Emergent Politics and Constitutional Drift: The Fragility of Procedural Liberalism

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Abstract
What does the reality of political bargains imply for the sustainability of constitutions enshrining procedural liberalism? I explore this question by taking a catallactic, or transactional, view of politics. I claim that the economic way of thinking—purposive behavior and exchange activity—is a valid means of understanding these phenomena, but I also argue that various theories of bureaucracies and elites that have been largely ignored by economists also must play a role. This view of the state is important because it seriously questions the received wisdom regarding how the state can be empowered to protect us and produce for us, without preying on us. Augmented by the insights of thinkers such as Burnham, Schmitt, Michels, Mosca, and Pareto, a catallactic and emergent view of constitutions shows that the quis custodiet? problem has not been solved, but ignored.

JEL codes: B5, H11, H83, P14, P16

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1 Introduction

A ‘constitution of liberty’ (Hayek 1960) enshrines political rules and procedures to protect individual rights, while still enabling collective action to provide useful common goods. What might be called ‘procedural liberalism,’ political architecture encompassing divided government and checks and balances, frequently is the cornerstone of such constitutions. But history suggests maintaining a constitution of liberty is quite difficult. De jure and de facto constitutional change, what might be called constitutional drift (Salter 2016), is the norm, rather than the exception. My purpose in this paper is to develop a framework for better understanding this political dynamic. I will make special reference to the institutions and practices of the modern bureaucratic-administrative state, most clearly exhibited in the Western constitutional democracies. This is because constitutional drift in the West has resulted in these kinds of institutions, and because these institutions, even in their early forms, contain the kernels of the transformative process from a constitution of liberty to a constitution of social control.¹

The framework I employ will be one of ‘political catallaxy’. This naturally follows from applying the tools of economics (price theory) to political phenomena, as in Buchanan and Tullock’s (1962) pioneering contribution. Just as these tools are used in commercial contexts to explain the unplanned order of markets as a result of individual economizing behavior and the ‘propensity to truck, barter, and exchange,’ I will use these tools in the service of what might be called an ‘emergent’ theory of the modern state, one that focuses on deriving outcomes from the particular political bargains made by holders of de facto political power (e.g., Salter 2015a, b). The tools themselves can be interpreted from a number of schools or backgrounds, the most

¹ It bears repeating that this is not the monolithic control of a leviathan, but the dispersed control by many, many quasi-autonomous bureaucratic agencies—the well-known ‘fourth branch’ of government.
prominent being the Austrian (Hayek 1948; Mises 1949), Chicago (Becker 1976), and UCLA (Alchian 1965; Alchian and Demsetz 1973; Demsetz 1967) approaches to price theory.

While these tools have long been used to explain political phenomena, the ‘emergent’ approach founded upon these insights has been relatively unexplored. Wagner (2016; see also 2007) has developed a theory of political catallaxy the furthest; my framework here explicitly builds on his work. While political catallaxy has its roots in the Virginia school, its point of departure lies in its characterization of the state. Virginia political economy traditionally characterizes the state as a monolithic actor, such as a revenue-maximizing ‘leviathan’ (e.g., Brennan and Buchanan 1980). Given citizens confront a state that is a rational, internally-coherent maximizer, individuals who will be subject to the governance of the state have a strong incentive to ‘get the constitution right,’ e.g., specify the rules that will govern the operating procedures for collective action (Brennan and Buchanan 1985). These rules should empower political procedures that enable the state to protect property rights and provide useful collective goods, but prevent the state from preying on its citizens (Buchanan 1975). This view characterizes the constitution as a filter, constructed to permit low-cost collective action that allows through generally productive policies, while preventing generally destructive policies, or policies that benefit well-defined interest groups at the expense of others.

However, this approach to political economy presumes the state is, to use Hayek’s (1973) terminology, an organization. That is, it presumes the internal coherence of the state such that it has a teleology, and its goals can be reasonably characterized by a single objective function. Instead, the emergent approach of Wagner (2016) characterizes the state as an order: a coordinated but unplanned, and uncontrolled, network of organizations that each operate semi-autonomously, and are also entangled with the activities of various commercial enterprises. The
key question for a theory of political catallaxy is, how does our approach to political economy change when we recognize the state is an order and not an organization, and as such, ‘getting the constitutions right’ has ambiguous meaning?

