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The Nature of the State and the State of Nature: a Comment on Grady & McGuire's Paper

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Synopsis: In 'The Nature of Constitutions', Mark Grady & Michael McGuire provide a model of the evolution and purposes of constitutions as arising to minimize appropriation by dominants of subordinates. This Comment builds on Grady & McGuire's article in three ways. First, it supplements their analysis by operationalizing a model of constitutional evolution that views constitutions as arising out of the conflict of competing high-ranking individuals to preserve their own authority. From this clash of self-interest of dominant individuals, constitutions are born. This predicts that constitutions will not simply tame all forms of appropriation, but will also hard-wire some forms of appropriation behavior into the permanent constitutional structure. Second, it examines the American constitution in light of this model to show how that constitution reflects the mixture of appropriation and appropriation-taming behavior. Third, this Comment argues that the breakdown of constitutionalism in the United States this century can be explained by a failure to fully appreciate the purposes of constitutionalism in a biological framework.

Key words: evolutionary economics, rent-seeking, constitutional economics, public choice

Introduction

> *The moment when first the conqueror spared his victim in order permanently to exploit him in productive work, was of incomparable historical importance. It gave birth to nation and state. . . . The root of everything human reaches down into the dark soil of the animal—love and art, no less than state, justice and economics.*
>
> Oppenheimer 1975, p. 27

Most legal scholars seem to think that evolutionary biology is relevant to one discrete constitutional question: does the Establishment Clause of the First Amendment require teaching evolutionary biology instead of religion-centered views of man and the universe? Mark Grady & Michael McGuire's 'The Nature of Constitutions' provides an antidote to this view (Grady & McGuire 2000). Indeed, the fundamental insight of their article is that the lessons of evolutionary biology are relevant to *all* aspects of constitutionalism. By contrast, the debate over the proper role of Darwin and religious freedom is a trivial, and probably incorrect, application of Darwinian lessons to constitutional law.

Grady & McGuire have done the heavy lifting of demonstrating the central thesis that constitutions arise to tame appropriative behavior. The purpose of this Comment is to supplement and extend their insights. As Grady & McGuire note, a proper understanding

of evolutionary biology directly impacts our understanding of the constitutional project generally and retains importance to our ongoing constitutional question.

While the lessons of Grady & McGuire's provocative article certainly will be mined by many subsequent scholars, in this Comment, I will limit my remarks to a few general points. First, I will discuss the purpose of constitutions generally, and the relevance of evolutionary biology to that general question. Second, I will discuss the relevance of evolutionary biology to the American Constitution, arguing that although the Framers were not Darwinists, the problems that they sought to address were virtually identical to those presented by the lessons of evolutionary biology, but also reflect some of the same appropriative forces that Grady & McGuire have identified. As a result, the original constitutional scheme was well-crafted to incorporate the lessons implied by Grady & McGuire. But the American Constitution also reflects the inherent limitations of constitutionalism. Third, the drift away from the original constitutional scheme, especially during the Progressive Era and the New Deal, was rooted in an inexplicable blindness about human nature when applied to the motives of government actors. Finally, I will conclude that the lessons of evolutionary biology have direct relevance to contemporary constitutional arguments.

The history and purposes of constitutional government

For Grady & McGuire the origins of the state are rooted in the desire for dominants to appropriate from subordinates. In this observation, Grady & McGuire's analysis is similar to that advanced by Franz Oppenheimer in his classic sociological study of the state. Consider Oppenheimer's definition of the state: 'What, then is the State as a sociological concept? The State, completely in its genesis, essentially and almost completely during the first stages of its existence, is a social institution, forced by a victorious group of men on a defeated group, with the sole purpose of regulating the dominion of the victorious group over the vanquished, and securing itself against revolt from within and attacks from abroad. Teleologically, this dominion had no other purpose than the economic exploitation of the vanquished by the victim' (Oppenheimer 1975, p. 8).

For Oppenheimer, as for Grady & McGuire, true constitutional government is an anomaly, arising late in human history. Instead, exploitative and appropriative relationships mark the character of the state for much of its history.

As Grady & McGuire indicate, constitutional government upsets the traditional appropriative characteristic of the state, potentially turning into a form of cooperation for mutual advantage. Their analysis reveals that the foundations of most successful constitutions are in fact *historically-rooted*, arising organically and through struggle. Second, although constitutions are historically-rooted and will differ among communities, successful constitutions share certain purposes, which purposes distinguish them from 'non-constitutional' societies. This Part considers each of these points in turn.

Constitutions as spontaneous orders

It is now well-understood that—at least as an oversimplified generalization—we are creatures of our genes. By which I mean that we are largely designed to replicate our genes

(Dawkins 1989). As an initial approximation, therefore, most of our basic impulses and attitudes can be traced back to genetic predispositions designed to maximize our reproductive fitness, and thereby maximize the likelihood of the propagation of our genes.

This simple truth has several direct implications. It leads directly to universal pattern of male and female mating preferences that exist independent of specific cultures (Ridley 1993). Invariably, women seek men of high wealth and status, so as to maximize the likelihood of siring healthy and successful offspring. Health and success, of course, will be related to the ability to prosper in a given community, and thereby generate further healthy and successful offspring. High wealth and status thus become the dominant characteristics of successful males, for the reason that they are coveted by females.

Again oversimplifying, this suggests that there are two, non-exclusive strategies that a male can pursue in order to maximize his wealth and status, and thereby his reproductive fitness: cooperative or appropriative strategies.[1] These strategies are non-exclusive, because those who will be most successful will in all likelihood have the ability to pursue either strategy, depending on the situation (Wright 1994). Which strategy is chosen will largely be a function of the strategies chosen by other members of a community, and the eventual reflection of those various strategies in the economic, cultural, and political institutions of a given community. Once these social forces are introduced, there is probably a wide range of relatively stable strategies and social institutions, ranging from largely appropriative societies (such as slave and rigid class-based societies (e.g., Antebellum America and the former Soviet Union)), to largely cooperative societies, such as modern capitalistic, constitutional democracies.

Thus, which strategy will become dominant will be a function of the costs and benefits of pursuing the alternative strategies. As Grady & McGuire observe, however, even in primitive societies there is a remarkable tendency toward egalitarian, cooperative-based societies and political structures, as opposed to rigid appropriative societies.

