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ORIGINAL PAPER

Constitutional craftsmanship and the rule of law

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Abstract Is "rule of law" anything more than a fictional allusion? After all, "law" is an abstract noun, and abstract nouns can't rule. Only people can rule. The conceptual framework of constitutional political economy invokes a central distinction between choosing rules and playing within those rules. Claims on behalf of a rule of law require a sharp distinction between the enforcement of agreed-upon rules and arbitrary changes in those rules. This paper explores whether there are constitutional arrangements under which it could reasonably be claimed that governance reflects a deep level operation of a rule of law despite the surface level recognition that it is men who rule. With the exercise of rulership being a social process and not a matter of individual action, the network pattern through which rules are enforced takes on particular significance. In particular, polycentric architectures are generally more consistent with rule of law than monocentric architectures.

Keywords Rule of law · Separation of powers · Constitutional political economy · Polycentrism · Constitutional drift

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"Rule of law" is a catchy phrase that points to an abstract object that might well lack substantive content. While the idea that everyone should be subject to law and

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no person should stand above or outside the law is of ancient origin, the seminal modern articulation comes from A. V. Dicey (1914, 1915). There, Dicey describes "rule of law" as the opposite of "rule of men." Within Dicey's context, "rule of men" describes a situation where ruling authorities can make arbitrary decisions that are binding on other people. In contrast, "rule of law" denotes a system where such arbitrariness is absent because ruling authorities are bound by the same rules as are ordinary people. But how can this binding be accomplished? Or can it? We necessarily must start with the simple observation that it is always men who rule. Whether it is reasonable to move from that observation to a conclusion that affirms a rule of law is a judgment that must lie at the end of some analytical argument, and most certainly cannot be reasonably embraced as a point of departure.

This paper explores what might be involved in trying to make the journey from the visible recognition that men exercise rulership to the conclusion that rulership is exercised on behalf of law, and with men being merely instruments for the articulation of law. In a society where there is rule of law, law must be independent of the men who articulate the substantive content of law, so much so that it is irrelevant who is governing or enforcing the law. Therefore the relevant question is whether law can be autonomous or independent of the men who articulate it. If not, rule of law is more a fiction than a reflection of actual practice. If rule of law is to be more than fiction, it is necessary to explain how the surface impression that it is men who rule can nonetheless reflect an underlying reality wherein those men are themselves ruled by law. To do this, we emphasize not the attributes of the law itself but rather the type of constitutional arrangements within which law is operationalized. Dicey (1915) and Hayek (1960) describe the attributes of a rule of law: rules must be general, known, certain, and apply equally to everyone. While acknowledging these attributes, we focus on the constitutional arrangements within which governance would plausibly reflect the operation of a rule of law wherein the substantive content of law is reasonably independent of the identity of those who articulate and enforce law.

To provide a familiar frame of reference, we start by reviewing briefly the analogy between choosing rules of a game and choosing strategies to play inside the rules of the game. This review is necessary because the analogy, while useful in organizing thought, is also perilous because it hides some significant complexity behind its simple façade. To get behind that façade, we posit the maintenance of constitutional rules not as the province of some person or office but as a property of networked-based relationships within a society. Doing this allows us to explore some implications of incomplete and distributed knowledge that are present in all real settings (Hayek 1937, 1945) but which are hidden by the simplicity of the standard analogy. In particular, we explore the connections and relationships between those who participate directly in choosing and amending rules and those who do not participate but who nonetheless subject to the rules chosen by others. To do this, we must avoid reducing governance to a representative interaction that is scaled up to the societal level. Instead, we treat governance as a social relationship that operates in network fashion. The qualities of governance thus depend on the architecture of the network that encases those who participate in governance. We specifically explore polycentric arrangements, or governance structures with no

locus of control, especially federalism, as processes through which rule of law is articulated and maintained.