Although the tools of price theory lend themselves well to a theory of political catallaxy, they have traditionally been employed in a rational choice theory of politics that straightforwardly reduces outcomes to intentions. There is no room for an order-organization distinction in politics. Political outcomes are a direct result of the relevant individuals’ choices, and these outcomes then ‘act upon’ other social spheres, such as the commercial, from without. This is intended to direct these spheres to more-preferred locations in social space. Important examples of this approach in a democratic context are Becker (1983), Persson and Tabellini (2002), and Wittman (1989). A subset of this literature focuses on the importance of the median voter model in determining political outcomes. Political outcomes in democratic procedures are determined by the median voter; political rents are exhausted by political competition; thus political outcomes can be explained simply as the electorate ‘getting what it wants.’

That this literature focuses on choice within democratic settings is understandable, given the prevalence of liberal democracy today. However, there are strong reasons for suspecting that there is much wiggle room in political spheres for outcomes to diverge from the preferences of voters. For example, Caplan (2007) notes that the preferences of voters differ significantly from actual political outcomes. Building on Caplan (2007), Brennan (2016) and Somin (2013) argue that voters are overwhelmingly ignorant about the issues, likely because they face little costs to not becoming informed. As a result, electoral constraints as a check on predatory governance—a way of making sure that the People are actually getting the government they want—do not bind very tightly. Furthermore, other works of price-theoretic political economy questions whether
modern bureaucracies are actually controlled by electoral procedures, and strongly casts doubt on their propensity, and even their ability, to carry out their mandates in a low-cost manner (Mises 1944; Niskanen 1971; Tullock 2005a, b). Taken together, it is surely reasonable to suppose the state, rather than an organization for collective action whose behavior terminates in the will of voters, is in fact a complex network of organizations, each with a degree of autonomy to engage in political exchange, and with much political output having, at best, a questionable relationship with the will of the people.

The theory I will develop is positive, not normative. I will not make reference to a constitution of liberty being desirable, nor a constitution of social control undesirable. To be clear, my own normative priors are strongly in favor of a constitution of liberty. But my goal here is not to explain the normative desirability of a constitution of liberty. My goal is to explain why it is so fragile. An important part of the explanation will have to do with the nature of political bargains. Political bargains take place when there is an incentive among holders of political power to exchange political property rights—that which specifies who may exercise a specific political power, and what benefits (or costs) accrue to the holder from doing so. Constitutions of liberty frequently create de jure political structures that embody unsustainable de facto divisions of political property rights. Thus it is not surprising that they erode. What also must be described is not just their erosion, but their erosion to a specific form of polity dominant across the West: the bureaucrat-administrative state.

Similar to Buchanan and Tullock (1962), my motivation is drawn from the constitutional arrangements of the United States. While these authors sought to highlight the economic mechanisms at work in the US Constitution that enabled mutually beneficial collective action, my own concerns are different: understanding why these mechanisms eroded. Perhaps more
than any other polity, the ‘constitutional moment’ of the United States was geared towards producing a constitution of liberty. Nonetheless, it too saw a political transformation into a constitution of social control. In just under three generations, in part spurred by the rise of the Progressive movement (e.g., Leonard 2016), governance institutions were transformed from a system of polycentric federalism (Holcombe 2002; Ostrom 2008 [1971]) into a one of monocentric nationalism (Epstein 2014; Greve 2012), dominated by a quasi-autonomous administrative bureaucracy. Understanding this transformation in the polity perhaps best situated to resist these kinds of political change is crucial for any political theory that purports to explain actual behavior of governance institutions. While the experience of the US is my primary historical motivation, the theory that follows should be generalizable to any polity whose formal constitution attempts to embody procedural liberalism.

I organize the remainder of this paper as follows. In Section 2 I explain that the historical transformations in governance are best understood as a case of constitutional drift, and that this drift results from features in the institutional environment underlying political exchange. Because the outcomes are emergent, institutions rather than intentions must perform the lion’s share of the work. Section 3 engages the works of the classical elite theorists, namely Michels, Mosca, and Pareto, as an underutilized source of mechanisms by which constitutional drift can be explained. Section 4 concludes by specifying what this framework teaches us about political outcomes, and in particular the behavior of modern states, as well as suggesting broad but nonetheless concrete questions for further exploration.

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2 While it is important not to homogenize the Founders—there are significant differences between a Hamilton and a Jefferson—I believe characterizing the collective attempt as constructing a constitution of liberty is accurate.

