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# An Experiment with Electronic Mail and Constitutional Theory

I. Trotter Hardy

In the spring semester of 1994, I conducted an experiment in constitution writing with a Law and Economics seminar. I assigned my class of fourteen students the task of writing a constitution for "Dalmatia," a real region of Eastern Europe, fictionally described as a soon-to-be-independent nation. The exercise was not to be done in the classroom. Rather, the students were to meet in cyberspace, by electronic mail, to plan and draft the Dalmatian constitution. This article describes the constitution-writing exercise, explains the why's and how's of using electronic mail for its accomplishment, and reports what I learned from the experiment.

## **Buchanan, Rawls, Public Choice**

It may sound odd to ask students to write a constitution in a class on law and economics, rather than a class in constitutional law. But I had a particular interest in experimenting with some of the conclusions of the public choice school of law and economics. Public choice economics deals with the application of economic principles and analysis to those goods and services that we choose to allocate through public means, that is, through government.

A seminal work in this area is James M. Buchanan and Gordon Tullock's *The Calculus of Consent*,<sup>1</sup> which tries to predict, using the tools of economics, what sort of constitution a "rational, self-interested" economic actor might choose to be governed by. Explicit in the Buchanan-Tullock approach is the belief that actors writing a constitution will do so without regard to the particular position they each will occupy in society once the constitution takes effect.

Closely related to this line of analysis is John Rawls's jurisprudential investigation of the notion of justice.<sup>2</sup> Rawls tries to define what is just with reference to the agreements that would be reached by citizens defining the institutions of society from behind the "veil of ignorance," that is, without knowing where in society they would end up.

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1. Ann Arbor, 1962.
2. A Theory of Justice (Cambridge, Mass., 1971).

Excerpts from both works appear in the text I use for the Law and Economics class.<sup>3</sup> These excerpts, and the rest of the public choice materials, come at the end of the course, which means that the class has about twelve weeks of other material before they are introduced to the public choice notion.

### **My Hypothesis**

The Rawls and Buchanan-Tullock approaches have long intrigued me: what sort of constitution would people actually agree on if they were somehow to find themselves behind the veil of ignorance? My hypothesis was that most people would arrive at a set of constitutional-level principles that would differ markedly from the actual principles that apply in contemporary U.S. Supreme Court jurisprudence. More particularly, I believed that ordinary citizens daily approve of government actions that reflect constitutional principles wholly at odds with the principles those same people would approve as an abstract proposition from behind the veil.

For example, I believed that constitution writers would impose a fairly strict limitation on any newly created government with regard to resource takings that were to be distributed in some way other than from richer to poorer citizens. I assumed that these “pre-citizens” writing a constitution behind the veil would, for example, deny a government the power to transfer resources from one geographic region of the country to another, or from one state to another state in a federal system.

But I thought these same writers, as citizens in an actual society with an established government, would readily accept the fact of our federal government’s collecting tax revenue from citizens of some states in order to provide hurricane or earthquake relief to other states (which is, of course, a form of resource transfer from some states to others).<sup>4</sup>

I decided to test this theory with the only ordinary citizens at my disposal: law students. I would have my students write a constitution, behind the veil of ignorance, well before they were exposed to the Buchanan-Tullock and Rawls materials in their textbook.

I thought the experiment ought to be conducted outside class. But arranging a time for even fourteen law students to meet with any frequency seemed almost impossible. I therefore seized on the idea of having “meetings” through electronic mail.

### **Advantages of E-Mail**

E-mail had some decided advantages. I will mention six. First, the use of e-mail obviously meant that no meetings had to be scheduled at all. Students could read and respond to messages at their leisure, night or day. In practice,

3. David W. Barnes & Lynn A. Stout, *Cases and Materials on Law and Economics* (St. Paul, 1992).
4. Some may object here that once a hurricane or earthquake strikes, the victims are indeed poorer than others not similarly affected. But I am speaking of the situation *ex ante*, when hurricane- and earthquake-prone citizens could either purchase private insurance or impose taxes on themselves at the state level.

I required them to check their mail at least twice a week, and I recommended that they do so more often. This was not a burden, given the flexibility of their own self-scheduling.

Second, if any students were away for an extended period, say for an illness, they could catch up with all that had taken place: they simply had to read more messages than usual. And once they had read all the messages, they would be *completely* up to date, for there would have been no other discussion or medium through which ideas had been exchanged.

