

Divergent paths:

How to reconcile Constitutional Theory with Political Science

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1. Introduction

Constitutional theorists generally describe legal institutions – constitutions, regulations, precedents, courts, and others – as exogenous components of the political order. According to this perspective, the legal and the political orders are distinct and autonomous domains. Normative arguments built upon this framework state that each domain must not overlap each other. In this sense, a pure, reasoned legal practice should be safeguarded by language-based constraints. On the one hand, the legal order should speak the language of principles, rules, and legal arguments. On the other hand, the political order is allowed to speak a broader vocabulary, including policy-based and outcome-based arguments. According to this framework, constitutional theorists pose judicial review as one of the main mechanisms that protect the legal order against the tensions arisen throughout the political process. Judicial review is depicted as a *central, countermajoritarian, and apolitical* institution that safeguards, enforces, and reinforces the Rule of Law.

By contrast, political scientists have exposed how actual power dynamics challenge this perspective.² They provide empirical evidence that show that the lines separating legal and political orders are more porous than how jurists claim. Political scientists state that interferences from one order to another are not only frequent but a regular pattern that profoundly influences the shape and the evolution of formal and informal social institutions. In sum, they denounce that the mainstream discourses raised by constitutional theorists became too detached from current social practices.

However, political scientists leave one question open: how is it possible to reconcile Political Science with Constitutional Theory? Indeed, these fields have different goals: the former aims to describe the reality of power interactions; the latter aims to build

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² See Deryl Levinson, *Foreword: Looking for Power in Public Law*, 130 *Harv. L. Rev.* 31 (2016).

normative discourses to discipline the use of power under rational constraints. This work advocates that it is therefore a task for constitutional theorists to converge these fields, which would require them to formulate normative claims in line with actual power dynamics. One of the main tasks of this project would require to re-arrange how legal and political orders are theoretically framed. Indeed, theorists should portray constitutions and courts as integrated into – and not excluded from – the political order.³ This premise does not allow the conclusion that law is a subset of politics, but rather that, despite their own specificities, legal institutions emerge as a result of interactions among political actors within the political order, thus giving rise to properties that depend on how political institutions work.

Based on this assumption, this paper develops a set of basic theoretical premises that re-reads the way that the legal order interacts with the political order. This perspective will allow Constitutional Theory to bring back a missing detail from the shadows of the social practices: there is a feedback process through which constitutions influence the interactions between political actors, while these same interactions also contribute to what constitutions ultimately become.

The rest of the article is organized as follows. The first section describes the properties of the political order and how the constitutions are integrated into its whole. The second section explains how distinct properties of the political order emerge, affecting the sustainability of the constitution. The third section analyzes some implications of these premises on the idea of judicial review.

2. Constitutions and the Political Order

Constitutions regulate the allocation of political power, as part of a project of disciplining and enabling the political process⁴. To accomplish this task, they *i*) define patterns of state and social behavior, *ii*) design and distribute power between institutions, *iii*) recognize who the citizens are, and *iv*) entrench fundamental rights and key principles of sovereignty and justice.

³ See Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, The American Political Science Review, Vol. 91, No. 2 (Jun., 1997), pp. 245-263.

⁴ See Tom Ginsburg, *Constitutional Endurance*, IN Tom Ginsburg & Rosalind Dixon (Organ.), *Comparative Constitutional Law* (Edward Elgar, 2011, p. 112).

Whether as a single written document or as a group of doctrines and judicial decisions, constitutions are integrated into a complex, polycentric⁵ and dynamic order⁶, which emerges from ongoing interactions between agents and information⁷, at the various levels of aggregation that both categories can develop – from individual players to social groups, from single vocabularies (e.g. rights) to institutions (e.g. judicial review). First, the order is complex because it is a whole comprising of a collection of aggregates, which entail interdependent relationships with one another – from cooperative and dialogical to competitive and predatory connections⁸. Second, the order is polycentric due to its plurality of focal points emitting incentives and disincentives of coordination that directly and indirectly affect its constituent elements⁹. Focal points assume a stabilizing effect, as they absorb and reduce tensions of the political process, thus allowing it to move forward. Although constitutions aim at standing as one of the most prominent focal points, other centers can also affect and shape the system. Some of them are established by the constitution itself (e.g. political institutions - Parliament, courts, agencies, etc.); others are relatively autonomous, even pre-existent to the constitution (e.g. social institutions - family, school, and informal norms.). Third, the order is dynamic as its state varies over time, due to simultaneous interplays between *i*) agents (citizens and congressmen, citizens and citizens, judges and regulators), *ii*) institutions (the Supreme Court and the Parliament, the Judiciary and the agencies, the District Court and the Supreme Court), *iii*) agents and institutions (Justices and the Supreme Court, citizens and the Parliament), *iv*) agents/institutions and norms/doctrines (the Supreme Court and its own precedents, official agents and regulations, citizens and the Constitution), and a number of other connections. Feedback loops arrange and re-arrange the aggregates, either increasing or reducing the variation of each component as time goes by.

