



THE PERSONAL AND THE POLITICAL: IMPLICATIONS OF CONSTITUTIONAL ENTREPRENEURSHIP

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INTRODUCTION

In arguing for the ratification of the U. S. Constitution, Alexander Hamilton in *Federalist No. 1* wrote, "It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."¹ This famous passage is the quintessential statement of a political project aimed at constructing governance institutions that allow individuals to reap the benefits of collective action, while avoiding its potential hazards. This received interpretation of the Constitutional project implies a heavy emphasis on institutional design, and a retreat from the stress

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¹ THE FEDERALIST NO. 1 (Alexander Hamilton).

placed on the virtues and vices of individual governors found in much of classical political philosophy.

However, the Founders were in fact intensely concerned with the character of the citizens of the new Union, and the governors who would be drawn from those citizens. They also appreciated that personal character matters, even in institutions with an even balance of power. In *Federalist No. 6*, after detailing numerous instances of personal influence over important social events throughout history, Hamilton writes, “[t]o multiply examples of the agency of personal considerations in the production of great national events, either foreign or domestic, according to their direction would be an unnecessary waste of time.”² During his presidency, John Adams would write in a letter to the Massachusetts militia, “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”³ The men who played a crucial role in forming the Union and governing it during its early days thus did not consider a well-crafted constitution as a substitute for personal character. Instead, the idea of a well-crafted constitution implied suitability for a specific group of people with a definite historical, political, and moral context. Some of these people would come to exercise political power, and thus be in a position to engage in further constitutional entrepreneurship. History’s most notable constitutional entrepreneurs held that even a robust constitution could not obviate considerations as to the characteristics of the constitutional entrepreneurs themselves.

This paper contributes to the literature on constitutional entrepreneurship by exploring, at a theoretical level, how and why

² THE FEDERALIST NO. 6 (Alexander Hamilton).

³ John Adams, *From John Adams to Massachusetts Militia, 11 October 1798*, FOUNDERS ONLINE (Oct. 5, 2016), <http://founders.archives.gov/documents/Adams/99-02-02-3102>.

the personal characteristics of constitutional entrepreneurs matters for social change.⁴ In the “mainline” tradition of political-economic analysis, individuals are treated as rational, in the sense that they are goal-seeking, and choose methods to reach those goals as best they know how.⁵ But individuals do not make choices in a vacuum; their choices, in terms of the incentives they face and the information they have at their disposal, are structured by the social institutions within which they act.⁶ Thus mainline political economy explains social outcomes by examining individual behavior as channeled through institutions.⁷ Given the role institutions play in generating information and aligning incentives, and hence their prominence in governing social feedback mechanisms, they have understandably received a great amount of scholarly attention. In the context of constitutions, this typically has

⁴ ROGER CONGLETON, *PERFECTING PARLIAMENT: CONSTITUTIONAL REFORM, LIBERALISM, AND THE RISE OF WESTERN DEMOCRACY* (2010); Magnus Henrekson & Tino Sanandaji, *The Interaction of Entrepreneurship and Institutions*, 7 J. OF INSTITUTIONAL ECON., 47-75 (2011); EDWARD LOPEZ & WAYNE LEIGHTON, *MADMEN, INTELLECTUALS, AND ACADEMIC SCRIBBLERS: THE ECONOMIC ENGINE OF POLITICAL CHANGE* (2014); Adam Martin & Diana Thomas, *Two-Tiered Political Entrepreneurship and the Congressional Committee System*, 154 PUB. CHOICE 21-37 (2011); Shruti Rajagopalan & Richard E. Wagner, *Legal Entrepreneurship Within Alternative Systems of Political Economy*, (GMU Economics Working Paper, No. 12-38 2012); Emily Skarbek, *Aid, Ethics, and the Samaritan's Dilemma: Strategic Courage in Constitutional Entrepreneurship*, 12 J. OF INSTITUTIONAL ECON. (2016); Diana Thomas & Michael D. Thomas, *Entrepreneurship: Catallactic and Constitutional Perspectives*, 27 REV. OF AUSTRIAN ECON. 11-22 (2014); Andrew T. Young, *From Caesar to Tacitus: Changes in Early Germanic Governance circa 50 BC-50 AD*, 164 PUB. CHOICE 357 (2015); Andrew T. Young, *Visigothic Retinues: Roving Bandits That Succeeded Rome* (West Virginia University, Working Paper No. 15-09, 2015).

