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# Constitutional Drift and Political Dysfunction

## *Underappreciated Maladies of the Political Commons*

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**M**y purpose in this article is to develop a theory of political dysfunction as it relates to constitutional drift—the tendency of de facto political procedures to change when these procedures are no longer incentive compatible for wielders of political power. Importantly, the term *constitutional drift* refers to informal constitutions—that is, the state’s actual decision procedure, with drift the unintended result of political bargains among political elites. As such, formal “constitutional moments” or revisions are not covered under this category. My exploration is theoretical, using tools of economic and political theory to explain how in the ordinary course of governing the institutions of governance may undergo organizational change such that the governors no longer have access to the knowledge necessary to govern in a generally beneficial manner, even assuming they wish to do so.

The term *political dysfunction* may be normatively charged, but I believe it is capable of doing positive analytical work in helping us to understand the state of currently existing governance institutions in the Western constitutional democracies. For clarification, by “political dysfunction” I do not simply mean “outcomes we do

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not like,” although this certainly is a part of such dysfunction. I instead argue that political dysfunction is best understood as an institutional malady. In particular, it describes constitutional drift resulting in a particular structure of governance institutions that lack important self-correcting (negative-feedback) mechanisms. Alternatively, political dysfunction lies in political institutions’ failure to cope with the “knowledge problem” (as in, e.g., Hayek 1960, 1978–81; see also Oakeshott 1991) as applied to the political process. It is thus complementary to but conceptually distinct from schools of thought that emphasize “incentive problems” in politics—namely, the Virginia School of political economy (e.g., Buchanan and Tullock 1962; Buchanan 1987). A concrete way to conceptualize the distinction is to recognize that constitutional drift frequently has its roots in incentive problems—incentive incompatibility between the welfare of political elites and the welfare of those subject to their rule (Salter 2015a). This incompatibility in turn leads to a reordering of political structures such that these structures are less capable of coping with the knowledge problem. Political dysfunction is the conjunction of the incentive problem and the knowledge problem. I take the former as my point of departure and focus analytical efforts on the latter, showing the nature and importance of political dysfunction in the context of the American republic.<sup>1</sup>

Political dysfunction so conceived concerns those continuing James M. Buchanan’s (1975) project: enabling the protective state and the productive state while enfeebling the predatory state. Political dysfunction culminates in political institutions’ increasing difficulty in generating reliable informational feedback, and hence the erosion of mechanisms for correcting errors. This means that effective means for enforcing property rights, upholding the rule of law, and providing public goods—all abstract desiderata that require institutional context for navigating the trade-offs involved—will increasingly be difficult to discover, while political processes fall prey to intergroup expropriation and rent seeking. Errors in the political process will be not only difficult to correct but also difficult to identify in the first place. The sense in which I use terms such as *mistake* and *error* should be thought of in this means–ends framework rather than as relating directly to normative goals. In this approach, I am building on the foundation laid by Austrian political economy (Mises 1951; see also Ikeda 1997, 2003), for which means–ends analysis of political process, from the perspective of information compatibility, is essential.

Seminal theories of political dysfunction come from James Madison and Alexis de Tocqueville, although they did not employ this exact terminology. Madison worried about the tyranny of the majority, Tocqueville about a paternalistic mild despotism. These arguments concern the erosion of political institutions, a version of what I have called “constitutional drift.” In addition, these authors worried that

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1. Very similar arguments can be made for other Western constitutional democracies. I use the American republic as my case study because it is the example with which I am most familiar.

the political forces that bring about these institutions will not subsequently relent. This is clearly a vision of undesirable end states that are not self-correcting. However, it is sometimes difficult to ascertain whether these problems are in essence ones of outcome or ones of process. In other words, it is unclear whether the end state is inherent in the initial setting of the metarules as opposed to constitutional novelty arising from bargains in an environment of genuine uncertainty. In reality, both play a role, but the relationship between process and outcome in a theory of political dysfunction might be more fully specified. Furthermore, these processes implicitly contain a mixture of incentive problems and knowledge problems. It is not problematic that these frictions are entangled—in political dynamics, they are necessarily so—but we could benefit from a more rigorous theoretical paradigm that (a) places a conceptual boundary on these two kinds of problems and (b) specifies the properties and implications of each. My theory of political dysfunction identifies the boundary between information and incentive problems. It also highlights the difficulties associated with political institutions whose information feedback is diluted.<sup>2</sup>