1 Choosing Rules Versus Choices within Rules

Constitutional political economy, at least since Eucken (1952), has distinguished between the choice of a framework of rules and the subsequent choice of strategies or actions within that framework. The rules provide a framework for subsequent actions that generate spontaneously ordered societal patterns. Game theoretic formulations understandably have been in the forefront of constitutional analysis, for they reflect recognition that observed patterns of interaction are governed by the rules that people follow. Different rules will thus generate different patterns of interaction. Many of these formulations, illustrated lucidly by Buchanan (1975), have worked with a Hobbesian variant of the prisoners' dilemma. One common illustration portrays a two-person interaction with options designated as trade and take. The best joint outcome is for both players to trade, but the prisoners' dilemma outcome is for both players to take. The constitutional issue is how to secure trade–trade and avoid take–take.

Coordination games also provide a framework for exploring the emergence of rules that frame subsequent actions, as Young (1998) illustrates. While coordination games point to different problems and approaches to resolution than do prisoners' dilemma games, both types of game theoretic formulations reflect recognition that observed outcomes depend on the rules that govern human interaction, which in turn suggests that in many cases the way to change patterns of interaction is to change the rules that govern those interactions. To be sure, not all rules are subject formally to legislative change. Still, the game theoretic framework has been central for organizing thought about constitutional rules and processes because that framework immediately creates the distinction between choosing rules of the game and choosing strategies for subsequently playing the game.

While the game theoretic distinction has been valuable in orienting constitutional thought in productive directions, we wonder whether it has also led to neglect of some deep complexities. The game theoretic framework often accomplishes a similar reduction to a representative interaction, and with the same effect as the representative agent. The Hobbesian-type portrayals of a prisoner's dilemma reduce the world to a single interaction where each party faces a common and starkly simple choice between trading and taking. For some analytical purposes, this procedure is fine for it brings much analytical tractability in its train. In some instances, however, that tractability can misdirect analytical attention, just as the representative agent formulation often misdirects the attention of macro theorists.

Models based on representative agents or representative interactions assume that a single actor or interaction can be scaled up to generate a societal outcome. There are surely cases where this is so, and it is surely reasonable to think that ordinary market processes typically operate to produce scalability. While large firms might differ in numerous qualitative ways from small firms, the conventions of private property and profit-seeking surely tend to operate to nullify those qualitative

differences. If a firm grows so large that it can't compete effectively, it typically will either shrink on its own accord or will do so involuntarily through competition. The theory of market competition is usually modeled as occurring on a field. There are grounds for thinking that political competition is better captured through network-based rather than field-based models, in which case scalability is often absent (Barabási 2002; Potts 2000). In the presence of scale-free models, the move from small to large entails qualitative changes in network patterns that is not a simple matter of scalar multiplication. While as a formal matter, the game theoretic distinction between choosing rules and choosing strategies inside those rules is still useful for orienting thought, there may be significant qualitative changes that arise as the size of interacting entities increases.

Consider a small-scale image of the game theoretic formulation of constitutional political economy. Eight people gather for an evening of poker. Before they can play, they must settle on the rules by which they will play. During the evening it will always be possible for one of the players to suggest some change in the rules. If the change is agreeable to the other players, subsequent rules of play will be by the new rules. This game theoretic framework is simple and clear. Within this parlor game framework, the players choose the rules. The players choose whether to amend the rules. Any new rule, moreover, applies to future plays and not to past plays or to an incomplete game currently in process.

While constitutional rules are often analogized to rules for parlor games, the analogy is significantly incomplete. The sharp temporal distinction between choosing rules and choosing strategies within those rules pertains only incompletely to social life. Constitutional and post-constitutional are entangled and not separated. Furthermore, the small scale of parlor games makes the separation seem reasonable, but the large scale of political activity makes the separation impossible because only a subset of people affected by any change in rules will participate in changing the rule. Within democratic systems, deliberately chosen rules are the province of parliamentary assemblies and, to a lesser extent, courts and administrative agencies. This is nothing like the parlor game where no game is played without the players agreeing on the rules.

