirical findings, I do so within the confines of Vanberg's own preferred epistemology. Thus, I accept that: (1) all actors behave rationally, in the sense that they select strategies

designed to maximize their relative payoffs given the institutional constraints they confront; (2) at any given point in time, these institutional constraints, or the rules of the 'constitutional politics game', are fixed; and (3) the underlying preferences of all actors are exogenously constituted, and are therefore also taken as given. In the following section, I shall focus on some of the consequences of the fact that game-theoretic approaches, at least at their present stage of development, are incapable of dealing with the single most important feature of constitutional politics, namely, the continuous adaptation of the rules of the game by constitutional adjudication.

Legislative Bargaining in the (Second) Fifth Republic

Let me begin with three general points. First, being contextually specific, game-theoretic models operate at low levels of abstraction. Although versions of the constitutional politics game are found wherever abstract review of statutes is exercised on an ongoing basis (see Stone, 1995; Stone Sweet, forthcoming), Vanberg has modeled the French case.¹ Second, formal models are ill-equipped to explain institutional change, the focus being on the microlevel effects of a particular, known, and therefore stable, institutional configuration. Vanberg proposes a model of an equilibrium outcome resulting from a complex sequence of events that radically transformed the French Fifth Republic (Stone, 1992a). In 1971, the Constitutional Council 'incorporated' into the constitution a bill of rights, despite the fact that the Gaullist framers had pointedly refused to include rights provisions (in order to preserve majority rule). In 1974, the constitution was amended to permit any 60 deputies or any 60 senators to refer bills to the Council for a ruling before being promulgated into law. The 1971 decision expanded the substantive grounds of referral, and the 1974 reform enabled parliamentary minorities to attack the majority's legislative projects. During the 1975–86 period, the practices that we now understand as French constitutional politics emerged and stabilized, and it is this stability that Vanberg has modeled.

Third, game theorists rely heavily on received wisdom, or common

1. Vanberg does not state this explicitly. The French case is the best place to begin, since every other European case is far more complicated. Most important, everywhere except in France, courts that exercise abstract review also exercise concrete review (activated by preliminary references from the judiciary), and many also hear constitutional complaints (activated by direct appeals from individuals). A fully specified model of the impact of constitutional review on legislative behavior in, say, Germany, would have to include the impact of the full range of the Federal Constitutional Court's review powers, as well as the impact of these powers on relations between the government, the Bundestag, and Bundesrat (Land governments, too, possess the authority to initiate abstract review).

knowledge, about the nature of the relevant social structure and actors. Vanberg's empirical base is largely my published research (he is currently engaged in his own original research, which will include a study of the German case). Because we disagree on several points, this work deserves a brief summary.

In seeking to explain constitutional politics in Europe, I have argued that three variables were crucial. These can be stated as propositions. First, the fewer the number of veto points in the legislative process, the more will abstract review be activated by the parliamentary opposition. In France, the Council is the *only* veto point not controlled by the parliamentary majority. Second, the more radical a bill proposed by the majority (the further from the status quo the majority wishes to move by way of legislating), the more likely it is that the proposal will be referred by the opposition. In France, radical proposals tend to come in bunches, immediately after elections, and especially after elections that yield a change from right-wing to left-wing parties. The third variable is endogenous to constitutional politics itself: the stage of development of the constitutional law at any given point in time, in any policy sector. The more that constitutional rules relevant to a legislative proposal being debated in parliament have been clarified by the court, the more influence the constitutional court will exercise on policymaking *prior* to being activated by a referral.

My methods were largely inductive. I traced every bill adopted by the French parliament during 1981–88 (and most of the important pieces of legislation adopted during 1974–80) through the policy process in order to assess, among other things, the impact of constitutional adjudication on policy outcomes (see Stone, 1992a, 1992b, 1994). During 1981–88, a period in which the parliamentary majority changed from left to right, I found that: opposition parties referred one in every three bills adopted to the Council for a ruling, including virtually every important bill; over half of all opposition referrals resulted in some form of annulment (a declaration of unconstitutionality by the Council), the opposition regularly threatened referrals in parliamentary stages of the legislative process, and regularly offered to the majority what it characterized as amendments designed to 'save' the bill from annulment; and the majority, mindful of the opposition's rate of success, regularly altered bills in order to secure the Council's approval. In a subsequent study of the French legislature's output in 1993, I found that the Council's influence on the legislative process had become even more pronounced (Stone, 1996).

