

Chapter 2

Veilonomics: On the Use and Utility of Veils in Constitutional Political Economy

Stefan Voigt

In reality, Constitutions are not written by social planners and veils of ignorance have large holes in them.

(Aghion et al. 2004: 578)

Abstract Time and again, discussions on “just” or “fair” constitutional rules are structured around the veil of ignorance (Rawls) or uncertainty (Buchanan). But how useful has this tool really been for identifying a set of rules large groups could agree to unanimously? Are thicker veils really connected with rules leading to more redistribution? This paper surveys the political economics literature broadly conceived and looks at theoretical, experimental, and empirical approaches. It concludes that the central conjectures of veilonomics are unsatisfactory on theoretical grounds and refuted both experimentally and empirically.

Keywords Veil of ignorance · Veil of uncertainty · Fair constitutions · Constitutional political economy

JEL Classification D63 · H11 · K10

1 Introduction

Constructing a direct link between principles for a “fair” or “just” society and the choice of a constitution appears straightforward. If a society’s constitution contains the most basic rule set according to which members of society want to live together, then principles of fairness or justice should be reflected directly in this

S. Voigt (✉)

Institute of Law and Economics, University of Hamburg and CESifo, Johnsallee
35, 20148 Hamburg, Germany
e-mail: Stefan.Voigt@uni-hamburg.de

document. John Rawls is often credited with having revived moral philosophy which was believed dead due to positivism and empiricism (e.g., Kersting 1993). His *Theory of Justice* inspires fellow philosophers even today (witness Sen's (2010) *Idea of Justice*).

Rawls famously draws on a veil of ignorance as an important precondition for the original position which is then used to derive his principles of justice. Rawls is explicitly engaged in normative and counterfactual reasoning. In contrast, representatives of Constitutional Political Economy are interested in explaining the choice of constitutional rules, among other issues. To make the two programs commensurable, this contribution tries to reformulate the central insights of the veil approach into positive hypotheses that are, at least in principle, testable. I then go on to ask a straightforward question: To what extent is the notion of the veil helpful in explaining the choice of constitutional rules?

The attempt to explain the content of constitutions drawing on the economic approach can be traced back to Buchanan and Tullock (1962). For decades, such a theory of endogenous constitutions was not picked up by anyone. Recently, this seems to have changed [see, e.g., the contributions by Aghion et al. (2004), Ticchi and Vindigni (2010), Hayo and Voigt (2013) survey the relevant literature.]. The central question dealt with in this paper can, hence, also be interpreted as part of this theory of endogenous constitutions.

As a survey-type article, this paper is primarily interested in providing some structure to the literature that relies on veil-type arguments. Some of the surveyed contributions develop their points in such a law-like manner that it seems justified to summarize them under the heading "veilonomics," hence the title of this paper.

Following the pertinent papers, questions such as whether thicker veils do increase the likelihood of constitutional agreement and whether the thickness of the veil can be discerned when analyzing the content of constitutions are discussed. Given that these questions can be answered in the affirmative, it is only a small step to inquire whether the thickness of the veil can be deliberately manipulated. This is a policy question and, hence, a far cry from the question that motivated Rawls.

A veil is per se something intransparent. Transparency has, however, been one of the catchwords of the entire discourse on governance. According to that debate, transparency is a crucial precondition for accountability and responsibility and, at the end of the day, for good governance. Thinking about deliberately increasing intransparency seems to be in marked contrast to that debate but can be entirely plausible within veilonomics.

The rest of the paper is structured as follows: Sect. 2 contains both a brief summary of the Rawlsian veil and a number of critical remarks. An attempt to translate arguments from moral philosophy into the world of real constitutional choices is being made in Sect. 3, largely along the lines of the veil of uncertainty as proposed by Buchanan and Tullock. Section 4 is a short section comparing the two approaches. Section 5 surveys contributions that have "tested" the notion of a veil in some way, namely (a) theoretically, (b) experimentally, and (c) empirically. Section 6 ventures possible steps beyond established veilonomics, and Sect. 7 concludes.

2 The Most Famous Veil: Rawls and Ignorance

The *Theory of Justice* is Rawls' most famous book, and he continued thinking about possibilities for its improvement for the rest of his life. In describing—and criticizing—the Rawlsian notion of the veil, I rely, however, entirely on the *Theory of Justice*. Since I am not interested in the intricacies of political philosophy but rather in the relevance of some veil notion for constitutional choice, this seems justified.

Before Rawls introduces his veil proper, he describes the context for which this notion is needed (1971: 10f.):

Thus we are to imagine that those who engage in social cooperation choose together, on one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust.

A number of observations seem to be in order: First, the principles of justice claim eternal validity; they are not subject to any change. Second, Rawls envisages a grand and explicit agreement, no development in small steps. Third, there is no talk of any concrete society; hence, the issue of who exactly agrees on any principles is not explicitly dealt with.

In the sentence preceding the passage containing the explicit introduction of the veil, Rawls (1971: 1) describes the original position as a “purely hypothetical situation.” I interpret this as Rawls being interested primarily—or even exclusively—in the derivation of some normative principles and not in the explanation of real-world choices of constitutional rules.

This is how Rawls introduces his veil (1971: 11):

Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.

In other words, the actors behind the Rawlsian veil know nothing about their own identity; they are soulless automata.

Further, Rawls envisions a clear sequence of choices behind the veil (12). First, the actors behind the veil make the “choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions.” Only in a subsequent step do they choose their constitution and in a third step the legislature and so on.

Binmore (1994: 329) interprets this not as a sequence of choices behind the veil but as four different veils. His interpretation is very convincing as the second choice will be made behind a veil that is already partially lifted in the sense that the “first principles of a conception of justice” have already been chosen. Binmore (ibid.) admits that he does not understand “precisely what Rawls intends that I remember and forget when I pass beyond his veil of ignorance.”

Rawls' main interest seems to lie in deriving his famous two principles of justice.¹ He is explicitly disinterested in making the next step, namely in deriving constitutional rules that best incorporate these two principles (*ibid.*, 14). "In particular, the content of the relevant agreement is not to enter a given society or to adopt a given form of government, but to accept certain moral principles." But a far-reaching consequence can be drawn from the Rawlsian premises: If the fundamental principles of justice can claim to be valid independent of time and place and form the basis for the choice of constitutional rules, then a universal ideal constitution ought to be derivable—even if Rawls never bothered to derive it himself. This does, however, not exclude that somebody else took up the question.²

According to Rawls, his two principles of justice hold independently of time and place. Although Rawls is explicitly not interested in deriving constitutional rules, an empirical follow-up question almost suggests itself: assuming that different societies might very well share different conceptions of fairness—and thus explicitly parting with Rawls' premises—do these lead to systematically different constitutional rules? An empirical analysis of the connection between first principles and constitutional contents can, of course, never refute Rawls' approach—as it is entirely normative. But if it could be shown that different conceptions of the normative, i.e., the fundamental principles, are reflected in differences in constitutional rules, then this would be an additional boost to the Rawlsian program. My hunch, however, is that constitutions are written by representatives of the elite whose preferences might substantially diverge from any fairness principles and such an exercise would, hence, be a blow rather than a boost to Rawlsians.