Even more, it can be deeply ambiguous whether a rule has been changed or an ambiguity in an existing rule has merely been clarified. With eight people coming together because they want to play poker, such ambiguity is unlikely and contestation among the players would surely be absent. But within large societies, ambiguity and contestation are ever present, baked into the cake so to speak. This setting contains the predominant case of changing constitutional rules through changing the interpretation of an existing rule, typically by a small group of individuals in the judiciary. The effort to move from an eight-person interaction over a limited domain to interaction involving many millions of people and with a domain that is pretty much unrestricted surely entails significant qualitative changes, and with those qualitative changes being of direct relevance to matters concerning the rule of law.

The prisoners' dilemma alternative of trade–trade and take–take is clear when it is applied to the poker game. But it is not at all so clear when it is applied to large societies. In representative agent models, there is no room for people to want

different things because by construction they all want the same thing. It is the same for representative agent interactions, for here it is presumed that both parties see their options in the same way. There can be general agreement in support of a world of peaceful commerce over one of rampant predation within society, and yet there can also be intense controversy along many specific margins.

2 Two Substantive Illustrations: Taking Property and Playing Santa Claus

We now advance two brief illustrations on takings and redistribution because they illuminate some of the difficulties in determining whether rule of law is a reasonable property to ascribe to actual political practices or whether it is a fiction that might serve ideological purposes but should not be confused with reality. These illustrations highlight how far removed democratic decision-making can be from the idyllic settings of parlor games.

A. Taking property. The 5th Amendment to the American Constitution clearly allows government to take private property through eminent domain. But that Amendment places rule-of-law type limits on the ability of governments to take private property. Such takings must be for a legitimate public purpose, and with public purposes being limited in number at the time of constitutional enactment. Furthermore, any taking must be accompanied by just compensation, which clearly must be something like a market valuation of that property because that is what is taken from the owner. Behind this Amendment lies a notion that people create governments to serve them, as reflected by the notion of the consent of the governed (Epstein 1985).

It's easy enough to argue that the 5th Amendment reflects a reasonable notion of a rule of law. As it reads, the Amendment would generate pretty much the same outcome regardless of the identities of the political officials involved in any takings of property. Whatever the identity and interests of the official, the taking would be for public use only, and it would be accompanied by just compensation. Disputes over particular takings, moreover, would be settled in courts. But why should anyone think the world works this way? A mayor, for instance, might support a taking of property to create some industrial district from what had been cheap housing. Where the public purpose might lie in this case would be in his mind and those of his supporters, but surely would not be commonly held by everyone and certainly not by the residents who were displaced. This situation is not equivalent to playing poker. Whether the mayor might get support from the city council would surely depend on how much the city would have to pay, how those payments would be distributed among taxpayers, and how any political resistance that taxation might create would play out in future political implications. This setting is far removed from any parlor game.

B. Playing Santa Claus. Charles Warren (1932) examines a century of American legislation and litigation over the general welfare clause of the constitution. Warren starts in the early nineteenth century with introduction of a bill into Congress to appropriate money to help farmers in draught stricken Ohio. When it was pointed out in Congress that Congress had no constitutional authority to appropriate money

for special needs because the general welfare clause limited appropriations to items that would be for the benefit of everyone, the proposal was abandoned. Warren recites repeat performances over the ensuing years, but with diminishing support for upholding the constitutional limit expressed by the general welfare clause. Finally, Warren relates how a motion to appropriate money for draught-stricken farmers in Texas was enacted by Congress, only to be vetoed by President Grover Cleveland. After a few more repetitions of the story of Presidential veto, a bill comes to President Franklin Roosevelt who does not veto it. Through a continual process of contestation and interpretation, the general welfare morphs from an external limit on the ability of Congress to appropriate to an internal product of Congressional determination as Runst and Wagner (2011) examine.

