Is the «Veil of Ignorance» in Constitutional Choice a Myth?
An empirical exploration informed by a theory of power[1]

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Abstract:

In this paper, we propose an empirical exploration of the theory of the veil of ignorance in the Canadian context. Adopting a cognitive perspective, we read the Canadian Constitution as an indication of the motivations that the Constitution drafters had at the time of adoption so as to assess whether the Constitution reflects more their own private interests than the general interest. We proceed in three steps. First we formulate a conceptual framework based on power analysis to distinguish three distributions of power that decision-makers want to maintain or modify through their choices. Second we detail a content analysis method that helps us systematically unveil the power relations present in the constitutional documents. Third, we describe and discuss our results, showing that the two Constitutional documents we analysed reflect the general interest more than the constitution drafters' private interests.

Introduction

A Constitution is a *social contract* defining a set of rules by which the governed agree to be governed. As such a Constitution ascribes power resources to governors while restraining the way they are expected to use them. But a Constitution is also a *discourse* on the distribution of power resources that the Constitution drafters want to see implemented in society. More specifically, it tells a story about the types of power that need to be ascribed or restrained and those that need not. Looking at a Constitution from both viewpoints opens a new window for uncovering the motivations that drove its drafters in the constitution-making process in which they were involved. In particular, it helps reveal the impact of uncertainty on constitutional choices.

The idea that constitutional choices are made under uncertainty and that this uncertainty determines the characteristics of such choices was first presented by James Buchanan and Gordon Tullock in their seminal work, *The Calculus of Consent*. They wrote:

> Recall that we try only to analyze the calculus of the utility-maximizing individual who is confronted with the constitutional problem. Essential to the analysis is the presumption that the individual is *uncertain* as to what his own precise role will be in any one of the whole chain of later collective choices that will actually have to be made. For this reason he is considered not to have a particular and distinguishable interest separate and apart from his fellows. This is not to suggest that he will act contrary to his own interest; but the individual will not find it advantageous to vote for rules that may promote sectional, class, or group interests because, by presupposition, he is unable to predict the role that he will be playing in the actual collective decision-making process at any particular time in the future. He cannot predict with any degree of certainty whether he is more likely to be in a winning or a losing coalition on any specific issue. Therefore he will assume that occasionally he will be in one group and occasionally in the other. His own self-interest will lead him to choose rules that will maximize the utility of an individual in a series of collective decisions with his own preferences on the separate issues being more or less randomly distributed (Buchanan & Tullock 1962: 78).

Buchanan and Tullock's perspective was positive as they wanted to describe how constitutional decisions were actually made. Following their lead, John Rawls (1971) then proposed his *maximin* criteria in a normative perspective. He saw a decision behind a «Veil of ignorance» (i.e., under uncertainty) as a thought experiment that could show how rational decision-makers should attend to the preferences of the least advantaged group in society when they are ignorant of their actual and future positions in society. We argue here for a return to the original positive

perspective to assess the role of uncertainty in constitutional choice[2]. We explore the implications of such a perspective for the analysis of the actual content of the Canadian Constitution showing that it has characteristics that are consistent with the motivations of constitution drafters deciding under uncertainty.

Constitutional political economy distinguishes between constitutional choice and 'in-period' choice, or equivalently between choice *among* constraints and choice *under* constraints. The first refers to the choice *of* rules, the second to choice *within* rules (Brennan and Hamlin 2001: 120-127). Brennan and Hamlin argue that these two types of choice have important characteristics that differentiate them – motivational, informational, social-capital, and public-good characteristics. We focus here on motivational characteristics, i.e., on the degree decision-makers choose in their own private interest or in the general interest when making choices. In constitutional choice, rational decision-makers attend to the interest of the many. Because they do not know what their future position in society will be, their «individual interests fade into the background and are replaced by the general interest of all agents» (*Ibid.*: 120). Indeed, «the uncertainty introduced in any choice among rules or institutions serves the salutary function of making potential agreement more rather than less likely. Faced with genuine uncertainty about how his position will be affected by the operation of a particular rule, the individual is led by his self-interest calculus to concentrate on choice options that eliminate or minimize the prospects for potentially disastrous results» (Brennan and Buchanan 1985: 30). However, 'in-period' choices are devoid of this type of ignorance as they are to last for a shorter period of time and as they are easier to change once adopted. In this context, decision-makers choose in their own interest. Assuming that a given constitutional document ensues from the constitutional level of decision-making[3], we may expect that it is submitted to the same motivational characteristic. Therefore its content should reflect the general interest more than particular interests.

