

Political and Economic Institutional Emergence

Defining rules politically poses the general question of which aspects of social ordering are tractable to public institutional resolution. But not all institutional creation is governed by the same set of emergent dynamics: self-interest subject to market discipline is quite different from self-interest subject to political discipline. Because of the structural way in which changes to political rules result in distributional consequences compared to the political status quo, their emergence is fundamentally governed by the dynamics of political self-interest. In contrast, while the public definition of economic institutions is also governed by political self-interest, emergent economic dynamics can redefine this political self-interest in socially beneficial ways. Through the analysis of the adoption of the Australian ballot and the general corporate form in the 19th Century US, I argue that the emergent dynamics governing public economic institutional change make it a process more tractable to constructivist influence. This is because dynamic economic forces (which operate through mutually beneficial exchange) can disrupt political economic equilibria. In contrast, constructivist political change is necessarily competitive, which makes such change less intrinsically related to longer-term benefits to social ordering.

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I. Introduction

The study of spontaneous orders and complex systems yields an important general principle: we can observe and understand phenomena that we nonetheless cannot deliberately influence (Hayek 1978; Buchanan 1982; North 1999). But if one posits a world that is not fully deterministic, then anyone seeking to understand the principles of beneficial institutional ordering must confront the question of the appropriate scope of what our institutions, both public and private, seek to address. What aspects of the economic and social orders that we seek to govern deliberately can we perceive yet not influence? The existence of this boundary between the spheres of deliberate influence and conscious recognition does not mean the task of scholars interested in political and economic governance is hopeless. Instead, it is through careful analysis of these complex processes of governance that we can learn more about normatively preferable principles of rule-based ordering (Buchanan 1975). Theorists must of necessity theorize about complex systems that they cannot fully perceive, let alone see in any physical sense (Wagner 2020b, 1). Clarifying the imprecise boundary of our sphere of deliberate¹ influence is a necessary component to identifying the institutions we should seek to devise deliberately, as well as those whose scope makes unintended consequences or ineffectuality far more likely. It is in this sense that I use constructivism in my analysis; our tendency to plan and then exert deliberate influence on the world is our attempt to “construct” the social and natural orders that surround us,² which frequently takes the form of public institutions to facilitate our collective political and economic action at scale. Our public institutional choices are some of our largest attempts to construct order, but not all public institutions are governed by the same set of emergent dynamics,³ which makes those dynamics further tractable to the analysis in which I engage here.

My analysis examines institutional change because systems of social ordering are necessarily dynamic, and the success of systems of governance is frequently a function of their ability to adapt in the face of unanticipated circumstances.⁴ Institutional change⁵ is, by definition, the result of deliberative choice, but the results of institutional change are frequently far more,

¹ Deliberate action is fundamentally individual. Yet collective action institutions fundamentally deliberate questions prior to their announcement and ensuing realization by individual action governed by the collective decisions. These collective action decision processes are thus deliberative, in furtherance of reaching a deliberate decision on the part of the collective. By deliberative, I thus mean those processes subject to rational human choice within defined social groups.

² The macroeconomy itself can be understood as an ecology of plans emanating from private and political organizations (Wagner 2020b, 11-16; 24-31).

³ By emergent, I mean the outcomes of a complex adaptive systems whose constituents parts and potential interactions among these parts outstrip the ability to fully describe, let alone reliably predict. Nonetheless, order can *emerge* within complex systems in ways that are tractable to our perception and (partial) identification. A partial characterization of the processes of emergence within a complex adaptive system can thus be understood as analyzing the *emergent dynamics* of a given set of distinguishable system outcomes.

⁴ The resilience of a given political system has been linked to its ability to coordinate (and facilitate credible commitment) in the face of unanticipated shocks (Broadberry and Wallis 2017). The endurance of a given constitution has been linked empirically to flexibility in its means of amendment (Elkins, Ginsburg and Melton 2009).

⁵ The economic institutions organizing markets include those defined publicly, which themselves greatly define transaction costs, and therefore directly limit any economic actor’s ability to calculate all relevant prices and choices (Piano and Rouanet 2018).

less, or different than that intended.⁶ This follows directly from the fact that institutions in any given broad social context are both a product and feature of a highly complex spontaneous order,⁷ which are greatly characterized by complicated intertemporal commitments of economic resources in the face of considerable downstream uncertainty. My analysis deepens the logical foundation for understanding different forms of public institutional change as either political or economic,⁸ and argues that deliberative public choices over political institutions are less likely to be linked to normatively preferable system-level features than deliberative public choices over economic institutions. Given the way in which economic institutional change is primarily governed by first-order economic incentives in its initial stages of emergence, as compared to political institutional change, which is governed by both political and economic incentives, my analysis here partly disentangles one aspect of the entangled relationship between political and economic organizations (Wagner 2016; Wagner 2020a).

Short-term political interest is required for political institutional change, but changes in economic institutions may occur despite short-term political losses. Political actors tend to act in their self-interest, conditional on their possibilities of reelection in democratic orders (Buchanan and Tullock 1962; Olson 1965; Buchanan 1975; Buchanan and Wagner 1977, chs. 7&8; Peltzman 1984). Institutions facilitating the pursuit of economic surplus are based in rights to property, exchange, and impartial administration. Political institutions, in contrast, define the rights and duties of citizens, but especially those surrounding the uniquely empowered political and judicial classes. Because of the structural way in which political rules result in distributional consequences compared to the status quo, their emergence is fundamentally governed by the dynamics of political self-interest. In contrast, while the public definition of economic institutions is also governed by political self-interest, economic dynamics can redefine this political self-interest in socially beneficial ways. Economic institutional change is thus a process more tractable to constructivist influence because dynamic economic forces (which operate through mutually beneficial exchange) can disrupt political economic equilibria. In contrast, constructivist political change is necessarily competitive, which makes such change less related to longer-term emergent benefits to social ordering. But to argue against formalized collective decision-making is to at some point argue against the benefits of public and private organizations at scale whose ubiquity instead suggests significant benefits. Rather than assailing the

⁶ Unlike social norms, which individual members of society take as fixed like relative prices, institutions are more like an announcement of intent to treat an individual in a certain way if certain conditions are met (or not met); however, the application of institutions is intrinsically less certain than the application of norms (Wallis 2020).

⁷ The effect of the institutions of a given organization is a product of their context, which per polycentricity includes the set of organizations (and associated subsidiary institutions) that they include, the set of organizations of which they are part, and the set of organizations with which they compete (Ostrom 2010).

⁸ Despite the relationship between political and economic institutions being one long identified as crucial to social outcomes (Hayek 1944), the nature of this dynamic has remained one of perennial interest to institutional scholars (Hayek 1979, 105; Weingast 1995; Murmann 2003; North, Wallis and Weingast 2010; Lawson and Clark 2010), as well as economics scholars more broadly (Acemoglu and Robinson 2020), including those drawing upon the Austrian tradition (Holcombe 2018; Holcombe 2020). My unit of analysis, the output of public institutional processes, also avoids the entangled political economy critique surrounding the ultimately inseparable nature of the political and economic realms in a given society (Wagner 2016; Wagner 2020a). Importantly, the emergent process governing the public definition of economic institutions provides a specific link between the political and economic spheres; as such, interrogating it here furthers the project of better defining an entangled political economy, which recognizes these two realms are never fully separable (Wagner 2007, 11-23; Wagner 2016; Wagner 2020a).

foundations of collective action writ large, the argumentation herein derives from the well-developed distinctions between economic and political rules, as applied to the process of public institutional change.

In section II, I draw upon economic theory to develop the following theoretical foundations to my analysis. While the political system is governed by public choice calculations in changes to both economic and political institutions, in cases of changes to economic institutions, economic changes (and economic interest writ large) can govern public institutional change itself. With economic institutional change, this is frequently an input cost for different groups in society associated with achieving a more efficient form of economic production, which only subsequently becomes formalized into public institutions. With political institutional change, the outcome is the new competitive equilibrium for the “industry”. Therefore, even if political self-interest is an unavoidable determinant of public institutional change, political economic forces can result in beneficial change to public economic institutions. Both types of change, like all public institutional change, can create winners and losers. However, changes in political rules do so by default, due to the very structure and substance of collective decision-making. Finally, the process of jurisdictional competition is likely to lead to the spread of both economically and politically beneficial institutions, but the emergent dynamics of these two institutions suggest public economic institutions are more closely tethered to social-welfare-enhancing outcomes.

In Section III, I examine the emergence of the Australian ballot and the general corporate form in the 19th Century US to illuminate these theoretical distinctions between economic and political institutional change. In Section IV, I discuss how these historical cases of public institutional change illustrate my argument that deliberative economic institutional change is more likely to result in normatively preferable outcomes in a given social order. Section V concludes.