⁵ GARY BECKER, *ECONOMIC THEORY* (2011); LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* (2008).

⁶ Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (1990); Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AMERICAN ECON. REV. 641 (2010).

⁷ PETER J. BOETTKE, *LIVING ECONOMICS: YESTERDAY, TODAY, AND TOMORROW* (2012).

taken the form of analyzing how various meta-rules, and meta-rule changes, will affect individual behavior.⁸ In contrast, this paper will focus on the characteristics of the individual who participates in constitutional change. Even if the personal traits of constitutional entrepreneurs are only analytically separable from their environment, focusing on these characteristics brings attention to an underserved, but nonetheless important, aspect of constitutional change, while complementing the insights of several related literatures.

The first of these is the literature on “robust political economy.”⁹ Robustness in this context designates stability in the face of stress. This literature analyzes the efficacy of institutions when the incentive and information environment in which individuals find themselves is imperfect. Robust institutions should work well, meaning channel individual behavior into beneficial social outcomes. This should be true even in situations where individuals are prone to pursue self-interest at the expense of the public interest, and are not in possession of perfect information or information-interpreting capabilities. An implication of this literature is that robust institutions should minimize personal influence on important events. To paraphrase F. A. Hayek, whose writings on the informational properties of institutions permeate the robust political economy literature, robust social institutions are

⁸ GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* (2000); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1999); VINCENT OSTROM, *THE POLITICAL THEORY OF A COMPOUND REPUBLIC: DESIGNING THE AMERICAN EXPERIMENT* (2008).

⁹ Peter J. Boettke & Peter T. Leeson, *Liberalism, Socialism, and Robust Political Economy*, 7 J. OF MARKETS AND MORALITY 99-111 (2004); Peter T. Leeson and J. Robert Subrick, *Robust Political Economy*, 19 REV. OF AUSTRIAN ECON. 107-11 (2006); MARK PENNINGTON, *ROBUST POLITICAL ECONOMY: CLASSICAL LIBERALISM AND THE FUTURE OF PUBLIC POLICY* (2011).

those that permit “bad men to do the least harm.”¹⁰ But institutions, including constitutions, do not automatically renew themselves, so even robust institutions need to protect against the possibility of individuals changing the rules to suit their narrow self-interest. By focusing on the personal characteristics of constitutional entrepreneurs, another dimension to robust institutions becomes apparent: their role as selection processes for individuals who occupy them. If institutions are robust in the information- and incentive-aligning sense, but cannot protect themselves against deleterious rule changes, they might be classified as statically but not dynamically robust. Focusing on the selection processes of institutions, akin to Boettke’s interpretation of a neglected aspect Hayek’s project, suggests two related avenues for further inquiry.¹¹ The first focuses on positive aspects of selection, for example, the kinds of characteristics, and hence kinds of people, for which institutions select. The second focuses on normative aspects of selection, for example, issues of commutative and distributive justice in selection for important roles within existing institutions, and the practice of virtue within those roles.

The second related literature considers the applicability of entrepreneurship, and particularly efficiency considerations, to institutions.¹² Here we take the position rooted in the market process and Virginia political-economic traditions¹³ that

¹⁰ F. A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 11 (1947).

¹¹ Boettke & Leeson, *supra* note 9.

¹² JAMES M. BUCHANAN, *FREEDOM IN CONSTITUTIONAL CONTRACT* (1977); Israel Kirzner, *Spontaneous Order and the Case for the Free Market Society*, in *IDEAS ON LIBERTY: ESSAYS IN HONOR OF PAUL POIROT* 45-50 (1987); *see also* Peter J. Boettke, *Entrepreneurship and the entrepreneurial market process: Israel M. Kirzner and the two levels of analysis in spontaneous order studies*, 27 *REV. OF AUSTRIAN ECON.* 233-47 (2014).

¹³ Thomas & Thomas, *supra* note 4, at 11-22.

entrepreneurship, as an omnipresent feature of human action,¹⁴ meaningfully applies to behavior that affects the rules of the social game. However, as Buchanan and Kirzner note, outside of the nexus of the price system where individual behavior is structured by the incentive- and information-aligning features of profit and loss accounting, there is no reason to suppose that entrepreneurial action results in a tendency toward systematic plan coordination.¹⁵ Institutional entrepreneurship, including constitutional entrepreneurship, can be harmonizing or disruptive, depending on the feedback mechanisms in which creative-imaginative behavior is embedded.^{16,17} Variables such as social wealth creation that change as a result of constitutional entrepreneurship may partially be explained by appealing to the higher-level institutions governing action at the constitutional level, in which case we have merely pushed explanation a stage higher. But if we hypothesize that, as we move up the ladder of social rules, each higher stage of rule-revision offers greater opportunity for the applicability of creativity, imagination, and other features that inject novelty into social processes, then it follows that the personal characteristics of the

¹⁴ MISES, *supra* note 5; ISRAEL KIRZNER, *COMPETITION AND ENTREPRENEURSHIP* (1973).