Before proceeding, I want to state clearly that here I do not treat political dysfunction that is attributable to conscious constitutional change, such as the Seventeenth Amendment to the U.S. Constitution, which provides for the direct election of senators (Zywicki 1994). I instead focus on the morphing interpretation of existing constitutional restraints, such as Charles Warren's (1932) treatment of Congress and the General Welfare Clause. Also, I do not argue that all constitutional drift has injurious consequences. Counterexamples abound. For example, the transformation of Great Britain under the Stuarts from an absolutist state to a de facto limited government that credibly committed to protecting property rights and upholding the rule of law was a constitutional change that many look upon favorably (North and Weingast 1989). I limit myself to constitutional drift that results in deleterious consequences for the purpose of building a theory of political dysfunction. That the former can result in the latter does not mean that it must.

In the next section, I provide an overview of constitutional drift as rooted in constitutional bargains among political elites. Understanding this bargaining process is necessary to set the stage for analyzing currently existing governance institutions and hence political dysfunction. I then focus on developing the theory of political dysfunction proper, showing its necessary relation to feedback erosion that follows from the “tragedy of the commons” in governance. As an illustration of the theory, I consider the case of fiscal imbalances in the American republic, showing how these imbalances are simply one way in which political dysfunction manifests. I conclude by discussing some implications of my theory as well as the costs and benefits of some possible remedies.

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2. The process-versus-outcome distinction itself is trickier. Adam Martin (2010) focuses more specifically on this aspect of the problem.

## Constitutional Bargains and Constitutional Drift

Constitutional drift is the necessary starting point of my theory. In the United States, it is almost self-evident that there has been a significant amount of constitutional drift since 1789. The resemblance between the existing *de facto* Constitution and the original *de jure* Constitution is tenuous at best (Greve 2012; Epstein 2014). This slight resemblance is explained by a series of constitutional modifications that took place outside the official procedures for amending the U.S. Constitution, the most notable being the New Deal. Although it would be a mistake to reify the New Deal as a complete break with the previous constitutional tradition, it nonetheless remains the singular event that characterized the restructuring of U.S. political institutions. What had previously been, in an ideal-typical sense, best characterized as a system of polycentric federalism (V. Ostrom 1997, [1973] 2008a, [1971] 2008b; see also Buchanan and Tullock 1962) has since evolved into a system of monocentric nationalism. As Michael Greve (2012) explains it, “competitive” federalism has been replaced by “cartel” federalism: genuine competition between jurisdictions in the provision of governance services and other collective goods has ceased, and local administrative bodies are largely implementation bureaucracies for plans devised in Washington.

I want to emphasize that for the purposes of this paper I attach no primary normative significance to constitutional drift. There were and continue to be powerful arguments justifying the drift and the final state of affairs; there were and continue to be powerful arguments against them. I do not wish to engage this issue here. I take as my starting point that constitutional drift—both in the United States and in political regimes throughout history—exists as an important phenomenon for study, and I focus on drawing out its implications.

As hinted earlier, constitutional drift always centers around the *de facto* constitution—that is, the actual balance of power, reflected in political structures and procedures, between the One, the Few, and the Many. *De jure* constitutions—formal or written constitutions—can reflect this actual balance, but not necessarily. *De jure* constitutions can be binding only if the structure they elucidate is self-enforcing (Lara, Greif, and Jha 2008; Leeson 2011; Mittal and Weingast 2013). This does not mean that *de jure* constitutions are superfluous. They can be extremely useful as coordinating devices, for example: because many, many possible political structures frequently have some legitimacy within a given population, creation of *de jure* constitutions can help holders of political power coordinate on one particular political equilibrium when many such equilibria are possible (R. Hardin 1982, 1989; Ordeshook 1992). However, if the *de jure* structures and procedures do not accurately reflect the *de facto* relationships among relevant wielders of political power, the *de jure* constitution may obscure, more than illuminate, the political sector’s actual operations (Salter 2015b).