It has often been noted that Rawls attributes extreme risk aversion to his actors. The relationship between risk aversion and the principles actually chosen can be turned into a hypothesis: The higher the degree of risk aversion, the more should the chosen principles be pointing toward equality.

Rawls' theory is often attributed normative status. Shepsle (2006: 1035), for example, writes: "As a normative treatise, *A Theory of Justice* is a milestone of twentieth-century thinking about constitutional moments. As a basis for a historical or positive analytical treatment of actual constitution writing, it possesses problems." It might be useful to somehow qualify the status of the theory. Step one of his theory consists in a hypothetically positive claim: "Given that individuals know *x* and do not know *y*, they would choose fundamental principles 1 and 2."³ Rawls himself describes this as "purely hypothetical." If one were mean, one could interpret this as an immunization

¹ To reiterate, they are (1) each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others and (2) social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all. The first principle always has precedence over the second; that is, they are ordered lexicographically.

² As far as I know, nobody has ever bothered to derive such a constitution in Rawlsian terms.

³ One could argue that "step zero" of his theory was clearly normative. It would read: "You ought to forget *y* for the sake of this experiment." As was just pointed out, this imperative cannot be executed and the whole enterprise seems to be non-starter.

strategy. As we will see in Sect. 5 below, experimental researchers beg to differ. They try to emulate the conditions specified by Rawls in the laboratory and have real people choose their own fundamental principles.⁴ Step two of Rawls' theory then is to claim validity for the derived principles for real-world situations. This is where his theory is clearly normative: "You (constitution-makers in the real world) should implement my two fundamental principles!"

Even if one believes that the fundamental principles derived at step one are correct (although most experiments have shown that real people choose different principles), the relevance of his normative advice is doubtful: Constitutional rules as the most basic layer of rules need to be self-enforcing. In other words, they need to constitute an institutional equilibrium. But what incentives do real-world constitution-makers have to follow the advice of a New England philosopher king?

Let me summarize. In this section, I have highlighted a number of queries regarding the notion of the veil underlying both Rawls' original position as well as his principles of justice derived behind that veil. I have also shown that Rawls' theory contains a nomological hypothesis that can be put to a test. The results of such tests will be reported in Sect. 5 below. Rawls' veil is clearly the most famous one, but he was definitely not the first to draw on this notion. The next section describes the veil as constructed by Buchanan and Tullock.

3 From Moral Philosophy to Real-World Constitutions: Uncertainty, not Ignorance

The *Calculus of Consent* by Buchanan and Tullock (1962) can be considered as the birthplace of Constitutional Political Economy. It is here that Buchanan and Tullock develop the argument that agreement on rules is scarce and that it is, hence, rational to economize on agreement by choosing rules adequately. It is here that Buchanan and Tullock develop their interdependence cost calculus, but it is also here that a version of a veil is presented which is completely different from the one developed by Rawls.⁵ This is how the authors describe the necessity of uncertainty (ibid., 78): "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."

The Rawlsian veil only works if societies are made up of actors who follow the imperative to forget who they are and deliberately walk through a veil of ignorance (however that can be done). In the Buchanan and Tullock version of the veil,

⁴ Rawls could, of course, claim that these experiments do not really depict what he had in mind.

⁵ But Buchanan and Tullock were not the first in developing a veil construction, either Harsanyi (1953, 1955) is an important precursor in the twentieth century. The notion of an "impartial spectator" can also be interpreted as a precursor of sorts, the notion going back at least to Adam Smith.

actors know very well who they are today, but are uncertain regarding their future positions. Unanimous agreement on constitutional rules will only be attained if the future is sufficiently uncertain. This likelihood will be higher the longer the constitution is expected to remain in force.

In a contribution jointly authored with Viktor Vanberg, Buchanan proposes to disentangle preferences into interests on the one hand and theories on the other. Regarding the choice of constitutional rules, one could, hence, distinguish between constitutional interests and constitutional theories. The interest component reflects the preferences of the individual, whereas the theory component reflects her hypotheses regarding possible cause–effect relationships.

	Interests	Theories
Corresponds more with what type of theory?	Contractarian	Deliberation
Status?	Evaluative	Cognitive
Falsifiability?	No (subjective)	Yes (objective)

Vanberg and Buchanan (1989: 53) intend to analyze constitutional choices that occur under realistic conditions, namely (1) people are not totally ignorant regarding their interests and are (2) not perfectly knowledgeable regarding their theories. The pleasant aspect about their approach is that empirically falsifiable hypotheses can be derived in a straightforward fashion. I shortly present the hypotheses contained in their contribution and add some comments.

Hypothesis 1 “As the veil’s “thickness” increases so will the prospect of achieving agreement.” (p. 54)

This is the core of the entire veil notion: The more uncertain I am regarding my future position in society, the more will I take the position of an impartial spectator. Since this reasoning applies to everybody, agreement on the content of the constitution becomes possible.

A number of follow-up questions immediately come to mind:

- (1) How can the thickness of the veil be measured? Is it uni- or multidimensional?
- (2) What is the functional form connecting the thickness of the veil with the prospect of agreement? Supposing the thickness of the veil could be measured, would the prospect of agreement be a linear function of the thickness? Would the prospect of agreement marginally decrease the thicker the veil becomes?
- (3) If agreement is (normatively) striven for and the thickness of the veil increases prospects for agreement, then the question becomes can we deliberately manipulate the veil’s thickness? To what degree can it be manipulated? Who has an interest in doing so—and who does not?

Hypothesis 2 “The degree of uncertainty is, in part, a function of the sort of rules that are under consideration. The essential dimensions here are the generality and the durability of rules. The more general rules are and the longer the period over which they are expected to be in effect, the less certain people can be about the particular ways in which alternative rules will affect them” (p. 54).

The hypothesis is straightforward and contains a partial answer to the second question formulated with regard to hypothesis 1 above: Yes, uncertainty—i.e., the thickness of the veil—can be deliberately increased by only allowing a certain type of rules, namely “general” ones; it is, hence, endogenous.⁶ If participants at a constitutional convention are interested in achieving agreement and the hypothesis is correct, then we should observe constitutional conventions agreeing on some kind of meta-norm, namely that only “general” rules will be considered for inclusion in the constitutional draft.⁷

Further, the hypothesis implicitly assumes that generality and durability are complementary. Empirically, this can be true. Logically, it need not be true as the two belong to different dimensions: Whereas the generality of the constitutional rules agreed upon is entirely endogenous to the decisions of the constitutional convention, this is not the case with regard to the durability of rules. Their durability will be influenced by a host of factors not under the control of the constitutional convention. One can, however, argue that rules perceived as “fair” or “legitimate” would stand better chances of becoming durable rules. But this might lead to circular reasoning: The (expected) durability of rules increases the prospects of agreement. Having reached agreement increases the legitimacy of the rules which, in turn, increases their expected durability.