The predominance of cooperative-based societies should not be surprising. Appropriative societies are structured on the basis of a zero-sum relationship: subordinates work, and the dominant appropriates from that subordinate (Magee 1993). As should be evident, however, this quickly undermines the incentive of the subordinate to work, leading to 'shirking' by the subordinate whenever he is able to get away with it (Alchian & Demsetz 1972). It is difficult for the dominant party to monitor the production of the subordinate to prevent shirking and expensive to punish the subordinate if he is caught. Under certain circumstances, widespread use of appropriative strategies (such as in the 'tragedy of the commons') can even result in *negative-sum* outcomes. One solution to this is a system of slavery, where the dominant holds the ultimate sanction over the subordinate. An alternative solution to this problem is to introduce elements of cooperation into the relationship, by using incentives rather than punishment to prevent shirking. The introduction of incentives creates an element of cooperation to a previously appropriative relationship.

Cooperation, by contrast, is based on a positive-sum relationship. Cooperative strategies can take two forms. The first, and most basic form, is cooperation for immediate mutual benefit. The classic example of this is the wolf pack, where several wolves hunt together because joint or 'team' production will allow them to capture significantly larger amounts of food than any wolf hunting alone (Alchian & Demsetz 1972, Dugatkin 1999). Similarly,

a ruler requires the assistance of his subordinates to fend off prospective conquerors. In these situations, the cooperative performance is immediate and for some clearly identified mutual advantage. Hierarchies that arise to prevent team members from shirking or to provide coordination among elements of the team and to allocate resources are examples of efficient, non-appropriative hierarchies.

The second form of cooperative behavior is rooted in reciprocity.[2] The benefits of reciprocity are rooted in the concept of comparative advantage and the prospect of gains to trade (Ridley 1997). In this situation, cooperation is not immediate, but spread out. One party bestows a benefit on another, in exchange for an expectation of a reciprocal promise in the future. The blood-sharing of vampire bats illustrate such a scenario (Wilkinson 1984).

The benefit of cooperative relationships is that it opens the door for greater wealth than before. By sacrificing his right to appropriate *all* of a small pie of wealth, the dominant can instead guarantee himself the right to appropriate *some* of a much larger pie of wealth.[3] Indeed, the existence of a surplus is a necessary condition for an appropriative strategy to even be effective.[4] In the end, therefore, the dominant can himself be made better off by creating the social conditions for wealth-creation, part of which is precommitting himself not to appropriate too large of a share of wealth. As Rosenberg & Birdzell observe, 'Almost always, government measures that altered property rights were adopted for the primary purpose of increasing [governmental] revenues' (Rosenberg & Birdzell 1986). At the same time, wherever the dominant retains some residual ability to appropriate wealth and the opportunity cost from doing so falls, then the dominant will follow an appropriative strategy (Barzel 1992).

In some situations, this movement from appropriative to cooperative solutions will be voluntary. This will be the case when the expected distributional gains to the former appropriator from moving to a more cooperative outcome exceed what is given up. Stated differently, it may be that a global adoption of cooperative strategies might be expected to create such a large increase in wealth that even though the dominant now has to share some of this wealth with former subordinates, the dominant party is still better off after the move than before.[5] The peaceful transition of the Soviet Union from a society based on appropriation by Communist Party members to several more-or-less market-based democracies suggests what a voluntary transition might look like.

Most transitions, however, will be revolutionary and involuntary. The decision by the United States to throw-off the yolk of British appropriation and the eventual success of the French Revolution suggest the replacement of appropriation-based political structures by constitutional, cooperative-based structures. Some constitutional revolutions, such as the destruction of the Third Reich and Imperial Japan, can be brought about through foreign conquest.[6]

The fact that constitutions result from struggle, not consensus, leads me to emphasize a point that Grady & McGuire make in passing. They suggest that the purpose of constitutions originate in the actions of subordinates taming appropriation by dominants. It is my view that constitutional government does not come about as a result of conscious effort of the great mass of subordinates to resist appropriation from a dominant. While this may in fact be the *consequence* of constitutional government, it is not, at least at first, the *cause* of constitutional government. Rather, constitutional government almost always arises

from the struggle among different groups of *dominants* to secure appropriative activities for themselves. In some cases this will be internally, as the sovereign is toppled by rivals who seek the throne, or wrest power from the sovereign for themselves. In other situations the change comes about externally, as through a war where a dominant from outside the community conquers the group and deposes the sovereign. Their chances of success often will be greater at the margin if they make promises to subordinates to support them (de Waal 1982), but it is competing dominants that drive the process. True subordinates are largely passive in this process.

For de Waal, of course, it was the alliance formation between two high-ranking but not alpha males, Luit and Nikkie, that toppled the previous alpha male, Yeoren (de Waal 1982, pp. 82–139). While the public opinion of subordinates played some role in this process, it is inconceivable to see low-ranking subordinates take the lead in overthrowing an appropriative leader, at least without the organization of some other dominant who seeks either to seize the throne for himself or to protect his own appropriative activity.

Human constitutional struggles are no different (MacKaay 1997). Consider Grady & McGuire's description of the creation of the Magna Charta. There, the Barons were not primarily seeking greater freedom and liberty for the masses of England. Rather, the Barons were simply protecting their *own* power, and implicitly, their own power to appropriate from those under their control. Benefits to the English masses, and especially the increasingly powerful English merchants, obviously accrued from this struggle, but that was simply a beneficial side-affect of the struggle between two classes of dominants—the King versus the Barons—for control over who would have the ability to set the terms of appropriation for the subordinates of England.[7] Thus, the Magna Charta arose from the struggle between two groups of high-ranking individuals over who would get to appropriate from subordinate individuals. Thus, to the extent that any benefit was accrued upon the merchants and masses it was only as a side-effect of this struggle.

Nor is the experience the Magna Charta unique. Indeed, the entire history of freedom in the West can be seen as the outgrowth of similar struggles among powerful parties to reserve the power to appropriate from subordinates. Harold Berman (1983) reports that the very concept of constitutional liberty and the rule of law can be traced to the diffusion of power among many competing political sovereigns (Berman 1983). The struggle for power, loyalty, and revenue, between religious and secular authorities provided an incentive for kings, lords, and clerics to respond to the needs of the people, and to vindicate injustices. Berman notes that an unintended consequence of this struggle among powerful elites was liberty for the many and protection from appropriation, 'A serf might run to the town court for protection against his master. A vassal might run to the king's court for protection against his lord. A cleric might run to the ecclesiastical court for protection against the king'. (Berman 1983, p. 10). This system of multiple overlapping jurisdictions prospered for many centuries and provided the cradle of freedom and western constitutional government.