¹⁵ JAMES M. BUCHANAN, *ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY* (1987); JAMES M. BUCHANAN, *The Limits of Market Efficiency*, 2 RATIONALITY, MARKETS AND MORALS 1-7 (2011); ISRAEL KIRZNER, *DISCOVERY AND THE CAPITALIST PROCESS* (1985).

¹⁶ Martin & Thomas, *supra* note 4.

¹⁷ Even constitutional entrepreneurship takes place in a series of nested institutions, informal and formal, that shape social outcomes. For example, the delegates that met in Philadelphia in 1787 were almost unanimously steeped in the Western intellectual tradition; even the Deists among the delegates were sympathetic to the cultural, educational, and sociopolitical institutions of Christendom, from which they drew their philosophical vocabulary in their efforts to frame a new government. The Western tradition can thus be viewed as an informal mechanism for governance, primarily coordinating rather than binding in function, that shaped the framing of the U. S. Constitution.

entrepreneurs, as a primary determinant of these features, cannot be ignored without omitting a crucial feature of historical-empirical studies of constitutional change.

The third literature consists of scholars working in the mainline political-economic tradition, placing a heavy emphasis on standard price theory in understanding social outcomes, but who wish to broaden the sources of constraints that shape price-theoretic tradeoffs to include what may be called moral-humanistic factors. Importantly, this does not involve merely adding a preference for virtue to utility functions, nor a dollar cost of vice to the budget constraint. Perhaps the best-known work in this tradition is that of McCloskey, who argues forcefully for the reality of virtue in commercial life, and locates the source of modern economic growth in the extension of liberty and dignity to the commercial classes.¹⁸ Others include the role of ideas, as distinct from constraints but that still impinge on decision-making, in political economy¹⁹ and the relevance of changing preferences, especially in the context of moral suasion, to social change.²⁰ Our contribution complements these works since, by focusing on constitutional entrepreneurs' individual characteristics, we draw attention to the entrepreneurs' practice of virtue,²¹ the ideas that move them, and their role as

¹⁸ DEIDRE MCCLOSKEY, *THE BOURGEOIS VIRTUES: ETHICS FOR AN AGE OF COMMERCE* (2007); DEIDRE MCCLOSKEY, *BOURGEOIS DIGNITY: WHY ECONOMICS CANNOT EXPLAIN THE MODERN WORLD* (2011).

¹⁹ Vlad Tarko, *The Role of Ideas in Political Economy*, 28 *REV. OF AUSTRIAN ECON.* 17-39 (2015).

²⁰ Murray N. Rothbard, *Towards a Reconstruction of Utility and Welfare Economics*, in *ON FREEDOM AND FREE ENTERPRISE: ESSAYS IN HONOR OF LUDWIG VON MISES* (2015); Edward P. Stringham & Jeffrey R. Hummel, *If a Pure Market Economy Is So Good, Why Doesn't It Exist? The Importance of Changing Preferences Versus Incentives in Social Change*, 13 *Q. J. OF AUSTRIAN ECON.* 31-52 (2010).

²¹ By 'virtue' we mean the character traits emphasized by the synthesis of the Classical and Christian traditions: the cardinal virtues of prudence, justice, temperance, and fortitude, and the theological virtues of faith, hope, and charity.

“teachers” to the rest of society due to their frequently prominent role in esteemed social institutions.

We organize the remainder of this paper as follows: Section I lays the foundation for a fuller discussion of constitutional entrepreneurship by specifying the relative importance of formal and informal constitutions. Section II builds a theory of constitutional entrepreneurship that draws attention to the personal characteristics of the constitutional entrepreneur. Lastly, Section III concludes by discussing the implications of taking personal influence over constitutional change seriously, including engagement with the renewed focus on virtue ethics in political economy, as well as understudied aspects such as the role and relevance of leadership in social change.