I also sought to theorize *autolimitation*, the exercise of self-restraint on the part of the government and the majority in anticipation of an eventual negative decision of the constitutional court. I argued that autolimitation, an indirect effect of constitutional adjudication, operates according to the

logic of deterrence, a highly structured process of anticipatory reactions involving (to use Vanberg's terminology) *I* (the government and the majority), *C* (the opposition), and the Council. In this process, *I* – after first reading the existing case law relevant to the bill in question, and then responding to constitutional arguments brought forward by *C* – anticipates the Council's likely decision on legislative provisions that it has introduced in the legislature. For any given proposal, if *C* prefers the status quo to the situation that would be produced if the legislation were to be promulgated, then *C* has an incentive to make (and threaten) the referral, since *C* has no other means of opposing the reform. If *I* calculates that the Council is likely to annul the bill if *C* makes good on its threat to refer, then *I* has an incentive to alter its bill in order to secure constitutionality. However, as I will argue shortly, *I* also calculates the costs of watering down legislative initiatives, costs associated with reneging on its electoral promises. To make matters more complicated for the modeler, *I* has at times used constitutional arguments as convenient pretexts, and constitutional courts as convenient scapegoats, to deflect blame for abandoning measures once promised to party activists.

Vanberg's Model of Constitutional Politics as Legislating

The great advantage of the formal model lies in its logic and rigor, to the extent that the analyst establishes and (at least minimally) justifies underlying assumptions, specifies the precise nature and scope of the causal mechanisms at work, and maintains internal consistency throughout the exposition of the argument. Although Vanberg has satisfactorily met these requirements, his model, built on a core assumption that I believe cannot be sustained, does not adequately represent French constitutional politics. Further, it appears that the model can be improved by respecifying constraints, and therefore the interests of *I* and *C*, without loss of parsimony.

Vanberg distinguishes two forms of autolimitation, the logic of which he seeks to uncover. The first, which has been studied in great detail, occurs when *I*, seeking to avoid Council censure, compromises with *C* by, for example, amending a bill in a direction desired by *C*. *I* and *C* are engaged in a competition to fix legislative rules: *I* works to adopt a law that best embodies its policy preferences; *C* uses constitutional arguments and the threat of referral to cajole *I* to scale back its initiative; and *I* must then make tough decisions about if and how to compromise in order to secure constitutionality. Vanberg argues that a second form of autolimitation, which to my knowledge has not been identified in empirical research on French legislative behavior, occurs when *I* and *C* 'strike political com-

promises in an attempt to bypass' the constitutional review process 'completely' (Vanberg, 1998: 309). Vanberg emphasizes two variables that impinge on the parties' strategies: 1. the level of judicial deference to the legislature; and 2. the 'shadow that future elections cast in the current electoral period'. Underlying the model as a whole is the following assumption: 'parties can be punished equally for making unconstitutional proposals, or for making unwarranted claims of unconstitutionality' (Vanberg, 1998: 305, n. 11).

Explaining Autolimitation

Vanberg is right to view the parties' payoffs in terms of policy outcomes; these payoffs decline the further a given outcome is from a given party's (*ex ante*) policy preference. And Vanberg is right to insist that 'the level of judicial deference to the legislature' constitutes a crucial variable giving rise to autolimitation. As he puts it, 'a highly deferent court is irrelevant'. The importance of the second major variable in the model is, however, suspect.

My own view is that *if electoral constraints play any significant role, they operate in the opposite direction to the one proposed*. Vanberg justifies his emphasis on electoral constraints in one short sentence: 'citizens are likely to care not only about *policy*, but also about *process*, that is, they expect politicians and their parties to "play by the rules"'. Further, he claims, when parties do not play by the rules there will be 'some defection by voters' (Vanberg, 1998: 305). Because it plays such a powerful role in Vanberg's model, this assumption deserves close scrutiny. I have several objections. Most generally, a political commitment by all major French political parties to adjudicate disputes about the proper scope of legislative authority under constitutional rules, on an ongoing basis, is itself an extraordinary commitment to 'process' and to 'playing by the rules'. Why should the public punish a move to constitutional review, regardless of the results, as long as each side accepts the resulting decision as authoritative, and agrees to abide by it? Second, even if the losing party suffers 'some defection' of voters, we have every reason to think that whatever defection occurs will not be significant enough to make a difference.² Third, as students of French policymaking know well, the permissiveness of the Fifth Republic's legislative process pushes the legislative majority into excess,³ rather than compromise (Keeler, 1993), not least, because parties fear being punished by their respective electorates for not making good on their electoral promises. It is precisely because successive parliamentary major-

2. The public salience of constitutional court decisions is low. Decisions that do not censure the government are reported only in major newspapers, and usually only in a few lines.