II. The Unavoidable Challenges of Constructing Institutions, both Political and Economic

Collective decision-making requires a process defined in secondary rules (i.e., intentionally-devised rules, or institutions), and this process requires the expenditure of costs in its definition, execution, and interpretation. To have sustained collective decision-making, a given organization must expend labor and resources on governance; this makes the deliberative definition of institutions inevitable in public and private organizations above a certain size. In the theory of the firm, these are some of the most integral of the classic costs of bureaucracy, which at some point, become so large that they limit the size of any given firm (Coase, 1937; Moe 1984; Sah & Stiglitz 1985). In the case of public governance, the legislative, judicial, and executive functions of collective decision-making are typically specified by a constitution (DiZerega 1989; Alder 2002; Alston 2019). This indicates that both public and private organizations cannot avoid institutions as a means of collectively acting at scale. While organizations provide immense benefits to societies, such organizations intrinsically require “political” rules, the definition and maintenance of which is costly. The definition of organizational units of collective decision-making, and their subsequent institutional output,

poses representative losses⁹ and efficiency losses,¹⁰ whereas the default rules operating at the level of individual or organizational economic action (although themselves the result of deliberate human action) by design better accommodate the wide range of human behavior, which in turn reduces these losses on both representative and fit dimensions.¹¹ Despite public institutions tending to pose greater costs to those governed by them, these institutions can themselves vary as to the extent to which they can accommodate the uncertainty of the interaction of human agents at constantly increasing scale and complexity. Given this, my analysis here relies on the distinction between those public institutions governing economic conduct as opposed to political conduct.

Institutional change can be understood as both a deliberative and spontaneous process, given the overarching recognition of spontaneous, or complex, systems over which we have imperfect control (Hayek 1973; Buchanan 1982; North 1999; Scott 2020). But rules that facilitate socially beneficial outcomes may not be beyond our recognition, even if we cannot always construct their emergence (Hayek 1973; Hayek 1978, 3; Potts 2013; Langlois 2024).¹² Once institutional principles have been identified, this poses an interesting paradox as to the possibility of replicating beneficial institutional ordering elsewhere, in advance of the spontaneous emergence of a better set of economic and political institutions.¹³ We are certainly inclined to overestimate our understanding of the forces that gave birth to an outcome over which we have a normative preference,¹⁴ which has humbling implications for those seeking to study or engage in the costly process of deliberative rule change. Hayek's consideration of the

⁹ Any political system is imperfectly representative compared to what it would take to truly represent the governance preferences of the entirety of the polity (Besley and Coate 1998), which are more likely to be expressed along the margins of individual choice than the deeply limited means of political influence for the average economic actor in society.

¹⁰ Because formally articulated rules are always over and under inclusive, no institution will ever do exactly what its devisers want it to (Sunstein 1995), especially as and when its prescriptions bind against individual action that would otherwise be occurring.

¹¹ The public unit of collective decision-making, the state, involves a level of centralization of authority over individuals and uniform applicability of its institutions to constituents in ways that far outstrip that of private organizations, which means these costs tend to be significantly magnified the more authority is centralized and the larger the group to which this authority applies. These losses are closely related to the need for process and local adaptability in the face of unforeseen circumstances that become increasingly hard to accommodate as the unit of social governance increases in scale or scope (Scott 2020).

¹² We may at times observe the rules governing complex systems or spontaneous orders, all though at best incompletely. As an example, the price system tends to obey a set of well-understood rules that we nonetheless cannot ourselves easily improve upon. These "rules" are not institutions, which by definition are the subject of deliberate human decision-making (North 2016; Wallis 2020). This boundary creates a major tension when it comes to the institutions we *do* choose to devise within our social groups; ill-chosen institutions can target features of complex orders that the tools of governance are ill-suited or entirely prevented from reaching (Ostrom 2009).

¹³ Too much of a constructivist perspective on this front is subject to the critique that the endogenous emergence of social rules (norms and institutions) governing complex social processes is not tractable to an "add institutions and stir" approach (McCloskey 2016).

¹⁴ James Buchanan argues how the features most of salience to us in a complex system will be the ones of normative interest to us, which makes us tend to discretize these outcomes from the system of which they are an inextricable part. We observe outcomes of a system as if they are separable from the system itself, but by the time we've sat down to write about those outcomes, the system has already changed, and at least some outcomes are different. The order in which scholars of governance are interested is defined in the process of its emergence – order is observable, but vexingly inseparable from the ongoing process that birthed the observation in whatever period we happen to make it or care about it. (Buchanan 1982).

study of social institutions modeled them as an emergent evolutionary process based in learning which institutional solutions maximize benefits and minimize costs in terms of realization of their purpose for a given social unit (Moroni 2014). But Hayek was also motivated in his pursuit of a socially beneficial institutional framework by the social conditions of his time (Boettke 2018, 6-9), which suggests that unless institutional change is always and everywhere a random walk from the perspective of the governed, the identification of beneficial principles of institutional ordering has normative value, even to scholars who were uncommonly cognizant of the limitations of deliberative institutional ordering.¹⁵ Furthermore, numerous scholars approaching the deep structural determinants of social and economic orders have necessarily considered the preconditions for the emergence of normatively preferable public institutional ordering.¹⁶ My analysis accordingly draws upon the traditions of Austrian and institutional economics to identify aspects of the emergent process of public institutions governing economic and political behavior that clarify what we can expect from the ongoing social choices surrounding these institutions.

Articulation of policy in the face of uncertainty is an essential component of governance, whether economic or political.¹⁷ Because of the non-ergodic nature of the world (North 1999), we cannot anticipate all downstream consequences (Williamson 1993). Being subject to an order whose forces we have limited (or imperfect) control over defines many of the institutional structures that surround us (Pennington 2011; Pennington 2017). The ongoing need for private and public dispute resolution is in great part a testament to the incompleteness of our institutional remedies. Still, certain remedies require affirmative expenditure on the part of one or both

¹⁵ Indeed, much of Hayek's career can be understood as motivated by correcting bad thinking in institutional design on the part of those with overly ambitious constructivist tendencies (1944; 1977; 1988) or by providing an affirmative vision for normatively preferable institutional frameworks (1979, 105-152).

¹⁶ Notably, a variety of foundational thinkers thought aspects of market processes that resulted in socially beneficial outcomes were not guaranteed to be normatively preferable in the medium to long term absent some other framework, be it moral (Smith 1822) or institutional (Hayek 1973; Hayek 1988). Smith and Hayek, whether advocating for the importance of moral rules of conduct or an institutional framework, posited that the larger set of rules within which economic conduct was occurring were a significant determinant of whether such conduct was ultimately socially beneficial. Other thinkers considering the preconditions of market transitions that led to the Great Divergence attribute a deep structural role for culture (McCloskey 2016) or sufficient political competition among governments that created the institutional conditions under which technological progress could flourish (Mokyr 2016). Whether one considers the process by which one influences morals (Smith 1822), institutions (Hayek 1988), limited government as a cultural value (Hayek 1978, 3) individual dignity as a cultural value (McCloskey 2016), or levels of jurisdictional competition (Mokyr 2016), these all at some level distill into the question associated with development of better rules. While one should not believe they can constructively influence the entire culture of the society in which they exist, any given individual's behavior is part of the large aggregate of behavior expressing preferences surrounding individual behavior (norms), as well as broad principles of social ordering writ large (culture). Moreover, for smaller units of social ordering than the nation, an influence on their norms and culture becomes increasingly possible. Institutions, however, pose a direct possibility for influence by design, although the wisdom of expending effort to influence institutions certainly changes depending on the size of the unit of social ordering (Caplan 2011).

¹⁷ Construed too broadly, the Austrian critique of constructivism could be used to argue against economic exchange over time, because this relies on the "constructivist" institutional artifice of contract. This quite evidently was not the perspective of thinkers like Hayek, who had much more faith in the decentralized incremental just-in-time adjustments that market institutions facilitate. This is because skepticism of central planning should not be construed as coequal with a skepticism of planning writ large. Market processes like investment and credit are necessarily intertemporal, but any exchange of labor for wages is necessarily so, too (Allen et al 2014, ix-xii).

parties, as well as the government, as compared to others. Namely, economic institutions like property and contract have an intrinsic tendency to “let sleeping dogs lie” – changes in circumstances such as the incidence of accidental or intentional harm or changes in valuation as to the underlying rights at issue can “force” the application of a given law or policy, but the rule itself doesn’t require activation because doing so tends to be costly to both parties (Arruñada 2012). The existence of a given default rule, or the coordination of two parties’ behavior in the shadow of what they expect will occur before a judicial actor, means changing any given default rule poses distributional and allocational consequences precisely because any given rule affects these parties’ behavior in equilibrium and because transaction costs are positive (Coase 1960).¹⁸ Similarly, changes in the collective decision-making apparatus of governance itself pose distributional and allocational consequences by their very nature, but the processes through which these institutional changes proceed are distinct from one another, a recognition that motivates my analysis throughout.