When taking part of the political process, political actors – congressmen, judges, officials, entrepreneurs, human rights activists, social movements, parties, citizens – hold distinct personal and/or group strategies, which may or may not coincide with the institutional values and interests set by the Constitution¹⁰. Since this picture is not static, strategies change according to how agents react and adapt to each other's behavior. These responses, whether

⁵ The idea of polycentrism in judicial review is developed in Jeff King, *Judging Social Rights*.

⁶ See Adrian Vermeule, *The System of the Constitution* (Oxford University Press, 2011).

⁷ See Cesar Hidalgo, *Why Information Grows* (Basic Books, 2015)

⁸ See Robert Axelrod & Michael Cohen, *Harnessing Complexity: Organizational Implications of a Scientific Frontier* (Basic Books, 2000); Robert Jervis, *System Effects: Complexity in Political and Social Life* (Princeton University Press, 1997).

⁹ See Daryl Levinson, *Parchments and Politics: The Constitutional Puzzle of Constitutional Commitment*, 124 *Harvard Law Review* 658 (2011), p. 701.

¹⁰ *Idem*, p. 706.

deliberate or not, generate subsequent interactions that affect not only other agents, but also the storage of information. This scenario helps to explain why the design of the institutions, the commands of legal norms, the language of the decision-making process, and even the interpretation of a doctrinal principle may change overtime.

Nonetheless, since agents respond in different ways to similar incentives, non-linear patterns of behavior arise from social interactions¹¹. For example, judges do not react in the same way when the Supreme Court issues a precedent. Some of them perceive the holding in a broader perspective, and tend to apply it in a number of cases; others read the *ratio decidendi* more strictly, and tend to apply the precedent less frequently; some of them might perceive the objective terms of the holding, but consciously refrain from adopting the precedent due to ideological purposes, by framing the holding in narrower terms to justify its distinguishing from other cases. In another example, a regulation that prohibits a business practice causes distinct responses from citizens: a group of people may promptly adapt its behavior to comply with the new rule; some entrepreneurs may question its constitutionality before the Supreme Court; other costumers might try to find alternatives to keep the same practice in different shape, even illegally. In another case, an electoral candidate tweeting fascist and homophobic messages can both attract voters and incentivize progressive groups to protest against his positions, by polarizing the political atmosphere in a way that congressmen decide to pass a law restricting freedom of speech, or even in a way the Supreme Court overturns a precedent that limits electoral discourse through a newly developed version of the balancing test. Subsequent reactions and adaptations may occur, affecting the electoral arena, the language of constitutional jurisprudence, and the Supreme Court's decision-making process.

In sum, this is a general picture of this first theoretical argument: in order to coordinate the political process, agents interact with one another and with blocks of information to design a collection of focal points that spread incentives and disincentives toward the components of social life – political actors, institutions, legal norms, informal norms, languages, doctrines, etc. The constitutions, along with the political institutions that they set, have become prominent focal points. However, by the time that these focal points are

¹¹ See Scott E. Page, *Diversity and Complexity* (Princeton University Press, 2011); Robert Axelrod & Michael Cohen, *Harnessing Complexity: Organizational Implications of a Scientific Frontier* (Basic Books, 2000); Robert Jervis, *System Effects: Complexity in Political and Social Life* (Princeton University Press, 1997); Donella H. Meadows, *Thinking in Systems: a Primer* (Chelsea Green Publishing, 2008); David Peter Stroh, *System Thinking for Social Change* (Chelsea Green Publishing, 2015).

introduced into the political order, they also become part of it, affecting and being affected by their environment. The whole complex remains in progress: deliberate and unintended outputs are routed back as inputs, as part of a cause-and-effect chain that forms loops. As political actors can adapt their strategies and behaviors and learn from past experiences, equilibrium is never achieved. Interactions reshape the system components from time to time, including the constitution itself. Overall, the constitution aims at coordinating the political order at the same time that the political order contributes to what the constitution become.