Empirically, a closely related kind of circular reasoning might, indeed, be relevant. It seems plausible to assume that the expectations of the delegates to a constitutional convention regarding the durability of their prospective constitution are formed on the basis of past experience of their own country. People in Haiti or the Dominican Republic are likely to expect their constitutions to remain in place only for the next eight or ten years. If most members of a constitutional convention assume a constitution to be short-lived, most of them will have fairly precise assumptions about their relative position over the expected life span of that constitution. If the entire veil argument is correct, then the likelihood that such countries will pass a draft unanimously (or might pass a draft at all) should be relatively low. Assuming that this gives the newly passed constitution only a limited amount of legitimacy and further assuming that legitimacy and longevity are connected, we have arrived at a self-fulfilling prophecy: If constitution-makers expect a constitution to be short-lived, they will act such that the constitution will, indeed, only be short-lived. Establishing this kind of causality empirically is, however, extremely difficult.⁸

⁶ This conjecture is also appealing because the generality or universalizability of rules has often been identified as one of the core ingredients of the rule of law (Kant 1797/1995; Hayek 1973; Buchanan and Congleton 1998).

⁷ It would be interesting to test whether any constitutional convention has agreed on such a meta-principle before agreeing on any substantial rules. Additionally, it would be interesting to know whether any constitutions themselves contain provisions requiring the generality of constitutional rules.

⁸ While writing their paper and reflecting upon durability, Buchanan and Vanberg might have had the US experience in mind. Elkins et al. (2009) show, however, that the median life span of all written constitutions produced since 1789 is below twenty years.

Hypothesis 3 “So far as the *interest dimension* is concerned, agreement is facilitated by whatever increases persons’ uncertainty about the *particular* effects that alternative rules can be expected to have on them. ... So far as the *theory dimension* is concerned, prospects of agreement on desirable rules are enhanced not by creating uncertainty but, on the contrary, by raising the level of mutually shared information on the general working properties of alternative rules” (p. 60).

This is a modification of central hypothesis 1 and a consequence of splitting up the preferences into interests and theories. Regarding interests, nothing changes. Regarding theories, the exact opposite from the conventional result appears, however. Agreement will be more likely the lower the level of uncertainty. Note that it is completely irrelevant whether the theories are true in the sense of reflecting reality. As long as almost everybody believes them to hold true, this is sufficient for reaching agreement. In other words, this part of the conjecture deals more with beliefs than theories as conventionally conceived.

Putting this hypothesis to an empirical test is no mean feat as we need to have measures for both degrees of uncertainty regarding the individual interests and the degree of uncertainty regarding perceived theories.

Given that we are interested in agreement and that the thickness of the veil can be deliberately modified, we would want a very thick veil regarding the interest dimension and a completely transparent one regarding the theory dimension. To understand whether transparency regarding the theory dimension can be deliberately increased, we do not only need to know how members of society—or representatives in constitutional assemblies—acquire their theories.

The introduction of an interest and a theory component has a number of consequences. First, it moves the entire enterprise closer to Rawls which is amazing taking into account some of Buchanan’s previous critique, e.g., (1977: 196): “... the Rawlsian framework as here interpreted must contain rather full information about alternatives for production and distribution available under cooperation,...” Robert Cooter (cited according to Buchanan 1977: 205) poignantly summarized the asymmetric assumptions regarding the information actors hold in the Rawlsian model: “..., an individual must know everything in general and nothing in particular.” Now, Buchanan and Vanberg seem to wish for actors with exactly that asymmetrical information.

Second, it means that Buchanan—probably inspired by Vanberg—has become less pessimistic than in previous work: In *The Reason of Rules*, Brennan and Buchanan (1985: 140ff.) were rather pessimistic regarding the chances that rational actors could agree on deliberately increasing the thickness of the veil. Only four years later, Vanberg and Buchanan (1989: 54) wrote: “The variables that affect the veil’s thickness, can, to some extent, be manipulated, and rational actors may take deliberate measures designed to put themselves behind a thicker veil, thereby entrancing the prospects of realizing potential gains from constitutional agreement.”

Vanberg and Buchanan describe a possibility; they do not make a prediction. To turn this into a hypothesis, one would have to know the conditions under which constitutional conventions are predicted to increase the veil's thickness. From the point of view of contract theory, this is also interesting because it amounts to some sort of meta-rule. Staying within the Buchanan frame, this rule would need to be passed unanimously. Whether this is likely will be discussed—among other issues—in the next section.

4 Rawls or Buchanan: Ignorance Versus Uncertainty

This short section tries to compare the two main veil notions discussed so far regarding their value in explaining real-world constitutional choices. More than two centuries ago, Hume (1777/1987) vividly described the conditions under which new constitutions are often produced. He is rather critical concerning the relevance of unanimous agreement:

... and were one to choose a period of time, when the people's consent was the least regarded in public transactions, it would be precisely on the establishment of a new government. In a settled constitution, their inclinations are often consulted; but during the fury of revolutions, conquests, and public convulsions, military force or political craft usually decides the controversy.

Hume thus envisions a situation involving a very high degree of uncertainty. If the prevalence of uncertainty as such was sufficient for the passing of “fair” or “just” constitutions, then the resulting constitutional rules ought to be fair almost by definition.

We just saw that Vanberg and Buchanan consider the possibility that people choosing a new constitution might deliberately choose to increase the amount of uncertainty to increase the chances to agree unanimously. But if we imagine a Hume-like situation, the exact opposite seems a lot more intuitive: If general uncertainty is already high, people will strive to reduce uncertainty to be better able to build expectations regarding the future that has a high chance of turning out to be correct.

So how important is the distinction between Rawls and Buchanan at the end of the day? I propose to distinguish between two veil conjectures, one attached to Rawls and the other one to Buchanan. The Rawlsian veil is used to derive two fundamental principles of justice, from which constitutional—and other—rules can be derived. I propose to call this the **substantive conjecture**. Buchanan's veil, in turn, is used to increase the likelihood of unanimous agreement. I propose to call this the **procedural conjecture**. In their comparison of the two different approaches toward the veil, Brennan and Hamlin (2002) point out that Rawls is interested in refining our ethical intuitions, whereas Buchanan is interested in politically feasible solutions.

5 Tests of the Veil Hypotheses

Scholars have picked up the veil notion in very different contexts. We propose to look at three of them in a little more detail here. The first one challenges veilonomics from a theoretical point of view. The second one is based on laboratory experiments, whereas the third and the last one are attempts to test some notion of the veil empirically.