Furthermore, participation in the economic sphere is, in part because of its direct connection to sustaining oneself, necessarily more egalitarian in terms of access¹⁹ than the political system (Holcombe 2020, 21-68), especially at the national political level in most countries. While my analysis here is most directly concerned with the public definition of economic and political institutions (which subjects them both to the critique surrounding power inequalities effectively preventing access to the definition of public institutions), there are nonetheless reasons to be more optimistic about the definition of public economic institutions. This is because such institutions can reflect individual economic choices which eventually alter, at times marginally and at times substantially, the public institutions governing these choices. Put differently, economic power can influence and even check political power in socially beneficial ways (Holcombe 2020, 149-165). Of course, this discussion throughout presumes the existence of a market economy, which is itself subject to some level of scholarly (and real-world) contestation (Pennington 2017). My analysis complements both the general analysis of public institutional systems that permit market processes as being normatively preferable (Pennington 2011; Pennington 2017), as well as the more thorough granular analysis of the distinction between the realms of economic and political ordering through the lens of power dynamics (Holcombe 2020), by distinguishing the comparative emergence of specific public institutions governing economic and political processes, respectively.

There are a number of ways in which political institutions (and alterations thereto) are more costly than economic institutions. First, rules that operate by design are more contentious than rules that operate by default. Economic institutions tend to operate as default rules, whereas

¹⁸ Interestingly, the Coase theorem is facially silent as to the distributional implications of transaction costs (or their absence) (Coase 1937, 1960; Buchanan 1973, 589 n 10). But because our institutional remedies are themselves costly, the calculation of the social welfare implications of institutional change is a more complex exercise than many assume.

¹⁹ Nonetheless, one benefit of public institutional definition has been argued to be comparatively egalitarian access, which is subject to a number of critiques that are discussed in Section IV. Certainly as compared to disparities in bargaining positions resultant from concentrations of economic power, one’s right to vote is much more accessible, but the extent to which this vote corresponds to true influence over the political system has been subjected to stiff theoretical and empirical criticism (Caplan 2011). In contrast, one’s ability to choose a new economic plan, whether in terms of employer, industry, or choice to work at all (given sufficient savings) is orders of magnitude larger than one’s ability to choose the political system governing them.

political institutions are almost self-executing because of the extent to which participants depend on the ongoing rents associated with doing so (Arthur 1988). Therefore, changes in political institutions necessarily result in distributional and allocational consequences surrounding the ongoing exercise of political power, including to parties not directly vying for the change. Second, political change is mechanically more costly than economic change.²⁰ Furthermore, political transitions are themselves costly, requiring all economic and political participants along the changed margins of the law to adjust to new equilibrium behavior (Kaplow 1986; Levmore 1999; Shavell 2008), which may itself result in additional political conflict surrounding any potential institutional change. In contrast, economic change, when surrounding the voluntary use of property or assent of contracting parties, indicates that the relevant economic actors consider the costs of the change to exceed the benefits. Thus, prior to a discrete economic choice receiving public institutional definition (or reinforcement through jurisprudence), it is likely to have been subject to the cost-benefit analysis of market participants numerous times over in order for it to rise to the level of public institutional definition.

However, political rules, given their very ubiquity in structuring collective decision-making processes for private and public organizations alike, suffer from an even greater structural defect when it comes to the process that yields them. Political processes, although perhaps not invariably zero-sum, create a much greater potential for strategic gains – logrolling over substantive political outcomes may be a form of reducing political transaction costs (Acemoglu 2003; Parisi 2003; Galiani et al 2014), but with respect to the political rules themselves, it is rare that that purely welfare-enhancing policy change takes place.²¹ However much each party cloaks its proposals as being in the public interest, the very existence of such heated disagreement as to exactly what is in the public interest indicates the fact that political change inevitably creates winners and losers as compared to the status quo (Kaplow 1986; Shavell 2003). Even the most fundamental components of governance (rules regarding delegated decision-making & implementation and interpretation of collective decisions) carry intrinsic costs as compared to obtaining every group member’s input surrounding every decision that structures and carries out the “will of the group” (Alston et al 2021).

This is not to argue that the benefits of collective decision-making do not exceed the costs, but is instead merely to point out how the inevitability of political rules changes the incentive structure of both voters and politicians. This means the calculus for political institution-making is not: should this cost be incurred? Instead, it becomes: given that this cost will be incurred, which institutional specification or change maximizes my political and economic interest? Put differently, even those who wish to preserve the political institutional status quo must expend costly effort to prevent change. The dominant political and economic elite each have strong (and intertwined) incentives to protect their rents from being disrupted by

²⁰ Changes to economic institutions may emerge endogenously as a result of the contractual choices of economic actors, but changes to political institutions by definition require the affirmative use of the public collective decision-making apparatus.

²¹ The scholarship (and contentious political debates) surrounding gerrymandering provide a stark example of this tendency. Contrasted with the ideal definition of political boundaries (Martin 2018), these debates indicate how closely tied this type of institutional change is to short-term political self-interest as opposed to social welfare maximization.

institutional change,²² but the economic sector (due to the engine of innovation) can destabilize the dominant political economic equilibrium (Thomas 2009). In contrast, political institutional change tends to be directly entrenching for the incumbent parties, a point I draw out through my analysis of the Australian ballot subsequently.

If a given political rule change has to operate in the interests of a majority political coalition, then this very margin creates an immediate threshold for political change that directs participants' incentives in problematic ways. Uncertainty, risk aversion, and time discounting all point toward the realization of political (and political economic) gains in the short term before considering benefits accruing to all members of a given polity as a result of political rule changes (DiZerega 1989, 10; Alesina & Tabellini 2007; Alesina & Tabellini 2008; McKenzie 2016). This should not be read to argue that political rules are intrinsically inferior. Many such rules are inextricable from the processes of collective action at the scale and complexity that modern governance entails.²³ Instead, it is to argue that the forces governing the emergence of these rules should make individuals more wary of the process of political institutional change than economic institutional change. Nonetheless, there is ample reason to understand jurisdictional competition as mitigating the inequality or poor representativeness of political rules (Hirschman 1970; Somin 2020), and indeed, as facilitating beneficial processes of technological and economic change (Mokyr 2016). The threat or emergence of better institutions in competing jurisdictions may itself discipline institutional choice within a given jurisdiction, especially if a failure to update institutions carries significant economic costs. But this very competition suggests the massive reduction in the possible dimensionality of political institutional choice for individual actors, as compared to that available economically. The uses of our labor and resources within the scope of property and contract rules are nearly infinite in comparison to the set of jurisdictions that individual constituents can feasibly choose from among.²⁴

From the very way in which political rules apply, changes to these rules force the question of allocational and distributional changes in ways that economic rules do not necessarily create.²⁵ Demsetz's seminal characterization of property rights notes how they coevolve with relative prices – the more valuable the underlying assets in question, the more

²² This concept is defined as “political capitalism”, the theoretical dynamics of which are first developed (Holcombe 2018), before arguing how the economic sphere presents a range of choice that the political realm denies most individuals in society (Holcombe 2020).

²³ At a minimum, the ubiquity of private associational forms suggests fundamental economizing benefits to the forms themselves (Coase 1937). Moreover, many of the functions that public governance currently involves, like adjudicating crimes, harms we inadvertently cause one another, and disputes surrounding our commitments to one another, would likely occur in more anarchist contexts too. Although David Friedman argues for a world in which voluntary assent to organizational forms is the core organizing principle, his “anarchism” does not lack rules surrounding contract, tort, and crime. Instead, his belief is that the process and substance of these overarching areas of rules governing our conduct toward and around one another would be more beneficially based around private (voluntary) systems of ordering (Friedman 2000).

²⁴ When one considers the actual flows of refugees internationally, as well as the scope of subnational units available to any given individual, the number of jurisdictions that are comparatively desirable, let alone economically feasible for any given individual to reach, is much lower than the number of these jurisdictional units in existence.