Constitutional drift is best understood as flux in *de facto* political structures and procedures. In the United States, the result is the wedge between “the Constitution”

and “the constitution.” In polities without formal constitutions, such as Great Britain, the distinction is less obvious but no less real. Constitutional drift must be understood as a result of the political bargaining process. The final distribution of political power, at any given point, is the outcome of bargains between holders of political power. To the extent that these bargains change the actual operating procedures of the political process, they can properly be classified as constitutional bargains.

Briefly broadening our perspective will help us understand the importance of constitutional bargains. Roger Congleton (2011) explores a series of constitutional bargains in Western polities dating back to the Middle Ages. His analysis focuses on bargains between kings and their councils or parliaments. The overall narrative documents the transition from medieval “shareholder states,” where holders of political power were literally owners of the realm, to modern constitutional democracy. In Congleton’s narrative, the results of these bargains were beneficial for the One, the Few, and the Many—originally the king, the nobility, and the commoners, respectively. That the bargains were beneficial for kings and nobles is not surprising given that they themselves were parties to the bargain. What is interesting is that although commoners did not begin with a “seat at the table,” constitutional bargains up to and including the reforms that formalized and expanded the franchise nonetheless increased their welfare.

It cannot be taken for granted that constitutional bargains will necessarily improve the welfare of all those who are subject to a given polity’s structures and procedures. Whereas Congleton (2011) sees the rise of political modernity as a series of welfare-enhancing bargains, Bertrand de Jouvenel ([1945] 1993) offers an alternative perspective. He examines the same history as Congleton but sees instead a series of welfare-enhancing bargains between kings and the commoners at the expense of nobles. These bargains are only temporarily beneficial for kings: the commoners eventually recognize that kings, in their attempt to build a sufficiently powerful coalition against nobles, have granted commoners so much *de facto* power that commoners seize power, taking over an already-existing bureaucratic administrative apparatus. Whereas Congleton sees a monotonic increase in welfare, Jouvenel sees rises and falls and, in some cases, cycles. In this sense, Jouvenel’s analysis hearkens back to the cyclical political theories of classical antiquity, whereas Congleton’s analysis is distinctly Whiggish.

For the theory of political dysfunction I develop here, it is unimportant whether Congleton’s or Jouvenel’s is ultimately the “correct” interpretation of Western political history.<sup>3</sup> What matters is the juxtaposition of the narratives, which highlights the *contingent* nature of welfare improvements for subjects as a result of constitutional bargains. This reminds us that when political bargains are struck between holders of

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3. I am not denigrating either Congleton’s or Jouvenel’s analysis; in fact, I find Jouvenel’s account of the importance of ideology persuasive. I want to emphasize instead that with respect to these theories my focus is on constitutional bargains *per se*.

political power and are binding on those without political power, the results of these bargains are not necessarily in subjects' interests. (And, following Jouvenel's logic, they are not necessarily even in the interests of those party to the bargains!) We can use the perspective offered by Congleton and Jouvenel to analyze the properties of governance institutions as they existed and as they currently exist to see how they coped or cope with information feedback in the context of political processes. Issues of feedback and error correction will follow from issues of incentive alignment (rulers exercising power in the interests of the ruled), which is why constitutional bargains and constitutional drift matter in the first place but are conceptually distinct and merit their own discussion.

### Political Institutions and Political Dysfunction

The evolution of governance structures in Western polities (excepting the American republic) culminated in modern liberal democracy from a form of government that we may call "shareholder states." The crucial difference between these two forms, for the purposes of this article, is the structure of political property rights—what privileges are attached to those who hold and exercise political power. European shareholder states were a consociation of sometimes cooperating and frequently competing powers: kings contended with nobles, contended with the church, contended with free cities and trade associations, and so on. In these polities, significant political action could not be undertaken without near-unanimous support of the (representatives of) these corporate bodies, resulting in a de facto "generality norm" (Buchanan and Congleton 1998). In addition, each party to the political bargaining process was a *residual claimant*—owners of property and the income derived therefrom, the value of which would fluctuate in response to the conditions of governance. Governance arrangements that were presumably in the interests of one party would increase the value of their property and their income; governance arrangements contrary to these interests would do the opposite. Because each party to political bargains was concerned with the effects of politics on his property and income, and little could be done without near-unanimous consent, governance tended to be in these groups' pecuniary interests and also had the (unintended) consequence of improving the realm's economic value.