3 For the purposes of this paper, I assume the reader is familiar with the history of changes in governance institutions in the United States. Because of this, I will not include any significant historical narrative here. The citations in this paragraph are valuable sources for deeper exploration.
3 Constitutional drift: the difficulties of maintaining limited government

How does a constitution of liberty become a constitution of control? In the span of three generations, beginning in the late 19th century, US constitutional arrangements changed from a federalist system of divided governance to a nationalist system of administrative-bureaucratic control concentrated in the Executive Branch. This transformation was enshrined by the New Deal, and it remains the de facto constitutional order of the United States today. If limited government, and in particular constitutional limited government, refers to governance institutions operating according to the procedures of its referent social contract, then there is no longer limited government in the United States.4 Rather than the Enlightenment ideal of governance according to general, predictable, and broadly agreed-upon rules, we have governance according to particular and opaque ‘administrative law’ under the auspices of Executive agencies (Hamburger 2014; see also Greve 2012). Furthermore, these rules cannot be meaningfully said to be democratic. Instead of checks and balances, day-to-day governance arrangements are dominated by these agencies, with only weak accountability procedures to the other branches of government.

Procedural liberalism according to limited government is widely perceived to be the best way of enabling the productive and protective state, while avoiding the productive state. But if the US, where procedural liberalism was the guiding star of the ‘constitutional moment’ (Epstein 2014), could not maintain these features for even a century and a half, we must question these features’ robustness. The fragility of the project lies not in procedural liberalism in the abstract,

4 The reference to a social contract only makes sense if there was a more-or-less coherent ‘constitutional moment’ where governance procedures were decided upon. I will not consider cases of constitutional drift in polities with only informal constitutions.
but the Enlightenment political project of de jure constitutionalism, within which procedural liberalism has been most widely developed and applied. Because of the nature of the liberal-constitutionalist project, there is the possibility of a significant tension arising between a polity’s de jure and de facto constitution.

Today, when we heard the word ‘constitution,’ we tend to think of its written constitution. This is the de jure constitution: a document or series of documents that explicitly defines the operating procedures of the state, specifying such features as powers granted to branches of government and mechanisms of checking the operation of these powers should they become abuses. Written, or de jure, constitutions attempt to institutionalize a specific breakdown in political power between the One, the Few, and the Many. But this is not how the pre-Enlightenment political theorists, many of whom we still look to for guidance, understood the concept of a constitution. Previously, the constitution of a state was understood in de facto terms. The constitution was the state’s actual operating procedures—the breakdown of political power, the possession of which entitled its holders to some share in governance, between those individuals or classes who exercised power.

In a polity with both a de jure and a de facto constitution, there is the possibility that they become incommensurate over time. A de jure constitution can certainly reflect the actual balance of power within a polity, but it does not necessarily do so. De jure constitutions thus must be self-enforcing in order to be binding—if they do not enshrine a breakdown in power that is commensurate with the actually-existing state of affairs, then they will neither accurately reflect how a polity is governed, nor provide the means to change governance institutions in order to bring about the intended arrangements (de Lara et al. 2008; Mittal and Weingast 2011). Under certain circumstances, de jure constitutions can have some power through their role as
coordinating devices. A written constitution can specify which set of rules, from a much larger set of feasible rules, will operate, and can thus help holders of political power coordinate their actions to mutual benefit (Hardin 1989; Ordeshook 1992). But this is very different than the intended, and broadly agreed-upon, utility of de jure constitutions, which is as mechanisms for binding or constraining. De jure constitutions cannot perform this role, and to the extent that de jure constitutions mask, rather than illuminate, who holds power over whom in a polity, may even be deleterious.

To phrase the above in more familiar political-economic terminology, by themselves formal constitutions have no power to enforce a structure of political property rights that is conducive to procedural liberalism. A political property right is that which enables its holder to exercise political power. It also specifies the costs and benefits that will accrue to its holder from doing so (e.g., Salter and Young 2016). Like market property rights, political property rights can be exchanged among holders of such rights. This claim follows directly from the ‘politics as exchange’ paradigm of the Virginia school (e.g., Buchanan 1987). But most of the efforts of Virginia school scholars have analyzed political exchange within existing rules, meaning they take the constitution as ‘given.’ In reality, many political bargains also change the de facto operation procedures of the state, and thus qualify as constitutional bargains. Political exchange, including constitutional exchange, will take place so long as there are gains to exchange to be had among participants. De jure constitutions, by specifying a particular set of rules (including rules for changing rules), implicitly attempt to institutionalize a specific breakdown in political property rights. But de jure constitutions cannot prevent holders of political property rights from identifying potential for mutually beneficial exchange at the constitutional level and acting upon them. For example, in the US, the transformation from genuine ‘competitive’ federalism to
hierarchical-administrative ‘cartel’ federalism took place largely with the willing consent of the bargaining parties through a series of de facto constitutional exchanges (Greve 2012). This is not a popular story, especially among today’s classical liberals and libertarians. Classical liberals and libertarians usually tell a story of usurpation of all branches of local government, and nationally the Executive at the expense of the Legislative. But the reality is that it is a story of political ingroups across all branches making mutually profitable bargains, and then passing the costs on to political outgroups. ‘Concentrated benefits, dispersed costs’ is just as valid at the constitutional level as it is at the post-constitutional level.