²⁵ Of course, the political system can make incursions on the domain of economic ordering in a variety of distortionary and often destructive ways. My argument is that the rules that emerge from a given economic system are more likely to reflect welfare-enhancing benefits to the complex spontaneous order that is a given society and its economy.

well-specified and enforced a set of property rights governing the assets will tend to be (1967).²⁶ Thus, property institutions tend to adjust incrementally among individual owners as a function of the relative prices of the assets in question. A political intervention requires a more final definition of the rights in question, which itself may create conflict where none existed previously.²⁷ Therefore, the emergence of economic institutions (when publicly defined) is disciplined by two forces, political rents and economic rents, where political institutions' emergence proceeds through zero-sum political rents almost exclusively. In some instances, like the context of the corporate form below, economic gains can be an input to overcoming the unavoidable costs of political change. This implies a presumption in favor of our comparative ability to identify through reason the set of economic institutions whose benefits are revealed ex-post through their incremental definition by market participants.

Another fundamental institution surrounds impartial treatment before the law, ensuring that enforcement does not hinge on the identity of individuals who appear before a court (Wallis 2011; Wallis 2020).²⁸ The integral nature of the rule of law to economic development hinges on the way in which this institution acts as a scalar mechanism (Alston et al 2018). If parties to a potential exchange (especially if complex or over a lengthy period) do not know one another personally, their willingness to tie up productive assets for an extended period is fundamentally a function of the extent to which the courts will reliably enforce the terms specified in a given contract (de Soto 2000). The more rule enforcement in a given society is personal (i.e., it hinges on the identity of one or both parties), then the more uncertainty increases as to the application of default rules in the event the arrangement breaks down due to unforeseen circumstances or opportunistic behavior. The highly personal enforcement of law not only encourages opportunistic behavior on the part of the more powerful party but either prevents assent to the

²⁶ A simple example serves to emphasize the relevance of Demsetz's characterization of property institutions to my analysis here. Two farmers who work adjoining fields each have certainty as to their ownership of the land they work for productive gain. Dividing their fields is a natural boundary, a seasonally meandering runoff ditch of marginal economic value. While both farmers' rights to their economically valuable land are well-settled, the exact location of the boundary of their respective land remains unspecified, because the benefit to either farmer of additional definition does not exceed the transaction costs of doing so. If instead a local government decides it wants to decide with finality where the boundary lies, then the costs of additional definition are sunk by administrative fiat: whether the farmers are forced to incur the costs themselves, or if the government is funding the additional definition, forcing the issue provokes the costly stance of settling rules politically with finality. In such a context, each farmer has the incentive to maximize the land they own if the costs of the additional definition required to do so are sunk. In contrast, if valuable minerals were discovered in the otherwise marginal land, the farmers might well dispute with one another, but this is to allocate the additional discovered value in a Demsetzian sense. Economic institutional rules tend to change when underlying relative prices make it efficient to do so, but political institutional rules do not emerge by the same efficiency-enhancing calculus.

²⁷ This has been a salient critique of the efforts to better specify and enforce systems of land rights in developing nations (Arruñada 2012). Hernando de Soto made famous the argument that institutions like property rights are a critical precondition to economic development (de Soto 2000), but property rights coevolve with investment, such that the likelihood that any given titling program is going to replicate the marginal definition that would have occurred spontaneously is quite low. In such cases, then, well-intended political programs carry the potential to provoke conflict (Lawry et al 2014) and are often themselves inextricable from a larger electoral political economy (Albertus 2021).

²⁸ Of course, no nation has achieved perfect impartiality in its legal and political processes, but the rule of law is nonetheless well recognized as an institution fundamental to the levels of prosperity enjoyed by modern market economics. Relatedly, some nations are understood to enjoy considerably more of this institution in a relative sense (Ginsburg 2018; Gutmann and Voigt 2018).

arrangement on the part of the less powerful party due to this opportunistic behavior or encourages the less powerful party to expend resources in hedging against this outcome. The problem thus becomes reciprocal, for a more powerful party cannot credibly bind their hands in a system where rule enforcement is personal and may themselves have to expend resources to more credibly commit than would otherwise possible.²⁹ Moreover, the rule of law has been argued to have considerable political benefits as well, due to the societal importance of credible commitment adhere to rules of political procedures and the outcomes of collective decision-making processes including elections (Broadberry and Wallis 2017; Wallis 2020).

All of this serves as an argument for how the rule of law provides economic and political benefits at a fundamental structural level surrounding commitment credibility. Nonetheless, this logic does not explain the emergence of the rule of law, because that requires a self-interested explanation with respect to the incentives of the dominant political coalition in a nation (Wallis 2020). Given the uncertain nature of the world, moving from a world where the powerful can act with impunity, to where they are increasingly bound by their contractual and political commitments specifically and the rules of society more generally, only provides certainty that the rules will be applied against the interest of the powerful in a future period. For what benefit, then, would the powerful ever relinquish impunity? The answer lies in the paradox of privilege: the powerful benefit in terms of the scope and magnitude of voluntary commitments that they are able to make under a system that enforces commitments impartially.³⁰ This underlying insight about the specific benefits of commitment credibility to the more powerful necessarily extends to the political realm as well (North, Wallis and Weingast 2009), which makes commitment credibility a critical input to whether or not a given political system can withstand unexpected shocks that disrupt rents (Wallis and Broadberry 2017). Despite these benefits, though, the historical record does not suggest that movement toward the rule of law as an institutional restraint on the government and the powerful in society was motivated by the realization of these longer-term benefits.

These two examples of the incremental nature of the definition of property rights and the self-interested emergence of the rule of law serve to emphasize the distinction I draw in this section between the emergence of economic and political institutions. Incremental definition of economic rules tends to occur endogenously as (expected or actual) changes in relative prices drive the further definition of the boundaries of individuals' economic allocations, which may in

²⁹ This defect in commitment credibility has been termed the “paradox of privilege” in that the more powerful parties are constrained in their ability to engage in the type of complex intertemporal commitments that are the lifeblood of modern market economies (Wallis 2020). None of this is to argue that such commitments are impossible absent impersonal rule enforcement – instead, less such commitments occur on the margin, and those that do are more costly to maintain over time because of the dynamics discussed here.

³⁰ Indeed, one of the first examples of an absolute sovereign making his commitments binding occurred when the King of England could not obtain financing to continue waging war. Having defaulted on debts with European moneylenders, the only source of potential finance was the nobility of England itself. Understandably, though, the nobility was concerned with the likelihood that the King would repay debts once they were incurred, but they nonetheless wanted to prevail against the French in the ongoing war. This led to the development of a set of arrangements where Parliament could terminate ongoing funding for the Crown at predetermined periods (Calomiris and Haber 2015). For the first time, the King's commitments were credible because it was in the interest of both parties to the arrangement to make them so, a short-term institutional fix that became a permanent institutional fixture. John Wallis provides a much more robust theoretical framework developing the logic spelled out here (Wallis 2020).

time alter the dominant political economic equilibrium, leading to public institutional definition of these incremental adjustments among economic actors. This process may be facilitated by jurisdictional competition, as the benefits of economic institutional change in one jurisdiction foment such change due to potential political economic losses due to not updating public economic institutions. In contrast, changes in political institutions cannot proceed absent the assent of the dominant political coalition. I have deliberately chosen institutions that are fundamental as motivating examples here to emphasize the distinction between the emergent properties of economic and political institutions. In the following section, I explore two additional institutional changes in greater detail to further develop this distinction in forms of rule-based social ordering.

III. Lessons from institutional changes in 19th Century US: Ballots and Corporations

The emergence of rules governing economic and political activity provides a useful comparative context in which to examine the arguments I derive in the preceding section. State-level institutional variation in the United States during the latter half of the 19th Century has provided economic and political historians with considerable analytical fodder, including the specific cases of the emergence of the Australian ballot and the corporate form. In the following subsections I detail how the distinctive emergence and downstream effects of the two institutions correspond to the theoretical distinctions between economic and political institutions that animate my discussion throughout.