5.1 Theoretical Challenges

In this subsection, I briefly present and discuss four issues that have been dealt with in the literature: (1) an attempt to introduce different kinds of uncertainty—instead of dealing with just one general and unspecified type. (2) Assuming that actors at the constitutional stage play a prisoners' dilemma game and further assuming the absence of risk aversion, agreeing on mutual cooperation should not be much of a problem; this is, at least, argued in one contribution. (3) Other contributions worry about preferences. The first one shortly presented here argues that representatives of constitutional political economy have been overly liberal in allowing any kind of preferences. Another contribution introduces expressive preferences and their possible consequences. These can, indeed, mean trouble for the entire approach. (4) Finally, attention is drawn to an approach that shows that public deliberation does not necessarily increase the likelihood of unanimous agreement. This has, of course, important implications for how to best set up a constitutional convention.

Mueller (2001) proposes to be more precise regarding the veil of uncertainty and distinguishes three kinds of uncertainty, namely (1) identity uncertainty, (2) numbers uncertainty, and (3) payoff uncertainty. Identity uncertainty is present if an individual at the constitutional stage knows everything about the future but not what type of person he or she will be himself or herself. Numbers uncertainty, in turn, is present if there are different types of players with different preferences—e.g., different ethnic groups—but the individual does not know how large these groups are. The choosing individual is, hence, unable to calculate any probability of what type he or she is likely to be. Finally, payoff uncertainty is present if the individuals at the constitutional stage are uncertain regarding the payoffs that various alternative choices will yield. A move from identity uncertainty to numbers uncertainty to payoff uncertainty implies a higher degree of uncertainty. Mueller assumes that “every individual at the constitutional stage can envisage the kinds of issues that will come up in the future” (ibid., 230). This is, of course, a very sweeping assumption. Instead, one might want to introduce a fourth kind of uncertainty, namely “issue uncertainty.”

Mueller (ibid., 231) points out that when only identity uncertainty is present, then, following Knight (1921), no real uncertainty is present, but only risk. Mueller

vividly describes the consequence of this assumption: “If in 20 or 100 years time, the threat of a flood would require the construction of a dike, the constitution framers could forecast this event, the future preferences of citizens, and determine their tax and effort obligations. These could then be written into the constitution. No second stage in the democratic process would be needed.” It is not only the consequences that become clear but also the very unlikelihood that something like this might ever occur. At the other extreme (*ibid.*, 235), if none of the uncertainties are lifted, then no procedure for making future collective choices can be written into the constitution stage.

Müller (1998) takes the Buchanan-type veil head on: Assuming that the coordination problem that individuals face when choosing constitutional rules is of a Prisoners’ Dilemma type, he argues that the assertion that uncertainty increases the prospect of agreement is false. Rather, in the absence of uncertainty, actors would achieve both unanimity and fairness without problems. Unfortunately, this raises a subsequent problem: Given that his (theoretical) argument is convincing, why is it that representatives in constitutional assemblies so often fail to achieve unanimity?

Müller’s argument is based on what Mueller (2001) calls “identity uncertainty”: Players know the game they are playing (i.e., the payoffs) but do not know what specific role they will occupy (column or row). Given this uncertainty, they can choose cells. Choosing (C, C), e.g., would imply empowering a third party to enforce that solution. Müller (1998) argues that (D, D) is weakly dominated and the choice among the remaining cells boils down to a genuine coordination game.

In his comment on Müller, Kyriacou (1998) calls Müller’s point an “interesting refutation” but sets out to qualify it by explicitly introducing some degree of risk aversion. Given risk aversion, a thick veil of uncertainty is shown to be conducive to the choice of fair rules. This qualification anticipates an important discussion between experimental economists, namely whether the idea of a veil is equivalent to the introduction of risk—or whether there is more to it. This discussion is summarized in the next section of the paper.

Witt and Schubert (2008) are also concerned with risk preferences, although they rely on them only as an example for the parsimony of preferences allowed in social contract models. According to them, these models are too parsimonious to allow for agreement on a social contract. Citizens’ constitutional interests vary with their risk preferences. To find constitutional rules that are in everybody’s interest and that are, hence, able to secure unanimous agreement, explicit assumptions concerning preferences are needed. They illustrate their point by referring to individuals’ risk attitudes and their systematic change over an individual’s life span. In a sense, they argue that the veil is too thick.

The usefulness of veilonomics and, indeed, the entire approach of constitutional political economy has come under attack from a pair of authors, namely Brennan and Hamlin (2002), *prima facie* unlikely to question the approach. They start from the observation that in post-constitutional democratic choices, expressive voting often plays a very important role: Voters know that their individual vote is not decisive, so they refrain from voting instrumentally and turn to express themselves. They are pushed to do so because the consequences of such behavior

are basically costless. Brennan and Hamlin (*ibid.*) now argue that expressive voting might, relative to instrumental voting, become even more relevant regarding constitutional choices. But if this is the case, then it becomes not only unclear whether unanimity can ever be reached but, given that it does, whether the agreed-upon constitution is the best possible one the community could agree on in case that instrumental concerns did prevail.

How to get out of this conundrum? Do away with the approach of Constitutional Political Economy in its entirety? For Brennan and Hamlin, expressive voting can only take over instrumental voting due to the large numbers involved. In a sense, expressive voting is the consequence of the “veil of insignificance” (Kliemt 1986). So Brennan and Hamlin propose to lift this veil basically by delegating the power to write a constitution to a convention that is sufficiently small such that any individual member’s vote is sufficiently important to keep instrumental and expressive voting in balance. Crampton and Farrant (2004) take issue with the solution proposed by Buchanan and Hamlin. They claim that “the expressive voting critique is devastating to the constitutional enterprise.”

Stasavage (2007) is concerned with a different problem; in fact, the word “veil” does not even appear in his paper. Uncertainty in our context refers to lack of information regarding one’s own position in society at some future date. Transparency, in turn, refers to information (or lack thereof) regarding the behavior of others acting on my behalf, e.g., representatives in a constitutional assembly. Transparency is, hence, important in principal agent relationships. Representatives of discourse theory such as Habermas usually argue that increases in transparency increase the chances of unanimous agreement. This issue is connected to our question because Vanberg and Buchanan (1989) claim that lower levels of uncertainty regarding theories are tantamount to a higher likelihood of reaching consensus.

Stasavage (2007) asks whether public deliberation is likely to lead to consensus. Drawing on game theory, he shows that public decision-making where citizens can observe both the vote of their representatives and the policy choice might increase, and not reduce, polarization. His formal result echoes the insights of Elster (e.g., 1995) who made this point with regard to constitutional assemblies a long time ago.