Constitutional bargains are in fact ubiquitous. For starters, constitutions will necessarily be incomplete social contracts, since they cannot specify all eventualities. Genuine novelty will impel ad hoc arrangements between holders of political power that are orthogonal to previous constitutional procedures. There is also the potential for specific bargains to undermine arrangements specific to procedural liberalism. If the de jure constitution assigns a particular governance activity to the Legislative branch, but legislators and operatives within the executive branch can benefit from creating an arrangement whereby the task is undertaken by an Executive agency, with the Legislative role reduced to that of ‘oversight,’ then separation of powers has effectively been short-circuited. Even if a constitution enshrining procedural liberalism accurately reflects existing balances of political power, and enable holders of political power to coordinate on rules for the maintenance of a constitution of liberty, changes in background variables can always create the conditions conducive to new constitutional bargains. There is simply no guarantee that constitutional desiderata such as separation of powers, checks and balances, and reserved rights will represent an equilibrium in the process by which political property rights are exchanged.
The omnipresence of political bargains, including constitutional bargains, suggests the incommensurability of constitutionalism with procedural liberalism. To the extent that procedural liberalism exists and is maintained in a polity, this is not a function of its de jure constitution. Constitutionalism, in other words, cannot solve the *quis custodiet?* problem, because this problem makes reference to a structure of political property rights that reflects a polity’s de facto constitution, which the de jure constitution has no power to change. The ‘autonomy of the political’ (Schmitt 1996 [1932]) is not brought under control by constitutionalism, but is merely obfuscated. If liberalism is best understood as a way of solving the means-ends problems associated with governance according to the common good (Mises 2002 [1927]), then we are still searching for its constitutional analogue: a way of getting, and keeping, procedural liberalism.

4 The dynamics of constitutional drift

Procedural liberalism and formal constitutionalism are thus uneasy bedfellows. While they are obviously not incompatible in terms of ideals, especially when considered as a historical-intellectual phenomenon, but unfortunately the latter does not seem to be a sound means for achieving the former. Political bargains, including constitutional bargains, will change the decision procedures of the state—in reality, a network of political enterprises rather than a monolithic Leviathan—until its de facto constitution no longer resembles its de jure constitution. What we require now is a better understanding of the *mechanisms* by which these constitutional bargains proceed. While there are several avenues, an appropriate place to begin our analysis of constitutional bargains is with constitutional bargainers: the holders of political property rights.
A group of scholars now referred to as the classical elite theorists, and in particular Robert Michels, Gaetano Mosca, and Vilfredo Pareto, are fertile sources for understanding the relationship between constitutional bargains and constitutional bargainers. I will explore each of these thinker’s unique contributions, but in brief, the unifying insight of these scholars is that the organizational logic associated with the employment of political power renders certain broad-level features of political property rights structures durable, and others fragile. These scholars emphasized varying aspects of the roles of elites, meaning the relatively small group of political (or, sometimes more broadly, sociopolitical) power-wielders. Whatever the outward form of a polity’s constitution, its inner structure will always be characterized by an ingroup in possession of authority, to be wielded over an outgroup. This insight can be damning for liberal democracy, but equally indicts other political forms such as absolute monarchy. Both extreme diffusion and extreme concentration of de jure authority are not sustainable; political bargains in either case will tend towards some intermediate concentration, although background variables in each particular case will determine the balance of power between the One, the Few, and the Many.

James Burnham (1943) is perhaps the most well-known commenter on the classical elite theorists, whom he refers to as the Machiavellians. Burnham’s most enduring work, *The Managerial Revolution* (1942), explored the transition of power away from the class of capitalists-bourgeoisie to a new class of ‘managers,’ meaning expert technocrats occupying bureaucratic positions in the state, or positions in business with liaisons to such bureaucrats. Burnham, who spent the latter part of his career as a recovering Marxist, naturally looked for class-based explanations to political phenomena. But his essential insight, which I adopt here, was the above-mentioned unifying perspective on the classical elite theorists. In fact, by exploring the commonalities among these thinkers and drawing out the mechanisms and forms of
argument they had in common, Burnham necessarily identified the deep tendencies in human behavior that resulted in a polity’s de facto constitution. In this sense, Burnham might be called the first economic commenter on the classical elite theorists—economic, because he rendered their commonalities intelligible in an implicit rational actor framework.