A. Adoption and Refinement of the Australian ballot

To argue that the Australian ballot was a normatively superior institution in a relative or absolute sense would be beyond the scope of this analysis, which focuses on the process by which the institution emerged and was subsequently adopted and refined across the United States from 1888-1913 (Alston et al 2018, 197-205). At its most basic, the Australian ballot combines two electoral features: secret voting and an official (typically state-printed) ballot. The institution is argued to facilitate electoral transparency, and limits the ability of the politically or economically powerful to subvert electoral outcomes as readily – both are outcomes that operate as constraints on undue concentrations of political power.³¹ One of the principal benefits of the secret, state-printed ballot is argued to be the extent to which it reduces vote-buying. While the benefits of a political system that better facilitates transactions among citizens and politicians are

³¹ The secret ballot is considered an integral right as pertains to electoral processes. It appears in international human rights covenants, as well as scholarly analyses of the core institutions of democratic systems (Aidt and Jensen 2017; Teorell et al 2017; Elklit and Maley 2019). Furthermore, from an evolutionary perspective, the institution has spread around the world, albeit its implementation is much more reliable in some places than others. This is not to endorse either human rights covenants in terms of their application, nor democratic political systems as intrinsically superior to all other forms of political ordering. The near-ubiquity of representative forms of democratic ordering (and their associated tradeoffs with respect to party composition and representativeness of electoral outcomes) means that democracy as a principle of political institutional ordering trades off with other institutional principles like the reduced costs of delegated decision-making for large groups, or the desire to restrain the exercise of government or majoritarian power as against less powerful or numerous social subgroups. Put differently, pure democracy is weakened by both the institution of delegated decision-making and constitutional limits as to government action empowered by such decision-making.

certainly debated,³² advocates of the benefits of markets have long identified the political risk associated with sustained periods of market success. Rather than use profits to compensate shareholders/owners, or improve productive capacity or quality, a wealthy individual or organization can increase expected returns in the future by influencing the political system (Holcombe 2018). A reduction in vote-buying accordingly restricts the exercise of economic power in a given electoral context, as well other forms of undue influence from employers or creditors more generally.³³

The Australian ballot posed a significant change to the status quo electoral institutions that emerged in the first decades of the nation's political development. Prior to its inception, each party had the onus of printing its own ballot on election day, which an individual would then obtain from party representatives, and submit into the official ballot box, typically in full sight of the rest of the community (Alston et al 2018 197-198). This meant minority parties could form relatively quickly to contest elections over special issues. Theoretically, the effect of the adoption of the Australian ballot on minority parties was ambiguous. On the one hand, the Australian ballot reduced the costs of publicly signaling one's vote for an unpopular party. It similarly reduced the costs associated with voting for candidates representing several different parties,³⁴ a phenomenon which has been empirically linked to electoral outcomes in the United States following the adoption of the institution (Rusk 1970). Indeed, arguments made in favor of the Australian ballot in states considering the change included that the electoral change would benefit independent and minority parties (Evans 1917, 24-25). However, having a single official ballot posed two additional questions that required resolution: (i) what did it take to appear on the official state-printed ballot?; and (ii) could candidates represent several parties on the official ballot? Therefore, the specific institutional definition of the ballot presented at least two margins on which majority political parties could increase the costs of appearing on the ballot or seriously contesting in a future election.³⁵

In the case of the Australian ballot, specific institutional choices (as a function of institutional intent) resulted in either "party column" or "office-bloc" ballots, each of which initially presented a viable means to victory for minority parties that were able to overcome the costs associated with appearing on the official state ballot.³⁶ Fusion candidacies, where a single

³² Buchanan provides a relatively early synthesis of transactional theories of political decision-making in light of the Coase Theorem (1973), which has since been formalized (Parisi 1995), as well as evaluated in variety of theoretical and real-world contexts (Acemoglu 2003; Galiani et al 2014)

³³ This has been argued to have specifically been the case in the United States. By an analysis that occurred in the decades following enactment of the Australian ballot, "machine politicians who profited by the vices of the old system" were among the principal opponents to the enactment of Australian ballot reforms. (Evans 1917, 20).

³⁴ A more recent empirical study found that homogenization of ballots associated with electronic voting led to a significant increase in split ticket voting relative to comparable jurisdictions that did not adopt the institutional change (Barnes et al 2017).

³⁵ An additional "benefit" from the perspective of incumbent political parties surrounded anticipated reductions in voter turnout or impact in districts where literacy was low among certain voter groups. This has been argued to have specifically led to the passage of Australian ballot legislation in southern states as a means of disenfranchising African-American voters (Guenther 2016).

³⁶ This variance in choice displays the difficulty in ascertaining the intent behind a given institution's emergence. In essence, we observe systemic consequences of the rule of law that make us normatively value the institution. However, these consequences may not have been what motivated the institution's emergence, as I discuss in the preceding section.

candidate represented more than one party, involved the candidate appearing more than once on a party column ballot, or having more than one party follow their name on an office-bloc ballot. Shortly after the passage of Australian ballot legislation in a number of states, incumbent parties (especially Republicans) began banning the ability of candidates to represent more than one party, which significantly reduced the ability of minority parties to contest elections, a move which has been credited with transforming the United States into a two party system once and for all (Alston et al 2018). These effects were not perfectly determinative of outcomes, for minority parties other than Republican and Democrat persisted on the local level well into the 20th Century, although the last minority candidate to contest the presidency was in 1896, a transition frequently linked to the convergence to the two-party system the US has today (Walker 2005). Nonetheless, the core lesson is that fusion candidacies were banned from appearing in both ballot formats over the course of the ensuing decade, due to the political advantages the incumbent party perceived to doing so (Alston et al 2018, 200-204).

Although opposition to the Australian ballot posed a number of valid theoretical arguments as to the negative effect on electoral outcomes that would result, much of the scholarship in the ensuing decades argued that these reasons were merely a front for the machine politicians and other beneficiaries of the status quo set of political institutions (Evans 1917; Ware 2000, 14-15; Moskowitz & Rogowski 2019, 6). This scholarship tends to paint institutional change in a dichotomous light as between the status quo and the “reformer” (Ware 2000), positing that the emergence of the ballot institution was for socially beneficial reasons (Fortier & Ornstein 2003). Other scholars that have not approached the question of short-term political motives have attributed a variety of benefits to the institution over the medium to long term (Rusk 1970; Kernell 1977; Katz and Sala 1996), an outcome consistent with the widespread recognition of the importance of secret voting institutions.

However, a number of subsequent studies instead found outcomes consistent with the adoption of the Australian ballot being more likely in contexts where its adoption operated to the benefit of incumbent political parties. A variety of political incentives have been identified as associated with the move to the Australian ballot, including greater party electoral control of congressional elections (Walker 2005, 218, 234) and committee assignments (Katz and Sala 1996) as well as reducing the volatility associated with minority parties either solely or through fusion contesting an election on a single polemic issues (Walker 2005, 222, 232). The electoral change has been attributed with changing candidates’ decisions whether to run again, as well as their votes on particularly decisive issues (Carson and Roberts 2005, 477; Carson and Sievert 2015), which indicates that the ballot had near-term political consequences for politicians.³⁷ Furthermore, contemporaneous observers concerned about the influence of machine politics lamented the fact that the institution had none of its predicted beneficial effects, an observation

³⁷ A theoretical argument motivated by the institutional change surrounds how incumbents have also been argued to be more constrained in terms of their ability to engage in vote-buying (Heckelman & Yates 2002); by reducing the ability of minority parties to buy votes, incumbents then have a much greater advantage in terms of public spending in advance of the next election to influence voters on the margin. Although to my knowledge there are no empirical studies of trends in public spending in pre-election years during the period in question, the extent of empirical evidence from modern contexts suggests that the incumbency spending advantage is an important general determinant of electoral outcomes, including historically (Ames 1977; Ferejohn 1986; Block 2002; Shi & Svensson 2006; Kriner and Reeves 2012).

borne out empirically in terms of legislative effort (Moskowitz & Rogowski 2019). Finally, the emergence of the Australian ballot as a function of political self-interest can be defended by simple logic: if the political change is costly (both directly and in terms of the opportunity cost of legislation), why would any party in control (direct or coalitional) expend costly effort changing the electoral institutions if they did not anticipate benefits to doing so?

In sum, state voters experienced a change to a political institution, that while arguably beneficial on some general margins, provided immediate benefits to incumbents in light of the status quo distribution of political power (Ware 2000). A recent comparative synthesis of the literature examining the emergence of the Australian ballot around the world concluded that it was the “strategic calculations of politicians and political parties” that determined the timing of when and how this particular institutional change occurred (Teorell et al 2017, 541). It is beyond the scope of my analysis to weigh the comparative systemic benefits and costs of the institution in light of the available scholarly evidence; instead, I wish to identify how the very nature by which the institution is predicted to emerge (about which there is considerably more consensus) surrounds few, if any, of the argued-for systemic benefits of the institution. Self-interested zero-sum competition over the margins of which voters will show up, and for whom they will vote, arguably led to the emergence of an institution that nonetheless provided system-level benefits surrounding reductions in vote-buying and undue influence. As importantly, though, the very adoption of the institution created an additional margin (fusion candidacies) that political actors could, and did, exploit to their downstream advantage.³⁸

B. General access to the corporate form

Is the emergence of comparatively beneficial political institutions more of a random walk than the deliberative choices of economic institutions whose benefits tend to be less zero-sum than changes in political institutions? The very dynamics of political bargaining mean that the dominant political coalition required to enact institutional change must perceive short-term benefits in doing so. In contrast, economic benefits motivate incremental adjustment of economic institutions that are frequently formalized at greater scale subsequently through private and public institutions. Incremental adjustments that initially begin through contract become standardized through terms of capital and credit and in law itself.³⁹ Rather than directly creating

³⁸ Such an outcome may be an inevitable expression of Duverger’s law (first-past-the-post single member geographic districts tend to converge to two party systems) working mechanically through the incremental choices of political actors (Riker 1982). Nonetheless, this outcome also displays how public choice provides a useful lens through which to examine institutional changes. Any successful change that is argued to operate to the benefit of all but the detriment of the status quo political coalition is likely one whose dynamics are not well understood.