The growth of property rights and economic development in the West also resulted from a fragmented political structure (Landes 1998, pp. 35–38). This political fragmentation severely constrained the appropriative opportunities of rulers. The first great commercial powers of the West were the politically-autonomous city-states of Italy, the Netherlands, and elsewhere (Rosenberg & Birdzell 1986, p. 59–60). Because there was no overarching

political entity that controlled these various autonomous governments, they remained in a frantic competition to attract population, economic talent, revenues, and tax base. Moreover, the small geographical size of these political entities and their close proximity made it easy for merchants to move from one city-state to another depending on the receptivity of the local area to commerce. A merchant literally could walk across a bridge to escape an appropriative sovereign, and many did so. Others found it unnecessary to actually exit, as the threat alone was sufficient to tame appropriation. Given the ease of 'exit', local princes had little ability to appropriate wealth directly from merchants. Instead, the city-states were forced to compete with one another by providing economic and political structures that were receptive toward trade and secure property rights.

In contrast, appropriative forms of political organization have survived the longest where there is only one monopolistic source of political and social authority. Thus, as Western Europe was leaping forward into industrialization, countries that lacked Western Europe's political fragmentation tended to stagnate, as the firm hand of a dominant ruling class eschewed dynamism and change.[8]

Related to this insight is a second: that the balance between appropriation and cooperation will be a function of particular institutions. As suggested above, it is the prevailing legal and political institutions that will signal to dominants whether they should pursue a cooperative or appropriative strategy. Thus, political institutions matter in the incentives they create for individuals to pursue cooperative or dominant strategies.

Two types of appropriation

Grady & McGuire justly criticize a branch of the theory of public choice and constitutional economics that sees constitutions as mechanisms for protecting private rights of contract and property. Indeed, their criticism reveals an even more fundamental flaw in Buchanan's views, as it is simply historically incorrect for Buchanan to argue that constitutions come about because of the need to protect private rights. The historical record overflows with examples of stateless societies that recognized and enforced private property and contract rights. From the Kapauku Papuans of West New Guinea (Popisil 1971), medieval Ireland (Peden 1977), and Iceland (Friedman 1979), to the law merchant (Trakman 1983, Benson 1989), to the settling of the American West (Morriss 1998, Morriss 1997, Umbeck 1981, Anderson & Hill 1979), and to the modern example of Peru (de Soto 1989), there are simply too many examples of systems of private property and contract enforcement without centralized state enforcement for Buchanan's theory to be plausible at all. One could argue that the absence of a state might result in a suboptimal level of contract enforcement, but not that there would be an absence of contract (Kronman 1985).

In short, relations of private property and contract are 'natural' institutions arising from repeated interactions of individuals and embedded in human nature through reciprocal altruism (Zywicki 1997a). The existence of 'territories' among animals is a clear precursor to private property in humans. Moreover, by deciding who gets what, private property presents itself as an alternative to dominance hierarchies as a mechanism for settling disputes.

Indeed, as Grady & McGuire's model predicts and history confirms, these stateless legal systems disappeared as states took them over, primarily to impose the law of the King, to

appropriate the revenues from providing the socially-valuable function of deciding disputes, and to reallocate property rights in favor of politically-powerful individuals (Benson 1990, p. 29). Indeed, in many of these situations, state intervention disrupted settled expectations and property rights regimes, introducing rivalry and conflict where previously absent (Benson 1990, p. 59). In short, Buchanan has the relationship completely backwards: states are not created to enforce property and contract because property and contractual relationships predate government.[9] States are parasitic and come into existence to appropriate some of the surplus generated by these voluntary relationships of property and contract.

Thus, Grady & McGuire's criticism of Buchanan is on the mark, and if anything, their criticism is even stronger than they suppose. But their criticism of Buchanan should not lead them to dismiss the insights of public choice completely, as other strands of public choice theory buttress the claims made in their paper. In addition, public choice theory enriches their model by focusing our attention on additional forms of appropriation against which constitutions are created to guard. At root, Grady & McGuire's vision of man is remarkably similar to that of public choice theorists; hence, it should not be surprising that the lessons they draw for constitutions are similar to those drawn by public choice.

In the economic theory of constitutionalism, constitutions serve two primary purposes: (1) reduction of agency costs, and (2) precommitment to super-majoritarian values (Pritchard & Zywicki 1999a, Boudreaux & Pritchard 1993). Although often dressed in economic, rather than biological garb, each of these concepts is directly-related to, and supportive of, Grady & McGuire's view of constitutions as mechanisms for preventing wealth appropriation.

Grady & McGuire argue that constitutions limit appropriation by parties seeking to use political power to appropriate wealth, status, and hence, reproductive opportunities for themselves. This is analogous to agency cost reduction.[10] Agency costs arise when an individual uses a grant of power to substitute his own pursuits for that of his principal, rather than serving the interests of those who have delegated the power to him. In a political system, this can be thought of as 'rent extraction', where a principal uses the power of his office to extract money from those he governs (McChesney 1997). Loosely defined, rent-extraction is relevant in this context in that it is concerned with the use of political office to further one's own interests, rather than the interests of others. Rent extraction of this sort is most obvious in the corrupt dictatorships and 'kleptocracies' that have proliferated around the world in recent years, as rulers use the power of public office to transfer wealth directly to themselves and their family members. But rent extraction and agency costs are also evident in a myriad of other ways in representative democracies, from using one's political office for financial gain and to increase one's status to using one's office to indulge one's personal ideological predilections without having to bear the costs (Zywicki 1999).

The most obvious and simple alternative to appropriative rule by a sovereign is democracy. But democracy simply recreates the appropriation problem in a different form. Now, rather than appropriation by the ruler of the ruled, unfettered democracy raises the specter of appropriation by the majority against the minority. But reducing the degree of electoral accountability reopens the possibility of sovereign appropriation. Madison recognized the inherent tension between sovereign appropriation and majoritarian appropriation in the Federalist, 'In framing a government which is to be administered by men over men,

the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself' (Federalist No. 51).

Majoritarian democracy represents a particularly virulent form of a prisoner's dilemma where there is no apparent stable solution. While everybody would be better off if transient majorities would agree not to appropriate from transient minorities, there is no way to ensure this result. A, a member of a majority would not willingly forgo his opportunity to appropriate from B, a member of a minority on the promise that B will forgo the same opportunity if he becomes part of a majority. Moreover, if C seeks appropriation, then he can form a majority with either A or B to appropriate the other. Thus, both A and B will be driven to an appropriation strategy simply to make sure that they don't end up in the minority.