However, if we are to look for the dynamics of constitutional drift in the classical elite theorists, we will need more than just Burnham as our prism. In particular, we need to situate his reading of the elite theorists within the particular institutions underlying political exchange. Wagner (2016) has provided the most compelling account of this institutional environment to date. His theory of political catallaxy accounts for the growth of the bureaucratic-administrative state in terms of an unplanned system of political bargains, whereby claims to resources in a society’s productive sector are staked by political actors, and profits informally distributed. The peculiarities of bureaucratic organization, and in particular the informality of residual claimancy, rather than a direct reduction of outcomes to intentions, is what drives familiar bureaucratic phenomena, such as the tendency towards cost maximization or mandate expansion. In what follows, Burnham’s reading of the classical elite theorists identifies the mechanisms; Wagner’s work identifies the rules within which these mechanisms operate, thus giving form to the particular results we observe in the United States, whose constitution has outgrown its Constitution.

4.1 Michels

Michel’s work on political parties (1915) is probably the most well-known work of the classical elite theorists, and is frequently cited and engaged with by contemporary scholars. His ‘iron law of oligarchy’ argues that even the most highly democratic organizations will eventually develop some internal and hierarchical administrative structure, because these structures are
much more capable of implementing solutions to advance the goal of the organization. Thus even in a highly democratic environment, with widespread franchise and frequent elections, political parties themselves will come to be run by a group of insiders, to administer the party, steward its resources, and implement its goals. This claim, while significantly undermining the more romantic theories of democratic legitimacy, is not regarded as an indictment of democracy per se. Nor should it be; it merely points out the durable institutional structure that exists even in environments that are, nominally, subject to ultimate plebiscitary control.

Burnham’s (1915, ch. V) interpretation of Michels is the starting point for understanding the iron law of oligarchy in the context of political property rights. According to Burnham, Michels implies that even in organizations nominally subject to popular control, patterns of top-down leadership, and hence rule, will evolve within these organizations. Because of the efficiency of some degree of hierarchical administration (in the context of organizations, not orders), there will always be an autonomous element stemming from personal decision-making, which is not reducible, or oftentimes even traceable, to a democratic mandate. This also echoes Schmitt’s arguments concerning the autonomy of the political, and thus has interesting implications for a polity’s de facto constitution. Those in a position of authority within political parties will have the power to engage in political bargains which rearrange political property rights. Because of the arguments detailed in Section 3, these bargains will frequently be de facto constitutional bargains, and will also sometimes inject genuine novelty into a polity’s decision procedures. This represents a significant degree of freedom from direct popular oversight. That political parties will develop a durable group of insiders is not alarming for democratic theory. But the fact that these insiders will have the opportunity to engage in political exchange that not only occurs without reference to popular control, but generates novel constitutional arrangements
that are orthogonal to the desires of the electorate, is alarming. If the political process develops this degree of autonomy, then political outcomes no longer terminate in the ‘will of the people,’ even if a coherent expression of popular will could be determined. The injection of novelty into de facto constitutional arrangements creates new issues and controversies which the political process, and hence the democratic process, must then navigate. Rather than party officials trailing the will of the people, the iron law of oligarchy suggests that the will of the people trails party officials.