In this chapter, we propose an empirical exploration of the theory of the veil of ignorance in the Canadian context. Adopting a cognitive perspective, we read the Canadian Constitution as an indication of the motivations that the Constitution drafters had at the time of adoption so as to assess whether the Constitution reflects more their own private interests than the general interest.

[2] For example, such a perspective has been applied to the analysis of the constitution-making process that followed the breakdown of the Soviet Empire in the early 1990s. Rowley (2008: 24) noted that «scholars recognized that Rawls's 'veil of ignorance' played no role in [that] process».

[3] As Brennan and Hamlin argue, «capital-C Constitutions [i.e., Constitutional documents] are only a small part of the set of rules that govern 'in-period' choices. Equally, capital-C Constitutions often include elements that are not small-c 'constitutional' in our sense at all» (2001 : 117).

We proceed in three steps. First we formulate a conceptual framework based on power analysis to distinguish three distributions of power that decision-makers want to maintain or modify through their choices. Second we detail a content analysis method that helps us systematically extract the power relations embedded in the Constitution as discourse. Third, we describe and discuss our results, showing that the two constitutional documents we analysed reflect the general interest more than the constitution drafters' private interests.

Theoretical approach

In this section we propose a conceptual framework based on the concept of power within a rational choice perspective[4]. Then we look at the interaction of power and decision-making behind the veil of ignorance assuming that maximising rational individuals want to maintain or to improve their relative position in the distribution of power in society for all the benefits that power brings.

Power and rational choice

In general, neoclassical economists have ignored power. In economics, argues Keith Dowding, the concept of power «has implicitly been analysed away» (Dowding 2009: 40). Bowles and Gintis share that opinion when they write «Economists have treated power as the concern of other disciplines and extraneous to economic explanation» (Bowles and Gintis 2008: 1). Another expression of the same opinion is Randall Barlett's: «Neoclassical reference to power, when it exists at all, is so far on the fringe that it has not penetrated the consciousness of the profession (Bartlett 1988: 4). But, political economy needs to integrate the concept of power among its conceptual tools. As Bowles and Gintis argued, «the fact that the exercise of power is ubiquitous in private exchange shows that it is mistaken to think of society as composed of a political sphere, meaning governments and other bodies with formal powers of coercion, and a private economic sphere in which the exercise of power is absent» (*Ibid.*). Indeed, the economy has traditionally been seen as a voluntary process of exchange between individuals[5]. But the conditions of exchange dramatically vary from one context to another. The price of a good is usually considered in absolute terms: a kilogram of potatoes is worth $2.00 on the market because buyers and sellers are willing to exchange it at that price. But things change if we consider prices relative to income or relative to wealth. One might be willing to trade one's gold ring for $100 in normal times, but if one were in a situation of starvation, one might accept to

[4] For a general discussion of the concept of power in policy analysis, see Imbeau and Couture, forthcoming.
[5] For an articulate argument contesting this view, see Holcombe's chapter in this volume.

trade it for a meal. The situation has changed one's bargaining power. The concept of power in a rational choice perspective allows us to analyse the interactions among individuals not only in terms of exchange – which is one form of power relation as we will argue shortly – but also in terms of coercion and of persuasion: in all three cases, the outcome of the interaction depends on the relative bargaining power of each actor, i.e., on the resources that she controls.

Power is the ability to produce intended effects (Russell 1962). Two dimensions of power are to be distinguished, instrumental power or «power to», and social power or «power over». *Instrumental power* is «the ability of an actor [to act on events or things] to bring about or help bring about outcomes». Power indices, for example, measure instrumental power. They focus on the capacity of an actor to influence, through his or her vote, the decision reached by a voting body, i.e., they focus on the voting power of committee members[6]. *Social power* is «the ability of an actor deliberately to change the incentive structure of another actor or actors to bring about, or help bring about outcomes» (Dowding 1991: 48). Or, borrowing Dahl's words: «*A* influences *B* to the extent that he gets *B* to do something [or to refrain from doing something] that *B* would not otherwise do [or would do]» (Dahl 1963: 40). Social power implies instrumental power but the reverse is not true. One may have the ability to make a gift to a charitable organisation (instrumental power), thus modifying the distribution of wealth in society (*ceteris paribus*, the giver has less wealth, the organisation has more), without having any social power over that organisation. But consider this other example. In order to change the incentive structure of a fast driver through the threat of punishment, a policeman must have the instrumental power to implement his threat in case the driver does not comply, or at least he must so convince the driver.