I. INFORMAL CONSTITUTIONS RULE

Williamson argues that informal institutions are the primary determinant of growth in developing countries, and that formal institutions are only effective when congruent with the underlying informal institutions.²² In a similar vein, we argue that in the context of constitutional entrepreneurship, informal constitutions are the relevant determinant of the constitutional status quo. Informal constitutions thus also structure the actions of constitutional entrepreneurs, but because not even informal constitutions enforce themselves, there is always room for creative-imaginative action on the part of the constitutional entrepreneur that goes beyond mere political arbitrage. Formal constitutions,

These can be combined in the expression of virtuous behavior in various moral spheres of action, including commerce. MCCLOSKEY, *THE BOURGEOIS VIRTUES*, *supra* note 18; MCCLOSKEY, *BOURGEOIS DIGNITY*, *supra* note 18.

²² Claudia R. Williamson, *Informal Institutions Rule: Institutional Arrangements and Economic Performance*, 139 *PUB. CHOICE* 371-87 (2009).

while not superfluous, perform a different role than the popular understanding of constitutions as constraining mechanisms.

A polity's informal constitution is the actual balance of power that prevails among those individuals and groups that determine the actions of the polity. The theory of constitutional bargaining suggests that, due to continual bargaining over political property rights, a polity's informal constitution will change when the underlying determinants of a given structure of political property rights changes.²³ At some level, constitutional bargains via exchange of political property rights must be self-enforcing.²⁴ This is the "loose joint" within which individual action, and hence individual characteristics, matter most. Just as market entrepreneurs, though confronted by the constraints of the marketplace, can inject genuine novelty into commercial relationships, constitutional entrepreneurs can inject genuine novelty into political relationships by imagining an alternative arrangement of political property rights — perhaps even creating new political property rights where none previously existed — and bringing their vision to fruition.

In contrast to informal constitutions, formal constitutions are explicit procedures for the decision process of the polity. Ideally, the formal constitution is a blueprint for the actions of political organizations. But the constraints enshrined in a formal constitution can only bind those who act within them if they reflect a stable, and thus self-enforcing, arrangement of political property rights. In a twist on Spooner, it is appropriate to say that a formal constitution, to the extent it matches the informal constitution, is superfluous; if

²³ CONGLETON, *supra* note 4; BERTRAND DE JOUVENEL, *ON POWER: THE NATURAL HISTORY OF ITS GROWTH* (1993).

²⁴ Alexander W. Salter, *Sovereignty as Exchange of Political Property Rights*, 165 *PUB. CHOICE* 79-96 (2015).

it does not match the informal constitution, it is immaterial.²⁵ But this does not imply that formal constitutions are irrelevant, because they can perform a role apart from binding political actors. Instead, constitutions can serve as political coordination devices, enshrining, among a larger set of feasible political meta-rules, the actual set of political meta-rules to be followed, thus reducing the transaction costs of constitutional bargains.²⁶ Formal constitutions, as of the time of their creation or amendment, give expression to the structure of political property rights within which and over which constitutional entrepreneurs act, but do not determine that structure.²⁷

It is thus the descriptive and not the prescriptive characteristic of constitutions that sets the background for constitutional entrepreneurship. One feature of constitutions, implicit in the above, should be made explicit: constitutions are necessarily incomplete.²⁸ While this insight has received most attention in the context of formal constitutions, it applies – and in the context of constitutional entrepreneurship, is ultimately relevant – to informal constitutions as well. The decision-making procedures that arise out of the balance of forces that comprises the informal constitution cannot specify courses of action for all particular

²⁵ LYSANDER SPOONER, *NO TREASON: THE CONSTITUTION OF NO AUTHORITY* (1867).

²⁶ RUSSELL HARDIN, *COLLECTIVE ACTION* (1982); Russell Hardin, *Why a Constitution?*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* (Bernard Grofman & Donald Wittman eds., 1989); Peter C. Ordeshook, *Constitutional Stability*, 3 *CONST. POL. ECON.* 137-75 (1992).

²⁷ It is possible that a formal constitutional amendment obscures, rather than illuminates, the underlying structure of political property rights, but analysis of a ‘constitutionalism of deceit’ is beyond the scope of this paper.