However, as I will argue in the next session, the lack of static equilibrium does not impede the political order from reaching sustainability. Constitutions should be able to provoke interactions that incentivize political actors to abandon their personal strategies as to engage with legal norms and institutional values. Under this scenario, it can be said that a constitution effectively developed self-enforcing and stabilizing mechanisms, and, therefore, it disciplines as much as it enables the political process.

3. The emergence of the properties of the political order

The collection of components of the political order can interact in different ways - cooperative, competitive, predatory, and even parasitic. All these relationships give rise to patterns of collective behaviors, which emerge either as an aggregate of simple components or as an aggregate of other aggregates. Each aggregate, as a whole, develops collective properties that are distinct from the arithmetic sum of the properties of its components¹². Like different constituent elements make up the cells, from which tissues, organs, and the human body emerge, the interdependent relationship between the whole and its parts is crucial to understand the political order. This task involves detailing what the whole does that its parts do not, as well as how behavior at larger scale emerges from the articulated structures and interactions at a finer scale. For example, a political order comprising political institutions whose elected members follow a majority decision-making process may not deliver an inclusive political order. However, it may be the case of turning the whole more inclusive by introducing an

¹² For a comprehensive understanding of the key concepts of the complexity science, see Scott E. Page, *Diversity and Complexity* (Princeton University Press, 2011); Robert Axelrod & Michael Cohen, *Harnessing Complexity: Organizational Implications of a Scientific Frontier* (Basic Books, 2000); Robert Jervis, *System Effects: Complexity in Political and Social Life* (Princeton University Press, 1997); Donella H. Meadows, *Thinking in Systems: a Primer* (Chelsea Green Publishing, 2008); David Peter Stroh, *System Thinking for Social Change* (Chelsea Green Publishing, 2015). The approach taken by this proposal bears distinctions from the approach led by the sociologist Niklas Luhman in his “autopoiesis” systems model. On the disagreements between complexity theory and autopoiesis system theory, see Thomas E. Webb, *Exploring System Boundaries*, 24 L. Critique 131 (2013).

institution whose unelected members follow a decision-making procedure that incentivizes a minority-protective perspective.

Two conclusions arise from this example. First, each interdependent part contributes to develop the properties of the whole, since changes in one the parts modify the whole. Second, identical parts do not necessarily build a complexity with their same properties¹³. On these grounds, for example, defenders of judicial review could defect the argument that courts with unelected members undermine the democratic legitimacy of the political order. It may be the case that the lack of democracy in few institutions, in fact, enhances the inclusive property of the whole, emerging from the relationship between democratic and undemocratic organizations.

From this perspective, *interaction* and *emergence* become key concepts to understanding how the properties of the political order and of its aggregates grow.

Constitutional theory attributes properties to political institutions: the constitution bears normativity; legislative bodies are inclusive organizations; the presidency conveys representativeness; judicial review is less democratically legitimate than the legislative decision-making process. Overall, some accounts treat these properties as implicit characters, as if they arose just at the time when political actors stoned some blocks of information in order to crystalize a stable and valued pattern of behavior, henceforth qualified as institutional interest. Actually, properties do not result from the institution's internal structure or from the information that it conveys alone, but also from the reciprocal interactions between these institutions and their environment. Normativity, inclusiveness, representativeness, legitimacy, and other properties are patterns of collective behavior whose origins may be rooted in a political institution, albeit distinct from it.

For instance, normativity, by which I mean the property of building self-enforcing mechanisms, must not be taken either as an implicit character or as the emergence of legal norms alone. The text of a legal norm is an inanimate block of information, which only gains force when political actors commit to uphold its entrenched values and interests. This purpose requires that the political order develops interactions that drive its agents to switch personal strategies to institutional commitments - in the case that they bear distinctions. When this pattern of behavior achieves a larger scale, normativity emerges as a property not of the legal

¹³ See Scott E. Page & John H. Miller, *Complex Adaptive Systems: an Introduction to Computational Models of Social Life* (Princeton University Press, 2007).

norms, but of the relationship between legal norms and their environment, forming a new aggregate.

In practical terms, the interplay between the constitution and other components of the political order (citizens, institutions, officials, judges, regulations, laws, etc.) gives rise to constitutional enforcement. If any phenomenon obstructs this relationship, normativity slows down. For this reason, a bill of rights alone does not necessarily produce minority protection, unless citizens, political actors, and institutions engage with its terms. Plus, a bill of rights adopted by three countries may deliver three distinct outputs, as one draws by analyzing how the freedom of speech achieved different conceptions and frames in the US, in Canada, and in Europe. In the same fashion, as Ogendo teaches on the African case, decolonized states that borrowed constitutional provisions from the European states have struggled with building self-enforcing mechanisms. Those documents immersed in an environment whose political actors held personal strategies far from democratic values. Therefore, constitutional norms and institutions that were transplanted from other political orders proved to be unprepared to fulfill this huge gap. For this reason, in many cases, African constitutions, despite conveying democratic values, have not produced inclusiveness and normativity, turning into a weapon taken by local elites to undermine democracy and to maintain state control. Ogendo calls this picture as 'constitutions without constitutionalism'¹⁴.

