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Choice, emergence, and constitutional process: a framework for positive analysis

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Abstract: Constitutional theorizing typically employs a bi-level analytical framework wherein the choice of rules precedes the actions that people pursue within those rules. Constitutions are thus products of planning and are prior to the spontaneous ordering that characterizes market processes. This paper explores an alternative conceptual framework wherein rules and actions are coeval and not sequential. Hence, constitutions are subject to spontaneous ordering just as are ordinary market processes. All societies necessarily possess constitutional frameworks that frame the actions of participants; however, those frameworks are not fully settled prior to action but rather evolve through action, which means, in turn, that constitutions, like societies, are living entities and not background precepts against which societal life evolves.

1. Introduction

Constitutional theorizing typically distinguishes between rules and actions, with actions taking place within some preceding framework of rules. This analytical framework, exemplified by such works as Buchanan and Tullock (1962), Buchanan (1975), and Brennan and Buchanan (1985), fits with common sense observations that people must agree on the rules before they can play a game. It suggests the presence of some constitutional moment which denotes a point of societal origination that produces the rules within which societal activity subsequently proceeds. The sequential character of this analytical framework is widely recognized to be conceptual and not historical, as it creates a fixed point to serve as an analytical point of departure. Among other things, this framework has given a strongly normative character to constitutional analysis, as illustrated by calls to impose constitutional limits on the budgetary and monetary activities of governments (Buchanan and Wagner, 1977) and by calls for judges to enforce what is believed to be original constitutional intent on the products of legislation (Epstein, 1985).

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While we too accept the distinction between the order of rules and the order of actions (Vanberg, 1994), we also seek to provide analytical space for positive constitutional theorizing. This space rests upon recognition that the constitutional order of a society is based on both explicitly articulated formal rules and tacitly recognized informal rules that reflect moral sentiments and understandings. This tacit quality means that rules are never wholly objects of universal agreement, but to some degree are objects of contestation (Bowles and Gintis, 1993). In consequence of such contestation and absence of universal consent, the order of rules by which a society can be described is subject to revision through actions that are independent of any explicit process of constitutional amendment. This does not deny that rules might comprise 'relatively absolute absolutes' (Buchanan, 1988), but rather asserts that constitutional rules emerge through action as well as through deliberate choice. This recognition does not deny the possibility of taking a critical posture toward the products of evolution, but rather is to recognize that societal constitutions are living entities and not absolutely fixed points of reference. It is quite possible to take a critical posture toward some products of such evolution, as exemplified by Thomas Schelling (1978), while recognizing all the same that the order of rules is as much a suitable topic for positive analysis as is the order of actions; moreover, both types of order can be illuminated usefully by principles of spontaneous order (Sugden, 1989).

2. The omnipresence of constitutional frameworks

Any society can be described as possessing some constitutive framework of rules that orders relationships among its members. In part, that framework can be given express articulation, as illustrated by constitutional provisions and judicial precedent. Those explicit articulations, however, comprise only a subset of the constitutive framework. The remainder of that framework is contained in the moral imaginations and the conventions of conduct that are alive within a society, as illustrated by Stewart MacCauley's (1963) recognition that the constitutive principles that govern relationships among business enterprises are reflected incompletely in explicit contractual relationships. Those frameworks comprise grammars that govern actions and interactions, just as communication among people proceeds according to recognizable grammar and vocabulary. Positive constitutional analysis is thus similar to linguistic analysis, in that it would seek to uncover the underlying framework of rules through which the order of actions is constituted. This framework of rules may, however, be captured only incompletely by explicitly articulated rules. For instance, the American experiment with the constitutional prohibition of alcoholic beverages had no such effect, though it did change the constitutional framework through which commerce was conducted. After Prohibition, alcoholic beverages were still produced and consumed, only this now occurred through different commercial

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channels and procedures than before, and these other channels and procedures became part of the constitutional framework of the time, at least with respect to positive constitutional theorizing.