²⁸ Phillipe Aghion & Patrick Bolton, *Incomplete Social Contracts*, 1 *J. OF THE EUR. ECON. ASS’N* 38-67 (2003); JEAN-JACQUES LAFFONT, *INCENTIVES AND POLITICAL ECONOMY* (2001); see also Christian Bjørnskov & Stefan Voigt, *Constitutional Verbosity and Social Trust*, 161 *PUB.CHOICE* 91-112 (2014).

contingencies. The particular breakdown of which groups control which aspects of political decision making, determined by the structure of political property rights, will leave some rights and responsibilities unspecified. It may be that specifying these rights and duties would involve political bargains that are too costly to strike; it may be that the terms of the bargains would not reflect unexpected circumstances that none of the parties to constitutional bargaining could have foreseen. Underlying circumstances that drive new bargains over political property rights, and hence create constitutional change, are driven by constitutional entrepreneurs who engage in arbitrage with existing political property rights, or bundle them into novel distributions. This offers a particularly important avenue for constitutional entrepreneurs' personal characteristics to find expression in the balance of power that determines polity decision-making.

The existence of "openings" afforded by perpetual bargains over political property rights combined with the accompanying feature of constitutional entrepreneurship, means that there is room for the personal characteristics of constitutional entrepreneurs to drive constitutional revision. The importance of personal characteristics cannot be eliminated, because the opportunity for creative revision is greater the higher up the political-institutional "ladder" one goes, even given nested institutions such as a cultural or intellectual tradition. Just as ideas matter proportionately more in higher-order institutional action due to the progressive weakening of negative social feedback mechanisms, constitutional entrepreneurs' personal traits matter more simply because there are fewer constraints filtering out these traits.²⁹ This implies that the Virginia school's two-stage analysis of politics, with a distinction made between action within existing political rules and action over

²⁹ Adam Martin, *Emergent Politics and the Power of Ideas*, 3 *STUD. IN EMERGENT ORDER* 212-45 (2010).

the political rules themselves, is purely analytical.³⁰ The distinction is extremely helpful in clarifying important features of the application of economic tools to political questions, but it cannot be taken as a dividing line sufficiently firm that getting the constitution right is the primary concern of robust institutional design. Political institutions are frequently entangled with other socio-economic institutions, which implies that constitutional entrepreneurs will be able to build bridges between these social realms, offering additional dimensions for creative constitutional bargains.³¹ Apart from this “horizontal” constitutional entrepreneurship, there is also the possibility of “vertical” constitutional entrepreneurship, where political operatives who find their plans frustrated by existing rules turn their attention to the rules themselves.³² Constitutional drift, rather than constitutional stability, is the normal course of affairs for polities, and it is clear that constitutional entrepreneurs’ personal characteristics may play a meaningful role in explaining why.³³

II. INDIVIDUAL INITIATIVE IN CREATIVE CONSTITUTIONAL CRAFTSMANSHIP

We focused in the previous section on the environment in which constitutional entrepreneurship takes place, to show that the

³⁰ BUCHANAN & TULLOCK, *supra* note 8; BRENNAN & BUCHANAN, *supra* note 8.

³¹ RICHARD E. WAGNER, PROPERTY, STATE, AND ENTANGLED POLITICAL ECONOMY (2009); Richard E. Wagner, *Entangled Political Economy: A Keynote Address*, 18 ADVANCES IN AUSTRIAN ECON.15-36 (2014); RICHARD E. WAGNER, POLITICS AS A PECULIAR BUSINESS: INSIGHTS FROM A THEORY OF ENTANGLED POLITICAL ECONOMY (2016).

³² Martin & Thomas, *supra* note 4.

³³ Alexander W. Salter, *Constitutional Drift and Political Dysfunction: Underappreciated Maladies of the Political Commons* (June 17, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619838.

background conditions are such that there are opportunities for constitutional entrepreneurs' personal traits to find expression in a polity's constitution. Here we turn our attention to the nature of constitutional entrepreneurship itself, to argue that personal traits matter in general. Our argument has much in common with Martin, who argues that the rational actor model of mainline political economy, when combined with insights concerning uncertainty and alertness, allows for open-ended social processes without abandoning rigor.³⁴ Entrepreneurship over constitutions certainly qualifies as open-ended; in light of the properties we will discuss next, habits of character such as virtue and vice ought not be neglected.