C. What's the point of these illustrations? It's obvious that the distinction between choosing rules and choosing actions inside a framework of rules is difficult to maintain or implement on the surface. It would seem as though constitutional amendment is a continual process that stands outside the disjoint framework that pertains to parlor games. With respect to the parlor game, everyone participates in choosing the rules as well as in amending the rules. With actual political processes, however, the preponderance of people are bystanders to the selection and amendment of rules by which they must play. When viewed from the surface, rule of law would seem to be a fiction similar to the common fictional statement that "the sun rises in the east and sets in the west," and which might have less fictional sometime in the past.

While superficial appearances are often accurate, they can also be wrong or incomplete. In the rest of the paper we explain why the reality of rule of law requires some sub-surface examination that explores the connections and relationships between those who participate directly in choosing and amending rules and those who do not participate but who nonetheless must take those rules as data in choosing their actions. To do this, we must avoid reducing governance to a representative interaction that is scaled up to the societal level. To the contrary, we treat governance as a social relationship that operates in network fashion. The qualities of governance thus depend on the architecture of the network that encases those who participate in governance.

3 Rules, Strategies, Non-Scalability, and Democratic Oligarchy

When constitutional rules are analogized to parlor games, the bi-level distinction between choosing rules and choosing strategies inside the chosen rules is clearly meaningful. While the distinction also has meaning within democracies, there are obviously significant differences in scale between the two settings which must be addressed. If the change in scale brings about qualitative differences between the two settings, a parlor game cannot be transformed into a democracy through scalar multiplication without also taking into account qualitative differences wrought by the change in scale.

If the rules are changed after some period of play in a parlor game, all eight of the players will recognize the change and agree to it explicitly. This will be so even if it

was only one or two of the players who suggested the change in rules. The twin presumptions of full knowledge and unanimity are descriptively accurate for this setting. Suppose these weekly games have always been played with each player bringing his or her own beverage. On this particular occasion, however, after some hours of play and with the beverage containers empty but with the players wishing to continue the game, two of the players suggest to replenish the beer by taking some chips from the biggest two piles on the table. They explain their proposal in 5th Amendment fashion: this taking of chips would serve the public interest in allowing play to continue and would also be accompanied by just compensation in an in-kind fashion because those whose chips were taken would thereby be able to continue playing poker where otherwise the game would end.

If the two players with the largest piles of chips agreed to this proposal, it could reasonably be said that the rule of law by which the game was constituted was affirmed by this method of getting more beer. But if those two objected and said instead that each player should buy his or her beer, the taking of chips would not occur and the initial rules would have been affirmed. While such small number cases are often used to illustrate the distinction between choosing rules and amending rules, as well as of choosing strategies within whatever rules are in place, these small number cases also carry with them implicitly the presumptions of universal agreement and full knowledge. For eight people playing poker, it is hard to see how it could be otherwise.

But this small-number setting may not be reasonably scalable to large societies. The presumptions of full knowledge and unanimity break down because there is no way that millions or hundreds of millions of people can participate in making or amending rules within a framework of universal agreement. Even modest sized parliamentary assemblies cannot truly operate with open-ended discussion and universal agreement, as Bertrand de Jouvenal (1961) explains in his examination of the problem a consensus-seeking parliamentarian faces within a parliamentary assembly, let alone a society at large. The parliamentarian faces a scarcity of time that almost surely will lead to a form of democratic oligarchy. Discussing a change in rules takes time during which other business cannot be discussed. A truly open process of discussion would allow all participants to inject their thoughts into the discussion until either a consensus was reached or the proposal was abandoned because no consensus was apparent. In most parliamentary settings, however, time for discussion is limited and in some cases even set at zero, in order to make a judgment without reaching consensus. The time cost of discussion is intensified by recognition that genuine discussion requires listeners as well as speakers, and it will be hard to obtain listeners as the speeches lengthen. In one way or another, participation in parliamentary discussion will be typically limited to what are regarded as major players due to the scarcity of time.