4.2 Mosca

Democratic procedures do not operate in a vacuum. They take place against a backdrop of social and cultural beliefs that form the ‘meta-norms’ underlying political exchange. Mosca’s (1939) work recognizes the political tendencies towards oligarchic dominance of democratic systems, which might be summed up in the phrase ‘small groups of the well-organized exercise power over large groups of the poorly organized,’ but situates this phenomena in the context of a society’s political meta-norms. Mosca focuses in particular on what he calls a polity’s political formula, which Burnham (1943, p. 72) describes as the ideological construct that “rationalizes and justifies its [elites’] rule and the structure of the society over which it rules.” Importantly, Mosca claims neither that elites are the source of a polity’s political formula, nor that they promulgate it to advance their material self-interest alone, nor that it has no basis in reality, i.e., is nothing more than a Platonic noble lie. Instead, Mosca notes that all societies have some political formula, and that there is a dialectic between elites and the political formula: the selection of elites is determined in part by the formula; the actions of elites in positions of political authority serve to change public interpretation of the political formula; the selection criteria for new elites alters, and so on.
The importance of the political formula can best be understood with reference to the problem of feedback in the exchange of political property rights. As Martin (2010) notes, the role of ideas and interpretive frameworks increases in importance in social realms where there is weak feedback between the employment of means and the attainment of ends. For example, in markets, producers who are unable to meet consumer desires are gradually weeded out. While interpretive frameworks and ideas obviously help producers do this, ones that contribute to a producer embracing an inconsistent means-ends relationship are removed by the profit-and-loss filter. But in politics, and hence the exchange of political property rights, feedback is weak. Profits and losses exist, but are informal, due to legal restrictions on residual claimancy in governments as public organizations. Many other margins also exist on which political rents are allocated and (occasionally) dissipated. With weaker feedback comes a looser filter, which requires some additional social superstructure in order for agents to successfully navigate the political world and coordinate their actions. The political formula, as defined by Mosca and reinterpreted by Burnham, is an important piece of ‘social technology’ which performs this role.

4.3 Pareto

Pareto is a towering figure within economics, but his contributions to sociology are less well-known to students of economics and political economy. While his insights regarding logical versus non-logical action, and the circulation of elites, are regarded as sociology, as with the other classical elite theorists, these insights can be understood in a rational actor framework. In conjunction with a theory of the institutions governing human action, Pareto’s ideas are thus amenable to economics and political economy, broadly conceived.

In *Mind and Society*, Pareto (1935) makes an important distinction between logical and non-logical action. In brief, logical action requires that “action is motivated by a deliberately
held goal or purpose; when that goal is possible; when the steps or means he [the actor] takes are in fact appropriate for reaching it” (Burnham 1943, p. 125). If any of these conditions are absent, action qualifies as non-logical. Importantly, non-logical does not mean irrational. Non-logical action is rational, to the extent it makes sense within the means-ends framework of the actor. As an example, a policymaker who is sincerely worried about the condition of the working class, and seeks to improve their lot by pressuring legislators to pass minimum wage legislation, is acting rationally, but non-logically.

As Wagner and Yazigi (2014) and Patrick and Wagner (2015) note, the institutional environment governing action has a large influence on whether action within those institutions is logical or non-logical. Market exchange is typically characterized by logical action. Economic calculation (profit and loss) provides a means for ‘objectifying the subjective,’ enabling actors to negotiate terms of tradeoffs that otherwise could not find expression except in subjective preference rankings. Ex post realization of profits and losses also filters out plans of action that violate one or more of the conditions for logical action. In politics, the situation is usually different. Because politics takes place in an environment of weak feedback, ideas are especially important because they provide content and enable actors to arrive at some notion of tradeoffs. But because political competition, such as electoral competition, frequently selects for plans of action wherein ultimate goals are unclear, undefined, or unachievable using the proposed means, action strongly tends to exhibit non-logical qualities. The ultimate importance of non-logical action in politics lies in the lack of mechanisms for adjudicating tradeoffs in a manner that

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5 Cf. Burnham (1943, p. 129): “The point is not that these slogans, ideas, programmes, [sic] and declarations do not influence action. Under certain circumstances they undoubtedly do, and tremendously. But they are not and cannot be a part of logical or rational action. I am not taking logical steps in pursuit of a goal if the presumed goal is nothing definite.” Burnham’s inclusion of “rational” in the penultimate sentence is due to his equation of logical and rational for the purposes of his discussion. It does not indict the claim that non-logical action can be rational, in the sense I use these terms.
results in widespread coordination of plans. As with markets, in politics, we can identify the formal characteristics that successful vs. unsuccessful action will take. But because the constraints on plans of action are significantly weaker in politics than in markets, outcomes are less predictable, especially for agents outside of the nexus of a given plan.\textsuperscript{6}

The other of Pareto’s crucial idea for understanding constitutional drift is his analysis of the circulation of elites. For Pareto, the characteristics of a society strongly resemble the characteristics of its elites, meaning those who are ‘upstream’ in matters of wealth, culture, and politics. Ideally, those who rise to the circle of elites will do so on their merits. In actual societies, however, this is almost never the case. The entrance into the circle of elites is necessarily partly restricted due to the social networks that arise organically between existing elites. To the extent that the selection criteria for elites diverges from the meritocratic criteria that would be in the best interests of society, elites can benefit privately, but create larger social costs borne by non-elites (Burnham 1943, ch. VI.4). This can be especially worrying if the criteria for elite selection and perpetuation rely on navigating institutions that select for non-logical action. As previously mentioned, a chief characteristic of non-logical action is lack of feedback oriented towards a coordination mechanism for harmonizing disparate plans. If rise in social rank, culminating with entrance into the elite, is achievable predominantly through institutions that promote non-logical action, then those who successfully navigate these institutions attain their goals without any mechanism promoting the tendency of their actions to mesh with the plans of others. This is a very broad category of behavior, of which ‘concentrated benefits, dispersed costs’ strategies are a subset. If the divergence between elite selection-