For nonpolitical transactions, reciprocity developed over repeated iterations and tit-for-tat strategies provide a way out of the problem of the prisoner's dilemma. The theory of democracy also rests on a belief in reciprocity, that majorities will resist appropriating the wealth of minorities because today's majority may become tomorrow's minority (Buchanan 1954, Tullock 1959). Thus, if coordination were possible, transient majorities and minorities would like to be able to precommit themselves not to plunder one another during their period of majority control, just as repeated market exchanges lead parties to forego short-term appropriative strategies.

While repeated iterations of the prisoner's dilemma leads to stable cooperative solutions in the market context, it does not appear to provide a stable solution for democratic politics. In the market scenario, the party that breaches the reciprocal promise bears the full cost of the punishment meted out by the other party. By contrast, in the political arena, there is no correlation between whether you impose costs and in return receive costs, nor that they are similar in degree. Moreover, once a dominant coalition is in power, they will find it to their advantage to use the power of the state to created political institutions that entrench their majority status and prevent minorities from taking control (Klarman 1997). As a result, reciprocity will not be an adequate constraint on political opportunism in a democracy.

The second purpose of constitutions, therefore, is to allow majorities and minorities to solve this coordination problem and precommit themselves to refrain from plundering one another while serving in the majority coalition (Pritchard & Zywicki 1999a). In short, constitutional precommitments, enforced by an independent body free from the pressures of transient minorities (such as an independent judiciary), put certain actions off-limits to majorities.[11] In Justice Brewer's colorful phrase, constitutional rules are 'proscribed by Philip sober to control Philip drunk' (Brewer 1893 [1968, p. 428]).

This tension between dominant appropriation and majoritarian appropriation is exhibited in the American constitutional experience. As Grady & McGuire suggest, the American Revolution was a revolt against the appropriative activity of King George, as reflected in Jefferson's Declaration of Independence. In order to control new threats of dominant appropriation, the early state governments provided for close democratic control over elected officials and a weak central government under the Articles of Confederation. In turn, this led to excessive appropriative activity by majorities against minorities, and the concerns about runaway democracy and 'mob rule' feared by the Framers.

In contrast to the Declaration of Independence, when Madison and his cohorts convened in Washington, their greatest concern was with *majority* appropriation, rather than

government appropriation. And indeed, Madison's concern about majoritarian appropriation is evidenced in his initial design of the Constitution, which called for a centralization of power in Washington. Most importantly, Madison sought to grant the federal government much larger taxation powers and powers even to veto state legislation. Madison's implicit argument was that centralizing appropriative activity at one level of government but divided among several branches, would lead to less appropriative activity overall, as measured as the sum of dominant and majority appropriation. The concerns about specific types of appropriation were evidenced most strongly in the constitutional protections in the Contracts and Takings Clauses, but also in such diverse provisions as the federal government's exclusive power to provide for a uniform federal law of bankruptcies, and bans on ex post facto laws and Bills of Attainder.

Madison and his colleagues clearly were wrong in two ways. First, they were wrong in viewing appropriation by dominants as less troublesome than appropriation by majorities. The use of federal office and federal power as an avenue to money, power, and status, and as recent headlines indicate, what can be referred to euphemistically as 'reproductive opportunities', shows the ability to use public power for private appropriation.

And second, they were clearly wrong in their belief that centralizing appropriative power in Washington would lead to less appropriation overall. Madison believed that factions would cancel one another out, leading to less opportunity for majoritarian appropriation. Of course, this is not the case. Factions simply form coalitions, and replicate the same majoritarian dynamic. There are gains to trade among special interest groups from capturing the coercive power of government for themselves (Zywicki 1999). There is no net reduction in the amount of appropriative activity that takes place, there is simply a change in the parties that prevail (Zywicki 1994). Madison was also incorrect in believing that the various branches of the federal government would cancel each other out in a struggle for power. Instead, they too have found gains to trade from increasing the power of the federal government thereby increasing their power and status, ranging from vast congressional powers to tax and regulate commerce, to executive discretion to wage 'unofficial' wars, to the judicial seizure of power to remake massive portions of American society according to their whims.

Most importantly, at the federal level, the power of 'exit' largely is ineffective, thus one of the most important checks on appropriation is absent. Appropriation will be minimized when appropriative activity resides at the most local level possible, thereby allowing exit. This is the city-states model of Europe, discussed above, where a merchant literally could take his wagon across the bridge to a more friendly principality. The Boss Hoggs of the world, of course, will also seek to appropriate to the extent they can—as Grady & McGuire observe, that is simply human nature. But the threat of exit constrains their ability to do so. Thus, even though there will still be appropriation at work, the overall level should be less when appropriation is done locally rather than nationally (Zywicki 1994).

Of course, Grady & McGuire's article do more than simply rephrase public choice concepts in different terms. Public choice and constitutional economics have been criticized because of their reliance on what is said to be an arbitrary postulate of rational economic maximization. Grady & McGuire provide a biological foundation for this otherwise arbitrary selection of utility functions. As they have shown previously, the drive by dominants to appropriate subordinates is insatiable (Grady & McGuire 1997, pp. 110–114). Although

their terminology is different, they share a concern with the public choice theorists: that government will be used as an instrument of appropriation by the powerful against the weak. And like public choice theorists, they view constitutions as a way to create the conditions for cooperation rather than appropriation.

The Framers and the relevance of biology to the constitution

It is obviously true that the Framers did not have a grasp of evolutionary biology. Indeed, Darwin didn't publish *The Origins of Species* until 1859. But the Framers view of man was quite similar to that offered by Grady & McGuire. Hence, while the foundation of the Framers' views may have changed over time, it is evident that the structure they created is responsive to the same concerns raised by Grady & McGuire.

The Framers' view of man

The Framers were not, and could not have been, Darwinians. Nonetheless, as John McGinnis has previously noted, their view of human nature was strikingly similar to that of modern Darwinians (McGinnis 1997, McGinnis 1996). But the similarities go beyond those cited by McGinnis. It often goes unremarked, but there are great similarities between the Darwinian view of man and religious view of fallen man, tainted by 'original sin'. Both see man's nature as potentially troublesome, with vast reservoirs of selfish, antisocial behavior available. Moreover, the Framers were clear that they were unwilling to trust to the higher reaches of men's souls. As Madison wrote, 'If men were angels, no government would be necessary. If angles were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions' (Federalist No. 51).

But at the same time, they saw the terrible potential for men to exploit government for their own advantage and for the advantage for some at the expense of others. In this way, their doubts about man's ability to act virtuously and charitably has found modern grounding in the lessons of evolutionary biology.