5.2 *Laboratory Experiments*

Experimental economics has been extremely successful over the last couple of decades; a number of Nobel prizes allocated to experimental economists attest to that. Experimental economics is closely related to behavioral economics as many experiments have shown that the traditional rationality assumptions used within economics are not reflected in how real people make real choices. But there have also been critical voices regarding the adequacy of the laboratory for testing conjectures regarding social contract theory. Binmore (1994: 184), e.g., who has carried out a number of experiments himself has this to say: “One cannot successfully mimic the real-life situations that matter to social contract discussions in the laboratory, but one

can at least try to come as close as possible.” Johansson-Stenman et al. (2002: 369) who have also conducted experiments involving the veil point out that preferences “revealed” via surveys or experiments might contain a good dose of moral thinking and thus not reveal the “true” preferences of the subjects.

For a long time, Frohlich et al. (1987) was the only experimental test of the veil hypothesis. It is a very broad experiment, setting out to test both the procedural and the substantive predictions made by Rawls. Frohlich et al. (1987: 4) describe the procedural predictions as (1) behind the veil, there will always be unanimous consent and (2) the principles chosen unanimously will always be the same. Rawls’ substantial prediction is, of course, that actors will choose the difference principle that maximizes the lot of the worst off. Regarding substantive principles, subjects can choose from four different principles, namely (1) maximize the floor income (Rawls’ difference principle), (2) maximize the average income, and two principles that Rawls would call “intuitionistic” because they constitute a mix of principles, namely (3) maximize the average income with a floor constraint and (4) maximize the average income with a range constraint. Before subjects decide collectively on their preferred principle of choice, they all have to pass a test making sure they have understood the four principles.

And here are the results: All groups (of five) were able to agree unanimously on a single principle. However, none of the (29) groups agreed on the Rawlsian principle, whereas 25 agreed on the principle according to which average income ought to be maximized subject to a floor constraint (the remaining four groups chose to maximize average income *tout court*). Frohlich et al. also tested the individual popularity of the four principles by asking subjects to rank them. Rawls’ principle reached the lowest number of first ranks (3) but the highest number of last place rankings (71).

Frohlich et al. does not only contain a careful discussion of the possibilities to put an ethical theory to an empirical test, but it is also very frank in admitting that not all of Rawls’ hypothetical conditions can be met in the laboratory. They explicitly mention two, namely the size of the stakes and the information conditions and discuss possible limitations of their insights very openly.

Summing up their experiment, they did find some evidence in support of the procedural hypotheses (people could agree unanimously, and they agreed on the same principle across groups—at least in the overwhelming number of cases), but they were not even close to agree on Rawls’ difference principle. The authors’ main message seems to be that Rawls’ one-dimensional principle does not reflect the complexity of human choices. The “intuitionistic principle” (maximize average income subject to a floor constraint) was not only much preferred but seems to be more human in the sense that we tend to have different goals which we try to reach by combining principles. It is, thus, not only the fact that Rawls’ principle scored so badly that constitutes a problem but also the insight that people tend to trade off principles at the margin, much like economic goods (*ibid.*, 21).

It almost seems as if the contribution by Frohlich et al. was so sweeping that one could not only get the impression that Rawls was dead but that, moreover, more experiments analyzing either the procedural or the substantive effects of the veil were all but superfluous.

Frohlich and Oppenheimer (1990) can be considered a direct continuation of Frohlich et al. (1987). Now, the question is whether consent to a distributive principle is stable over time. Overall, the authors answer “yes” to these questions. More precisely, Frohlich and Oppenheimer report (1) changes in the rankings of distributive justice principles over time, (2) the confidence of the subjects in their rankings, and (3) satisfaction with their choice having experienced taxation and redistribution. They conclude (1990: 473): “... when subjects participate in choosing the principle, their satisfaction is higher than when it is imposed upon them. When they participate and are required to choose *unanimously*, their confidence in the choice increases.” Encouraging as these results may seem, the question of external validity might be especially severe here; the disutility from working is not very severe, and the real time over which an experiment extends is rather short. Whether an experiment such as this is adequate to identify the stability of one’s choice regarding a distributive principle might be doubted.

More recently, Powell and Wilson (2008) have tried to mimic the Hobbesian Jungle in the laboratory. This is of relevance to our interest here because they also ask whether subjects agree unanimously to a constitutional contract to get out of the state of anarchy and whether—given that they have been able to agree on a contract unanimously—they then abide by it in subsequent rounds of the game. Of 32 situations in which a constitutional contract could have been concluded, only one was agreed upon unanimously. And alas, it was reneged upon only seconds after its conclusion and theft and plunder continued.

5.2.1 Using the Veil to Estimate a Social Welfare Function

We now move on to present a number of experiments that well deserve to be called “perverse” from a Rawlsian point of view. Remember that Rawls was a staunch opponent of utilitarianism with its teleological orientation. There are a variety of papers—mostly penned by Swedish authors—in which the veil is used to determine the shape of the social welfare function empirically. Usually, subjects are to choose between different societies that differ regarding average income and (or) the distribution of income (Johannesson and Gerdtham 1995 started that tradition). These papers are mentioned here because they also reveal some information on a critical assumption of Rawls’, namely that actors are extremely risk averse. In addition, a more recent paper nicely separates between risk aversion on the one hand and preferences in favor of equality per se.

Johansson-Stenman et al. (2002) took up the lead and tried to use the veil to identify the relative importance of risk aversion on the one hand and the preference for relative standing on the other. The idea is that subjects are asked to choose the society they would want their (hypothetical) grandchildren to live in from a number of societies that differ regarding both mean income and income distribution (depicted as information on minimum and maximum income).⁹ One

⁹ Remember Mueller (2001) who uses exactly the same device to talk about identity uncertainty.

such society serves as a benchmark, and subjects are then asked to make pairwise comparisons with (in this case) eight other societies. The benchmark society has the highest average income but also the highest income inequality. Their choices reveal the relative risk premium (defined as the income they are willing to forego to live in a more equal society) and, implicitly, their relative risk aversion.

Remember that Rawls assumes subjects to be extremely risk averse. According to the results of Johansson-Stenman et al., less than 20 % of their subjects can be grouped into that category. At the same time, 17 % of their respondents were found not to display any risk aversion at all. The authors used the characteristics of their respondents to identify the determinants of risk aversion. They find that left-wing voters are significantly more risk averse than others, while business students appear to be least risk averse (*ibid.*, 376).

Carlsson et al. (2003) is an almost perfect replica of Johansson-Stenman et al. (2002) with the important difference that it is being played in India which allows the authors to include at least two interesting twists: first, whether risk aversion is context dependent: After all, Swedish society is characterized by both less income inequality and higher average income than Indian society. Further, vertical mobility has been severely restricted in India due to the caste system. It turns out that risk aversion does not dramatically differ between Indian and Swedish students. The authors (*ibid.*, 826) point out that among Indian students, there is a “somewhat higher fraction of the Rawlsian kind.” In my reading of the results, the main difference is rather in the lower share of those who are not risk averse at all (4 % in India compared to 17 % in Sweden). The dummy for membership in “scheduled” (i.e., lower) casts was highly insignificant (with a *p*-value of 0.98).