Actual constitutional processes involve a relatively small number of people in changing the rules through interpretation rather than through express amendment. This, for instance, was the history of the American general welfare clause that Warren (1932) chronicled. This process is inherently oligarchic, in that it involves a relative handful of people choosing or revising rules that apply to other people. At this point the question arises as to whether it is possible to distinguish between an

amendment of a rule and an interpretation of an original rule. Participants in such processes invariably assert that they are interpreting or clarifying the meaning of existing rules and not engaging in constitutional amendment. But is this a reasonable assertion to make? It is easy enough to understand why participants in this process would advance this assertion in light of the controversy that seems to greet notions of a living constitution.

The idea of a living constitution conveys the notion that constitutional amendment and refinement is entangled with choosing strategies within a settled framework of rules. One category of strategies, in other words, is to try to secure changes in the allowable set of actions through rearticulating the meaning of rules. This is mostly in the domain of the judiciary, and most often, a single judge, or a handful of judges interpret and clarify the meaning of rules.

The controversy over cedar rust between Warren Samuels (1971, 1972) and James Buchanan (1972), and with that controversy continuing in Buchanan and Samuels (1975), illustrates this point (as Runst and Wagner (2011) discuss). Cedar rust could infect apple trees. The Virginia legislature declared that cedar trees adjacent to apple trees would have to be destroyed if they were infected with cedar rust. Samuels used this situation to illustrate continual interaction of economics and politics in an open-ended environment which happened to play out this particular way. The Virginia legislature was acting within its constitutional prerogative in upholding public health and safety. In contrast, Buchanan argued that the legislature was amending the rules because the existing framework of private property and market interaction allowed a Coase (1960) resolution of conflict between the owners of apple trees and cedar trees.

One can debate interminably whether the Virginia legislature acted within the rules or changed the rules, and with that debate surely intensifying with the size of the stakes involved. Yet that debate cannot reasonably be reduced to a parlor game, even though it was presented in this manner. If it could be reasonably reduced to a parlor game, it would be a simple matter for the owners of cedar and apple trees to agree on a resolution, for rust that spreads from a cedar tree to an adjacent apple tree is in the same position as someone who in felling a tree finds it to fall onto a neighboring house and not into the open field that was the target. But far more than these two people are involved. The owners of cedar and apple trees might not be reducible to representative owners due to different degrees of interaction and proximity between the two types of tree. The prices of apples and cedar products will be affected by the resolution of this controversy and they will bring their interests to bear on the case. Members of the legislature are not, moreover, some kind of joint compound of cedar-apple owner but have their own interests that involve complex relationships among many participants. In other words, the distinction between amending rules and interpreting rules is not so straightforward once the setting of the parlor game is left behind because it is not possible by direct observation to claim that all participants as distinct from a few have agreed to the change in rules.

Rule maintenance outside of such small number settings as parlor games always involves a relative handful of specialists deciding about the rules that will apply to everyone else. For claims on behalf of rule of law to be sensible, it must be claimed

that the judgments any set of specialists make will be invariant to changes in the identities of those specialists, given that there is no change in the identities of the remainder of society. With respect to the poker game, two of the eight players may comprise a committee that rules on complaints or suggestions that the other players advance. If rule of law rather than personal preference governs such decisions, the content of the judgments should be invariant to the composition of the committee. For the parlor game this outcome seems reasonable because the players have much relevant knowledge about one another and must maintain support from the other players. The committee is, in other words, in much the same position as a private arbitrator who must maintain support from both sides of the dispute being arbitrated.

Due to non-scalability and the unavoidably oligarchic character of decision-making, maintenance of rules, is largely done by a handful of experts and small committees. Therefore, the system will generate rules that satisfy the rule of law, when the decisions and rules made by a committee are invariant to the members forming the committee. Within contemporary political frameworks, however, there is no good reason to presume that the judgments made by any committee drawn from among the population will be invariant to the composition of that committee. Much depends on the process by which a committee is created from among the population.