Given these remarkably similar views of the Framers and modern biologists, it is little wonder that Grady & McGuire endorse the view of constitutional government created by the Framers. They were responding to similar concerns, that those who could seize its reins would turn government into a tool of appropriation. In short, we have come full circle: biological man and fallen man are one!

The American constitution and limiting appropriation

As noted above, both biology and economics suggest that constitutions exist to prevent appropriation by dominants/politicians and by majorities. This further suggests that two types

of rights usually will be subject to constitutional precommitment, those that play an important role in controlling appropriation and rent-extraction by dominants/politicians, and those that control appropriation by majorities of minorities. As John McGiniss argues, the protections for political speech in the First Amendment provide this function by ensuring the conditions necessary for forming coalitions to overthrow appropriative dominants. Similarly, the Contracts and Takings Clauses of the federal Constitution prevents appropriation of private wealth by majority coalitions. Prohibitions of bills of attainder and *ex post facto* laws prevent politicians and majorities from singling out individual rivals for punishment. Constitutionally-protected rights to jury trials was also intended to check overreaching by federal officials by allowing local citizens the ability to 'nullify' oppressive laws and prosecutions initiated in Washington (Zywicki 1996). The Second Amendment was clearly intended to protect the citizenry against appropriative government (Lund 1987). Similarly, the Equal Protection clause prohibits the government from creating 'permanent' classes of majorities and minorities by prohibiting discrimination on the basis of readily-identifiable characteristics such as race and sex, thereby preventing the type of all-out appropriation against Jewish lenders described by Barzel.

But focusing purely on the enumeration of certain rights conceals a more fundamental aspect of successful constitutions. As noted above, constitutions usually have their roots in struggles among dominants, where subordinates benefit as an ancillary effect of the struggle. In turn, this implies that for a constitution to be successful, it must *create* conflicts between dominants wherein protection of the rights of subordinates from appropriation arises as a *by-product* of this conflict. Subordinates will rarely have the ability or incentive to stand-up to dominants directly. Thus, the real struggle must be among dominants for control, and it is only out of this struggle among dominants that subordinates' freedom from appropriation is secured (de Waal 1982).

The Framers clearly understood these lessons about pitting powerful dominants against one another and protecting individuals from appropriation through the power of 'exit'. The Framers were skeptical of the ability of 'parchment barriers,' such as enumerated constitutional rights, to limit usurpation by politically powerful forces. Rather, they sought to pit 'ambition [against] ambition', so that a mutually-destructive competition between political actors would 'counteract' one another, resulting in protection for individuals.[12] This was to be reinforced by creating within the governmental structure incentives for the constitution to be self-enforcing, so that the political 'interest of the man must be connected with the constitutional rights of the place' (Federalist No. 51).

They did this in two famous ways, first by dividing the power of the federal government among the various branches, and second, by dividing power between the federal and state governments. Based on their experience under the Articles of Confederation, they feared the power of the legislative branch the most. As a result, they further subdivided that into a bicameral legislature, with the lower house elected directly by the people, but the upper house elected by the state legislatures.

Somewhat involuntary, they also recognized the concept of 'federalism,' a system of shared sovereignty between the federal and state governments. Federalism limits the ability of politicians or majorities in any specific geographic area from acting in an appropriative manner toward minorities (Zywicki 1997b). Because federalism requires individuals to physically move from one jurisdiction to another, it is less effective in protecting individuals

from appropriation than was a system such as that described by Berman, where multiple political authorities shared overlapping political jurisdiction. Nonetheless, the 'exit' option has always been an important source for protecting constitutional rights, ranging from the ability of Southern blacks to migrate north during the 1950's, to the ability of religious minorities to seek refuge in discrete states (such as the Mormons in Utah), to the ability today to choose to live in states that offer greater protection for certain constitutional rights than courts have been willing to offer (Lund 1997).

Rather than trusting to 'parchment barriers' such as the Commerce Clause or the Tenth Amendment, the Framers sought to make federalism self-enforcing by providing election of U.S. Senators by state legislatures in their corporate capacity.[13] This idea rested on the realization that state legislatures would jealously guard their appropriative opportunities and would be unwilling to cede them to the federal government. Like the Barons who forced King James's hand in 1216, the state legislators could be expected to keep political power close to home and keep their prerogatives close to home as well. In this light it is significant that the original Bill of Rights did not apply to the states and that the Civil War and Reconstruction involuntarily forced the Bill of Rights upon the states. To effectuate this scheme, the state governments were given representation in the U.S. Senate, essentially allowing them to veto acts by the federal government that infringed on the states' prerogatives (Zywicki 1997b). Of course, the Framers were not making any distinction between who was more worthy to appropriate wealth from the citizenry, federal or state politicians. Rather this entire scheme was designed to pit federal against state politicians, pitting dueling federal and state dominants against one another, with the public as the beneficiary of the struggle. In a sense, the whole point of a constitution is to create and maintain a prisoner's dilemma among various political dominants, denying them the very gains to trade suggested by Grady & McGuire.

The American constitution and institutionalizing appropriation

Although the Constitution was crafted in part to constrain appropriation, there are also crucial features that reflect the fact that it emerged from a struggle among high-ranking individuals, and that true subordinates had very little in the way of a direct hand in its construction. Thus, most obviously, the Constitution preserved slavery, and in fact, arguably *increased* the protections for slavery by the inclusion of the fugitive slave law and the promise of a strong national government to enforce it. Similarly, the Constitution created a common market between the states, but in large measure this was to reduce smuggling and permit the erection of high tariffs on the national level, thereby benefiting influential industry interests at the expense of dispersed consumers. Thus, while the Constitution eliminated some forms of appropriative activity under the Articles of Confederation, it should not be ignored that it also *increased* and entrenched several other forms of appropriative activity, and that the inclusion of these appropriative provisions was a necessary condition for the Constitution's passage. Indeed, it was not until the Civil War and the passage of the Thirteenth and Fourteenth Amendments that additional forms of appropriation by government were restricted.[14]

Grady & McGuire identify another form of 'opportunity cost' to sovereign appropriation that is especially interesting in the American experience. They note that, 'The current

sovereign may avoid defense costs and a diminished expected flow of appropriations by restraining his appropriations against this individual and even sharing with him his appropriations from others'.[15]

The constitutional history of the twentieth century suggests that appropriative powers have become aware of the positive-sum opportunities to themselves of sharing the fruits of appropriations and have increased the coordination among them (Pritchard & Zywicki 1999b). Hence, rather than seeing *competition* between the state and federal levels for opportunities for appropriation, we instead see a *sharing* of appropriation by the use of the federal government to collect taxes and other appropriative activities. Similarly, there is a collusion of powers at the federal level to maximize the appropriative opportunities of the federal government. In this sense, the collusion among these various institutions of the state and federal governments is analogous to that of economic competitors to cartelize and industry and divide up the profits.