Carlsson et al. (2005) introduce a distinction between “individual risk aversion” and “individual inequality aversion.” The latter refers to a preference—and possibly a willingness to pay—to live in a more equal society *per se*. To disentangle the two, two experiments are played, in which the subjects decide what is best for the—still imaginary—grandchildren. The choice of a lottery refers to risk aversion, whereas the choice of a society refers to inequality aversion. In the latter experiment, the income of the grandchildren is always at the mean of society, but societies differ with regard to their income distributions. Carlsson et al. (2005: 384f.) find that females are both more risk and more inequality averse than males and that left-wing voters are also significantly more risk averse.¹⁰

Schildberg-Hörisch (2010) tackles with the same problem—how to distinguish simple risk aversion from genuine pro-equality preferences—but chooses to answer it via a different route. She draws on a dictator game with two additional features, namely (1) an efficiency loss for units transferred from the dictator to the receiver and (2) identity uncertainty: Participants decide how to divide the pie before they know whether they are the receiver or the dictator. She finds that social preferences differ depending on whether subjects decide from behind a veil or

¹⁰ Brennan et al. (2008) are the first to test whether there is a systematic relationship between other regarding preferences and attitudes toward risk but fail to find any such relationship.

without such a veil. Women display more genuine preferences in favor of egalitarian outcomes than men, a result that has been found in many experiments (Croson and Gneezy 2009 is a survey).

These insights can be easily translated into a hypothesis which is empirically testable like “*ceteris paribus*, the higher the proportion of women in the constitutional assembly, the higher the degree of redistribution to be found in the constitutional document.” Of course, the hypothesis can also be framed in terms of the ideological positions of the members of the constitutional assembly. But since being left-of-center is almost equivalent to being pro-redistribution, it would surprise nobody if it turned out to be confirmed by the data. As interesting as it is to learn something about the determinants of risk aversion, this is a far cry from the Rawlsian setting as those choosing the principles neither know their gender nor their ideological positions. But we might learn something on constitutional choices. Relatedly, Hayo and Voigt (2012) recently found that female leaders are more likely to increase the degree of constitutionally safeguarded judicial independence than their male counterparts.

Gerber et al. (2013) is an attempt to reveal preferences for redistribution as a function of uncertainty. The authors distinguish three different treatments that are run with a different degree of uncertainty—a veil with different degrees of thickness if you will—in this case regarding the productivity of the subjects. The treatments were called “no uncertainty” (in which subjects knew their own productivity), “full uncertainty” (in which they did not have any clue regarding their productivity) and “half uncertainty” (in which they received a noisy signal regarding their productivity). Compared to the theoretical benchmarks, subjects choose “too much” redistribution under half uncertainty and too little of it under full uncertainty. Interestingly, Gerber et al. did not find any gender effect in their experiment.

5.2.2 Introducing Behavioral Economics

Behavioral economists teach us that many of the standard assumptions regarding the rationality of actors are flatly wrong. Bukszar and Knetsch (1997) can be interpreted as the explicit contribution of behavioral economics to the discussion on the possibility to use veils for distilling people’s preferences regarding redistribution. To do so, the authors rely on one of the central insights of behavioral economics, namely on reference points. Their main point is to show that preferences regarding redistribution are highly dependent on the concrete situation. Their claim is that these differences can be explained drawing on the different reference points subjects draw on when choosing a distribution principle. “Earning” one’s endowments by a simple chance game, for example, significantly reduces the propensity to agree to redistribution rules as do differences in the input value to some sort of production. Their results can be interpreted to be at odds with those of Frohlich and Oppenheimer (1990) who found a high degree of stability in chosen principles.

Behavioral economics has taught us the importance of framing. One question to ask with regard to the experiments thus is how exactly they have been framed. Behavioral economics further teaches us that many actors do not have consistent and well-ranked preferences. To what degree can we assume that experiments on the veil can reveal valid information on participants' preferences if one central insight from behavioral economics is that actors do not have a set of stable preferences?

In Sutter and Weck-Hannemann (2003), the participants play a two-person game in which one person works and has to decide on the effort level, whereas the other person represents the tax authority and has the power to set the tax rate. Sutter and Weck-Hannemann are primarily interested in finding a Laffer curve effect experimentally. Their experiment is relevant in our context because the authors include a veil treatment in which subjects are uncertain *ex ante* as to whether they will be supplying labor or deciding on the tax rate. Following the terminology proposed by Mueller (2001), Sutter and Weck-Hannemann experiment with identity uncertainty. They do point out (*ibid.*, 222) that their experiment does not reflect the veil setting in the usual sense as their subjects commit to specific actions once the veil has been lifted—and not to general rules—as is usually the case.

The results are a lot less clear-cut than expected: Average tax rates do not statistically differ from each other irrespective of whether they were chosen under uncertainty or not. The hypothesis that subjects are more likely to exert effort from behind the veil than under certainty conditions can only be confirmed for higher tax rates. Remarkably, with tax rates lower than 30 %, effort levels are even higher under the certainty than the uncertainty treatment.

Let us sum up: Almost all of the experiments draw on the Rawlsian version of the veil and, by implication, almost none on the Buchanan and Tullock version. With the exception of the Frohlich et al. (1987) piece, these studies show little interest in the “procedural veil” hypothesis (the conjecture that more uncertainty increases the likelihood of agreement), but almost all of them are interested in the substantial principles themselves. Following Rawls, “justice” or “fairness” is mostly being reduced to “distribution” or “redistribution” here. These experiments teach us that (1) people are unlikely to agree on the so-called difference principle but are more likely to agree on a principle according to which average income ought to be maximized subject to a floor constraint, (2) people are rarely as risk averse as assumed by Rawls, but a fifth or even a quarter of society might be as risk averse, (3) there is no consensus on whether agreement to a principle is stable (Frohlich and Oppenheimer 1990) or not (Bukhszar and Knetsch 1997), and (4) the concept of the veil can be applied to disentangle attitudes toward risks from preferences in favor of equality *per se*.

This is an impressive list, but some caveats might be in order: (1) Most, but not all, experiments disregard the cost of redistribution. Preferences in favor of redistribution might be impacted by the costs to overall efficiency. (2) Recent research shows people not only underestimate the current degree of inequality, but they also state preferences in favor of redistribution that are at odds with their decisions at

the voting booth [Norton and Ariely (2011), Schwartz (2011: 19) asks whether the authors have identified a new veil of ignorance behind which “people develop and express political preferences in ignorance of some of their own values.”]. (3) Finally, the results of only two of these studies are directly comparable (Sweden vs. India). It is desirable to enlarge the number of countries for which similar results are available to see to what degree context influences both (a) the degree of risk aversion and (b) a preference in favor of equality per se.