Ownership of the realm, in the form of residual claimancy attached to political property rights, is the bridge linking issues of incentive alignment to information alignment and knowledge generation. The story outlined earlier contains an implicit reliance on the knowledge-generating properties of market processes made famous by Friedrich Hayek (1948). We do not need to postulate an overly strong version of *Homo economicus* to justify this narrative. Rationality among the actors instead resided in the fact that they operated in an environment that gave them information feedback to correct errors through time (Smith 2009). If the "owners of the realm" agreed to political action that they mistakenly believed would be beneficial but was in fact

harmful, the reduction in the value of their property and income provided them the signal needed to identify the error and correct it. Again, this was privately beneficial but was also conducive to the stewardship of the economic value of the polity because the polity itself was privately owned. These governance arrangements were obviously not intended to benefit those not party to political bargains but frequently did so due to the particular institutional context, much as ordinary market exchange as described in any principles of economics textbook. This is why several notable authors insist that the remarkable story of economic growth in the West is incomplete without reference to the *de facto* polycentricity, in an environment of political residual claimancy, that characterized the Middle Ages (e.g., Baechler 1975; Berman 1983; Anderson 1991; Raico 1994; Stark 2011, chaps. 14–16).

Obviously, these governance structures no longer exist. Liberal democracy in the West is characterized by a very different structure of political property rights. The realm (now the state) is no longer private property. The state is instead a *commons*, entrusted to representatives of the people (and the representatives' appointees) whose private benefit from exercising governance rights are significantly less tightly attached to their success in stewarding the polity's resources.<sup>4</sup> Political agents control the current-use value of governance structures but not their future (or market-capitalized) value. That this arrangement results in regrettable incentives for stewardship is well known (G. Hardin 1968). As seen earlier, it also has crucial implications for knowledge generation and error correction.

Without residual claimancy to the governance of the state, the aforementioned information-feedback mechanism breaks down. For simplicity, assume a political agent in this environment whose only desire is to promote the “productive state”—to provide the mixture of state-supplied goods and services that contribute to the public welfare (Buchanan 1975). How should she go about doing this? The most promising way seems to be to rely on the knowledge-generating features of the market process. Her shorthand decision rule is: provide the mixture of goods and services that maximize the value of the resources used in the provision.<sup>5</sup> In this sense, she can use profits derived from her activity purely as an informational crutch, abstracting from the admittedly powerful incentives that profits provide. However, this solution is not actually possible. Profits are the surplus of revenues over costs. The political agent can keep track of costs well enough, but because she is a public supplier

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4. For the purposes of this paper, the term *commons* is shorthand for a property-rights arrangement characterized by current-use value but not future capitalized value. I do not claim there are no control rights over political procedures; such an assertion would fly in the face of reality and would do violence to the spectrum of institutional arrangements on the state–market spectrum that emerge to facilitate interpersonal cooperation (E. Ostrom 2010). I simply want to convey that those in the position to wield the means of governance reap current benefits from their activities, but because these means are nonalienable property, those in power do not internalize fully the capitalization effects of their decisions.

5. This account of human welfare is not “materialistic” or “reductionist.” It simply recognizes that if the value of society's resources is not maximized, mutually beneficial exchange between two parties is still possible, meaning that their self-perceived well-being can be increased without damage to another's.

in an environment of the state as commons, her output cannot be priced via market processes (supply and demand). She thus has no way of actually calculating revenue, and hence half of the necessary information for calculating profits is unavailable to her. Without profitability (the analogue of income in a privately owned shareholder state), she has no access to a feedback mechanism that guides her in adjusting over time the mixture of state-supplied goods and services that the public most values (Mises 1944; Niskanen [1971] 1994; Tullock 2005).