The constitutional process in this respect can be represented by a bi-level framework. The ground level is the entire population to whom the rules pertain, and who are in the position of the poker players. The upper level is a set of players drawn from the ground level, and who will rule on disputes and suggestions. That upper level, moreover, is not some random draw from the lower level. Rather it is selected through some non-random process that starts with self-nomination. The extent to which rule of law might be reasonably descriptive of the constitutional process depends on the pattern of connection between the planes, and not just on the pattern of connection among the articulators of rules.

4 A Wicksellian Intermezzo

Constitutional arrangements whereby the rules are invariant to the composition of a particular rule making body require that this body reflect an underlying concurrence within the society at large. In this respect, Knut Wicksell's (1958 [1896]) treatment of just taxation is a seminal contribution to constitutional political economy. Wicksell sought to set forth a parliamentary framework within which it could plausibly be claimed that actions taken within a parliament would reflect the actions that would have been taken had the entire society belonged to parliament, if only this were possible. Choices made within a parliament would be invariant to the particular identities of the members of parliament, which would make it plausible to claim that it was law and not arbitrarily selected preferences that ruled. To be sure, this invariance was a property of Wicksell's sociological presumption that Swedish society could be reasonably well represented by a small number of preference types (Wagner 1988). Within a suitable form of proportional representation, those

preference types could be projected onto parliament as a suitably stratified sample of the population. With parliament being pretty much a miniaturization of the underlying population, unanimity within parliament would correspond to unanimity among the population. Parliamentary rulings would thus mirror the poker game with respect to its rule-of-law properties.

Wicksell advanced unanimity as a limiting case to illustrate his point about how a small parliament could make the same decisions, as would a large society, if only that society were capable of acting as a parliament. As a concession to practical parliamentary operation, Wicksell retreated from unanimity by suggesting something on the order of three-quarters or five-sixths approval. Starting with Buchanan and Tullock (1962), it has been well recognized that any rule short of unanimity will move away from the strict distinction between choosing rules and choosing strategies inside those rules because one possible strategy is to secure changes in the rules through biased interpretations on behalf of ruling factions. While faction is typically thought of as domination of minorities by majorities, there is also plenty of room for small minorities to dominate large majorities. To illustrate this point, suppose the members of a society of one thousand people treat each of a series of issues as equivalent to a coin flip, save for a faction of 50 people who act in unison. This faction will be able to get its way about 80 % of the time because there is only about a 20 % chance that 501 of the other 950 people would vote the other way (Rogowski 1974: 71–142).

As Vincent Ostrom (1997) explains, however, democratic processes typically operate with a rich set of procedural rules that do not reduce to a simple voting rule within parliamentary assembly. In the end, some vote will be taken, but prior to that vote some structured network of actions and procedures will be necessary. What is finally put to a vote will be an emergent quality of interactions that occur within some framework of parliamentary procedure that must be navigated prior to a vote.

There are, of course, many ways of constituting democratic processes, as Congleton (2011) illustrates, all of which involve a network-based architecture of some form. Within such architectures, much of significance resides in the extent to which different architectures require concurrence among genuinely independent entities as contrasted with requiring concurrence among various versions of essentially the same entity. Within the US, for instance, a majority of the population pays nearly no personal income tax, though other taxes are also in use. A bi-cameral legislature where both chambers are selected by the same one person-one vote procedure would pretty much duplicate one another. An alternative arrangement would entail chambers that mirrored rather than duplicated one another. For instance, one chamber might be selected through votes weighted in proportion to taxes paid, while the other chamber was selected by one person-one vote. This mirroring procedure for a bi-cameral legislature surely maps more fully onto the rule-of-law process than the duplication between the chambers. In any case, the Wicksellian framework reminds us that in the extent to which a process reflects the presence of a rule of law requires consideration of the relationship between those who articulate law and the remainder of society.