3. A permissiveness counteracted by the development of constitutional politics.

ities in the 1980s sought to *changer la vie* through radical legislative reforms that successive oppositions began systematically to activate the Council, and French constitutional politics emerged. All of the evidence points to the conclusion that *I* fears defection for failing to promote or defend important policy objectives more than it does for being censured by the Council for pursuing its objectives; in the event of censure, *I* regularly accuses the Council and the opposition of working to thwart the will of the people's representatives.⁴ For its part, *C* seeks to use every means at its disposal to block important bills proposed by *I*, the most effective of which is referral to the Council. In short, parties worry about the consequences of too much, not too little, compromise.⁵ I do not argue that parties are never concerned with being punished politically for failing to correctly anticipate a Council decision, but only that this concern is usually overwhelmed by others.

I offer the following propositions.

PROPOSITION 1. *Other things being equal, the more prominent the place a given legislative reform occupies in I's electoral program, the more unlikely I will be to compromise with C, and the more likely I will be to risk constitutional censure at the hands of the Council, if C chooses to refer the bill to the Council.*

PROPOSITION 2. *Other things being equal, the more C's preferred policy outcome differs from that proposed by I, the more likely C will be to attack I's proposal in Parliament and, if the proposal is not amended to C's satisfaction, to refer the proposal to the Council for review.*

Both *I* and *C* do so, in part, to placate their own respective electorates.

If Vanberg has misspecified the 'electoral constraint' variable, exaggerating 'costs' and 'risks' associated with coming into conflict with the Council, then the second form of autolimitation will be a theoretically plausible, but empirically anomalous, phenomenon. As Vanberg writes, the opposition's 'willingness to grant the majority some leeway depends critically on the possibility of being punished electorally for coming into conflict with the court' (Vanberg, 1998: 308). Research shows that (1) the more *C* judicializes a legislative process – by attacking a bill as unconstitutional and threatening referral – the more likely it is that the bill will be referred, regardless of the scope of the government's concessions. The most heavily amended bills in the history of the Fifth Republic (e.g., the Decentraliza-

4. Such accusations are what get the big play in the media, not the niceties of the Council's annulments. Such attacks are sometimes used to energize party militants.

5. In France's multi-party system, voters have always been able to move left *or* right away from the ruling party.

tion Law of 1982, the Press Law of 1984, the Pasqua Penal Code reforms of 1986 and 1993), were also subject to referral, although the majority had gutted its own bills by adopting amendments that were virtually identical to those proposed by the opposition. Bluntly put, French oppositions are voracious; they can afford to be, since the costs of referral are virtually zero.⁶ In fact, I am aware of only one important case in the history of the Fifth Republic where *C* both strongly opposed and developed constitutional arguments against a bill supported by *I* in parliament, but nevertheless chose not to refer the bill to the Council (calculations of electoral losses were crucial to this decision, but the case operated according to a different logic than the one theorized by Vanberg⁷).

To summarize so far, Vanberg ought to reconceptualize the linkages between policy preferences and electoral consequences, elaborating the parties' payoffs strictly in terms of policy outcomes. Policy preferences are embodied in party programs that are submitted to electorates before elections. Specific policies, which are usually ordered in terms of their relative importance, are elaborated with reference to electoral costs. In his analysis of autolimitation, Vanberg is right to designate these policies as ideal points, and to elaborate payoffs accordingly. *I* is less likely to compromise its core policy objectives, and *C* is therefore more likely to threaten and to make referrals to the Council, as a function of the intensity of *I*'s commitment to a given policy preference. To do otherwise would incur electoral costs for both parties. Further, it is likely that the more important any given policy objective is to *I*'s party program, the greater the space will be between the ideal point (represented by proposed legislative rules) and the status quo (represented by the legal rules in place). If Vanberg wishes to save his model as elaborated, he must tell us why the French court is not bypassed more often: that is, why does the opposition refer, even after extensive autolimitation efforts, virtually all important

6. The costs are largely administrative: the referral has to be written; 60 deputies or senators must be found to sign the petition; and the action must be filed with the Council, which (in the case of the National Assembly) usually involves a scooter ride (by a well-known law professor of the University of Paris) across the river Seine. Of course, parties are less willing to bear even these minimal costs if a compelling case against a law cannot be mustered.

7. In 1990, the two major right-wing parties, the RPR and the UDF, originally opposed but did not refer the Rocard (Socialist) government's language bill. The right feared both outcomes: either (1) the Council would accept its arguments that the bill violated rights to free expression (and rights), which would advantage the National Front, while exposing itself to charges of racism; or, (2) the Council would side with the left, again, exposing the right to charges of racism. Most constitutional law professors believe that the law, as adopted, is unconstitutional.

bills to the Council (one in three bills adopted!)? By revising his model as I have indicated, these questions are handled easily.