Perhaps the most important quality for constitutional entrepreneurship is the existence of uncertainty over future outcomes. By "uncertainty" we take Knight's definition: unknowns concerning the future that cannot be objectively quantified in the form of probability estimates.³⁵ Coping with uncertainty is central to the concept of entrepreneurship in general.³⁶ Entrepreneurship "involves the subjective assessment of the possibilities and limits of the future state of the world and is therefore not just a matter of constrained optimization."³⁷ Constitutional entrepreneurs, like entrepreneurs in general, bear uncertainty. Their tolerance for bearing uncertainty, and their inclinations regarding how to respond to it — e.g., acting opportunistically or altruistically, creating new allocations of political property rights that involve previously unrealized dimensions, or reallocating political property rights merely to tip the balance of power along existing dimensions,

³⁴ Martin & Thomas, *supra* note 4.

³⁵ FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT (1921).

³⁶ KIRZNER, *supra* note 14.

³⁷ Thomas & Thomas, *supra* note 4, at 14 (2014).

etc. – are personal characteristics that will matter a great deal in determining, among a myriad of other factors, the direction of constitutional change. These characteristics of entrepreneurs matter even in relatively tight feedback environments, such as markets, where the institutions themselves, as opposed to the organizations that act within them, are the locus of filters such as profit maximization.³⁸ Where feedback loops and filtering processes are weaker, such as at the constitutional level, these properties of entrepreneurship will matter even more.³⁹

The possibility for creative and imaginative action at the constitutional level is the most important consequence of uncertainty. As Thomas and Thomas note, there is an important distinction between ordinary behavior within political rules, which may be sufficiently predictable in light of the behavioral postulates of mainline political economy, and behavior that affects the rules themselves, which at most are subject to pattern prediction due to the creative aspects involved.⁴⁰ The opportunity for creative constitutional action is the chief avenue whereby novelty can be injected into a polity's constitution.

Take, for example, the constitutional bargains that occurred during the 1787 Constitutional Convention in Philadelphia. While the delegates to the Constitutional Convention were empowered merely to amend the Articles of Confederation, they instead took the opportunity to craft a significantly different set of political

³⁸ Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. OF POL. ECON. 211-21 (1950).

³⁹ This is also implied by the 'veil of ignorance' perspective adopted by scholars working on positive (*e.g.*, BUCHANAN & TULLOCK, *supra* note 8) and normative (*e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (2009)) aspects of constitutional design.

⁴⁰ Thomas & Thomas, *supra* note 4, at 4 (2014).

machinery.⁴¹ The Constitution as eventually ratified would be the result of the citizens of the several states coordinating around this new machinery. Novel features, which had some antecedent in history but also were genuine innovations, included a separate executive branch with a Chief Executive who was neither monarch nor prime minister, and the attempted institutionalization of a balance of power among the branches of the federal government. The latter idea that had its roots in Montesquieu's theories concerning the separation of powers, but went a step farther in putting in place checks on political predation.⁴² Again, it is possible to partially explain this result by appealing to meta-institutions within which the Founders acted. There is a clear continuity between political machinery of the Union and the Founders' understanding of constitutionalism in Greece and Rome and the "higher law" tradition in Western jurisprudence.⁴³ Western culture and the Western intellectual tradition could thus be viewed as a constitution for the Constitution. But this would only be a partial explanation. All of those who attended the convention, especially those who played the most significant roles in shaping the government of the Union, were men of renown in their communities, with significant commercial, intellectual, and military accomplishments to their names. Their virtues – and their vices as well – were important determinants of their social roles, by which they would come to have the opportunity to practice constitutional entrepreneurship. It is difficult to believe that the finished

⁴¹ That the delegates technically operated *ultra vires* suggests the design and ratification of the Constitution is best understood in the context of "informal constitutional supremacy."

⁴² BARON DE MONTESQUIEU, *SPIRIT OF THE LAWS* (1748).

⁴³ See, e.g., CHARLES H. MCLWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (1947); EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955).

Constitution, or the earlier “blueprint” of the Virginia Plan, can be separated from efforts uniquely attributable to James Madison, or that the Bill of Rights would have taken the form it did without the efforts uniquely attributable to George Mason in his earlier work with the Virginia Constitution. Explanations of Philadelphia in 1787 – or Paris in 1793, Vienna in 1814, or St. Petersburg in 1917 – that rely solely on institutional characteristics without reference to constitutional entrepreneurs’ virtues and vices, their exercise of authority and their capacity for moral suasion, are not only historically incomplete, but at variance with the growing realization that entrepreneurship applied to social rules is a meaningful concept.