These definitions are dispositional in the sense that they focus on a dispositional property of an agent, that is, on the ability or the capacity to do certain things. From this point of view, saying that *A* has the capacity to influence *B* does not imply that *A* actually influences *B*. *A* might decide not to use her power in which case social power remains potential. Furthermore, *A* does not have to act in order to exercise her social power. For example, the silence of the Pope vis-à-vis Nazis' exactions was sufficient for him to exercise power over German Catholics. Bachrach and Baratz (1963) coined the phrase «nondecision» to refer to this possibility in the policy process.

[6] For a survey, see Felsenthal and Machover 1998. For a nice collection of recent analyses, see Braham and Steffen 2008.

Power as a capacity is based on the control over resources. In the context of public policy processes, the three most important power resources are: force or authority, wealth or things of value, and knowledge or information combined with rhetoric. Each power resource may be associated with a method and a main impact on incentive structures. Thus we identify three forms of social power: Political, economic, and preceptoral (see table 1). *Political power* refers to the use of force or authority to increase the cost of the recalcitrant through the use of threat or punishment. The policeman exercises political power when he threatens one of a fine – and of prison if one ever refuses to pay it – if one does not slow down on the expressway. This threat increases the cost one would incur if caught and may change one's behaviour if the probability to be arrested is high enough and the benefits one draws from fast driving low enough. *Economic power* refers to the use of wealth or things of value in order to change the benefits of the other party in an exchange. For example, when the minister of Finance issues a government bond at a given interest rate, he uses the economic power of the government to act on the incentive structure of potential investors so as to make them willingly transfer part of their wealth to the public treasury. Thus the minister of Finance exercises economic power over the investor[7]. *Preceptoral power* is based on «knowledge», i.e., information and rhetoric. Its exercise consists in the influencer using her knowledge in order to change the beliefs of the influenced concerning his costs and his benefits through persuasion. An expert might use her knowledge to persuade a politician that he would be better off adopting one policy line rather than another. Preceptoral power pervades all societies. It is recognizable under many forms including commercial advertising, religions proselytism, capture relationships, expert consultation, agency relationships, political propaganda, etc.[8]

Table 1: The forms of social power

	Forms of Social Powerl		
	Political	**Economic**	**Preceptoral**
Ressource	Force Authority	Wealth Things of value	Knowledge (Information and rhetoric)
Method	Threat	Exchange	Persuasion
Impact on incentive structure	Costs	Benefits	Beliefs about costs or benefits

[7] For an empirical analysis of the relationship between the ministers of Finance, taxpayers and investors in the Canadian provinces, see Imbeau 2009.
[8] For a discussion, see Imbeau 2007 : 177-181.

Not only does a power perspective allow us to characterise power relations among agents but it also gives us an indication as to the broad types of outcomes that rational actors want to bring about. The events or things that are the object of instrumental power and, ultimately, of social power are conceived as the maintaining or the modification of the distributions of political, economic, or preceptoral powers. Indeed, power is unequally distributed. Some have more, others have less. Some individuals have more political power in the sense that they control the resources necessary to influence a larger number of people through the use of threat or to modify, through the use of coercion, the distribution of political power – for example, by defrauding one of his political power – or to modify the distribution of economic power – for example, by depriving one of his property rights over part of his wealth – or to modify the distribution of preceptoral power – for example, by unilaterally imposing a theory or a belief as *the* truth thus making the defenders of this theory or belief more persuasive.

The same logic applies to the holders of economic power or of preceptoral power. They can use the resources they control to maintain or modify the distributions of political, economic, or preceptoral powers. Wealth may be *exchanged* for a political appointment thus modifying the distribution of political power, or for a gold ring thus modifying the distribution of wealth, or for a university position thus modifying the distribution of knowledge. Knowledge may be used to *persuade* the prime minister to make a specific appointment to the cabinet thus modifying the distribution of political power. It may also be used to make one buy something that he would not buy otherwise thus modifying the distribution of economic power, or to persuade an audience that one's argument is stronger than that of one's opponent, thus modifying the distribution of knowledge in society. In a nutshell, depending on the resources she controls, a power holder can *force* one to do something that he would not do otherwise, or she can *bribe* one into doing something that he would not do otherwise, or she can *persuade* one that doing something that he would not do otherwise is what he actually wants. These are all exercises of power.