\textsuperscript{6} Planning requires a coherent objective. Individuals can plan, and organizations can be reasonably characterized as planning. Orders cannot. Of course, the boundary between an organization and an order is often shifting and difficult to locate.
perpetuation criteria and widespread public benefit becomes sufficiently large, then the prevalence of non-logical action in these selection-perpetuation criteria can entail significant social costs. A form of this phenomenon has been emphasized, in quite different contexts, by scholars as diverse as Olson (1982) and Quiggley (1961), both of whom locate the roots of social decay in the wedge between private and public benefit due to, in part, the corruption of elite selection-perpetuation criteria.

4.4 Political catallaxy as institutional context

The classical elite theorists provide the tools with respect to organizational durability (Michels), ideological legitimacy (Mosca), and selection criteria for human action (Pareto) to tell a coherent story of constitutional drift, away from a constitution of liberty and towards a constitution of control. But one more aspect of such a story is missing. Although these theorists developed their ideas in the context of parliamentary democracy, the institutional environments underpinning the behavior of elites is, ironically, underspecified. This is where Wagner’s (2007, 2016) perspective on catallactic politics comes into the picture. Wagner’s paradigm is firmly within the ‘politics as exchange’ tradition, but in a manner that respects the distinction between organizations and orders, and agent-level intentions and system-level outcomes in particular.

Wagner’s original contribution is to characterize political organizations as peculiar types of enterprises. These organizations can reasonably be characterized as having goals, but the state itself, which is a collective interactive network of such organizations, cannot. Political organizations do not act ‘outside’ and ‘upon’ commercial organizations, as is traditional in political economy analyses. Instead political organizations and commercial organizations are mutually entangled. Political calculation necessarily makes reference to tradeoffs as embodied in market prices, and commercial calculation necessarily makes reference to costs and benefits
that are political in origin. Of special importance is the ‘parasitic’ use political organizations make of market prices. Political organizations do not operate in an environment of traditional residual claimancy. Bureaucrats are not in a position to internalize the discounted future revenue streams from the public output they provide, both because their own output is not priced (a knowledge problem) and because they are formally forbidden from doing so as part of their mandate (an incentive problem). While considerations of power, ideology, and elite selection are important—any genuinely social theory of politics, informed by the universals of human action, cannot afford to ignore these issues—focusing too much on these issues tends to muddy the necessary, albeit mundane, consideration of navigating tradeoffs. Political organizations have budgets, allocate resources, and interact with commercial organizations. Some means of navigating tradeoffs is necessary. Rather than reducing this to the outcome of a bureaucrat’s utility-maximizing calculus, Wagner argues it emerges as market and political organizations interact in a quasi-tatonnement process over time.

Because political organizations are a peculiar type of enterprise, they must deliver returns to their supporters and agents, but the process of generating and providing these returns must be informal. Because orthodox economic calculation is not available, the quasi-calculative process operates in conjunction with durable organizational operation procedures, ideas and ideologies, and selection-promotion filters within and across organizations to give concrete reality to these tradeoffs. In summary, the classical elite theorists provide a set of means-ends compliant political realities that underlie a polity’s de facto constitution; Wagner provides the institutional context that gives these formal realities their particular significance.

4.5 Resumé
To sum up: rational (goal-seeking) action and exchange behavior are the two pillars of political economy. These pillars hold up an interpretive framework through which human action in all spheres, including politics, can be understood. Politics, too, is exchange. Political actors broker deals, negotiate tradeoffs, and seek the highest returns possible for a given expenditure of resources. In any durable polity, we can add institutional context to the above universals by focusing on political property rights: which agents possess what authority to participate in governance, along with the costs and benefits that accrue from doing so.

Formal (de jure) constitutions are social contracts that try to solidify a specific arrangement of political property rights. A constitution of liberty is one that enshrines a structure of political property rights reflective of procedural liberalism. Familiar aspects include separation of powers, checks and balances, reserved rights, and a specific procedure for amending the constitution. While formal constitutions can be powerful coordinating devices, their ability to bind the polity to the specified decision procedures—widely perceived to be the greatest strength of formal constitutions—is insignificant. Where there are gains to be had from political exchange, including constitutional exchange, goal-seeking individuals will do what they can to capture them. To the extent that these bargains change the de facto decision procedure of the polity (or rather, its various organizations), the constitution has been amended.