For scholars interested in endogenous constitutional choice, many questions remain wide open. Is there any clear relationship between the degree of uncertainty members of a constitutional assembly are facing and the degree to which they include redistributive principles in the constitution? How can redistributive principles (not outcomes) be measured and compared across constitutions in the first place?

5.3 *Empirical Tests*

A serious challenge in testing the hypotheses spelled out in Sect. 3 above is that one needs to find a way to measure or estimate how thick the relevant veil is. As far as I know, this had never been explicitly attempted until the VOIP project was initiated by Louis Imbeau. In a 2009 paper, he describes the conceptual ideas of the project, whereas in Imbeau and Jacob (2011), the empirical approach is laid out in more detail. Their conceptual framework relies on power analysis and distinguishes between three distributions of power that decision-makers are interested in conserving—or modifying—through their choices. In a second step, they propose to carry out a detailed content analysis that is to reveal the various power relations embedded in constitutions. Their approach is described in more detail as Chap. 4 of this volume (Imbeau and Jacob 2015). The results of these analyses with regard to ten nation-state constitutions are also documented in this volume.

McGuire and Ohsfeldt have dealt with the choice of the US Constitution in a number of papers (e.g., 1986, 1989a, b, 1996) explicitly taking up the dichotomy between constitutional and post-constitutional choice introduced by Buchanan into Constitutional Political Economy. Although McGuire and Ohsfeldt never explicitly mention the veil, their papers are summarized here because they ask whether actors involved in constitutional choice make decisions more to the benefit of the general welfare than actors making post-constitutional decisions. One reason for this possibility could be the presence of “constitutional moments” à la Ackerman (1991), another one the higher degree of uncertainty prevalent regarding constitutional choice.

More particularly, McGuire and Ohsfeldt are interested in identifying the factors that led representatives of both the Philadelphia and the single-state conventions to vote in favor of—or against—a particular measure or the constitution in its entirety. They find that merchants, Western landowners, financiers, and large public securities holders supported the new constitution, whereas debtors and slave

owners opposed the constitution (1989a: 175). They further find that there are important differences between the two phases of the ratifying procedure: Whereas for the delegates of the Philadelphia Convention, the interests of their constituents are a better predictor for their voting behavior than their own interests, the opposite is true for the delegates to the 13 state conventions.

McGuire and Ohsfeldt conceptualize the behavior of the representatives to the conventions within the realm of the principal agent model; that is, they differentiate between the interests of the representatives and those of their constituents. They further point to the fact 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 (*ibid.*, 184).

An ad hoc hypothesis for this difference could be that the Philadelphia delegates were more narrowly constrained in their voting behavior 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. Imbeau (2009: 5) argues that the difference in voting behavior between the drafting and the ratification stage might be due to differences in the thickness of the veil. This is, however, not saving the argument as McGuire and Ohsfeldt argue that in the latter, the representatives vote more in line with the interests of their constituents—and not the “general interest,” however delineated.

Another literature is interested not in explaining the choice of entire constitutions but of some constitutional segments only. Ginsburg (2002), for example, is interested in explaining the different levels of Judicial Review found in many newly passed constitutions. He argues that strong Judicial Review can be interpreted as insurance: If I lose an upcoming election and the then majority wants to pass new legislation not in accordance with the constitution, the content of the constitution can be insured if it installs a neutral body endowed with the competence of Judicial Review. Ginsburg does not explicitly mention any kind of veil, but his theory is based on the degree of uncertainty prevalent at the constitutional stage; it thus seems perfectly compatible of the notion of the veil made prominent by Buchanan. In sum, the higher the degree of uncertainty at the constitutional stage, the higher the degree of constitutionally entrenched judicial review.

Ginsburg (2002) does set out to test his theory albeit on a very small scale. He proposes to measure the strength of judicial review by operationalizing three of its dimensions, namely (1) court size, (2) term length, and (3) access. These are his dependent variables. He proxies for political uncertainty at the time of constitutional design by constructing a variable “party strength” which is the difference in the first post-constitutional election between the seat shares of the strongest and second strongest parties or blocs of parties in the legislature. This is, of course, not unproblematic as one has to assume perfect foresight on the side of constitution-makers with regard to post-constitutional developments. It furthermore neglects the difference between plurality and proportional electoral systems: In plurality systems, it is highly likely that only two political parties will survive, whereas the number of “stable” parties in proportional systems can be a lot higher. Ginsburg

interprets the bivariate correlations as showing that “party strength” is highly correlated with an index composed of all three variables proxying for judicial review.

The empirical test stands on problematic grounds. Not only is it a simple bivariate correlation, the number of observations is, moreover, confined to 18 countries in Eastern Europe that adopted new constitutions in the course of the 1990s. Hayo and Voigt (2012), drawing on a large sample of up to 100 countries and analyzing not only first-time constitutional choices of JR but also changes thereof over time, find only meager support for the insurance hypothesis. In other words, more uncertainty does not necessarily make politicians “buy” insurance in the sense of establishing a judiciary endowed with the capacity to refrain governments with different positions to reverse legislation passed by them.

To summarize, it is unclear whether—and if yes, to what degree—higher levels of uncertainty lead to a higher propensity for members of a society to agree unanimously on a basic set of rules. It is further unclear whether—and if yes, to what degree—higher degrees of uncertainty lead actors to be more risk averse and to choose, in turn, constitutional rules that contain more safeguards for the worst off, i.e., more redistribution. Relying on experimental evidence, there are quite a number of results indicating that the conjectures of both Rawls and Buchanan are not in line with how real people really behave. This sobering evidence is complemented by empirical evidence that is not in line with many of their predictions either.

6 Beyond Established Veilonomics

This section serves to go beyond established “veilonomics” and tries to connect the insights discussed so far with other strands of the literature. In Constitutional Political Economy, the veil is an instrument for making choices at the constitutional level. Vermeule (2001) argues that in historical, as opposed to purely hypothetical, situations, actors do know their identities such that a veil must be functioning differently under real-life conditions. To make his veil operational, he puts Rawls on his head (as Table 1 tries to show): Behind the Rawlsian veil, actors do not know their own identities, whereas behind the veil imagined by Vermeule, they know exactly who they are but are uncertain as to how exactly a certain choice will affect them personally. Vermeule does not only claim that such rules can be very useful for making post-constitutional choices but also that some of them found their way into the US Constitution.

Table 1 Putting Rawls’ veil on its head

	Rawls	Vermeule
Certainty with regard to	Distributive consequences	Identity
Uncertainty with regard to	Identity	Distributive consequences

Vermeule believes veil rules to be only one means to countervail self-interested decision-making but reminds his readers that James Madison (in *Federalist* #10) argued that ambition should be counteracted by ambition via the separation of powers. Vermeule interprets veil rules as a supplement to the more established separation of powers. He identifies five different means (“tactics”) to deliberately introduce uncertainty: (1) prospectivity (whereas retroactive legislation would be combined with certainty regarding identity, payoffs etc.), (2) generality, (3) durability, (4) delay, and (5) randomization, quickly adding that this last tactic has not been used very frequently but mentioning the selection of juries in the US as an example.