5 Monocentric and Polycentric Architectures for Generating Rules

One significant distinction in this respect is between monocentric and polycentric architectural arrangements. Monocentric architectures are hierarchical; polycentric architectures are heterarchical. This distinction can be illustrated nicely by comparing two familiar games that children often play, both of which entail networked relationships among the players. One game is "Simon Says" where one player is appointed "Simon," and during various activities the other players must do as Simon says. What Simon says the other players should do is clearly perceived as a command, and the objective of the game is to be the last person standing after the other players have been eliminated for failing to follow Simon's command. This game is hierarchical as the commands flow from one node within the network to the remaining noes. In this system all the nodes are connected to the final node of "Simon" and the architectural arrangement is one that flows from the top down to the other players.

The second game is "rock, paper, and scissors," where children settle matters among themselves. Within this game played by hands, a clenched fist signified rock; an open hand with fingers close together signifies paper; and two extended fingers signify scissors. Rock breaks scissors; scissors cuts paper; and paper covers rock. In this game each node within the network is connected to other nodes in a specific relationship, without being connected to some parent node. In this sense, this relationship is heterarchical and not hierarchical. These different architectures are not just found in the playing of games. They are also found in the settlement of disputes among children. One scheme for settlement is hierarchical, wherein a dispute is resolved by looking to a "superior," often a parent or a teacher, and doing as the superior says. Within this heterarchical scheme, each player has equal voice and the game cannot continue until the participants agree to do so.

It is evident that "Simon Says" has the characteristics of a monocentric architectural arrangement, whereas "rock, paper, and scissors" has a polycentric arrangement. Any competitive process will entail a polycentric arrangement among individuals (Polanyi 1951). Within a polycentric arrangement, there is no locus of control over the arrangement. By contrast, a monocentric or hierarchical arrangement is inherently monopolistic because an order of precedence is built into the hierarchy. The ruling authority within a monocentric arrangement may well grant some measure of autonomy to lower levels in the arrangement, but that arrangement is always subject to amendment from the higher level.

Within any network-based framework, the structural arrangement of the network exerts significant influence over the properties of the actions the participants take. For a monocentric network, it is unlikely that rules will be independent of who heads the network, for that person occupies a position of sovereignty. To the extent Carl Schmitt (1996 [1932]) is correct in asserting the autonomy of the political, political processes will always contain some measure of monocentricity, which means in turn that rule of law will never be found operating in full flower. Still, an explicitly polycentric arrangement can come closer to rule-of-law notions, even if such arrangements are incapable of reducing the political wholly to law, economics, and morality.

Polycentric arrangements are in principle capable of expanding the extent to which rule of law notions pertain to constitutional maintenance, but only if the procedures through which rules are maintained or amended through processes that reflect more the notion of mirroring than of duplicating. The injunction that no man should be a judge in his own cause is counsel to avoid duplicating. The principle that the person who divides a cake should let the other person select which slice to take is counsel to embrace mirroring. With this distinction between duplicating and mirroring, we arrive at federalism as a possible means of incorporating polycentricity into the constitution of governance.

6 Federalism, Polycentrism, and Rule of Law

The ability of a simple republic to maintain what could reasonably be called a rule of law as distinct from a rule of men depends on the extent to which the various participants in the articulation of law mirror one another rather than duplicate one another. This distinction is not captured by the simple notion of a separation of powers. If legislative, executive, and judicial offices are all populated through the same electoral process, the outcome is more likely to be duplication than mirroring. To achieve mirroring requires some different type of electoral framework, such as illustrated by Wicksell's scheme of proportional representation combined with a dynastic executive who operates from a position of residual claimacy. The Wicksellian scheme would seem to map reasonably well onto the parlor game setting where a rule of law clearly obtains. As noted immediately above and as Buchanan and Tullock (1962: 233–48) sketched, a bicameral legislature could have similar mirroring properties, depending on the extent to which different selection principles between the two chambers meant that motions that passed both chambers implied greater concurrence among the members of society than would be implied when both chambers were filled by the same electoral principle.