Third, I had specified that the students' final grades would be determined by an examination on the classroom material. But I also specified that the grade from the exam would be raised or lowered one notch, depending on the amount of class participation. This is a common practice with seminars at my law school, but I specified that, for our seminar, class participation included both spoken comments in class and the e-mail constitution-writing exercise.

The use of e-mail to help determine class participation offered something that the usual assessment of participation does not: objective verification. Instead of relying on memory or even notes, which are sketchy at best, I had before me at the end of the semester every word the students had said.

The participation component of a seminar grade is usually determined by the amount a student contributes rather than by the content of the contribution. The idea is to encourage students to speak up and not worry that every word is being judged on the spot. I decided to continue that approach with the e-mail project: unless I thought they were writing nonsense (which none of them did), I would make distinctions among the students, for class participation purposes, roughly in accordance with the amount they wrote. And I was able to determine, with the aid of a word-counting word processor, *exactly* how many words each student wrote.

Fourth, although I had not thought of it at the time, I believe that the e-mail exercise was valuable because it forced students to do more writing than they would have done otherwise. I suspect that all of us in law teaching think and speak well of our students, but if pressed we would acknowledge that their writing skills are often weaker than we would like. I did not mark up their e-mail with comments on their writing, but in general I think it was desirable for them to write more rather than less. The constitution-writing exercise with its continuous exchange of written communication was an excellent and relatively painless way to accomplish that goal.

Fifth, because everything the students wrote was available in an already-computerized format, I was able to produce for them at year's end a complete printed transcript. In previous experiments with on-line discussion groups I had developed a set of word-processing macros or automated steps to do rudimentary editing of e-mail messages.<sup>5</sup> With the aid of these existing macros, I was able to edit out of my students' messages all extraneous Internet

5. See *Electronic Conferences: The Report of an Experiment*, 6 *Harv. J.L. & Tech.* 213 (1993).

addressing information, convert single-line paragraphs into the multi-line paragraphs that word processors prefer, and mark the FROM:, DATE:, and SUBJ: entries for special formatting (boldface, italic, etc.). Then I added an index of messages by author and a cover page to the transcript, printed it on a laser printer in two-column format, had it reproduced and bound with a black spiral binder (along with card stock front and back covers), and gave a copy to each student. The resulting work product looks quite impressive; I think the students got a great deal of satisfaction from seeing their words in print, most for the first time.

Finally, a potential advantage of an e-mail adjunct to live class discussions is that it allows students who are not forthcoming in class to find their voice in writing. My class of fourteen was a bit small to really test this advantage, but my impression is that it was less true than I had expected. Most of the major e-mail contributors were the major classroom contributors as well. Happily, there were a few exceptions. One student only infrequently and briefly expressed views in class; I would have considered this student's participation to be below average and would probably have marked the final grade down. During the constitutional e-mail discussion, however, the student delivered a torrent of articulate arguments that were strikingly impressive. I notched up the final grade accordingly.

### **Mechanics**

To make sure that all class members received all messages that any class member sent, I arranged for my university's computer center to create a special listserv list.<sup>6</sup> The listserv software maintains what amounts to an e-mail mailing list.

The operation of a listserv list is quite simple, though it provides an elegant and powerful communications tool. The listserv software maintains the list of e-mail addresses for all subscribers.<sup>7</sup> Whenever a subscriber sends a message addressed to the mailing list, the software copies that message and sends it back out (sometimes called "echoing" the message) to all other subscribers. In this way, every message is sent automatically to everybody, and the listserv software also maintains an archive of all messages.

This is the same mechanism that underlies thousands of discussion groups on the Internet, including the discussion list known as LAWPROF, subscribed to by more than 500 law teachers. Indeed, most people associate these discussion or mailing lists with nationwide or worldwide discussion groups. But it is helpful to remember that the same mechanism can be extremely useful for a dozen students all located in the same town.

6. "Listserve" becomes "listserv" because many computers cannot handle names with more than eight letters.
7. Unlike most Internet discussion groups, my classroom list was closed to outside subscribers; I specified that it should be confined to the members of my class. The mere establishment of a listserv list is a public event on the Internet and can be discovered by other Internet users around the world. Some users who discover a new list will try to subscribe to it, which is of course undesirable for the sort of project I am describing.

During about ten weeks of e-mail discussion, fourteen students wrote a total of 134 messages averaging 2,770 words per student over the semester. The class champion wrote almost 9,000 words in 25 messages. The least communicative student wrote just over 900 words in six messages.<sup>8</sup>

I did not consider the exercise time-consuming for me.<sup>9</sup> I wrote very few messages myself during the semester-long discussion. For the most part, I just got things started by writing the introductory materials and background; kept things on track when the discussion seemed to lose focus; and wrapped it up at the end with a several-page summary of how I thought things had gone and what the students might learn from the exercise. My effort in editing and printing the transcript required about six hours, from first sitting down at the computer to delivering the document to the photo-reproduction shop. I considered that a modest investment for a very attractive finished product.