Thus, an important information-feedback mechanism, resulting from the transition from private to public governance, is no longer available. The dominant alternative, electoral feedback, which is ultimately supposed to structure bureaucratic activity, is inadequate under a range of plausible scenarios (e.g., Brennan 2014 and Gunn 2014; see also Caplan 2007 and Somin 2013).<sup>6</sup> The most obvious solution to this problem—allow the political agent to supply her goods and services in the market and hence allow them to be priced—would be a return to de facto private governance and thus would solve the problem only by sidestepping it completely.<sup>7</sup> This impels us to search for an institutional arrangement that retains a powerful information-feedback mechanism for governance but avoids the abuses by private governance—which are sufficiently well known that, in the interests of space, I do not recount them—throughout history. With all this in mind, we can return to the specific example of the American republic, both as it was and as it is, to see what solutions it offers, if any.

## The American Republic and the Fiscal Commons

It is widely recognized that the American republic finds itself in a fiscal situation that is, at minimum, troubling. As of this writing, the national debt stands at approximately \$20 trillion, which is 107 percent of current gross domestic product (GDP).<sup>8</sup> However, the national debt greatly understates the degree of the American republic's fiscal problems because it does not take account of unfunded liabilities. Unfunded liabilities are obligations that the central government has undertaken but have not yet come due. The largest sources of unfunded liabilities include expected future payments for social programs such as Medicare, Medicaid, and Social Security. There is no precise figure for unfunded liabilities as there is for the national debt because the magnitude of unfunded liabilities depends on future claims, which itself depends on factors such as population growth, labor-force participation, and so on, which

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6. The *Critical Review* (vol. 26, nos. 1–2 [2014]) recently ran a symposium on political epistemology, which treats this issue in far more detail.

7. By “return,” I mean “more closely mimicking past arrangements.” Normatively, whether one views this return as an improvement or not depends on one's definition of self-governance and on whether such governance is a desirable end, apart from whatever means it may serve.

8. Data from TreasuryDirect, the U.S. Treasury online interface (at <http://www.treasurydirect.gov>).

are probabilistic. As such, it is unclear for how much taxpayers are liable. Some researchers (e.g., Wagner 2015) suggest \$100 trillion is a reasonable estimate for the magnitude of unfunded liabilities, but Laurence Kotlikoff (2013) argues that it may be as high as \$205 trillion, or 10.3 percent of the estimated present discounted value of all future GDP.

The constitutional drift that resulted in the transformation of the American republic from a system of polycentric federalism to a system of monocentric nationalism created the environment out of which the current fiscal situation grew. In 1930, total government expenditure was 9.4 percent of GDP, of which 3 percent was central and 6.4 percent was state and local. By 2010, total government expenditure had grown to 38 percent of GDP, of which 24 percent was central and 14 percent was state and local (Wagner 2015, 2). Constitutional drift resulted not only in an absolute growth in the size of government but also in a transference of activity away from state and local governments to the central government. Indeed, it is likely that without the constitutional drift that resulted in an increase in the activities of the central government relative to state and local governments, such an absolute growth in size would not have been possible. When the *de facto* constitution limits government financing of state-supplied goods to smaller and more local governance units, these smaller units are incapable of imposing sufficient economic burden to finance this spending without driving the populace away to a less economically burdensome locality. This is the well-known story told by Charles Tiebout (1956): citizens “vote with their feet” to select the locality that provides their most-preferred mixture of state-supplied goods for a given tax bill. By relocating the locus of state-supplied goods provision from state and local government to the central government, constitutional drift inadvertently resulted in significantly higher exit costs—it is more costly for individuals to leave their country than to leave their city, county, or state—so, all else being equal, a larger fiscal burden becomes practicable.<sup>9</sup>

The fiscal situation is a predictable result of the creation of a fiscal commons (Wagner 2007, 2012a). The fiscal unit of government, or *fisc*, is stocked via taxation and depleted via ordinary expenditure. Political agents possess current control rights to the fisc but not future value rights—these rights are inalienable and inseparable into negotiable shares, as opposed to more familiar private corporate enterprises.<sup>10</sup> The obvious result is that the fisc is understocked and overdepleted, as is any common-pool resource in an environment without institutions that effectively check privately beneficial but socially costly behavior. This lack of institutional oversight in aligning

9. Space constraints prevent me from detailing additional examples. For analyses of other cases of constitutional drift, see Holcombe 2002; Wagner 2007, 2012a, 2012b; Greve 2012; Higgs [1987] 2013; and Epstein 2014.