At this early point, constitutional analysis faces a fork in the theoretical road regarding the place of reasoned deliberation and the sentiment of tradition in the explanation of constitutional order. One path envisions a state of disorder that must have existed prior to the observed orderliness, and so embraces the notion of a constitutional moment when disorder becomes order. The various formulations of the escape from Hobbesian anarchy follow this path of constitutional analysis. To be sure, this formulation is not taken to denote some essential feature of history, as against being an analytical instrument for providing scholarly orientation toward the constitution of social order. The two-stage constitutional framework is thought to be useful in thinking about the constitution of human governance. This path places primary emphasis upon the use of reason to construct arrangements for orderly living together, and is associated particularly with James Buchanan (1975).

The other path starts with recognition that the historical situation is never one of strangers meeting to form societies. Societies are a primitive condition of life and not something formed by agreement among otherwise autonomous individuals because, among other things, adults could not survive infancy without being reared in social units of some type, nor could they even come into existence in the first place, as explained, for instance, by Norbert Elias (1982, 1991). Societies are real objects just as are the individuals through which they are constituted. The constitutive rules by which people make their way in a society are initially acquired through repeated practice (see Fleetwood, 2008) in childhood and adolescence, and with adherence to those rules largely residing in tacit knowledge. This path places considerable emphasis on evolution and tradition, and is associated particularly with F. A. Hayek (1960, 1973–79). Particularly instructive in this regard is Peter Murrell's (2009) explanation of the Glorious Revolution of 1688 as a product of evolution and not of design.

The dichotomy suggested by the image of an analytical fork in the road does not require a choice of one branch over the other. It is possible to recognize that constitutional rules are open to deliberation while recognizing that those rules can also be modified through actions independent of constitutional deliberation. Vincent Ostrom (1987), and what has become known as the Bloomington Research Program (Boetke and Aligica, 2009), has posed the dichotomy, offered by Alexander Hamilton in Federalist #1, as to whether reflection and choice can be brought to bear on the quality of governance or whether that quality must be left to accident and force. Our claim is that both processes are at work, with one of the aims of a positive theory of constitutional processes being to clarify the relation between the two.

The constitutive framework of any society involves the relation between the individual and the society. A constitution of liberty is but one among many

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possible frameworks, all of which reflect governance of the relationship between individual action and societal regulation as represented either by positive duties or negative restrictions. In one society, an individual may be able to create a business and enjoy the fruits of success if the business is successful. In a second society, an individual might face collectively imposed obstacles to the formation of new enterprises. In a third society, there may be widespread hostility to demonstrations of ambition, which may preclude many people from exercising ambition; moreover, those who might exhibit signs of success might be vandalized, harassed, and hounded into submission or emigration.

Each of these societies could be described as possessing some set of constitutive rules that govern actions and relationships among members. Those rules, however, would never be fully the result of express agreement, though there would surely be areas of such agreement. The sequential formulation runs from rules to actions: first the rules are established, after which actions occur and outcomes emerge through interaction. Within the coeval formulation, observed regularity in actions points to the presence of underlying rules; moreover, irregular actions can inspire sufficient replication as to become new rules. The pursuit of plans and actions can thus generate revision in the constitutional framework outside of express amendment. A society will always involve people in pursuing some activities while refraining from other activities; moreover, that pattern of activities will reflect a tacit set of rules that shape and constrain individual action. Within this framework, the primary task of positive constitutional analysis is to explain the pattern of constitutive rules present in a society, and also to render intelligible the processes by which those rules change.[1]

3. Sentiment, reason, and constitutional situs

The incorporation of constitutional rules into a framework of spontaneous order while maintaining analytical space for both reason and tradition requires an acceptance of three modest points. First, society and its orderliness is an analytical primitive and not something that is posterior to the individual members of society. Humans are raised in groups and it could not be otherwise. Groups that survive have evolved rules of conduct that support that survival. Hobbesian dilemmas might be useful for illustrating problems that successful groups must overcome, but we may be sure that those problems have been overcome, and not wholly through processes described by notions of reason as distinct from sentiment, and with the latter being captured by tradition. It should not, however, be thought that reason and tradition are independent, let alone antagonistic, as against being complementary, as illustrated by Martha Nussbaum's (2001) formulation of the intelligence of emotions.