Power relations behind the «veil of ignorance»

The theory of the veil of ignorance tells us that the informational characteristics of the decision-making context determine the choice made by decision-makers. When she is relatively certain about her future position, the decision-maker chooses according to her own preferences to maximize her utility. But when she is uncertain about her future position – i.e., when she stands behind a veil of ignorance – the decision-maker moves away from her own preferences to attend

to the preferences of another individual. The identity of this individual is a matter of contention. For Buchanan and Tullock, the uncertain decision-maker would «support constitutional provisions that are generally advantageous to *all* individuals and to *all* groups (1962: 78; emphasis added) hence their focus on unanimity rule. Rawls rather proposed a maximin criterion according to which decision-makers under uncertainty should attend to the preferences of the least-advantaged group in society. A median-voter theoretic interpretation would suggest that median preferences should be attended to (Congleton 2003) whereas a probabilistic voting theory would target the preferences of the mean voter (Lafay 1993). These divergent views may be reconciled in the following principle: in constitutional choice, uncertainty makes decision-makers move away from their own preferences toward the preferences of a less privileged individual. A simple illustration may be useful here. Power, like income, is asymmetrically distributed in any society and decision-makers typically are located in the positive tail of the distribution. Attending to the preferences of a less privileged individual implies a movement toward the opposite tail: toward the mean, the median, or the least privileged. For our purposes, it is not necessary to decide where precisely the target individual stands on the distribution. Suffice it to say that he stands on the left of the decision-maker on the relevant distribution of power.

Therefore, as the theory has it, decision-making under uncertainty is typical of constitutional decision-making. Because constitutional choices last longer, the uncertainty of decision-makers is more prevalent than in in-period choices. Hence decision-makers tend to serve the preferences of a less privileged individual as her future situation might later be closer to his than it now is. But the veil of ignorance is lifted in in-period choices. The time horizon is shorter and the majority requirement for changing the rule is less stringent thus making it easier for one to see that his interests are attended to. Therefore, when the decision-maker is relatively certain about her future position, she chooses according to her own preferences. As it is more difficult to gather a winning coalition under a more demanding constitutional decision rule when everybody follows his or her own preferences than when each tends to move toward the preferences of a less privileged individual, constitutions contain choices mainly corresponding to areas of uncertainty for the constitution drafters.

In a power perspective, the preferences of agents are evaluated in terms of their power position in society. They use their power to maintain or improve their position, somewhat like an entrepreneur uses his wealth to produce more wealth (or to avoid loosing too much). Therefore uncertainty refers to the future power position of an agent: will she be higher or lower in the

future distribution of power. If she is uncertain about her future position, she will choose according to the preferences of a less privileged individual. If her co-deciders make the same evaluation concerning their own future positions, the decision-making body will more easily arrive at a decision. However, under relative certainty, the opposite will prevail. Constitution drafters will follow their own private interest and no constitutional decision will be made, the issue being postponed to the in-period process.

Now it goes without saying that constitution drafters occupy the higher part of the three main power distributions in society. They have more authority, more wealth, and more knowledge than the average individual in each of these distributions not to mention the least-privileged one. Unless they are uncertain about their future position, they will work hard to protect or to improve their position. But if they think that they might drop toward a lower position, then they will be careful to adopt rules that would protect them in the future.

The volatility of power positions is not equal from one distribution to the next. We can safely say that volatility is higher in the distribution of political power, especially in democratic regimes where majorities often shift with electoral results. When this occurs, a whole class of decision-makers changes position on the distribution of political power, some leaving, others entering government circles. Thus constitutional drafters are quite uncertain about their future political position. But they are less uncertain about their economic power position. Without being absolutely certain, they expect to keep their economic position in the future and even to bequeath their wealth to their children. The distribution of wealth is much more stable than the distribution of authority but still relatively less stable than the distribution of knowledge. Indeed, those who are considered as knowing – clergy persons in some societies, policy experts in others, etc. – occupy a preceptoral-power position that is quite stable. It takes a long time for a society to change its criteria of truth and good. Consequently there is less uncertainty in preceptoral power than in economic power and less in economic power than in political power. It follows that constitutional documents should be more concerned with political power than with economic or preceptoral power. It also follows that by adopting the preference of a less privileged individual in the distribution of political power, constitution drafters tend to *limit* political power rather than to *abscribe* political power. These are our main hypotheses.