Constitutional Politics as Legislating *and* Constitutional Rulemaking

Up to this point I have accepted the assumption of fixed rules. Vanberg's focus is on the competition among the parties to control legislative outcomes. But (to maintain the language of games) this game is nested in a competition, among the same parties, to control the development of the constitutional law. Constitutional rules trump legislative rules in any conflict of norms capable of giving rise to the abstract review of a statute. In order to get to the Council, *C* must translate its legislative dispute with *I* into a constitutional one, and *I* must defend itself in terms of constitutional law. For its part, the court must justify its decisions with a reasoned and authoritative interpretation of the constitution. Thus, every abstract review process is simultaneously a dispute about the terms of a specific legislative initiative and a dispute about the meaning of the constitution. As both *I* and *C* know, the abstract review process constitutes an effective means of revising the constitution, the rules of the game that bind legislative activity.

Vanberg has chosen not to deal with these aspects of constitutional politics – although they are arguably the most important – presumably because they would introduce too much complexity. Game-theoretic analyses, at least at their present stage of development, are unable to capture the dynamic nature of constitutional politics, and of judicial rulemaking more generally, for essentially the same reasons that game theorists have difficulty modeling 'institutional design' games (see Tsebelis, 1990: ch. 4). Although much more could be said about the problem,⁸ I will focus here only on certain, crucial consequences of constitutional rulemaking for legislative bargaining and autolimitation, consequences that are all but ignored by Vanberg.

First, the parties are often more interested in the outcome of the 'constitutional revision game' than they are in the impact of the Council's decision-making on a specific statutory provision. In dozens of cases of which I am aware, the impetus for referral is to obtain a specific ruling about the meaning of the constitution; the referred legislation functions as a vehicle for getting the dispute about constitutional interpretation to the Council (a referral may be avoided for fear of provoking an unwanted

8. Game theory's influence among public law political scientists has been limited because of the failure and/or inability of its practitioners to pay sufficient attention to normative reasoning, judicial interpretation, and the relative autonomy of the law. I leave aside these issues here (see note 13, p. 337).

constitutional innovation.⁷ Because the constitutional court's decisions are treated by all of the actors involved, including constitutional judges, as precedents, both *C* and *I* care deeply about constitutional development, because the content and conduct of future policymaking is partly dependent upon the direction of the Council's case law. Thus, *C* refers bills even after they have been heavily amended by *I* (which, under certain conditions, conflicts with expectations derivable from Vanberg's theory).

Second, 'judicial deference' not only varies across time, but also varies, for the same court in the same legislative period, across policymaking sectors (across domains of the constitutional law). In some areas the court may be quite deferent, the relevant case law being non-existent or permissive of legislative discretion; in other areas, the court may be quite restrictive, the relevant case law laying down detailed prescriptions that effectively close off some reform routes and force lawmakers down others. The parties, to the extent that they wish to maximize their effectiveness in the 'constitutional politics game', have a powerful interest in mastering the details of specific lines of case law, and in differentiating relative levels of judicial deference across issue areas.⁹

The consequences of how the constitutional law has been developed in existing case law for the conduct of legislative bargaining are enormous. In the previous section, I proposed two propositions about autolimitation in an 'other-things-being-equal' form. The most important factor conditioning autolimitation, which virtually always varies, is the relative density and clarity of existing constitutional constraints, as developed by the court in its case law. *I* is unlikely to engage in significant autolimitation when legislating in an undeveloped area of constitutional law.¹⁰ *C* is advantaged in its efforts to obtain concessions from *I* when *I* is seeking policy reforms in a sector governed by a dense web of constitutional prescriptions and obligations. In fact, research shows that, for any bill making its way through the legislative process, the number of amendments adopted pursuant to constitutional debate in parliament is positively correlated with the prior development of constitutional law in a domain of law relevant to the bill in question. Thus, a crucial, causal variable that structures the conduct of legislative bargaining is absent from Vanberg's model. For these and other reasons, Vanberg's assertion that 'a court that is seldom used may ... be

9. The political parties regularly engage constitutional law professors and former members of the Council to advise them on how best to attack or defend legislative projects, in Parliament and in written communications to the Council.