1 See Kingston and Caballero (2009) for an overview of theories of institutional change.

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Second, concord and discord are not disjunctive states where the state of existence at any particular moment depends on whether the Hobbesian dilemma is in play or has been held in check. Rather, concord and discord are complementary or dialectical features of an on-going constitutional process. Established property rights denote social space where conflicts are presently settled. Conflicts, however, are always in play in human societies; indeed, conflict is just another name for scarcity and so is never abolished in human societies (Bowles and Gintis, 1993; Hirshleifer, 2001). The distinction between selecting rules for a game and playing a game within those rules is a useful mental heuristic; however, the two types of activity occur simultaneously and not sequentially (Wagner, 2008).

Third, constitutional processes involve entanglement between reason and sentiment, in contrast to treating the two as separate spheres of activity, as perhaps illustrated by the distinction between formal and informal rules. The distinction between reason and sentiment, as well as between formal and informal rules, can be valuable in organizing observations. At the same time, however, recognition of the significance of tacit knowledge in human action (Polanyi, 1958) speaks also to recognition of the entangled relationship between either pair of dichotomies.

The situs of a constitution is not easy to locate once the informal character of tradition is joined with the formal character of reason. An emphasis on reason in conjunction with the priority of rules over actions suggests that the constitutional situs is either constitutional parchment or parchment in conjunction with articulated codification. The alternative situs that comes into play when tradition and sentiment is brought into play resides largely in observed conduct. This alternative situs is similar to the stance of the lexicographer or the grammarian in reporting on common usage with respect to language. There is a constitution of a language community, with those constitutive rules denoted to a large extent by grammar and vocabulary. The rules of that constitutive framework can be inferred through observation as this is informed with some underlying knowledge about human nature. Those formal grammars are codifications of usage and not the situs of that usage, for the situs resides in the members of that language community.

Those formal grammars also acquire normative standing as people allow those grammars to stand in judgment of their use of language. While those grammars represent codification of language as a purely positive exercise, they also thus take on normative force as members of a language community seek mostly to remain faithful to that community. At the same time, however, it is clear that the constitution of a language is largely discovered through practical usage, and with subsequent codifications serving more to reinforce usage than to establish new patterns of usage.

Language is not stagnant. It develops through time, and in a process that involves people in inventing new words, new spellings of old words, and new

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patterns of punctuation. In this manner the rules governing the use of language are changing simultaneously with the ordinary use of language. To be sure, not all such inventions take hold in a language community. New spellings often are just regarded by other people as spelling errors, in which case the innovator is perhaps regarded as a bit of a dunce and the linguistic invention dies in any case.

4. Original intent, living constitution, and relatively absolute absolutes

Buchanan's (2004) two-stage framework can be mapped readily onto a critical posture toward legislation and judicial interpretation whenever it is plausible to claim that the original intent of some constitutional document has been abridged. Richard Epstein's (1985) treatment of how the practice of eminent domain violates the limits in the American constitution on takings of property is exemplary in this respect. In this case, the situs of a constitution is presumed to reside in the minds of the people who wrote the constitutional parchment, as encapsulated by the notion of original intent, save only to the extent that such original intent expressly was altered through subsequent amendment.

A problem with this formulation is that what is articulated explicitly is but a subset of the tacitly held knowledge that is necessary for such explicit articulation. The underlying rules by which people are able to live together in geographical proximity is capable of only incomplete articulation, so any effort to reduce that articulation to constitutional parchment would be incomplete. It would also fail to capture the necessarily living feature of constitutional order, just as language is alive and open to change. Notions of a living constitution have often been advanced as rebuttal to constitutional criticism grounded on claims that original intent was being violated, as illustrated by Ackerman (1998). The dichotomy between original intent and a living constitution is, however, more than a debating point.