³⁹ The study of the private firm emphasizes how the firm economizes on a variety of margins specific to the industry in which they are engaged. While the firm exists to economize on the costs of transacting on the market, the specific boundary of the firm may exist to prevent hold-up problems associated with asset-specific investment generally, (Williamson 1993), as well as a variety of other more specific problems associated with credible commitment of the continued deployment of the firm’s productive capacity in the face of future uncertainty (Lamoreaux 2005). The exact boundary of the economic institution of the firm is governed by economic factors specific to the assets involved in producing the firm’s output, which makes this an associational form whose malleability can itself be a source of competitive advantage (Prendergast 2002; Aghion et al 2014; Graham et al 2015; Lo et al 2016; Aghion et al 2017). Private ordering by definition contains adaptability as a structural feature – as members of a given organization wish to modify the terms of a given arrangement, doing so only requires the assent of the organization’s decision-makers.

the problem of constructing large-scale outcomes in a spontaneous order, economic ordering creates a default sphere of influence that is limited in terms of those affected – unlike a political rule, an economic rule is intended to affect only the parties to a given private agreement.⁴⁰ In contrast to the history detailed in the preceding subsection, the adoption of general incorporation laws around the United States displays how economic benefits can provide a countervailing force to the political self-interest that nonetheless determines institutional change. It is important to note that this is still a political rule, which is subject to all the public choice characteristics I have noted thus far; what distinguishes this case is that the law governing corporations is fundamentally one of property and contract, as opposed to political process.

Until the middle to late 19th century, access to the corporate form required an affirmative act of the state legislature (Hamill 1999; Wallis 2005; Lamoreaux & Wallis 2019). Indeed, in industries such as banking, insurance, manufacturing and public utilities, states tightly controlled access to the industry, and levied considerable rents (including public financing) associated with the ability to have a state-granted powerful “monopoly⁴¹” (Butler 1985 at 138; Calomiris & Haber 2015). Other major projects of social significance, like the railroads, also were granted special corporate status (including a host of special powers surrounding their rights of way and adjoining grant lands) (Mercer 2016). In contrast, other enterprises were limited to the forms of partnership or the unincorporated joint stock company (Handlin & Handlin, 1945). Both these structures suffered from relatively unlimited liability, which created agency problems between members as one member could commit the entire organization to costly obligations, for which other members then could have unlimited liability (Lamoreaux 1998). Also, due to risk aversion, wealthy individuals would necessarily be less willing to enter arrangements with unlimited liability because they would be proportionally more liable than any of their less wealthy counterparts in the event a venture’s liabilities were sufficiently large (Manne 1967, 262).

Put simply, liberalized access to the corporate form offered considerable economic benefits in terms of access to finance and reductions in incentive problems among contributors to a business enterprise.⁴² Moreover, liberalized access to the corporate form is arguably associated

⁴⁰ This is not to blithely deny the existence of externalities to economic parties’ voluntary exchange, but to argue the reduction of these is intentional in terms of legal and regulatory boundaries for acceptable private activity in a given society. If harms to third parties or the environment are sufficiently large, this is a direct predicate for government intervention. In contrast, reducing the “unintended” harms to other political parties resultant from institutional changes wrought by the status quo is often the exact opposite of what is intended by a political rule change.

⁴¹ These “monopolies” were spatially delimited, which meant their monopolization of a given market was imperfect, but still quite sufficient to generate the rents associated with considerable market power (Butler 1985 at 142).

⁴² This is not to argue that structure of the American corporate form was optimal as compared to any other potential configuration of rules governing private associational forms organized for the pursuit of profit. Indeed, the standardization of the corporate form, required by the nature of its political definition, has been argued to have resulted in a set of costs, both in terms of the adaptability of relationship among shareholders and management, as well as the general way in which corporate governance in the United States has been argued to result in majoritarian shareholder dominance of minority shareholder interests (Lamoreaux 2005). Thus, as compared to absolute freedom of contract, any rigidly-defined associational form will present issues of fit as compared to the complexity of human associations occurring within a given economic organizational structure. Nonetheless, even in an anarcho-capitalist world, it is likely that dispute resolution authorities (whatever form they take) would rely to some degree on standard contractual terms, or barring those, standard interpretations of similar contractual terms. While the realm of associational forms is theoretically infinite, resolving disputes emerging from the interaction of these associations and their members, and other associations, would likely require some level of convergence to standardized treatment.

with consumer benefits due to increased competition in the market for goods and services, but also social benefits due to the increased political competition that access to economic associations facilitates (North et al 2009). Given my analysis thus far, it may be unsurprising to note that changing the rules governing access to the corporate form did not proceed in a fashion consistent with a recognition of the large economic and social gains to doing so. This is because, as compared to the status quo, the shift in control over the corporate form involved a transfer of economic control from the political system to economic actors. Anyone being able to form a corporation (and compete with previously state-granted “monopolies”) meant anyone could, in theory, become a new source of political rents. By one argument, monopolistic corporations were tolerated by the public more broadly because the rents they provided state governments prevented tax increases that would have otherwise been necessary to fund infrastructure improvements like canals (Wallis 2005 at 215).

Importantly, the states with the largest levels of manufacturing activity (which was stimulated during a war period in 1807-1808 when levels of trade were significantly restricted) passed acts of general incorporation well before other states, with New York being the first in 1811 (Hilt 2016). The close tie between open access to the corporate form and specific industries in which states were specialized suggests that the benefits of increased economic activity may have outweighed the political benefits of legislative control over access to the corporate form.⁴³ These economic organizational benefits could have been related to the asset-specific nature of manufacturing and the need for scale in finance that such asset-specific capital investment required; under a partnership, any partner could force the liquidation of assets at opportunistic times, which made assembling the capital required for these enterprises harder than under a system that provided the benefits of corporation more readily (Blair 2004, 49-50). This initial phase can be understood as an outgrowth of jurisdictional competition associated with the granting of special privileges in the first place. As one state benefited from the activities of a special corporation, neighboring states (and their politicians) recognized these benefits and granted similar privileges to specific organizations within their borders (Shughart & Tollison 1985). The initial moves toward general incorporation created a dual system where special corporations retained enviable provisions in their charters compared to general corporations, an incremental liberalization that makes sense given the political economic calculus associated with the rents politicians (and state budgets) received from the special corporations (Butler 1985, 143-152). Rather than threatening every term in the charters of special corporations, state legislatures minimized transition costs by granting open access under standardized terms going forward, which may have been the only politically viable route in a world where special corporations still wielded considerable political economic power.

⁴³ Those states with earlier industrial specialization in manufacturing also had an institutional legacy of contesting and defining rights of incorporation as before the crown during the colonial period, in part due to the role of particular colonies as principal ports for exports to and imports from Britain, and the associated companies that sprung up to fill this demand (Kaufman 2008). This institutional legacy itself supports my contentions here about economic definition of public institutions. Sylla and Wright (2013) also note how differences in incorporation rates in the United States during the antebellum era were a function of economic factors, which emphasizes how economic forces can precipitate early institutional definition that can then spread when the right balance of political interests occurs.

Scholars have identified two forces that led to the move away from the presence of the special corporation, whether singularly or alongside general corporations, that were subject to less preferable terms of incorporation. First, given that special corporations were part and parcel of a particular political economy, these corporations tended to be tightly aligned with the incumbent party, which, during the initial period of liberalization was the Republicans. This meant liberalization in access to the corporate form tended to be associated with Democratically-controlled legislatures, which suggests that competition in access to economic rents played a role in the change (Hilt 2015 at 12). While the Democrats during this period were interested in reducing the extent of “special privileges and vested rights” (Hilt 2016), it is worth noting that these institutional changes could be predicted to benefit their political interests compared to those of their primary opponents. If Republicans relied on their political support from groups who benefited from special access, then even if Republican constituents garnered additional economic power from corporate liberalization, it was unlikely that Republican politicians would benefit proportionately to Democratic politicians, as the latter did not rely as squarely on the support of those empowered economically by special incorporation.