Research design

To test the hypotheses that constitutional documents in Canada have much more references to political than to economic or preceptoral power, and that there is more occurrences of limitation than of ascription of political power, we content-analysed the two most important Canadian constitutional documents, the British North America Act of 1867 and the Constitution Act of 1982, henceforth referred to as the 1867 Act and the 1982 Act[9]. We identified every case of power relation in these two texts. These are our units of analysis. Here a «power relation» is a description of the relationship between two agents – social power – or between an agent and an object (thing, event, or result) – instrumental power – such that an agent has the capacity to act, or is prevented from acting, upon another agent or upon an object. There can be as many power relations as there are combinations of agents, objects, and types of power. We then coded each unit on five characteristics: Type of power (instrumental or social); direction of power (positive or negative – increasing or restraining the power of an agent); resource of the influencing party (authority, wealth, or knowledge); object of influence of instrumental power (distributions of authority, wealth, or knowledge); resource of the influenced party in a social power relation (authority, wealth, knowledge). A single coder (a research assistant) was trained to the extraction of units of analysis and to their coding. The assistant then extracted the power relations in each text and coded them. The result of her analysis was then systematically reviewed by the first author. The proportion of intercoder agreement was extremely high (over 90%) for the coding part but was much lower for the extraction part (52%). This was due to a misunderstanding as to the nature of instrumental power[10]. After discussion and proper adjustment we corrected this problem.

Our method implies that the Constitution is conceived as a discourse describing the distribution of power in the Canadian society, ascribing social or instrumental power to a class of citizens and restraining the social or instrumental power of others[11]. Consider for example section 38(1) of the 1982 Act:

> *An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by*

[9] The Canadian Constitution is scattered in 42 laws, most of which are statutes of the United Kingdom. For a list, see http://canada.justice.gc.ca/eng/pi/const/index.html

[10] This content analysis was very useful to the authors to refine their conceptual framework. We think that this low intercoder agreement does not invalidate our results as the whole process was done over again so as to make sure no misunderstanding remained.

[11] For a discussion of the methodological and epistemological implications of this approach see Imbeau, forthcoming.

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

This clause gives the Governor General the instrumental power of amending the Constitution through a proclamation. It further gives the Senate, the House of Commons, and a certain number of provincial legislatures the instrumental power to authorize such proclamation and therefore the social power over the Governor General to prevent him or her from doing so.

Thus this clause assigns various actors a given position in the distribution of power[12]. These power relations are depicted in figure 1. They are coded as four power relations, one instrumental power relating a holder of authority (the Governor General) to the distribution of political power (the capacity to issue an amendment to the Constitution), and three social power relations linking holders of authority (the Senate, the House of Commons, and provincial Legislatures) to a holder of authority (the Governor General)[13]. Here is the actual coding ascribed to these four relations:

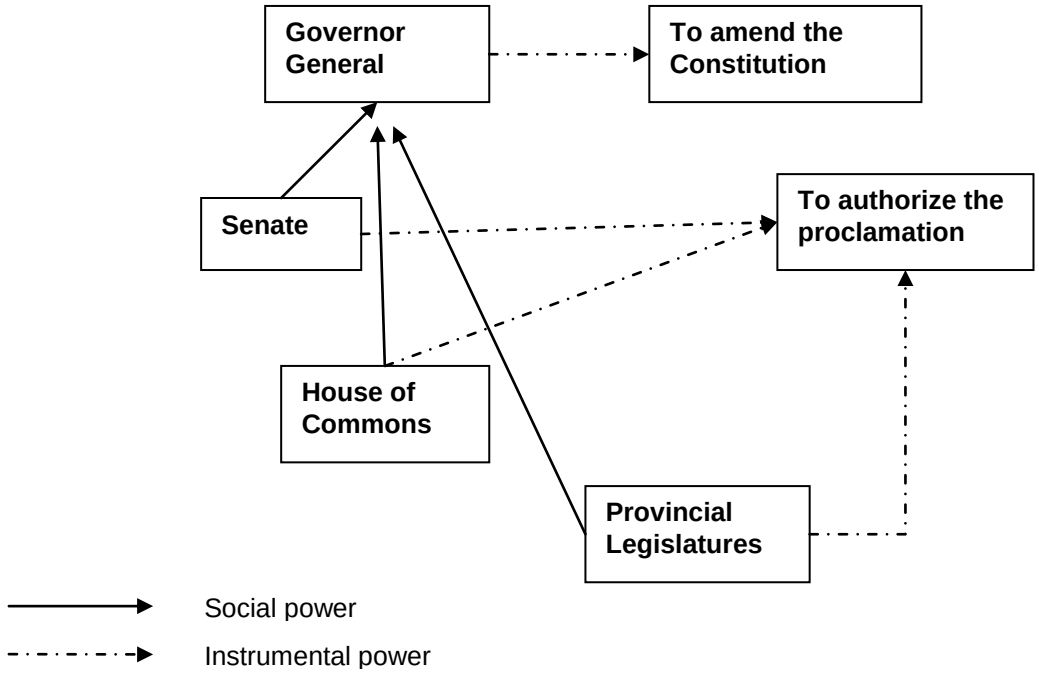
Type of Power	**Direction**	**Resource of influencing party**	**Object of instrumental power**	**Resource of influenced party**
Instrumental	Positive	Authority	Authority	n.a.
Social	Positive	Authority	n.a.	Authority
Social	Positive	Authority	n.a.	Authority
Social	Positive	Authority	n.a.	Authority