Claims of original intent can only speak to a subset of what comprises the constitutive underpinning of a society at any instant. Furthermore, such claims leave no room for growth in knowledge or in patterns of activity that in turn might generate new issues regarding the social organization of structured living together. To treat these matters analytically requires recognition that societies are living organisms that are being continually recreated through human interaction, and with some products of that interaction possibly representing improvement and other products perhaps denoting retrogression (Wagner, 2006).

Historically, the American constitutional founding is a good illustration of both the value and the limitation of the sequential, two-stage process as an analytical device. American society was orderly prior to 1789 and also prior to 1776, so order was not established through the articulation that resulted in constitutional parchment. That parchment contained much codification of tradition along with some explicit products of reason. All societies necessarily have frameworks through which their orderliness is constituted. The sources

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of that orderliness, however, need not reside wholly or even predominately in reason, as against residing in tradition or sentiment.

The American constitution, for instance, makes little mention of fiscal matters. Nonetheless, fiscal processes are governed by a dense set of rules that govern and constrain those processes and which comprise what Kenneth Dam (1977) describes as the American fiscal constitution. From time to time, people have advanced proposals to adopt explicit constitutional provisions, as illustrated in recent years by proposals that would require balanced budgets, or at least restrict deficit financing, and limit the size or growth of government spending. Such constitutional proposals represent islands of constitutional construction proposed for insertion into an ocean of rules that are not expressly constitutional but yet which are part of the framework of rules within which fiscal activity proceeds.

While rules and actions are both governed by and generated through spontaneous ordering processes that operate simultaneously, there is still value to the two-stage, sequential orientation as conveyed by Buchanan's several references to relatively absolute absolutes. Lexicographic ordering, for instance, gives a hierarchical structure to the options for choice. This structure can fit easily with a notion of relatively absolute absolutes, where only a subset of all conceivable courses of action is open to choice at any moment. The residual subset that is less open to choice would comprise the material of a constitutional framework suitable for positive analysis. While this subset is less open to variation at any instant, it is still open to variation because its constituents are only relatively absolute absolutes and not genuine absolutes.

5. Reason, sentiment, and Coasian bargaining

The constitutional dichotomy we have been exploring is illustrated crisply in the controversy that was ignited when James Buchanan (1972) responded to Warren Samuels's (1971) analysis of the US Supreme Court's ruling in *Miller et al.* v. *Schoene* (276 U.S. 272 (1928)) upholding the constitutionality of a Virginia statute that allowed the state to condemn cedar trees in the vicinity of apple trees.[2] Samuels presented his work as a positive explanation of the interrelation between economic and political processes. In this view, 'government becomes an instrument for the realization of such objects as deemed proper by those in control of or with influence in governments' (ibid.: 444). Buchanan responded by arguing that this situation already had a Coasian (1960) resolution, for the owners of apple orchards could always have bought the cedar trees and destroyed them, and so the legislation was an illustration of constitutional infringement. Samuels (1972) responded that in giving privilege to the *status quo*, subsequently arguing that Buchanan was 'trying to simulate with logic what is in

2 Samuels (1972) responded to Buchanan's critique, and an extensive correspondence that subsequently took place between this is published in Buchanan and Samuels (1975).

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reality a function of power, knowledge, and psychology' (Buchanan and Samuels, 1975: 23).

In his summary of the debate, Boettke (2001) acknowledges Buchanan's 'conservatism' due to the ability of unanimity to favor the existing set of arrangements. Nonetheless, Boettke claims realism on behalf of Buchanan's approach because it is based on what presently exists and not on some imaginary ideal. Even so, the unanimity construct is not a model in the positive scientific sense, and instead is advanced as a normative point of departure. This is fine for normative discourse but it does not advance positive discourse for which the Coasian insight requires some elaboration. The Coasian resolution resolves the conflict within the market, where the alternative takes it outside the market; normative argument can seek to rank these options, but positive analysis would seek to explain that changing pattern of use of the different venues for settling disputes and the implications that result for a constitutional order.