Even in extremely democratic environments, there will necessarily be some durable organizational structure to political organizations, including parties. Agents with final decision-making authority, meaning significant endowments of political property rights, in these organizations can make important decisions without respect to the will of voters. When political property rights holders interact, the scope of their actions will be partially demarcated by some complex of ideas and ideologies, which informally specify the costs and benefits of various
exchanges and thus help political property rights holders cope with weak feedback. Importantly, these ideas and ideologies can be unrelated to the procedures outlined in the de jure constitution, as was the case with Progressivism in the late 19th and early 20th century United States. By necessity, the significant holders of political property rights will be a minority, a sociopolitical elite. A mixture of formal and informal procedures governs admission to, and circulation among, elites. The selection procedures for the acquisition of political property rights will be the result of some combination of logical and non-logical action. Because the institutional underpinnings of political enterprises allows holders of political property rights to engage in bargains while forcing unwilling third parties to underwrite these bargains, there is no reason to suppose the de facto governance arrangements among holders of political property rights will advance the common good. These bargains will also be reflective of political rules and meta-rules that do not conform to procedural liberalism.

5 Conclusion
The above arguments, if accepted, have several important implications. The first and most obvious is that formal constitutions are neither necessary nor sufficient for maintaining procedural liberalism. If a given social order that exhibits procedural liberalism is durable, it is because holders of political property rights cannot benefit through exchanging these rights such that procedural liberalism erodes. Formal constitutionalism was ultimately supposed to answer the *quis custodiet?* problem, as exemplified by Hamilton’s remarks in *Federalist No. 1*. But viewing de facto constitutions as founded ultimately on political property rights, it is clear that since political property rights holders can ‘agree to disagree’ with formal constitutional procedures, it must be the case that political property rights holders must find themselves in an
environment where the structure of political property rights is compatible with procedural liberalism. Even if constitutions in their coordinating capacity result in holders of political property rights agreeing to organize their activity around meta-rules that exemplify procedural liberalism, there is nothing stopping constitutional drift in the future as tastes, technologies, and endowments underlying the drive to exchange political property rights change. The constitution of liberty that matters is not the de jure, but the de facto constitution.

A second implication focuses on the relationship between constitutional bargains and public welfare. Market exchanges, in the right institutional environment, contribute to public welfare because of the tendency to exhaust gains from exchange. Even familiar problems like information asymmetries, externalities, etc. can be overcome, since by the standpoint of economic efficiency, these ‘market imperfections’ represent profit opportunities waiting to be captured. But the key to this argument is the institutional environment itself—that which protects private property rights, enforces contracts, and upholds the rule of law. Constitutional bargains necessarily alter this framework. One could look and specify a meta-constitution—the rules for making the rules for making the rules—to answer the question of whether constitutional bargains are commensurate with the common good. This would provide partial context, but also quickly results in an insurmountable regress. We have come full-circle back to Juvenal. A better way forward lies in recognizing, pace Schmitt, there is an inherent autonomy to political bargains that cannot result in a neat ‘closing’ of options for constitutional bargaining. Because of this, and commensurate with the logic of politics, constitutional exchange will always entail the possibility of the bargainers making agreements that are involuntarily underwritten by outsiders. If the insights of the classical elite theorists can be summarized in a single aphorism, it is that
small groups of well-organized and tightly-networked elites will be able to pass on the costs of governance to large outgroups lacking similar social cohesion.

Normatively speaking, the tenuous link between constitutional bargains and public welfare should frighten both disciples of Rawls and Buchanan. The realities of political property rights exchange at the constitutional level render the efficacy of explicit social contrasts highly uncertain, at best. There are a number of questions that these results impel. To what extent does this indict institutional design sui generis? Must we be ‘against design’ (Devins et al. 2016)? More specifically, what underlying factors render a given instantiation of procedural liberalism durable? If internal political constraints do not bind, can external constraints perform this role, and if so, when? These are the questions that positive political economy scholars interested in procedural liberalism, and normative defenders of ordered liberty, must tackle. An ideal research program entails both: constitutions of control must be understood before they can be fought. But neither is likely to be accomplished by insisting that late 18th century political-economic meta-norms ought to bind, when by their nature they cannot.

References