10. It is hardly imaginable that the French Socialists would have compromised on any significant feature of their nationalization bill in 1981. Nationalizations were the centerpiece of their legislative program and in 1981 the Council had never rendered a decision on expropriation or the scope of property rights (see Stone, 1992a: ch. 6).

more powerful in the sense of influencing legislation than a court that is very active' (Vanberg, 1998: 315) cannot be sustained.¹¹

Third, in the 'constitutional politics game', *I* and *C* debate the constitutionality of legislation in parliament, but their intended audience is the Council. In these debates, each side tries to show the court that it takes the constitutional law seriously. *I* argues that it has elaborated the law with strict observance of the constitutional law and Council precedent. *C* tries to show that *I* has erred, offering amendments partly designed to show the Council what a constitutional version of the bill would look like. Often enough, these debates lead *I* to compromise with *C*, especially when existing case law makes it relatively clear that the bill will not pass constitutional muster. If we analyze autolimitation without reference to the constitutional rulemaking and the 'Council-as-audience' dynamic, we observe what appears to be irrational behavior. Why should *I* ever move away from its ideal point in the direction of the status quo if, as I have argued, the electoral costs of losing the case are nil? The answer will be found in the payoff structures of the two games. *I* calculates that amending the bill will raise the likelihood that it will escape annulment, thus maximizing the chances that a bill closest to *I*'s ideal point will be promulgated, *and* helping to establish the parameters for the Council's constitutional decisionmaking. Once legislative process has been judicialized by *C*, *I*'s best strategy is almost always to make the best possible argument in support of a bill's overall constitutionality in parliament, while making amendments on specific provisions in order to 'improve' the bill, to secure its constitutionality, and (*I* hopes) to limit the Council's elaboration of constitutional rules governing in the sector.

Last, what the parties know about the Council's decisionmaking process also conditions the conduct of legislative bargaining. Public hearings

11. Vanberg argues, logically enough, that 'the ability of abstract review to create compromise is greatest when the court is so restrictive, or the consequences of a confrontation with the court are so detrimental, that parties avoid the court completely' (Vanberg, 1998: 314–15). He then goes on to criticize certain comments I made on the Austrian court (Stone, 1992a: ch. 9), namely, that because only five bills had ever been referred to that court, judicialization had not proceeded. Two criticisms of this argument merit emphasis. First, Vanberg has not shown that the consequences of judicial-political confrontation can ever be detrimental enough to produce the effects described; as I have argued, we have better reason to think that the 'consequences of a confrontation with the court' are relatively limited. Second, and far more important, the argument is illogical on its face, since in order for a court to be restrictive, a court must take decisions (as Vanberg otherwise recognizes, e.g., p. 308); and in order for the court to take decisions, and therefore to construct constitutional constraints, it must have a case load. In the absence of a case load, and in the absence of constitutional rulemaking, we do not have a restrictive court. In such a situation, what generates legislative bargaining and autolimitation?

between the parties are not held. Instead, the Council reviews the parliamentary debates and the amendments made, and assesses the quality of the respective arguments; in addition they receive *C*'s referral, which details the complaint, and a counter-brief, usually written by the government. The Council nearly always selects from specific arguments raised by the parties in the debates, and has even been known to praise *I* for its autolimitation efforts!¹² Further, most legislative bargaining focuses on isolated parts of a bill, precisely because the parties know that nearly all Council annulments are partial annulments, touching specific provisions which, once removed from the bill, allow the rest of the bill to be promulgated. (Vanberg's insistence that the court has two options, to annul or not to annul a bill, is another fiction useful for model-building; a total annulment is exceedingly rare.) This knowledge of the review process reinforces practices described above.

Conclusion

Game theorists have every reason to develop a positive theory of constitutional politics. Constitutional courts participate in the policy process, effectively altering legislation by their decisions, and channeling legislative initiative down increasingly narrow paths. As important, constitutional adjudication leads these courts to enact and to revise the constitutional law, thus constituting and reconstituting the choice contexts in which legislative decisionmaking, and bargaining, takes place. Although I sympathize with the difficulties that any evolving system of rules poses for Vanberg and game theory, the tools of formal modeling remain ill-adapted to the task of explaining core elements of European constitutional politics. The challenge of developing a game-theoretic explanation of the dynamics of adjudication ought to be a central priority of rational choice, not least, because how legal systems evolve is symptomatic of the evolution of social systems more generally.¹³

12. Reported in Stone, 1992b: 44.

13. In Stone Sweet (forthcoming), I have sought to develop a model of institutional change, focusing on the causal connections between strategic interaction among individuals, third-party dispute resolution, and normative structure. In this model, I attempt to elucidate the logic, and the microfoundations, of each of four stages of a continuously iterated process: 1. bargaining and contracting; 2. delegation to a dispute resolver; 3. dispute resolution and rulemaking; and 4. the feedback of rulemaking on bargaining and contracting. The theory is an attempt to integrate concern for self-interested, strategic behavior, and normative (rule-governed) reasoning.

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