The original constitutional structure was critical in checking appropriation in another way. Under the original constitutional structure, the federal government's power of taxation was limited to capitation taxes, thereby preventing the government from appropriating the wealth of particular individuals and also limiting appropriation by majorities. In this sense, this protection was analogous to that imposed by the prohibition on *ex post facto* clauses, bills of attainder, and Takings Clause, which prevented singling out particular individuals for discriminatory treatment. The Sixteenth Amendment and its eventual interpretation to permit progressive taxation, of course, eliminated this constitutional limitation on discrimination among various individuals and encouraged the plunder of high-income minorities by politicians and majorities.

While not part of the original constitutional structure, the passage of the Equal Protection Clause in the Fourteenth Amendment provided a similar restraint on appropriative activity. In particular, the Equal Protection clause limits the singling out of certain individuals as the subject of appropriation on the basis of the readily-identifiable attribute of race. Of course, the rise of so-called affirmative action and the use of racial spoils as an instrument for appropriation by certain politicians and interest groups has similarly weakened the restraints on appropriation imposed by the Equal Protection Clause, allowing politicians to transfer wealth and power to politically-influential groups.

The wrong turn

This similarity between the Framers' view of man and the modern view of man conceals an ironic and puzzling twist in American constitutional history. Darwin penned his *Origin of Species* in 1859. Through the nineteenth-century and into the twentieth, Darwin's ideas gradually came to supplant religion-centered views of the world as the dominant secular religion intellectuals. Today, the general dominance of Darwinian views is signified by its status as an objective 'science', whereas religion-centered views of the world are shunted aside as subjectivist mysticism. Moreover, Darwinian ideas have come to permeate our worldview and jargon, as 'evolutionary' models are routinely proposed to explain certain developments, even when those ideas are not evolutionary at all.[16] Darwinian ideas have

captured intellectuals, including legal academia, and those ideas have found official sanction in the First Amendment jurisprudence of the Supreme Court that the 'science' of evolution is to be distinguished from religions.

But ironically, the academy has accepted Darwin only from the 'neck down'. While it is generally accepted that our bodies (two arms, two legs, two eyes, upright gate, etc.) are the products of evolution, academics have stubbornly resisted the idea that our brains and minds are also the product of evolution. It is unclear whether this is merely intellectual error or a willful act to deny the obvious.

The fact that Darwin's conclusions are believed to stop at the neck has had dramatic consequences for our vision of constitutional government. As noted, a consistent application of Darwinian insights inevitably lead to a view of man and a view of constitutional government similar to that of the Framers. Visions of man rooted in original sin and Darwinian biology caution against utopian constitutional systems, and instead point in the direction of a constitutional system arranged so as to minimize the use of State power for appropriation. The Framers understood this, and by fragmenting power and pitting dominants against one another took appropriate precautions to prevent it.

But a surprising development has occurred in this century. The rise of Darwinism as the prevailing orthodoxy in the academy and judiciary ironically has been matched by a decline in the influence of those same ideas in the understanding of man's nature, intellect, and the Constitution. Because our minds are stipulated to be 'outside' evolution, we are stipulated to be guided wholly by reason, culture, or our economic relations. The error in this view is obvious—reason and culture cannot make me jump high enough to dunk a basketball. Thus, it is curious that many would believe that it can make us significantly smarter or moral than our natures have made us. As a result of this perverse intellectual revolution, the traditional limitations of constitutional government that were put in place to restrict the ability of the government to do ill have been swept aside in favor of maximizing the potential of the federal government to do well. To those versed in the concerns of the Framers or the learnings of evolutionary biology, the effect of this change has been predictable: to increase appropriative activity by the federal government and powerful interests who have been able to use the federal government to divert wealth and power to themselves. A brief tour of twentieth-century American constitutional history is appropriate.

The roots of twentieth-century constitutionalism can be traced to the Civil War. There for the first time Americans grasped the potential for the federal government to do great deeds, such as the abolition of slavery. This also was the culmination of the great Enlightenment belief that we are all essentially equal. There also, however, the American populace for the first time permitted dramatic increases in the power of the federal government to silence dissent and vested the President with dictatorial powers to detain political critics. These developments sowed the seeds of the responses to future political emergencies.

By the close of the nineteenth-century, government was looked on more and more as a redemptive force to do good for society, whether it was standing up to the 'trusts' or waging war against Spain. During this period a remarkable divergence in intellectual opinion began to take hold. What can loosely referred to as the Darwinian mindset began to take hold in the views of the people toward business and businessmen, but the opposite view of government began to dominate.[17] Businessmen were 'just our for themselves' and are

willing to appropriate wealth from consumers and employees for themselves. In a strange fashion, however, the lessons of the Framers about government were forgotten. Politicians were seen as somehow immune from the temptations of using government for themselves. Instead, they were 'public servants' who are looking out for the 'public good'.

Now this is a startling intellectual duality. Just as Darwin's views were bursting on the scene, thereby tending to confirm and reinforce the Framers' view of man, the populace retreats from this view, at least as applied to politicians and the power of government. The results have been dramatic.

What explains the widespread acceptance of this incongruity of neck-down Darwinianism? I do not have an answer, but I will offer a few speculations. One possible explanation is that the rise of Darwin corresponded in time with the 'death of God.' But Darwin merely drove the final stake through religion; the mortal wounds had been inflicted a century earlier during the Enlightenment, where Enlightenment philosophers glorified reason over divinity. The acceptance of Darwin, therefore, was hitched to this larger project of the Enlightenment. Having liberated individual reason from one form of religion, the Enlightenment was not willing to sacrifice it to the new 'religion' of Darwinism. Moreover, the Enlightenment and the triumph of reason unleashed an unprecedented enthusiasm for utopias, a worldview contrary to the cautionary vision urged by Darwinian lessons, a view of constrained reason, profound inequality, and essential selfishness.

Thus, upon the inevitable realization that reason itself was limited and constrained, these children of the Enlightenment looked elsewhere for explanations, including Rousseuian culture, Freudian psychoanalysis, and Marxian economics. At the same time, Darwinian thought itself took a wrong turn into the abyss of 'social darwinism', wounding its credibility and eliminating itself from consideration in an era seeking utopian solutions.