While it is possible to think of ways where this increased degree of concurrence among the population at large might be accomplished within a simple republic, a compound or federal republic offers a further menu of ways of doing so. Much depends on whether the form of federalism is what Eusepi and Wagner (2005) describe as genuine or spurious federalism. Genuine federalism entails competition among governments, which can create a framework wherein governmental power at one level restrains government at the other level. This was the vision of the compound republic set forth particularly by James Madison's essays in The Federalist and elaborated by Vincent Ostrom (1987). This form of federalism operates on polycentric principles of open competition where the pattern of activities among governments is an emergent product of that competitive process. A system of competitive federalism requires independent, competitive action among governments, and such a system may give way to a system of spurious or cartel federalism, as Michael Greve (2012) examines.

There are several instruments through which cartelization can be established. For instance, a higher level government that has independent taxing power throughout a nation can use that power to enforce cartelization through its use of contracts

financed by tax extractions from residents of lower levels of government. The higher government may offer grants and contracts to support, for example, various transportation projects, and require that unionized labor be used to staff those projects. Some lower level governments might decide not to participate under those conditions. If so, the taxes paid by residents of those governments will not be reduced, but instead will leave larger budgets to distribute among those governments that do participate in the program. By offering contracts of this form, the higher level government has a good deal of leverage to impose national uniformity in place of the greater degree of local variety that would otherwise have resulted. The ability of the higher government to impose nationwide taxes, as against receiving revenues through appropriations from lower level government, is one institutional arrangement that can cartelize what otherwise might have been a system of competitive federalism.

In the US, for instance, the 16th and 17th Amendments, both of which were ratified in 1913, supported use of the federal government as a cartelizing agent for the federal system. The 16th Amendment allowed the federal Congress to tax income without having to collect the revenues proportionately from among the states. This Amendment allowed the federal government to engage in geographical discrimination and coalition formation that previously had been restricted by the constitutional requirement of tax uniformity (Brennan and Buchanan 1980; Buchanan and Congleton 1998). The 17th Amendment provided for the direct election of federal senators, where previously federal senators had been elected by state legislatures. This change in electoral procedure likewise expanded the scope fiscally discriminatory coalitions between subsets of the population within particular states held together by the federal government freed from the uniformity constraint and the state selection of federal senators.

These constitutional changes which expanded the scope for fiscal discrimination are reinforced by judicial asymmetry that likewise operates to cartelize a federalist system. Within the US, for instance, the federal judiciary is able to process claims against state governments. A state may enact legislation that discriminates against businesses located elsewhere, and a state court may well uphold a constitutional challenge to that legislation. But that challenge can be taken to a federal court, which might rule differently. In this manner, state legislation is subject to federal judicial oversight. Federal legislation, however, is immune from this type of challenge. Constitutional challenges to federal legislation must be taken to federal courts. This is a fundamental constitutional asymmetry, as Niskanen (1978) explains, and it works to support the cartelizing activities of the federal government. Avoidance of that asymmetry would require some process by which constitutional challenges to federal legislation are heard in state judicial forums. To be sure, there is a long standing constitutional principle that no man should be a judge in his own cause. This principle, however, is applied asymmetrically: complaints against lower level governments are heard in higher level courts, but complaints against higher level governments are also hears in higher level courts.

7 A Summing Up

The analytical point of departure for this paper is recognition that as a literal matter there can be no such thing as a "rule of law." There is no way that the abstract noun denoted as law can exercise the practical activities we denote as rulership. Only people can practice rulership. Rulership requires exercise of the practical imagination, to employ the title of David Lindenfeld's (1997) treatment of *Staatswsissenschaften* in the nineteenth century. Whether that exercise might conform to the non-arbitrary qualities associated with the rule of law is what we have explored here. Rule of law elicits an analytical framework based on networks of nodes and edges as the way to conceptualize governance. Rule of law refers to qualities of the process through which rules are articulated and maintained. That process cannot be hierarchical, for then the head of the hierarchy is the source of law. In this instance, it is that person and not something called law that rules. Rule of law must map into some polycentric process of rule articulation and maintenance. Codification of practice is one form of rule of law, but many polycentric arrangements could hold that quality. The principle that no person should be a judge in his own cause reflects a polycentric notion of the rule of law.

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