10. It may be strange to think of governance in the same terms as a for-profit corporation, but the development of Western polities in an environment of realm ownership, as discussed in previous sections, shows that governance can be extremely profitable for holders of political property rights and that with the “correct” structure of political property rights, profit-accurring governance can also be in the interests of nonholders of political property rights.

incentives also explains why, from the perspective of holders of political power, public debt and unfunded liabilities are relied on more than taxation (Wagner 2015).

But incentive misalignment, a result of constitutional drift, is only part of the story. We also need to consider the information feedback properties of such a system. Abstracting from whether the massive increase in state-supplied goods and services by the central government is justified or desirable, we notice that in such a system there is only weak informational feedback for whether such a system improves governance from the perspective of the governed. How can honest and well-intentioned political agents tell whether the current tax bill, along with present and future indebtedness, is “worth it” to consumers of state-supplied goods and services? Emigration may be one measure, but it is inherently noisy. Individuals may emigrate for a number of reasons only tangentially related to the quality of governance. Given that many other polities are wrestling with their own commons problems in governance, so that leaving one polity for an unambiguously preferred polity is highly unlikely, the informational content of emigration statistics is weak. GDP is also unsatisfactory because it begs the following question: Today’s GDP can be increased by significant borrowing and spending by the public sector, but is this increase worth the future costs? Nor is electoral feedback sufficient given the voting public’s well-known political and economic ignorance (Caplan 2007; Somin 2013). Because each voter has essentially no chance at casting the decisive vote, voters rationally abstain from acquiring political-economic information that would improve the quality of their decisions. This seriously undermines what is popularly but mistakenly believed to be the sufficient guarantee of error correction in political processes.

Furthermore, even if it were decided that the present fiscal situation is undesirable, that it was reached in error, the lack of an information feedback system precludes the possibility of negative feedback dictating when the quality of fiscal decisions has improved. How do we “get out” of the current fiscal situation? “Raise taxes and cut spending” is a purely formal answer, which is to say not an answer at all. It is the same kind of statement as advising a private business to maximize profits “by setting marginal revenue equal to marginal cost”: it describes the properties of a specific set of decisions but provides no guidance for what the content of those decisions should be. It is unclear what information, if any, can be consulted to let political agents know how the mixture of state-supplied goods and services and their accompanying financing methods should be adjusted to restore fiscal balance while still governing in the interests of the governed.

The American republic was previously structured in a manner that provided much more useful informational feedback concerning the mixture of state-supplied goods and services and their financing methods. Unlike the European polities, the American republic was never a privately owned realm. That model was explicitly rejected at the “constitutional moments” that produced both the Articles of Confederation and the Constitution. The model chosen was instead one that maintained many of the favorable properties of European-style private governance but also left

room for genuine self-governance. Consider an ideal-typical governance arrangement in the early days of the American republic, especially before the election of President Andrew Jackson. Constitutional rules focused the majority of public activity at the local level. The local fisc was stocked via property taxes, and the franchise was restricted to property owners. In such a system, raising taxes to increase the provision of local-government-provided goods would be balanced against how these taxes would affect property values. If providing additional collective goods via collective action ultimately made the locality a more desirable place to live from the perspective of current and potential residents, property values would increase. If instead the additional provision of collective goods was not worth the expense in the eyes of current and potential residents, property values would decrease. Combined with the standard Tiebout (1956) mechanism, changes in property values provided those in a position to influence political decisions with reliable information as to the quality of those decisions at a moment in time and also provided guidance as to whether changes in the provision of collective goods by public means were improving throughout time. Polycentric federalism, with norms of localism and subsidiarity, combined with the particular public-finance and franchise arrangements described earlier, thus was able to approximate the market mechanisms in the form of negative feedback loops, which made European shareholder states effective governance providers (Olson 1982, 1993; Salter and Young 2016). But these checks on political predation did so in a way that preserved republican “liberty under law.” The American experiment is thus illuminating for implementing a blueprint for governance that was effective and adaptive in that it created the means for and made effective use of information-feedback systems but did not come with the baggage of a formalized sociopolitical hierarchy that was prevalent in Europe.