The second change that led to the more widespread emergence of the corporate form also emphasizes how political self-interest ultimately governed this emergence. If one state’s political economic equilibrium depended on tightly controlled access to the corporate form, then a neighboring state liberalizing access to the corporation could have adverse consequences for a given special access state to the extent a general corporation could engage in business across state lines. This led to the restrictive treatment of out-of-state corporations as compared to those native to a given state, for obvious reasons (Butler 1985). But the phrase “business across state lines” evokes the obvious question as to the constitutionality of such treatment of out-of-state corporations. In 1869, the Supreme Court was presented with the question in *Paul v. Virginia*, which facially upheld Virginia’s right to treat out-of-state insurance companies differently, but in so doing, held that a state could not exclude an out-of-state corporation from doing *interstate* business within the state, for doing so would violate the Commerce Clause (1869). This ruling had the effect of turning the entire state-level political-economic equilibrium on its head. Now, any firm engaged in interstate commerce could effectively choose which open access state provided incorporation on the most favorable terms. Suddenly, rather than cementing political economic rents by tightly controlling access to business activity within a given state, states were forgoing economic gains by controlling access to the corporate form, because then other states would capture the tax revenue and political rents associated with increasingly large firms being chartered in their state (Butler 1985). Political self-interest, following *Paul v. Virginia*’s effective removal of the political economic benefits of special charters, now cut toward liberalized access to the corporate form.

Importantly, the pace, scale and scope of industrialization were all increasing over the same period. This meant firms were increasingly engaged in interstate commerce, but also had increasingly asset-specific investments and large finance requirements that partnerships were ill-suited to attracting. Therefore, economic fundamentals cut toward increased political economic rents from more corporations (at a larger economic scale), both in terms of public finance derived from increased economic activity but also due to states now competing with one another for the corporations whose political influence had previously been tied to legislatively-defined

state “monopolies” (Butler 1985). Thus, it is interesting to note that the national level institutional remedy in *Paul v. Virginia* occurred at a time when the scale and scope of corporate activity was transforming, a jurisprudential institutional change that directly reflected underlying structural economic change.⁴⁴ Nonetheless, small and medium sized enterprises were among the most numerous adoptees of the corporate form after generalized access became available (Lamoreaux 2005), which suggests welfare gains beyond the large companies whose scale may have fomented the change in an evolutionary sense. As importantly, other nations’ organizational forms, nominally partnership, offered many of the specific institutional benefits that the corporate form came to in the United States.⁴⁵ This suggests that the economic benefits of these specific institutional choices led to their widespread emergence globally, regardless of the nominal characterization of the overarching institutional form in which they manifested.

What all of this indicates is that the political system is governed by public choice calculations in changes to both economic and political institutions. But in the case of changes to economic institutions, economic changes (and economic interest writ large) can govern the public institutional change process itself. Even if the exact institutional expression varies considerably by context, the benefits of access to capital markets under systems of transparent governance and limitations on investor’s liability have been wrought around the world (including in socialist regimes (Rothbard 2006)). Therefore, even if political self-interest is an unavoidable determinant of public institutional change, political economic forces can result in beneficial change to the public definition of economic institutions.

IV. The Benefits of Economic Disruption to Political Rents

In each case of institutional emergence, the process was messy and incremental, with considerable variation in the institutional form occurring as compared to “institutional intent”, which makes deriving conclusions more frustrating than the cleaner realm of pure theory. Nonetheless, the broad distinction I draw here is seen reflected between the two cases. While the Australian ballot (and subsequent refinements to prevent fusion candidacies) emerged directly as a function of political self-interest, the emergence of the corporate form displays how changing economic forces can actually overwhelm previously stable political-economic coalitions. This provides a logic by which to understand how beneficial changes to economic institutions may be more endogenously emergent from government than changes to political institutions. Using political institutions to control political rents is inevitable. Using political rents to control

⁴⁴ Such a perspective is consistent with the characterization of institutional change as an evolutionary process, at least in part. Whether the Supreme Court ruling in *Paul* was merely an inevitable catalyst (given the power of underlying structural economic forces), or had causal force is beyond the scope of this analysis. Nonetheless, the correspondence of these structural economic changes suggests they played a role in redefining the dominant political economic equilibrium. This is consistent with other historical work showing how changes in economic production structures (and associated access to economic rents) eventually overcome the stable political economic rents associated with the status quo political regulation of economic activity (Thomas 2009, 332).

⁴⁵ Limited liability in particular, as well as means of separating ownership from control in a way that didn’t allow owners to exercise unilateral dissolution, were institutional features that French firms could take advantage of as partnerships (Lamoreaux and Rosenthal 2005). Thus, while I focus on access to the corporate form, the economic benefits of this form in United States law have come to be associated with limited liability, increased access to finance, and ameliorating hold-up problems through separation of ownership from control, beneficial features which have emerged elsewhere, albeit under wide variety of nominally different forms (Guinnane et al 2007).

economic rents is all too common in governance (Holcombe 2018), but short-term political self-interest can coincide with a change in political control of economic processes (Thomas 2009), wherein socially beneficial institutional changes emerge through the deliberative choices of political actors, even if these social benefits are not a primary motivation for political actors to make the change.

The examples I use to motivate my distinction are separated by analytical artifice; both institutional changes were “political” by definition, but one squarely treated the rules of the political system itself, whereas the other treated the rule of the economic system governing access to associational forms. In the electoral case, political self-interest was a binding precondition to action, a well-recognized phenomenon with public ballot institutions more generally (Lewis-Beck and Squire 1995). In the case of access to the corporate form, economic interest drove the liberalization of access in a few states where it was politically beneficial to do so, but the political economic concentrations of market power created by special access to the corporate form proved broadly resilient until the superior force of a Supreme Court ruling weakened the political economic rents (although the ruling may have itself been a reflection of deep structural changes to the economy that were occurring over the period in question). Once the hegemony of a given state-licensed corporation was weakened by out-of-state competition, then the political calculus changed, paving the way for open access to the corporate form.

In the case of changes to ballot laws, political interests defined the change where it occurred in practice; the long run systemic “benefits” were ancillary to the motivations that underlay the passage of Australian ballot laws and anti-fusion legislation. This is similar to the cases documenting the emergence of institutions associated with the rule of law. In order to secure ongoing military financing, the King of England submitted to an arrangement that gave Parliament authority to determine ongoing financing in the future (Calomiris & Haber 2015) which then led to a variety of changes to economic rights that benefited the newly empowered Parliament (North & Weingast 1995). In order to retain the administrative officer he wanted, President Jefferson adhered to a judgment that significantly expanded the judiciary’s ability to review legislative and executive output (Alston et al 2018, 248-251). These well-trodden historical examples illustrate how self-interest first defines political rules, which then define a sticky equilibrium, making change costly especially when it comes to upsetting political-economic coalitions associated with the status quo. Economic rules can also be observed in a given equilibrium, but can adjust atomistically and incrementally as circumstances (relative prices) require, which may ultimately alter the public choice calculus of politicians surrounding the public definition of these economic rules.

Beneficial changes in economic institutions thus may be more likely to emerge endogenously than political institutions. Changes to economic institutions for short-term political benefits can nonetheless disrupt political economic equilibria, which provides dynamic resilience in the face of uncertainty, and serves as a justification for market processes writ large (Pennington 2011; Pennington 2017). One characterization of Hayek’s understanding of cultural evolution as related to economic institutions was that the benefits of the latter would provide reinforcing benefits to the former (Hayek 1988; Boykin 2010; Lewis & Lewis 2016), and my analysis here fleshes out the emergent dynamics of this process. From the perspective of any representative individual, the vast majority of public institutions are fixed (Holcombe 2020).

There is therefore an important extent to which our governance institutions can be understood as a spontaneous order in their own right. Nonetheless, we expend considerable resources in fruitless government activity, and do considerable damage with the unintended consequences of our policies. This poses an important role for someone who thinks fewer public institutions are needed than exist currently – defense of those intrinsically beneficial principles of institutional ordering may warrant more “political” activity than would otherwise be optimal (Neily 2013).