The enigma of how the properties of the political order emerge has been nuclear for constitutional design. As they are not implicit characters of any political institution, but an emergence arisen from patterns of behaviors, the design of institutions becomes more challenging and complex. Understanding feedback and agent adaptation turns as important as analyzing the values that underlie the structure of a political institution. Reasoned elaboration, selection of valued interests, and application of general principles certainly take part of a designing enterprise. However, as *a priori* properties must not be assigned to any artifact of the political order, institutions alone become a plan of journey rather than a concrete path to the normative commands that they convey. Predicting whether they will generate the proposed properties requires an empirical understanding of how they will *impact* and *be impacted by* political actors and the environment. Thus, a systemic, consequentialist, and experimentalist approach to constitutional design helps the craftsman to lapidate a detailed set of norms based

¹⁴ OKOTH OGENDO. "Constitutions without constitutionalism: an African political paradox" in douglas Greenberg S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (Chapter 4) OUP, New York". In: *Cent. Afri. J. Pharm.Sci.* 5(3): 60-66. *Cent. Afri. J. Pharm.Sci.* 5(3): 60-66; 1993.

not only on deontological conceptions, but on how this new piece, as part of the whole, will contribute to enhance the desired properties of the political order and of its aggregates.

In sum, within the constitutionalist project, the sustainability of the political order relies on the capacity of a constitution to position itself as a coordinative focal point, integrating with existing informal institutions (e.g. family, school, etc.). A constitution can so by introducing new political institutions that stabilize systemic tensions and re-distribute power between players (e.g. judicial review, Parliament, universal vote, etc.). As institutions depend on collective behavior to activate the desired properties of the political order, constitutional design process assumes relevance. More than selecting abstract principles and values in a vacuum, analyzing the actual interactions within a political order becomes an essential step in defining the set of rules that will conform a proposed institution. Eventually, the larger the diffuse support that political institutions achieve, the stronger the self-enforcing mechanisms of the political order become.

4. The political order and the judicial review

Judicial review is an institution designed to protect constitutions against the tensions of the political order. Its task is twofold. First, judicial review performs a stabilizing function. It enforces constitutional norms and spreads out self-enforcing incentives, by *i)* issuing commands that uphold values and interests entrenched in the Constitution, and by *ii)* applying sanctions whenever political actors do not comply with rulings, through the legitimate use of force. Second, judicial review performs a dynamic function. It fulfills interpretive gaps found in the constitution, regarding both *i) a priori* issues, when political actors did not achieve consensus over a controversy during the constitution-making process, leaving it unsolved to be decided afterwards either by the general political process or by the courts, and *ii) a posteriori* issues, which arose by the ongoing interactions between political actors and other components of the political order, as its complexity increases. Both stabilizing and dynamic functions enable the constitution to endure over time¹⁵.

This formal definition aside, a number of theoretical accounts have developed some discourses that pictured judicial review as a *central, essential, definitive, counter-majoritarian, apolitical* and *collaborative* institution. Most of them have become a common sense in courts'

¹⁵ See David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 Harvard International Law Journal 319 (2010);

opinions and doctrines of Constitutional Law. However, from our perspective, assigning those properties to an institution might be a mistake. First, these properties rely on patterns of collective behavior that emerge from the interaction between institutions and its environment, and not from judicial review itself. Second, there are theoretical and empirical researches that provide evidence that most of those properties are not seen as a general rule in many political orders. Based on the theoretical assumptions that I outlined in the previous sections, I aim at briefly falsifying those claims.