### Substance of the Discussion

I wanted the students to begin their exercise by considering the question of voting rules. One of the findings of the public choice literature, originating with the work of Kenneth J. Arrow,<sup>10</sup> is that voting rules and procedures matter a great deal to the outcome of a vote. Buchanan and Tullock also provide a very useful perspective on voting when they observe that there is nothing magic about simple majority voting. Indeed, they show that unanimity is the only truly special voting rule because it is the only rule that guarantees that group decisions will make everyone better off.<sup>11</sup>

Because I knew that later in the semester the class would be discussing the analysis of voting rules, I wanted the students to come to agreement early on about the voting rules of their "drafting committee." We began this discussion with my asking by what vote (majority, supermajority, unanimity) they would officially adopt the Dalmatian constitution. Of course, hidden behind this simple request was the meta-issue of what voting rule would be used to decide what voting rule they would use.<sup>12</sup>

I predicted, from the Buchanan-Tullock materials, that the students would come to see—whether on voting procedures, or voting procedures to decide voting procedures, or voting procedures to decide voting procedures to decide voting procedures, et cetera—that ultimately the only noncontroversial way for resolving the issue would be to agree by unanimous decision. Anything else would just be a power grab by the majority at a time when the minority would not be obligated to go along.

To my surprise, the voting discussion was lengthy, occupying one week of intensive discussion, with repeated references and further comments running

8. Yes, this student's final grade was notched downward for lack of participation.

9. I realize now that I never asked the students what they thought about the time involved.

10. *Social Choice and Individual Values*, 2d ed., 96–100 (New York, 1963).

11. Buchanan & Tullock, *supra* note 1, at 88–90.

12. A rule of "consensus" would in my terms be a "voting rule." It means either unanimity or some majoritarian decision taken without a formal vote.

on for another week or two. More surprising, most students *never* came to the conclusion that a unanimous decision on some fundamental issue was the only feasible way to confer legitimacy on the group's subsequent efforts.

In fact, the group never decided exactly how they would approve the provisions they might write for the Dalmatian constitution. They seemed to prefer to sweep the matter under a rug, trusting that they would find certain provisions sort of "generally acceptable" (my words).

After this opening inconclusive round of ground rules, the discussion floated through taxation, property rights, bicameral legislatures, governments with plenary versus enumerated authority, a bill of rights, and more. My impression is that taxation (the power to tax, limits on that power, due process for effecting a tax, flat versus progressive taxes, and so on) was the overall topic that drew the most attention.

### **Outcome**

Recall my assumption that constitution-writing pre-citizens would view abstract constitutional principles differently from the way they view today's implementation of those principles. At the end of the course, I reviewed the students' discussions to see whether my hypothesis had been borne out. It was not. Alas, neither was it rejected. In fact I was able to draw relatively few conclusions, of any sort, about my hypothesis. My primary conclusions are that conducting a constitution-writing exercise through the use of e-mail is a worthwhile thing to do, but that it is too slow to permit fourteen people to come anywhere close to writing an entire constitution in twelve weeks.

Students did seem to be influenced by their public choice reading when they finally got to it. Early in the semester, many students discussed voting rules the way many Americans do: as long as a majority of voters vote for *X*, then *X* ought to be done. That is, at the outset of the experiment, students associated "democracy" with "simple majority voting." The public choice materials in our text make clear that simple majority voting is only one type of voting; in the appropriate context—for instance, where there is a legitimate fear of the tyranny of the majority—supermajority rules may be more desirable. Student exchanges at the end of the year seemed to reflect a greater sophistication about these other possibilities than had been true at the beginning. At least the e-mail exercise showed that learning does take place!

Next year I will set up the same exercise but sharpen the focus from the beginning: I may well have the students simply draft a takings clause, or perhaps a free speech clause, or some other quite specific and fairly narrow provision.

In all, the exercise was a useful one. I certainly encourage other teachers to use the new electronic technologies as an adjunct to classroom instruction. Students did a lot of writing; they learned something about electronic mail; they experienced firsthand the perplexing problem of reaching institutional agreement when there is no institution to start with; and they demonstrated an evolution in their thinking after exposure to the materials in the course. Not bad for an experiment in the use of new technology!