To be clear, we are not advocating for the adoption of a Carlylean “Great Men” historical hermeneutic.⁴⁴ Nor are we arguing that political economists should all become biographers. Instead, we believe it is important to understand what the constitutional entrepreneurs’ personal characteristics, encouraged by the open-endedness of constitutional entrepreneurship itself, imply for the political-economic project of discovering robust governance regimes. The first implication is that robust political economy studies cannot content themselves with discovering incentive- and information-compatible governance regimes only. In the Introduction, we made a distinction between static and dynamic robustness. The former focuses on incentive- and information-alignment, usually abstracting from considerations involving the relationship between the passage of time and open-ended change. The latter focuses on the capability of these regimes to renew themselves, or rather, on whether constitutional entrepreneurship will be fundamentally preservative or transformative. But if we are appealing to institutional characteristics to explain what kinds of

⁴⁴ THOMAS CARLYLE, *ON HEROES, HERO-WORSHIP AND THE HEROIC IN HISTORY* (1841).

constitutional entrepreneurship a given set of governance mechanisms will manifest, are we not abandoning the focus on personal characteristics, which was the point of our argument in the first place? The solution to this paradox lies in a continuation of one of Hayek's projects, namely his theories about why political authoritarianism results in the "worst getting on top."⁴⁵

Hayek describes the propensity for institutions, over time, to select for those who occupy positions of authority within them.⁴⁶ This filtering aspect of institutions operates directly on the personal characteristics of institutional occupants, some of whom inevitably will engage in entrepreneurship over the rules. For example, a liberal perspective on this feature would emphasize that the scope and scale of government directly bears on the characteristics of the governors, which affects both static and dynamic robustness. In a federal constitutional republic, where decisions regarding collective action are made as locally as possible and under a clear rule of law, those who come to occupy governance positions will be likely to exhibit the "republican virtues," behaving prudently within a limited mandate and toward the goal of maintaining self-governance. In contrast, in a national, monocentric state, those who come to occupy governance positions will be drawn less by the prospect of participating in self-governance than by the allure of power — personal influence over affairs of importance — and a desire to impose their view of the "good society" from above. Constitutional entrepreneurship in this case will likely be transformative, in the direction of increasing control and discretionary authority, rather than preservative, as in the former scenario. Of course, this is only one perspective; conservatives and Progressives would each give their own answers, but each could

⁴⁵ F. A. HAYEK, *THE ROAD TO SERFDOM* (1944).

⁴⁶ *Id.*

construct a narrative regarding how institutions operate on the margins of virtue and vice, intelligence, will, capacity for deliberation, moral suasion, and other personal characteristics of their occupants.

III. PERSONALISM IN POLITICAL ECONOMY

We have argued that the open-ended nature of constitutional entrepreneurship, in the context of political bargaining that coordinates rather than constrains, necessarily entails that constitutional entrepreneurs' personal characteristics matter for the restorative, or transformative, aspects of constitutional change. This insight poses difficulties for the realization of robust governance institutions in a static sense, but also opens up analysis of these institutions to an additional dimension in a dynamic sense, in that governance institutions can select for certain sets of personal characteristics over others. Aspects of this approach, which might be called a personalist political economy, currently exist in several seemingly unrelated literatures. Whereas in the Introduction we detailed how our contribution complements certain literatures, here we conclude by showing how the personalist approach can inform political economy going forward.

The Fall 2013 issue of the *Journal of Economic Perspectives* features a mini-symposium titled "Economics and Moral Virtues." In the symposium, Michael Sandel argues that economics must re-engage issues in moral and political philosophy, and in particular the role of virtue and vice in moral reasoning, in order to ascertain the proper "limits of markets."⁴⁷ Sandel argues that the instrumentality of market reasoning leads to the erosion of broader civic goods that deserve protection, and that a broader

⁴⁷ Michael J. Sandel, *Market Reasoning as Moral Reasoning: Why Economists Should Re-engage with Political Philosophy*, 27 J. OF ECON. PERSP.121-40 (2013); MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* (2012).

philosophical perspective is therefore required to set the limits of market vs. non-market resource allocation.⁴⁸ In response, Bruni and Sugden argue this argument is flawed.⁴⁹ Using the techniques and tools of virtue ethics, Bruni and Sugden argue that the market is a moral space in which the virtues can meaningfully be practiced. This exchange is important, not only because the debate matters for our understanding of the role of moral reasoning in markets, but also because of the implicit agreement concerning how moral reasoning affects the limit of markets. If moral reasoning, and in particular the practice of virtue, matters for locating this boundary, it follows that the theoretical understanding, and practical expression, of virtue in those in a position to influence the boundary's location matters as well. How constitutional entrepreneurs understand the relationship between markets and the practice of virtue, and how they practice virtue themselves, will affect the political bargains in which they engage, which in turn affect the rules governing the political boundaries of markets. Thus a personalist political economy can help us understand the relationship between markets and virtue in the abstract, as well as how constitutional entrepreneurs' understanding of this relationship actually impinges on political-economic outcomes – a positive study of the normative element in human action.