Applying this method, we were able to identify every power relation in the two constitutional documents. Our first hypothesis is that the number of power relations considering a holder of authority as the influencer or as the target will be significantly higher than those considering holders of wealth or holders of knowledge as influencer or influenced or the distributions of wealth or of knowledge as target. Our second hypothesis is that the number of occurrences of negative power will be significantly higher than positive power.

[12] Of course, constitutional conventions have stripped the Governor General of almost all real power in favour of the Prime Minister. We ignore these, concentrating as we are on Constitutional texts.

[13] Instrumental power relations which are, by assumption, associated with social power relations were ignored.

Figure 1 : Power relations in section 38(1) of the 1982 Act



Results

Density and type of power. We found 260 power relations in the two constitutional texts that we analysed, 187 in the 1867 Act and 73 in the 1982 Act. This represents an average of 1.34 power relations per section in 1867 and 1.24 in 1982 (see table 2). The density of power relations is comparable in the two texts. 125 years apart, the drafters of these two texts seem to have had a similar view about the importance power relations should have in such texts. These writers also seem to have had a similar idea as to the type of power to be concerned with as they emphasized instrumental power (84%) over social power (16%). This means that they were more concerned with the capacity of agents to act on things and events (like the power of the Queen to make laws for the Peace, Order and Good government of Canada[14] or like the power of a provincial legislative assembly to limit the application of an amendment to the Constitution that derogates from the legislative powers of a province[15]) than to act over other people (like the necessity for the Queen to get the advice and consent of the Senate and the House of Commons, i.e., the power

[14] 1867 Act, section 91.
[15] 1982 Act, section 38(3).

of Parliament over the Queen[16] or like the necessity for the Governor General to get the authorization of the Senate, the House of Commons and a number of provincial legislative assemblies to amend the Constitution, i.e., the power of the Parliament and provincial legislatures over the Governor General[17]. This emphasis had the same magnitude in the 1982 and the 1867 Acts.

Table 2: Characteristics of Power Relations in Two Canadian Constitutional Documents (Percentage)

		1867 Act	1982 Act	Total
Resource of Influencing Party				
	Authority	100	100	100
	Wealth	0	0	0
	Knowledge	0	0	0
Direction of power relation				
	Positive	84	27	68
	Negative	16	73	32
Type of power				
	Instrumental	84	84	84
	Social	16	16	16
(Number of observations)		(187)	(73)	(260)

Whose power? Which target? Our first hypothesis

A power relation includes an influencing party and a target. When we asked what the resource controlled by the influencing party in a power relation was, we got a strong univocal response: force or authority. The source of power is always authority. Wealth and Knowledge as power sources are completely ignored. This confirms our first hypothesis. Our hypothesis is also confirmed when we look at the target of social power. It is always holders of authority. Things are somewhat different when considering the target of instrumental power, i.e. power over events or things. Here, events or things related to the distribution of authority are still more numerous, thus confirming our hypothesis (64 percent authority, 32 percent wealth, 4 percent knowledge). However, when we differentiate the two Acts, we find that only 50 percent of instrumental power relations have authority as target in the 1867 Act compared to 98 percent in the 1982 Act. Our hypothesis is still confirmed in the two acts but something is going on in the 1867 Act that needs further analysis.

[16] 1867 Act, section 91.
[17] 1982, section 38(1).

Positiveness: Our second hypothesis Our second hypothesis predicts that the constitutional documents restrain power rather than give power. In terms of our design, this means that power relations are more often negative than positive. This hypothesis is contradicted by our results as 68 per cent of the power relations found in the two texts is positive. They more often ascribe power than restrain it (see table 3). But something peculiar appears when we compare the two texts. The 1867 Act is positive in 84 percent of the cases whereas the 1982 Act is *negative* in 73 percent of the cases. In other words, our second hypothesis is confirmed with the 1982 Act but not with the 1867 Act. The difference is highly significant ($X^2 = 77.287$, df=1, $p<0.001$). That is to say that the 1867 Act tends to ascribe power whereas the 1982 Act rather tends to limit power. This is what one would expect given the fact that the purpose of the 1867 Act was to create a new federation and as such had to ascribe both instrumental and social powers. Being based on the 1867 Act, the 1982 Act could concentrate on limiting already ascribed powers. The Charter of rights included in the 1982 Act seems to account for much of this difference as each right conferred to «Every citizen of Canada» or to «Everyone» or «Every individual», etc., is a limit to the instrumental power of the holders of authority positions. This result would suggest that the theory should be amended to differentiate founding constitutional documents from amending constitutional documents. The effect of uncertainty would be less important in the former than in the latter.