The result of this intellectual revolution was the weakening of the most important constraints imposed by the Constitution. Beginning with the Progressive Era, there was a dramatic transfer of power to the federal government and a staggering increase the appropriative potential of the federal government. The Progressive reformers sought to strip away many of the anti-democratic features of the federal government that had been established to limit the ability to use the power of the government to appropriate wealth and power. More importantly, their views represented a fundamental change in the understanding of human nature. Far from being suspicious of concentrated government power, Progressives saw concentrated government power as an important lever to enact social and economic change, so long as the 'right' group of people was in charge. Hence, rather than seeing 'exit' as a constraint on appropriative activity, they saw 'exit' through federalism as a way for selfish private actors to escape socially-valuable regulation by moving from one state to another, and they saw power-dispersing institutions such as the Senate as an obstacle to social change by giving their enemies a concentrated place to exert their influence to obstruct the power of the people.[18] Human behaviors and beliefs were primarily social artifacts, not inherent biological or religious attitudes.

Most obviously, the passage of the Sixteenth Amendment in 1913 gave politicians the power to tap directly into individual incomes, thereby increasing their power to appropriate wealth from the citizenry. The appropriative potential of the Sixteenth Amendment was exacerbated by the contemporaneous ratification of the Seventeenth Amendment, which

provided for direct election of Senators. The purpose of the Seventeenth Amendment was to increase the power of urban political machines and make it easier for interstate special interests to secure favorable legislation from the national government by increasing agency monitoring costs, reducing lobbying costs, and increasing the tenure of Senators (Zywicki 1997b, Zywicki 1994). The shift from election by state legislatures to direct election effectively sounded the death knell for bicameralism and federalism as constitutional limitations on appropriative activity by the federal government (Zywicki 1997b, pp. 209–215). The preconditions for modern constitutionalism were now in place. Soon after the passage of the Progressive Era Amendments, the first great wave of special-interest legislation hit Washington, as the power of the federal government was used to transfer wealth to powerful special-interests (Holcombe 1996).

The New Deal can be seen simply as the culmination of this view of human nature and its translation into constitutional power. The rise of the administrative state during the New Deal can be seen as a final abandonment of the Framers' fear of centralized power. Independent agencies accountable to no one but the administrators themselves provide massive grants of power to powerful individuals on the 'honor system'—a simple and unenforceable promise that they will not abuse the power of their office. As a result, we see the modern structure of American government; the Constitution in ruins along with its limitations on centralized government and its appropriative potential. Federalism largely rests in the dustbin of history, at least as a constraint on appropriative activity. The decision by the Supreme Court during the New Deal to cease enforcement of the Commerce Clause eliminated the last shred of limits on the federal government. Moreover, during the *Lochner* era, the Supreme Court aggressively invoked ancient common law principles to strike down blatant 'class legislation', e.g., special interest rent-seeking legislation (Siegan 1980). During the New Deal, of course, this oversight of the political branches was also reduced. Finally, residual rights of the people to resist oppression, such as jury nullification and the protections of the Second Amendment, were also whittled away during the twentieth-century as pernicious vestiges of a bygone era.

The New Deal ushered in an era of growth in the federal government that has proven irreversible. Federal politicians bask in the power of untrammelled discretion, recognizing unprecedented opportunities for the conversion of government service into wealth, status, and power. Unsurprisingly, they have exploited these opportunities to maximum effect. The appropriative potential of government service is second only to the ability to convert that power into lucrative lobbying opportunities after leaving office. Meanwhile, special interest groups, proceeding under the benign cover of the 'public good' use the government to funnel money, power, and prestige to themselves.[19]

This brief constitutional history is important as it provides a cautionary tale to Grady & McGuire's story. Like many others, Grady & McGuire imply that once a constitution is in place, it will provide an exogenous constraint on future social and political action. As twentieth-century American constitutional history illustrates, however, constitutions are themselves more endogenous than is generally recognized (Zywicki 1997b, Zywicki 1994). So long as constitutional change can be brought about in a non-unanimous framework, those seeking to use the power of the state for appropriative ends will attempt to undermine the constitutional rules that interfere with their goals. Just as portions of the original

Constitution reflected the influence of appropriative powers hard-wiring their appropriative activity into the Constitution, the constitutional amendments of the twentieth century indicate that emergent special interest groups brought about constitutional changes to further their own agendas.

Implications

Are there direct implications for the biological analysis of constitutions? Several applications come to mind. One potential reform would be term limits, as reciprocity provides some constraint on appropriative activity (Zywicki 1997b). Thus, forcing politicians to return to the private sector to live under the laws they pass might be expected to provide some constraint on appropriative activities in office and overrunning of constitutional limitations on appropriation. In a similar vein, attempts to entrench incumbents through so-called campaign finance reform should be resisted (Zywicki 1997b).

Second, an enforceable balanced budget amendment would also tend to restrict appropriative activity by creating the conditions for competition among dominants for scarce appropriative opportunities (Zywicki 1997b). Combined with a super-majority requirement for increasing taxes, a balanced budget amendment might provide at least a modest constraint on the overall amount of appropriative activity in the economy.[20]

Third, some of the more obvious ways in which the government singles out individuals and small groups for discriminatory treatment should be resisted. Thus, something like a flat tax is warranted as a measure to restrain the power of the government to appropriate wealth from wealthier individuals. For similar reasons, aggressive enforcement of the Takings Clause is also appropriate (Epstein 1985). Similarly, true enforcement of the Equal Protection Clause to require nondiscriminatory treatment of all relevant kinds should be required.

Fourth, a scaling back of the administrative state is also warranted. The entire apparatus of the administrative state was premised on an incorrect view of human nature. The architects of the New Deal believed that a government of unbiased experts would unleash the redemptive power of government. Instead, it has unleashed the vagaries of human nature. Immune from most of the checks and balances of constitutional government, administrative agencies exercise almost unlimited discretion to funnel appropriative opportunities to themselves and to bully isolated individuals who have the misfortune to find a 'wetland' on their property or who want to open a small business. Career regulators routinely use the power of government to write regulations that indulge their personal preferences. Non-career regulators write regulations that increase their power and discretion, then they pass through the 'revolving door' and portray themselves as possessing expertise in the same regulations they just authored (Zywicki 1999).

And what of the Supreme Court? The disconnect between the triumph of evolutionary biology as an intellectual concept and its demise as a constitutional philosophy is most obvious with respect to the Supreme Court. In perhaps the greatest irony, the Supreme Court aggrandizes power to itself to declare evolutionary biology the official state 'science' and to forbid the teaching of religious views in school. Could anything be more comical than the Justices of the Supreme Court using the power of the state to enforce their political world view on private individuals in the name of constitutionalism? Rather than constraining

themselves under the Constitution as Darwinian theory would caution them to do, the Supreme Court Justices use the power of their office to impose their personal beliefs on an unwilling American society (Pritchard & Zywicki 1999a, pp. 497–498).