It was this negative-feedback system that constitutional drift ultimately destroyed. We thus have a complete theory of political dysfunction: Beginning with bargains among holders of political power (an issue of incentives), constitutional drift results in a state of affairs where the *de facto* political structure is no longer capable of generating information conducive to diagnosing political error (an issue of information) or of correcting error even if, perhaps due to a prior agreement on normative theory, holders of political power so desired. Because there is no feedback for error correction, there is no clear way the political process can revert to a more favorable arrangement for generating governance outcomes in the interests of both governors and governed.

## **Conclusion: Pathways toward a Constitution of Functional Politics**

I chose the fiscal commons as the example to illustrate political dysfunction in the American republic due to the inherent link between extensive goods and services

provision by the central government and the fiscal arrangements that make such provision possible. Although fiscal crisis is a salient example, it is not the only example that the theory of political dysfunction can explicate. In the interests of brevity, I do not explore others, but it does appear that considering modern political issues by the features they have in common—the existence of problems long decried by both the Right and the Left, combined with their puzzling persistence—yields patterns rendered intelligible by political dysfunction. Importantly, these patterns cannot be understood without a unified conception of how information problems relate to incentive problems. My theory provides this link, and although it is obviously not the sole explanation of political maladies, it is a particularly timely one.

I do not want to link my theory too closely to any particular normative framework, but I should state that the reality of political dysfunction via constitutional drift does not unambiguously support classical liberalism, although classical liberalism is frequently the normative governance philosophy of many scholars interested in promoting productive and protective governance while preventing predatory governance. Governance institutions in the West were for a time approximately classically liberal and proved unable to maintain themselves. Although they were not then dysfunctional, they fell prey to the constitutional drift that eventually resulted in political dysfunction. As such, it is reasonable to conclude that no school of thought currently has a “solution” to the problem of political dysfunction. Nonetheless, in closing, I feel it appropriate to make some brief remarks as to some potential avenues for undoing political dysfunction.

The overall process of political dysfunction is emergent. It is not reducible to the intentions of any one person or group acting within the political process; it is instead a result of the interaction between persons and groups. There is no direct and simple relationship between the “macro” phenomenon of political dysfunction and the “micro” phenomenon of individual or group decision making (Wagner 2012a, 2012b). Because constitutional drift began the process, it may appear as though subconstitutional “tweaks” to political processes will be insufficient to reverse it. Does this mean constitutional problems require constitutional solutions? It does appear that only by getting the metarules right (Buchanan and Brennan [1985] 2000) can the framework be laid for within-institution political action that may be resistant to political dysfunction.

Importantly, constitutional solutions do not have to be formal constitutional revisions. Any change in the state’s actual decision process qualifies. Following Buchanan (1959), proposing large-scale change within existing formal metarules, while securing the consent of all interested parties, is one possibility for informal-without-formal constitutional change. Consider the following thought experiment: Immediately close all U.S. departments except Defense, Interior, Justice, and Treasury. Continue to pay all former employees full salary and benefits, irrespective of their future employment status. In addition, transfer payments formerly under the now-defunct departments, such as Medicare and Medicaid, can be spun off into independently

administered agencies, as is done with Social Security, and continued. Such a proposal would, if the theory I have sketched is accurate, entail large wealth gains for the polity. Given existing political dysfunction, it follows that lack of access to knowledge-generating governance mechanisms is resulting in significant waste. But this waste lies in the mobilization of resources in an inefficient manner, not in the salaries and benefits paid to public employees and transfer recipients per se. As such, the real resources that were almost certainly inefficiently employed can now be put to use in processes with sufficient knowledge-generating mechanisms that they will at least tend toward efficiency. At the same time, former employees of these departments and transfer recipients do not lose because continuing to pay their salaries and benefits ensures that their command over resources is unchanged. This proposal obviously would change the state's actual decision-making procedure—surely these organizations do not operate in isolation but interact with each other in ways that influence not only the content but also the process of public decisions—without formal constitutional revision. It thus qualifies as *de facto* constitutional in a manner similar to (albeit in the opposite direction as) the New Deal.