Table 3: Targets of power relations by type of power (Percentage)

		1867 Act	1982 Act	Total
Instrumental Power	Authority	50	98	64
	Wealth	44	0	32
	Knowledge	6	2	4
	(N)	(159)	(61)	(220)
Social Power	Authority	100	100	100
	Wealth	0	0	0
	Knowledge	0	0	0
	(N)	(28)	(12)	(40)

Discussion

According to Voigt (1997) one finds four concepts of Constitution in the constitutional choice literature. A Constitution is either a social contract *à la* Buchanan, or the product of a principal-agent relationship, or a pre-commitment device – Ulysse's problem – *à la* Elster, or the result of a cultural evolution *à la* Hayek. Ours may be related to the first conception where constitution

drafters choose among a set of rules to be applied in their future interactions. We know of no other empirical study in the social-contract perspective. However, Robert McGuire and Robert Ohsfeldt provided empirical results that may be related to ours, though from different conceptual and methodological perspectives.

McGuire and Ohsfeldt analyse the drafting and ratifying process of the American Constitution in a principal-agent conceptual framework. For them, the delegates to the federal Convention who participated in the drafting of the Constitution in 1787 and the delegates to the 13 state ratifying conventions in 1788 are conceived as agents representing their constituents electing and supporting them, the principals. According to the principal-agent model, there is a strong incentive on the part of agents to shirk from their principals' ideology and interests and to attend to their own ideology and interests. Using econometric techniques on a large dataset on individual delegates' votes and characteristics, McGuire and Ohsfeldt estimated the effect of delegates' and constituents' ideology and interests on roll call votes. Their findings are quite interesting as they find, like we do, two contradictory results at two different stages of the constitutional process. They show that at the *ratifying* stage, the support for the proposed Constitution is significantly related to the interests and ideology of the delegates (McGuire & Ohsfesldt 1989b). But McGuire (1988) shows that at the *drafting* stage (the Federal Convention of 1787), the constituents' interests are a better predictor of a delegate choices than his own interests. He writes: «In many cases, the statistical results support the argument that the delegates were more responsive to their constituents' interests and ideologies than to their own interests and ideologies»; to conclude: «The empirical evidence, thus, offers support for Buchanan and Tullock's (1962) positive theory of constitutions» (McGuire 1988: 519).

Voigt suggested an *ad hoc* hypothesis to explain the difference found by McGuire and Ohsfeldt: «An *ad hoc*-hypothesis for this difference could be that the Philadelphia-delegates were more narrowly constrained in their voting behaviour than those in the 13 states because the constitution would not have turned into effect if not at least nine of the 13 states had ratified it» (1997: 32). We propose an alternative explanation. Delegates faced greater uncertainty at the drafting stage as the content of the Constitution was still in the making. Things were quite different in the ratifying stage as the Constitution project had been known and discussed for quite some time by delegates and their constituents. In other words the delegates to the Philadelphia Convention voted behind a veil of ignorance that was more opaque than that behind which the delegates to the 13 state ratifying conventions stood. This uncertainty incited the first group to attend to their

constituents' interests more than their own. Coherent with this interpretation, the authors note «that the ratification process can hardly be claimed to have taken place behind a veil of uncertainty à la Buchanan and Tullock and that it seems therefore justified to assign its ratification to the operational as opposed to the constitutional level» (McGuire & Ohsfeldt 1989a: 184, quoted in Voigt 1997: 32). Thus McGuire and Ohsfeldt's results are a confirmation of the theory of the veil of ignorance, at least at the drafting stage. The delegates' responsiveness to the interests of their constituents, like our own findings, confirms the theory of the veil of ignorance.

This distinction made by McGuire and Ohsfeldt between the drafting and the ratifying stages could not inform our own research as our data do not allow us to separate the two stages in the Canadian case[18]. Our findings rather point toward a distinction between founding and amending constitutional documents. Voigt suggested that two types of constitutional change should be considered: Explicit change through amendment and implicit change through reinterpretation.