“Generality” and “durability” played already an important role in Vanberg and Buchanan (1989) discussed above. It is interesting to see that Vermeule interprets them as means (also) relevant for the post-constitutional level. An example of “delay” could be that heads of states agree on the introduction of a new common currency but decide that it will only become operative a number of years down the road. This was, actually, exactly the way the Euro was introduced.

Drawing on such “tactics” is, however, not without cost. Take the example of delay. To what degree is it plausible to assume that the politicians acting in t_0 are primarily concerned with the benefit of future generations? One could even assume the contrary: Perhaps the widespread use of “delay” indicates that politicians are particularly irresponsible? And even if they had the benefit of future generations in mind, how can one exclude that future generations do not have entirely different preferences? (see Holmes 1988 for a very similar argument).

Figure 1 is an attempt to depict and to put in context the veil rules discussed so far. The figure has two dimensions: The horizontal one can be interpreted as a sort of time line, whereas the vertical one depicts the respective level. In Constitutional Political Economy, a distinction is usually only made between constitutional and post-constitutional choice. Here, we propose to make a fourfold distinction: The first level refers to “pre-constitutional choice,” i.e., the level on which decisions are made that will then be relevant for making constitutional choices proper. Remember that Rawls proposes to choose the basic principles first and the constitution only at a later stage. Rawls’ veil is thus placed on this level. For empirical constitutional choice processes, it is on this level that criteria for members of the constitutional assembly are determined.

Vermeule’s veil rules, as we just saw, come in only on the third level of Fig. 1 as he is interested in veil rules that are made part of the constitutional document and that are then used to make post-constitutional choices later on. If this covered the entire veil literature, we would be left with a curious gap that is depicted with the second box in Fig. 1, namely the degree of uncertainty—and attempts to manipulate it—during constitutional deliberations. It is on exactly this level that the VOIP enterprise aspires to make a contribution.

Elster (e.g., 1995) has actually worked a lot on this second level. He is, more specifically, concerned with the degree of transparency—or the thickness of the veil—between members of the constitutional assembly and society at large, making a distinction between public and secret deliberations of the constitutional assembly. In our context, we can interpret secret deliberations as implying a thick veil.

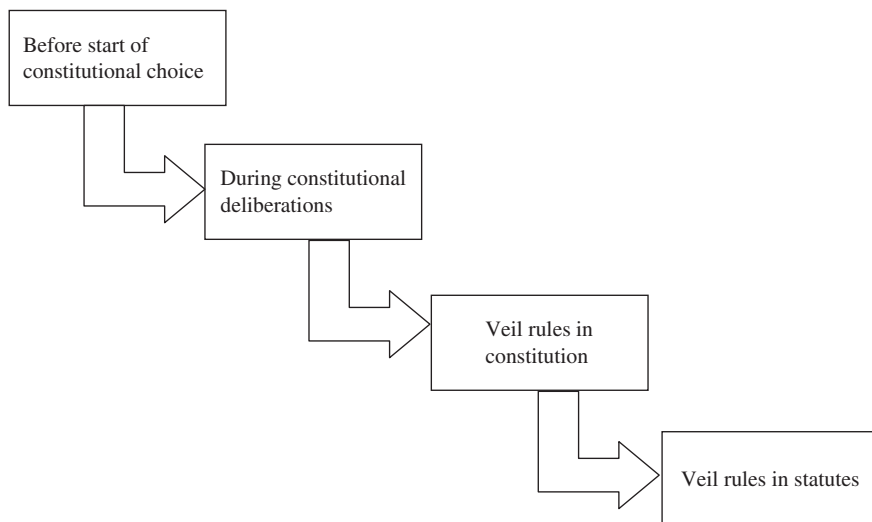


Fig. 1 Different veils at different stages

Elster asks under what conditions a norm against pronouncing purely self-interested claims can be expected to be strong and hypothesizes that it will be stronger in constituent assemblies than in ordinary legislatures. Secondly, the norm will have more impact in public settings than in cases in which discussions take place behind closed doors. He expects this to be the case because a broad public will not accept its representatives resorting to outright power games and calls this effect the “civilizing force of hypocrisy” (1991: 83ff.).

Note that we have just slipped in a different term—namely “transparency”—to paraphrase “the veil.” A thick veil is to guarantee a low degree of transparency, and conversely, a high degree of transparency implies the absence of any veil. Yet the terms are not used as the direct inverse of the other: Whereas a veil refers to uncertainty regarding one’s own position, lack of transparency refers to uncertainty regarding someone else’s behavior. Transparency, hence, becomes relevant in principal agent situations in which I would like a delegate to a constitutional assembly to best represent my own interests. Two implications seem to follow: First, veil-type arguments implicitly assume that all decisions are taken by everyone concerned (direct participation) or that principal agent problems do not exist should decisions be taken by representatives. Neither seems convincing. Second, transparency arguments—concerned with the reduction of the principal agent problem—only make sense in the absence of uncertainty concerning the preferences of the principals.

Up until now, the fourth box of the figure has not been mentioned at all. It is to indicate the possibility that veil rules might not only be contained in constitutions that are to structure the law-making process later on, but also in statutory legislation. One means of randomization are lotteries. Examples for their use include the choice of jury members in the USA but also the choice of conscripts in some armies.

7 Conclusions and Outlook

We began this paper with a straightforward question, namely to what degree is the notion of the veil useful in explaining the choice of constitutional rules? Is there evidence that it is easier for groups of people to agree to a set of basic rules once they have been deprived of basic information regarding themselves? Is it true that—uncertain of one's own (future) self—people are more likely to be in favor of rules favoring redistribution? In this paper, we have surveyed much of the available constitutional economics literature on the use of veils in constitutional choice. We have seen that not all veils are alike and in particular that there are important differences between the notions of veils developed by Rawls on the one hand and Buchanan on the other. The literature dealing with veils has been structured into theoretical, experimental, and empirical contributions. Our overall conclusion is rather sobering: We found that the basic conjectures of veilonomics are not completely convincing in terms of theory, that neither the Rawls nor the Buchanan notion resonates well with experimental evidence, and that in the real world, the veil notion is not only said to be absent but even detrimental to the rational choice of constitutions. In their take on endogenizing constitutions, Ticchi and Vindigni (2010) explicitly define their “original position” as one in which any kind of veil is completely absent.

Throughout the paper, I suggested that a direct confrontation between the notion of the veil, on the one hand, and that of transparency, on the other, might lead to a helpful heuristic. As this paper is primarily a survey, the potential of this heuristic could only be hinted at here. Future contributions might ask under what conditions increases in transparency seem desirable and under what conditions the exact opposite, namely increasing the thickness of the veil, seems desirable.

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