My analysis relies on the structural distinction between economic constructivism and political constructivism. Choices made to facilitate economic exchange in one context can yield policy change elsewhere, to the extent such a novel arrangement yields sufficient welfare-enhancing benefits compared to the status quo elsewhere. Economic change can, through political economic channels, change the self-interested calculus of political actors (Thomas 2009). Tautologically, political change cannot change itself. Choices made to facilitate political change cannot proceed absent the assent of the dominant political coalition (regardless of the exact nature of the political system that has yielded a given coalition), whereas economic change can influence, if not outright change, the dominant political coalition. Therefore it is less likely that: (i) we can ex-ante identify principles of public political ordering that yield normatively preferable outcomes; and (ii) deliberately operationalize our preferred principles of political ordering because of the relative costs of doing so due to the need to satisfy short-term political interests. Changes in resource allocations by definition involve expected welfare improvements when conditioned by voluntary exchange, and when a sufficiently preferable institutional form has emerged, it tends to be reinforced through law and regulation, in part due to the need for economic rents to stabilize the dominant political economic coalition.⁴⁶ This means economic institutional change is governed by a process more closely tied to social welfare than the necessarily oppositional nature of political institutional change with respect to the balance of political rents available for contestation within the system.

My analysis presents economic and political institutional change as evolutionary processes governed by distinct forces. Given this distinction, I have presented a number of reasons to be more optimistic about the spontaneous emergence of socially beneficial economic rules, but this is not to present economic institutional ordering as universally superior to political institutional ordering. Indeed, this separation is to some extent artificial, for the social orders surveyed here (and the modern market democracies of most interest given their comparative levels of prosperity) have never existed absent some balance of political and economic institutions, which suggests the inextricable nature of these two organizational forms (Wagner 2020a). In important ways, democratic political systems married with market economies have been recognized as protecting minority interests, especially as against bargains between parties with great disparities in economic power. Indeed, the emergence of the rule of law provides immense protections against the actions of the economically powerful in addition to the politically powerful. But the analytical motivation here surrounds better understanding the intent

⁴⁶ This analysis does not speak directly to the extent to which the tendency to institutionally reinforce economic rents flowing the dominant political economic coalition is destructive to social-welfare enhancing economic outcomes due to the restraints on competition this force tends to create. Instead, in recognizing the ubiquity of some measure of public institutional definition in social orders at scale, I explore the distinction between two fundamental spheres of public institutions.

underlying a given public institutional change, as opposed to that change's ultimately socially beneficial effects. Therefore, the implications of my analysis do not cut directly against the need for political ordering altogether.⁴⁷

Other critiques of economic ordering as compared to political ordering surround the ability of the political system to evaluate itself as a whole self-reflexively, as compared to economic actors' atomistic pursuit of increasingly efficient resource allocations being relatively blind to the systemic consequences of these individual pursuits in the aggregate (Knight and Johnson 2007). This sidesteps the critiques surrounding the extent to which individual citizens can actually influence public institutional processes (Caplan 2011; Holcombe 2020), not to mention the profound reductions in dimensionality of choice available to political constituents through the process of exit as compared to choice available to individuals through market processes. While jurisdictional competition may well operate to speed up the processes of public institutional change, it does not alter the fundamental underlying calculus facing public institutional decision-makers. Democracy may hold out the hope of evaluating itself as a system, but the question remains as to who is actually empowered to make, let alone act upon that judgment.

In the case of potential future changes to either economic or political institutions, the lessons of history are messy, and scholars should carefully delimit what policy conclusions they derive.⁴⁸ But the spread of institutions, once emergent in a given specific context, may offer some measure of hope. In both the case of adoption of the Australian ballot and access to the corporate form, institutions were wrought with arguable benefits to system level features of political and economic ordering, respectively. Despite being motivated by self-interest, the changes were adopted relatively quickly across the political system, which suggests that the process of deliberative institutional choice can have scalar effects that magnify those islands of ergodicity in institutional definition within a given system of governance.

V. Conclusion

Are we more likely to see emergence of beneficial economic as opposed to political institutions over time? Self-interest subject to market discipline looks very different than self-interest subject to political discipline. Economic forces can exert political discipline, though, which provides an additional governance mechanism for institutional change. While the production function of political institutional change is intrinsically competitive, the production function of economic institutional change is less so. Although all institutional change tends to create winners and losers, my analysis here displays historical contexts where changes in

⁴⁷ Of course, any discussion of political and economic ordering should be sensitive to the scale at which economic versus political choices can go wrong. Sufficient levels of political constructivism at odds with the underlying livelihoods of a given polity can be both destructive and tragic (Scott 2020).

⁴⁸ Constructivist foreign interventions in specific contexts suffer from a variety of defects, such as the likelihood that they are impossible due to the extent to which they alter established political economic coalitions. This is a poignant lesson in the context of the transition economies of the former Soviet Union. Unless endogenously emergent, imposition of "better" property rights can provoke conflicts, once the marginal costs of additional specification are sunk from the perspective of competing asset owners. This means any historian should be cautious not to advocate an approach that distills to "add institutions and stir," and instead be sympathetic to the immense extent to which institutions are endogenous to larger cultural changes (McCloskey 2016).

political rules create winners and losers by default, due to the very structure and substance of collective decision-making. Political markets are not open because of institutional density, which makes opportunities for vetoing productive changes abundant. In the economy, in contrast, decentralized market forces provide a significantly enhanced ability for atomistic economic actors to engage in the process of institutional innovation that eventually foments public institutional change.

Changes in political rules, at least initially, when viewed through a historical lens all too often feel like a random walk. Public governance is inextricable from conflict⁴⁹ (Alston 2022); better governance reduces the likelihood of conflict as well as the need for activation of the public means of dispute resolution in cases where it does occur, but it nowhere prevents all crimes, torts, or contract disputes.⁵⁰ The intrinsically competitive nature of political ordering means that certain groups with concentrated incentives may have an advantage in influencing outcomes, and that changes in political institutions are only likely to occur when they operate to the benefit of the dominant coalition or political party. This follows directly from the careful consideration of political systems through the lens of rational individualism and transaction cost economics (Buchanan & Tullock 1962; Olson 1965; Williamson 1996).

This challenge in political ordering is only amplified by our tendency to observe features of normative interest in a complex system and believe we can influence them (Buchanan 1982), which has an interesting effect when applied to hindsight. Because in believing that the features of a spontaneous order over which we have normative preferences are outcomes we can actually influence, we may impute motives for institutional change in prior periods that were either secondary, or altogether absent. This makes the identification of the “true” political motives behind a process of institutional change require the careful consideration of short-term economic and political rents in play at the time. Piercing the veil of political altruism may be as fraught an exercise as piercing the corporate veil to identify the individuals involved in making decisions.

Whether a given institutional change was the fruit of human choice as opposed to an inevitable emergent phenomena may frequently be beyond empirical identification. But just because we cannot engage in causal empirical inference to the extent we can specify every counterfactual does not mean the ill-defined boundary between choice and emergent dynamics is one we should ignore (Wagner 2020a). What is apparent is that once emergent, institutions that benefit incumbents spread quickly. If this process occurs at least partially through choice, which is especially defensible with humanly-devised rules occurring in the context of our organizations (if they’re costly to devise, inertia cuts against incurring the cost randomly), then the spread of beneficial institutional forms may mean that social welfare gains occur earlier than they

⁴⁹ As Coase noted, “calling it a harm presupposes a right.” (Coase 1960). In many instances where our desired actions (whether past or future) conflict with one another, institutional remedies minimize costs, but the very determination of these rights has distributional consequences that can provoke conflict as compared to the status quo.

⁵⁰ Whether hard cases make good or bad law, the existence of hard cases is unavoidable, precisely we cannot specify all downstream contingencies ex-ante. Competition is baked into the very essence of resolving fundamental governance questions – the obvious welfare-improving choice is rarely hotly contested politically (Alston 2022). Furthermore, our own confirmation biases surrounding the political forces we agree with may make us perceive the welfare-enhancing benefits to our political positions whether or not they truly exist, precisely because institutional solutions to complex social problems may by definition be unknown ex-ante.

otherwise would have. Therefore, my analysis hinges on two (hopefully not entirely fatal) conceits: (i) we can learn, and have learned, over time some subset of comparatively preferable institutions; and (ii) in a world that is not fully deterministic, these institutional blueprints can be applied (both for reasons associated with their systemic benefits and for political opportunism, depending on the specific nature of the institutions) to benefit a given unit of social ordering.

The titanic arc of history makes me think the grandeur of our constructivist institutional designs is not something I would change if I could. Our ability to conceive of a world that does not exist is at once a weakness and a strength. In search of solutions to the problems with which the messiness of the complex world confronts us, the imagination allows us to contemplate outcomes that can never be, but also leads us to conceive of possibilities that are not yet but *can* be. At its most general, this is the very essence of progress, whether technological, economic or political. A full-fledged attack on the validity of the motives for constructivism would necessarily become nihilistic. Instead, I merely argue here that our innate creative tendencies result in a distinct set of outcomes when we channel such tendencies toward economic constructivism as compared to political constructivism, due to predictable structural differences surrounding the processes of political and economic institutional emergence.

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