> Explicit change occurs when the text of the constitutional document is modified, implicit change can be brought about by all three branches of government: by the executive if it interprets constitutional rules differently over time, by the legislature if it passes laws that would have been considered unconstitutional in some former time and by the judiciary if it lets the executive and the legislature get away with their modified interpretation (Voigt 1997: 34).

It would be difficult, if at all possible, to apply our approach to implicit changes as there are no formal texts in which these «changes» are documented. Our finding is related to an «explicit change» to the 1867 Act[19]. Voigt focuses on demands, by pressure groups, for explicit changes to the constitution. Here the issue of the motivation of the drafters of an amendment is particularly interesting in the context of our own approach. Are the drafters going to attend to the interests of the pressure group (interests that may be seen to correspond to their own as a pressure group will typically pay a rent for the desired amendment) or will they attend to the interests of the larger population? Again, this depends on the degree of uncertainty in which decision-making occurs. Because of the rent paid by the pressure group in exchange for a constitutional amendment, we might be tempted to assume that the decision-maker is in a brand new situation as the promise of a rent would tear the veil apart. The decision-maker would now be certain of the short term advantage she would get from the amendment and would therefore be less concerned with the

[18] A systematic comparison of the discourse during the drafting stage prior to 1867 to the discourse during the ratifying process in each of the former British Dominions would be necessary to confirm McGuire and Ohsfeldt's results.

[19] The 1982 Act was not, strictly speaking, an amendment to the 1867 Act. In fact, the 1867 Act is not even mentioned in the 1982 Act. But it was clearly a complement to the original act and as such may be conceived as an amending document in our terms or as an explicit change in Voigt's terms.

long term consequences of her decision. The fact of a decision-maker introducing an amendment would be a proof that she is now considering the short term advantage she draws from the pressure group (her rent) rather than the long term uncertain effects of the amendment given her future possible power position. Therefore there should be less of an impact of uncertainty on amendments than on founding documents.

But are we not allowed to go further and to say exactly the same thing about founding constitutional documents? Indeed, constitutional documents giving birth to a new polity are not created in some sort of ethereal world devoid of pressure groups. On the contrary, they are drafted by agents historically and socially located, i.e., with private interests. From the perspective of a theory of pressure groups, the creation of a new polity would be prompted by demands emanating from particular interests, like merchants, entrepreneurs, religious or political elites, etc. Typically, these interests are many and they compete with each other. And the first locus of this competition is the securing of a sufficient number of decision-makers sympathetic to one's cause and willing to support the desired amendment. Therefore, one would expect to have several decision-makers promoting different views, according to their clients' interests. This is coherent with the work of McGuire and Ohsfeldt mentioned above.

Now, the theory of the veil of ignorance ignores pressure group demands for constitutional amendments. It considers only the interests of the decision-maker, both certain and uncertain to her, or known and unknown. Considering pressure groups is a way of making explicit the mechanism relating known interests to choices. But this does not interfere with the impact of uncertain interests on constitutional choice. No matter how these interests are manifested, the prediction remains: constitutional documents, both founding and amending, should be more concerned with political than with economic or preceptoral power, or, in terms of resources, they should be more concerned with authority and force than with wealth or knowledge. And the theory would tell us that it is so not because Constitutions are by essence related to the distribution of political authority but because constitutional choices are made behind a veil of ignorance. We found empirical support for this hypothesis. However our second hypothesis is supported only for the 1982 Act as there are more negative power relations in this act but more positive power relations in the 1867 Act. Our *ad hoc* hypothesis explaining this finding is that there is a fundamental difference between founding and amending constitutional documents. The first type of documents must of necessity ascribe powers (positive power relations) whereas the second are not in the same obligation. Restraining the use of power resources already ascribed by

an existing Constitution is rational for constitutional decision-makers choosing under uncertainty. But to do so, there must be an explicit distribution of resources already in place, something that is absent when a polity is to be created.

Conclusion

The distinction between constitutional and in-period choices suggests a major difference in the motivation of decision-makers. They are more affected by the uncertainty of their future position in the distribution of power in society in the former than in the latter. When they choose «behind the veil of ignorance», decision-makers move their preferences towards a less privileged individual. Our content analysis of two Canadian constitutional documents confirmed this prediction and suggested that this effect was more acute in amending constitutional documents than in founding ones.

Our findings obviously lack robustness as they are based on a single comparison between two constitutional texts. Hence our subtitle: «An empirical *exploration*…». A more robust test would require a comparative analysis of several constitutional documents in several countries. Any generalisation would be premature at this stage.

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