The personalist approach can also be found in the social philosophy of Bertrand de Jouvenel, finding its fullest expression in his *Pure Theory of Politics*.⁵⁰ Jouvenel's project focuses on the implications of "bottom-up" authority: the capacity of "men to

⁴⁸ *Id.*

⁴⁹ Luigino Bruni & Robert Sugden, *Reclaiming Virtue Ethics for Economics*, 27 J. OF ECON. PERSP. 141-64 (2013).

⁵⁰ JOUVENEL, *supra* note 23; BERTRAND DE JOUVENEL, *SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD* (1997); BERTRAND DE JOUVENEL, *THE PURE THEORY OF POLITICS* (1963).

move other men,” which is the essence of political life.⁵¹ Authority for Jouvenel is not understood as an imposition, but as a response to the particular characteristics of those who, in virtue of those characteristics, find themselves in roles of political influence.⁵² Traits such as intellect, will, and the practice of virtue, along with the thoughts and feelings such characteristics produce in others, are the “data” underlying an implicit rational actor model, augmented with an explicitly ethical dimension.⁵³ Jouvenel’s social philosophy fits nicely with mainline political economy, provided the system is not closed through ruling out open-ended social processes. For example, his analysis of the creation of new political organizations complements Congleton’s theory of constitutional *formateurs* and Levy’s account of the formation of contractual societies within an overarching particularist-pluralist social network.⁵⁴

The general progression of constitutional change in Jouvenel’s theory begins with the coordination of groups by individuals whose traits endow them, in the view of their peers, with authority⁵⁵. As these organizations and practices become regularized, they become institutionalized, and the holders of political positions that follow now derive their authority from personal characteristics as well as the authority of the inherited institution⁵⁶. But new groups lead by new individuals constantly arise, and the formation of new political aggregates whose goals may clash with existing aggregates is the locus of potential conflict, which can result in political bargains that

⁵¹ JOUVENEL, *PURE THEORY*, *supra* note 50.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ CONGLETON, *supra* note 4; JACOB T. LEVY, *RATIONALISM, PLURALISM, AND FREEDOM* (2015).

⁵⁵ JOUVENEL, *PURE THEORY*, *supra* note 50.

⁵⁶ *Id.*

change the social and moral landscape.⁵⁷ These political bargains can drive constitutional enrichment, such as the aftermath of the Glorious Revolution in England, or constitutional erosion, as in the case of the American republic in the 20th century.⁵⁸ While any given constitutional change can be viewed as either enrichment or erosion depending on one's normative priors, what Jouvanel shows is that constitutional change, *qua* political phenomena, cannot be understood without recourse to the moral dimension, which includes its expression in individual conduct.⁵⁹

If the "facts of the social sciences" are what people believe and think, then the moral dimension of constitutional change is a valid margin on which individual choice, and social phenomena more generally, can be analyzed.⁶⁰ There must be room for analysis that at least partially locates constitutional change in constitutional entrepreneurs' unique characteristics. This will almost certainly entail a greater emphasis on understanding and intelligibility, relative to prediction, in the study of constitutional evolution. While the immediate result of a personalist approach to political economy will be revisiting institutional analysis with a focus on filters relating to personal characteristics, the exploration of how those characteristics relate to constitutional renewal or transformation, and how that relation bears on our particular understanding of the "good society," should constitute a realm of analysis in and of itself.

⁵⁷ *Id.*

⁵⁸ E.g., D.C. North & B.R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. OF ECON. HIST. 803-32; e.g., Alexander W. Salter, *supra* note 33.

⁵⁹ JOUVENEL, *PURE THEORY*, *supra* note 50; JOUVENEL, *SOVEREIGNTY*, *supra* note 50.

⁶⁰ F. A. Hayek, *The Facts of the Social Sciences*, 54 *Ethics* 1-13 (1943).