

Politics without Romance? Yes and No

James Buchanan, a pioneer in the development of public choice, viewed his approach to the study of government and politics as the analysis of “politics without romance.” But Jim couldn’t really live without the romance, and no sooner had he expelled it out the front door than he let it in the back door, calling it “constitutional political economy” and supposing that “constitutional level” politics, related to the most basic rules for collective decision making, could be separated from and made more durable than the “rent-seeking” decision-making related to ordinary politics.

My understanding of political history led me to conclude that Jim was engaged in wishful thinking in the “constitutional political economy” phase of his project. In my view, constitutional issues are as constantly and as hotly contested as the issues of ordinary politics—politics is politics, and political actors seize every instrument available for attaining their ends.

Yes, one can adopt a constitution that makes its amendment difficult, but that very feature explains why, from the outset, political actors in the United States of America usually undertook to amend the U.S. Constitution not by explicit, formal amendment in accordance with the stipulations expressed in the original document, but by judicial reinterpretation of legal and constitutional meanings. Judges that make law, as opposed to merely interpreting it, are not, as many conservatives imagine, a relatively recent occurrence for which Progressives or New Dealers are to blame. Such judicial law making goes back at least to the Marshall court of more than 200 years ago, and conservative justices practice it as well as progressive ones.

Notice how, today, appointments to the Supreme Court elicit such fierce politicking. (Indeed, this heated wrangling has been the case for a long time.) Such would not be the case if there were no judicial law making. All sides expect it, however, and act accordingly.