Coase's treatment of disputes can be illustrated by a physician whose medical apparatus imposes a level of noise that bothers the watchmaker who lives next door. As Coase explained, overall welfare does not depend on whether the physician has an initial right to produce this noise or whether the watchmaker has the right to a level of silence which allows him to pursue his professional activities. With low transaction cost, the same pattern of activity will result in either case. This Coasian treatment also holds for situations in which non-pecuniary evaluations play a role. The physician might be retired and runs the machinery only to recall the glories of his medical career. Even if the physician were to reject a significant monetary offer from the watchmaker to cease operating the machinery, the situation would still be characterized as Pareto efficient. While idiosyncratic valuations are as valid as commonly shared preferences, this outcome is surely uncommon because the physician would incur various forms of cost for his un-neighborly behavior. Hence, the disciplining function of the market as well as that of processes within the precincts of civil society might well lead to adherence to informal rules of courtesy. Yet, these forms of discipline might not be sufficient to overrule psychological idiosyncrasies which every individual possesses to some degree and which might be regarded as 'improper behavior' by other individuals.

At this point, we acknowledge a departure from the mode of thinking common to economists, one which leads people to be surprised when they understand for the first time Coase's proposition about the irrelevance for efficiency of the assignment of rights. The counter-intuitive Coasian insight is one that does not translate readily onto the constitutional level, not because the faculty of reason cannot grasp it but because it often clashes with sentiment. In our endeavor to understand constitutional rules, their origins, and development, it is precisely the fact that most, if not all, people, including constitutional actors, have a somewhat emotional response to the question of with whom should reside the rights in particular situations.

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Thus, when we analyze the continuous change of constitutional rules, we have to recognize that, although these moral considerations do not affect the economic welfare properties of the particular situation, the rules that govern conflict are made by people who often have a very clear idea about who was acting 'justly' or 'properly'. Hence, the bitter old physician who runs his machinery because he dislikes the watchmaker's presence in the neighboring apartment would be considered, by most individuals, to be at fault, regardless of the fact that overall welfare is not affected. The rules, or rights, of structured living together are thus affected by moral sentiments even though these rules themselves are irrelevant to overall economic welfare in the event of an externality. Thus, Buchanan's valuable insight that it is the security of a status quo allocation of rights that allows for mutually beneficial bargaining nonetheless neglects the moral prejudgment which legislators, judges, and also the general public bring to any such conflict and which positively affects their actions. It neglects the enormously complex dynamics of the emergence of the 'proper' rules of structured living together. Therefore, Samuels (1971) provides an important counterweight to Buchanan in that he alludes to both the moral imagination of those in control as well as the self-interest of lobby groups as driving factors of constitutional change, and not only to a normative framework which neglects the 'here and now' of the constitutional process.

6. The historical evolution of tacit constitutions: a specific case

In the presence of differences among people, any explicit codification of a constitution will represent more of a compromise among people than a genuine agreement. The American Founders were, of course, aware of this reality. For instance, Benjamin Franklin urged the members of the Constitutional Convention to accept the tension between positions in prospect of the greater benefit that a written constitution would bring about: 'I confess that there are several parts of this constitution which I do not at present approve; but I am not sure I shall never approve of them … I cannot help expressing a wish that every member of the convention … would, with me, on this occasion doubt a little of his own infallibility, and to make manifest our unanimity, put his name to this statement' (Franklin cited in Warren, 1935: 9). The tension that remains alive underneath the surface of the explicit document is a product of departures in reasoning as well as in political tradition. The explicit constitution was not fully constructed, but also embodied past political experiences and tacit understandings of what constitutes proper boundaries of political action. Any notion of necessary ongoing agreement with constitutional rules by the citizenry, as highlighted by Vanberg (2005), must therefore not be seen as perfect congruence of will, but as overlapping circles, where outside areas of disagreement potentially ignite future conflict about the proper scope of the rules.