Conclusion

Grady & McGuire have updated the insights of the Framers and have put them on the foundation of biological science. Their pathbreaking and provocative article is certain to initiate a debate as to the nature of man and the nature of the government that implies. And while they are one of the first to root the nature of constitutional government in the biological nature of man, they should take comfort in the fact that their lessons find ample support in public choice economics and the annals of history.

The state is rooted in conquest and appropriation. The desire for appropriation is rooted in human nature. Recognizing those facts is the first step in taming the state and creating real constitutionalism.

Notes

1. These two categories are similar to Oppenheimer's (1975, p. 12), distinction between the 'economic' and 'political' means of acquiring property. He distinguishes the terms in a manner similar to that advanced by biologists, 'I propose . . . to call one's own labor and the equivalent exchange of one's own labor for the labor of others, the 'economic means' for the satisfaction of needs, while the unrequited appropriation of the labor of others will be called the 'political means'.
2. I explore this theme further in Todd J. Zywicki, 'Bankruptcy and Reciprocity', Working Paper, George Mason University School of Law, October 31, 1999.
3. Grady & McGuire 2000. It is exactly this calculation that explains the transition from sovereigns raising revenue by direct appropriation from unfavored individuals to taxation. (Rosenberg & Birdzell 1986, pp. 120–122). This transition occurred in Western Europe well before the rest of the world, and gave subjects a greater incentive to engage in productive activity and to make large capital investments in factories and the like, which would have been appropriated by the kind under the old regime.
4. Oppenheimer (1975, p. 13), observes, 'The state is an organization of the political means. No state, therefore, can come into being until the economic means has created a definite number of objects for the satisfaction of needs, which objects may be taken away or appropriated by warlike robbery. For that reason, primitive huntsmen are without a state; and even the more highly developed huntsmen become parts of a state structure only when they find in their neighborhood an evolved economic organization which they can subjugated. But primitive huntsmen live in practical anarchy.' Jared Diamond (1997, p. 30), makes a similar point that surplus food production was necessary before a class of professional politicians could be supported.
5. A similar calculation of the trade-off between efficiency gains and distributional consequences can be seen in the question of deregulation of previously-regulated industries. (Zywicki 1999).
6. Olson (1982, pp. 75–77), argues that World War II destroyed old patterns of hierarchies and class control of the Axis states, allowing constitutional government to flourish. Pritchard and Zywicki (1999b) argue that the victory of the United States in the American Revolutionary War created a similar opportunity for efficient constitutionalism to emerge in the United States.
7. Rosenberg & Birdzell (1986, p. 119), note that by establishing the importance of property rights under English law, the Magna Charta benefited merchants and provided the conditions for economic development in England before the rest of Europe.
8. Rosenberg & Birdzell (1986, pp. 86–88), discuss stagnation in China due to political authorities desire to check decentralized centers of economic entrepreneurship.
9. As Hayek observes, 'It is only as a result of individuals observing certain common rules that a group of men can live together in those orderly relations which we call a society. It would therefore probably be nearer the

truth if we inverted the plausible and widely held idea that law derives from authority and rather thought of all authority as deriving from law—not in the sense that law appoints authority, but in the sense that authority commands obedience because (and so long as) it enforces a law presumed to exist independently of it and resting on a diffused opinion of what is right.' (Hayek 1972, p. 95).

10. The concept of 'agency costs' is not a wholly apt term to describe this, as the State was designed to transfer wealth to rulers, thus 'agency costs' would arise only when individuals pursued their own ends rather than maximizing the ruler's wealth. Nonetheless, the underlying principle is the same, and is captured in the idea of 'rent extraction', political leaders using the power of government for the primary purpose of enriching themselves, rather than the 'public good'.
11. See Hayek (1960, p. 179). The role of an independent judiciary as a specific institution for enforcing precommitments is discussed in Boudreaux & Pritchard (1994).
12. The Federalist No. 51. Similarly, John Dickinson noted that election of U.S. Senators by state legislatures would produce a salutary 'collision' between the state and federal governments, which would enable them to 'check each other'. Debates in the Federal Convention of 1787, S. Doc. No. 404, 57th Cong., 1st. Sess. 6 (1902). The importance of this constitutional provision and others of the Framers' techniques of fragmenting power and pitting political authorities against each other is discussed in Zywicki (1997b).
13. The importance of election of Senators by state legislatures as a mechanism for self-enforcing federalism is discussed in more detail in Todd J. Zywicki, 'The Seventeenth Amendment and the Demise of Self-Enforcing Federalism' (Forthcoming 2000). Barry R. Weingast also discusses self-enforcing federalism, but without reference to the initial method of electing U.S. Senators by state legislatures. (Weingast 1995).
14. Of course, the Thirteenth through Fifteenth Amendments were themselves the side-effect of the desires for the Republicans to entrench themselves as the majority party by granting the franchise to former slaves. (Boudreaux & Pritchard 1993).
15. Such rent-sharing arrangements are a common means through history for avoiding conflicts among competing authorities. North and Thomas, for instance, describe the web of tax collection and tax exemption schemes that characterized the medieval relationship between political and religious authorities. (North & Thomas 1973, p. 83).
16. I develop this theme in my forthcoming article, 'Assessing Evolutionary Models in Jurisprudence,' Working Paper, August 31, 1999, George Mason University School of Law.
17. Of course, much of this rhetoric was self-serving, as it provided cover for those seeking to use the power of the state to advance their own selfish interests. (Zywicki 1994).
18. See Zywicki (1997b, pp. 188–189). Of course, by requiring Senators to raise large amounts of money so as to conduct massive state-wide campaigns, the passage of the Seventeenth Amendment increased the importance of wealth and power in politics. Indeed, this probably was one of the purposes of the Seventeenth Amendment, as the urban political machines were one of the greatest sponsors of the Amendment. (Zywicki 1997b, 185–194).
19. For instance, environmental lobbying groups have been able to trade on their image as guardians of the 'public interest' to acquire a degree of prestige, power, and influence over law and regulation unmatched by almost any other private interest group in any other area of law. They use this influence to funnel wealth and power to themselves, even when those private goals conflict with improving environmental conditions. (Zywicki 1999).
20. On the value of supermajority rules for taxing and spending, see McGinnis & Rappaport (1999a) and McGinnis & Rappaport (1999b).

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