My theory also draws attention to the merits of “designed” versus “grown” constitutions, suggesting a healthy degree of skepticism toward the former (e.g., Devins et al. 2015). The competitive federalism of the early American republic was perhaps the best-designed attempt to enable profitable collective action while preventing the predatory possibilities of the political commons. As we have seen, it proved quite vulnerable to cartel federalism when the ideological climate and the payoffs associated with particular political bargains shifted. Cartel federalism was not the result of usurpation by national political actors at the expense of local political actors; it was the result of voluntary bargains between these actors, whose private payoff came at the expense of political institutions capable of resisting dysfunction. It impels the question of how constitutional solutions can be reached when there is no guarantee that the constitutional structure in question will be self-enforcing. The question is merely a rephrasing of the dilemma Alexander Hamilton expressed in *Federalist No. 1*, but the framework within which the question arises may also suggest the beginnings of an answer.

Securing the benefits of the productive state while also restraining the predatory state requires (in part) setting the demarcation between supplying goods and services by private contract versus collective action. If political metarules begin with a list of what specific prerogatives are permitted to collective action, these metarules also embody an implicit assumption about where this demarcation lies. Using constitutions to coordinate around this kind of an equilibrium will be largely ineffective if that political equilibrium quickly becomes pressured by constitutional drift. If we instead treat the demarcation as something that must be *discovered* as part of the operation of the political process rather than decided upon *ex ante*, the imperative becomes to set the metarules such that they are most conducive to this discovery procedure. The political question shifts from “Ought the government to supply Good X?” to

“What political structure will result in the government supplying Good X if supplying Good X is productive or protective and not if supplying Good X entails predation?” Interestingly, the latter question is easier to answer because it limits itself to questions of procedures, which are more definite than questions of specific collective action because the particulars of time and place can plausibly be both conducive and unconducive to collective action concerning Good X. Constitutions that deemphasize specific rights permitted to collective action or reserved to private contract and that emphasize procedures for discovering which rights are best allocated to which provision method in a given context may be more compatible with the requirement that constitutions must be self-enforcing. Political operatives probably have less incentive to deviate on procedures than specific outcomes because outcomes are more likely to draw the support of or hostility of interest groups. Procedural focus at the constitutional level thus affords a degree of flexibility that constitutions mandating specific outcomes lack. If formal constitutions can facilitate coordination around a set of political metarules that are conducive to this discovery process, they can be significantly more helpful in securing lasting protective and productive outcomes and in avoiding predatory outcomes.

Thinking of the problem this way switches the focus from the incentive-aligning features of constitutions (preventing political predation), which traditionally receive the lion’s share of attention in political economy and philosophy, to the information-generating feature of constitutions (discovering the demarcation between private contract and collective action). Preventing undesirable constitutional drift, and hence political dysfunction, requires constitutions to be robust in both of these senses. If the *epistemic* feature of constitutions is sufficiently favorable, political agents are more likely to receive a sufficiently high payoff from directing their entrepreneurial activities to productive uses that they will refrain from making predatory procedural changes. Ascertaining which procedures create the most favorable epistemic environment while also remaining incentive compatible for holders of political power would be the focus of a research program oriented toward resisting political dysfunction. There is obviously no final solution to this problem—at some level, everything is endogenous, so everything can change—but some political orders are almost certainly more resistant to dysfunction than others. This resistance will almost certainly involve some institutional arrangement that curbs the effects of the political commons, from which political dysfunction proceeds.

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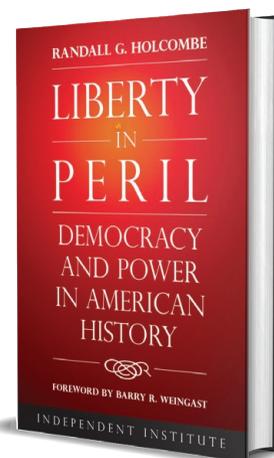
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