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In contrast to the explicit, written constitution, the tacit constitution does not exist as a snapshot in time but is continuously evolving at various margins. Therefore, at any moment tension will exist between the original document that was written in the past and the tacit ideas that are held presently regarding what the social rules should look like. An instructive illustration of this situation is presented by Charles Warren's (1932) examination of continual changes in the legislative and judicial interpretation of the General Welfare clause of the American constitution over roughly 150 years' time. He opens his legislative history with the constitutional debate between Madisonians and Hamiltonians, the former being more restrictive than the latter on Congress' ability to spend money. Though contractarian thinkers have never claimed that their analytical narrative approaches historical reality, this tension nevertheless reaffirms the fragile nature of constitutional consent. Participants agree to the original document as it represents an attractive compromise without giving up their unique individual points of view. Indeed, in an initial period of limited contestation up to the civil war, Congress initiated various public transportation projects. These were not yet explicitly based on the welfare clause, but formed a first precedent which subsequent political entrepreneurs built upon. In an exemplary understanding of public choice principles, Warren writes: 'A road, canal . . . or river . . . becomes national or not national in the ratio of its supporters and the influence of those who ask it' (Warren, 1932: 30).

During the period ending about 20 years after the civil war, the powers of Congress grew at an accelerated pace, fueled by the Supreme Court's decision that control over public lands lies entirely with Congress. Throughout this period, several public insurance and relief schemes were introduced as a response to natural disasters. After 1885, proposals for governmental expansion exploded when compared against the earlier baseline. The Supreme Court remained passive as Congress enacted publicly funded agricultural experimentation stations and colleges, implicitly approving a constitutional interpretation that was not in line with earlier interpretations. Furthermore, funds to support these programs were now being taken directly out of the treasury and not from the proceeds of land sales. Public colleges expanded and offered education for industrial and trade personal. Implementation of insurance against disease (1920), hygiene acts (1921), and public pensions (1930) followed, by now openly in the name of the General Welfare Clause, albeit not without opposition (Ibid.: 92–100). Warren concludes that marginal changes on the basis of previous precedents were driven by what we would now recognize as public choice processes, along with a general feeling of necessity or charity in response to disaster.

Two points should be noted. First, the interpretive correctness of the judges' decisions (remaining passive also constitutes a decision) play only an insignificant role for this development. Even if an 'objective' analysis of the words in the constitution would result in a rejection of federal insurance programs, such an analytical outcome is unlikely to have proven relevant. There are only

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subjectively motivated individuals who have personal goals, even when acting in such a public sphere as a parliament or a judiciary. In order to fulfill these personal goals, individuals may not always adhere to the previously accepted interpretation of any single constitutional clause. They might even abandon interpretations that they themselves once defended. Senator William C. Dawson remarked that 'if a citizen and politician goes from any part of the union to the Western States, he forgets all that he has learned in early life ... and comes back here ... believing in the unlimited power of Government' (Dawson cited in Warren, 1932: 58). Second, one might object that it is impossible even for an emotionally and financially motivated judge to interpret the general welfare clause as an invitation to engage in redistribution that favors interest groups. Yet any change is marginal in nature and does not appear as a global rewriting of constitutional principle but rather appears only as interpretative clarification. The introduction of insurance schemes into the domain of legitimate government action took place about 150 years after the publication of the constitution. In the meantime, each gradual change laid the foundation for the next one, driven by rational individual actors with personal goals.

Supreme Court interpretation is, however, not the only link between tacit and explicit constitutions. In two instances, Congress itself, without doubt carried by a strong sentiment of urgency, passed a hitherto unconstitutional bill, effectively bypassing the court. Before his presidency Lincoln stated: 'If I were in Congress, and a vote could come up on the question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision [which held such prohibition unconstitutional], I would vote that it should' (Lincoln cited in Levinson, 1988: 39). The courts, consequently, did not act when Lincoln became president despite their documented opposition (see Levinson, 1988: 39). Similarly, in 1937 Roosevelt bypassed the court's interpretation of the constitution when he said that the United Stated 'reached the point as a Nation where we must take action to save the Constitution from the [Supreme Court]' (Levinson, 1988: 41). These two examples illustrate that if a tacit constitution, which emerges from moral sentiments held within a society, stands in too stark an opposition to desires that acquire rational expression through political processes, the resulting gap is sometimes closed by effectively changing the constitution through interpretation. If political processes generate changes in the *status quo*, judicial rulings often validate the change rather than contest it. In cases where the judiciary contests those changes, legislative assemblies can nonetheless often overrule those verdicts. As Levinson (1988: 184) summarizes: 'The 1787 constitution is not the constitution that we live with', and then later notes that the 'constitution is a linguistic system, what some of us might call a discourse' (p. 191).

There exists no truly independent source of constitutional control: there is no final safeguard for constitutional rules. Every constitutional check resides within the society to which that constitution pertains. Interpretations are never

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value free, but are undertaken by individuals who are purposeful and goal-directed. The impossibility of truly external enforcement is the primary cause of *de facto* contestation of the explicit constitution that manifests itself in changing interpretations of the document. The sum of every marginal step will lead to an increasing gap between original intent and constitutional reality, or, as Charles Warren (1932) puts it: precedent accumulates. Every legislative act that widens the boundaries of government action beyond what was previously acceptable is a manifestation of the evolution of the tacit constitution. Each Court decision is the result of an interpretive framework grounded in the political culture of its members. Notice that we do not challenge the fact that marginal political change is driven by rational political actors. We do, however, expand this explanation. Every political action, every topic that is raised stems from a political debate that is ultimately, but not exclusively, grounded in a political culture (Wagner, 2007). Despite some (Ashenfelter *et al.*, 1995) but contested (Buchman, 2007; Choi and Gulati, 2008; Posner *et al.*, 2008) evidence to the contrary, judges decide according to their ideological interpretation of the law. Even if there were no ideological effects across judges, all of them would still be influenced by the political sentiment of their time.

7. Concluding peroration

While our positive orientation toward constitutions entails the notion of a 'living constitution' in the sense of Ackerman (1998), we do not deny the significance of the constraining force of constitutional rules. Nor do we portray constitutional evolution as constant improvement carried by popular consent. Evolutionary processes can bring improvement, but they can also bring retrogression. Our positive orientation toward constitutional material puts normative concerns into the background, but it does not eliminate them. Rather it commends for consideration such an alternative analytical framework as that represented by Thomas Schelling (1978). In that work, Schelling gave a number of illustrations where interactions among participants generated societal patterns that none of the members of those societies would have chosen if they had the ability to do so. It is quite possible for a society whose constitutive framework would be described as a constitution of liberty to evolve through regime drift into what might be called a constitution of servitude. This drift would not occur in one giant step but rather would occur through the accumulation of numerous steps over many years, much as Charles Warren articulated.

The constitutions of societies necessarily will have lives of their own because they are products of interaction among multiple interested parties and not objects of some person's reflective choice. The most that can be hoped for in this situation is some relatively informed consensus about some principles of constitutional navigation, recognizing that the course that is charted is not an object of some chooser's deliberation but is a spontaneous emergence out of interactions among

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a multiplicity of actors, and filled with the problematic features described by Vincent Ostrom (1997). One such illustration of constitutional navigation recurs to Walter Eucken's (1952) statement of O*rdnungstheorie*: that formulation also worked with a two-step procedure, only of a different character. The first step involved selection among the principles that governed relationships among people, as illustrated, for instance, by distinctions between being governed by principles of equality before the law versus being governed by principles of status and station and of subordination and domination. A constitution of liberty, for instance, embraces equality before the law. One constitutional filter within this framework is between legislation that is market conformable and legislation that is no t. In a related vein, Jane Jacobs (1992) portrays societies as governed through interaction among institutionalized carriers of distinct moral sentiments, which she describes as the commercial and the guardian syndromes. Jacobs's treatment of how the two syndromes might work well together is complementary to Eucken's articulation of state action being guided by market conformability, while her treatment of what she describes as 'monstrous moral hybrids' is reminiscent of Eucken's treatment of the destructive processes that can be set in motion when market conformability is abridged.

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