First, judicial review does not assume a central location within the political order. There is no doubt that judicial review has become a prominent institution since the end of World War II, mainly due to a wave of global constitutionalism deepened by the constitutional reforms in Europe ('50s and '60s in Western Europe, and '80s and '90s in the post-socialist Eastern Europe), the adoption of written constitutions by the decolonized countries in Africa and South Asia (from the '60s), and the demilitarization of Latin America (from the '80s). During the second part of the 20th century, interactions between political orders induced a process of migration of constitutional ideas across nations, with an emphasis on a fourfold set of institutions: written constitutions, rule of law, human rights, and judicial review¹⁶. This movement has roots in the political reactions against the atrocities led by the fascist and the Nazi governments, coupled with subsequent movements that gave rise to the 1948 Human Rights Declaration, the minority-protective jurisprudence of the U.S. Supreme Court from the '50s, the explosion of international agreements on political, social, and economic rights (called 'rights revolution'), and so on. Constitutional Courts and Supreme Courts with the power to strike down unconstitutional norms have spread worldwide. Although some countries adopted weaker versions, as the UK and Japan, judicial review became an important feature of constitutional enforcement. At finer scale, even the legal vocabulary has also evolved due to the expansion of judicial review: new expressions have been gradually introduced (e.g. proportionality, balancing, and empirical reasoning), while existing ones had been reassigned meaning (e.g. principles, rights, political morality, etc.).

In many countries, political actors have strategically used judicial review to shortcut constitutional enforcement, to lower the natural risks and costs of the political process, and to block opponents. Systemic dysfunctionalities - such as the malfunctioning of the state

¹⁶ See WEINRIB, Lorraine. *Postwar Paradigm and American Exceptionalism*. IN Sujit Shoudhry, *The Migration of Constitutional Ideas*. Cambridge: Cambridge University Press, 2006. P. 89-90.

bureaucracy and the obstruction of political channels - have also encouraged agents to go to courts. The movement of judicialization of mega-politics, in which players take sensitive issues from the political process to bring them before the courts, along with judicial activist responses, have been widely criticized as impoverishing democracy¹⁷.

However, saying that judicial review has become the central institution of the political order overestimates its contribution to the constitutionalist project. Mainly in common law countries, both Constitutional Theory and Jurisprudence have over-focused on understanding how judicial review operates. For some authors, such as Dworkin, the traditional question '*what is law?*' turned into '*how judges (should) decide cases?*'. On the other hand, the capacities of other institutions and their contributions to the political order remain underestimated and understudied by legal academics. Legislative bodies, executive agencies, presidencies, and electoral institutes are few examples of other organizations that function as important focal points of constitutional coordination, some of them producing legal norms that may in many cases impact many more aggregates than a precedent issued by the Supreme Court¹⁸.

Although there is no empirical evidence that could support a claim that judicial review is less impacting than other institutions - and it might be the case that, in many political countries, judicial review is much more prominent than other focal points -, there is enough support to the claim that judicial review is not a central institution of the political order. As it has been said previously, political order is polycentric, within which a collection of focal points interact by emitting and receiving incentives of coordination.

Second, judicial review is not an essential institution. As Mark Tushnet poses, expressivist approaches in Comparative Constitutional Law induce us to think that a set of institutions is a unique and exclusive complex that could never be adequately replaced by any other organization¹⁹. This resembles the idea of false necessity. Nonetheless, albeit prominent, if judicial review were removed or weakened, agents would gradually adapt their strategies to reorganize the political process, in order to achieve new patterns of sustainability. Comparative Constitutional Law provides examples of experiences involving different strengths of judicial

¹⁷ See Ran Hirschl, *Towards Juristocracy: the origins and the consequences of the new constitutionalism*. Cambridge, Harvard University Press, 2004.

¹⁸ For an account defending the legislative function over adjudication, see Paul Yowell, *Legislated Rights*, 2018.

¹⁹ See Mark Tushnet, Some reflections on method in comparative constitutional law. In: *The Migration of Constitutional Ideas*. Cambridge: Cambridge University Press, 2006. p. 81; Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*. Harvard Law Review, Vol. 119:109, p. 128.

review, as well as experiences of judicial reforms or political backlashes that weakened this institute in some countries, without causing the decay of their political order.

Third, judicial review is not definitive. The expression ‘the Supreme Court as the last interpretative resort’ has become popular in the American jurisprudence and has spread worldwide, sometimes as a rhetorical strategy to enhance the authority of judicial review. However, if the political process remains a dynamic complexity, within which agents react and adapt to each other’s behaviors, the idea that a precedent closes a constitutional issue has no support. Judicial review does not finish a book; it makes at most a chapter of a book. Once a precedent is issued, agents respond non-linearly, giving rise to new interactions that later might even overturn its ruling.

Fourth, judicial review is not always counter-majoritarian²⁰. Again, the American jurisprudence built a defense of the democratic legitimacy of judicial review based on the idea of its minority-protective function. This approach was initially raised to justify the U.S. Supreme Court’s progressive jurisprudence in favor of disempowered groups from the ‘50s (blacks, women, LGBTs, etc.). Political Philosophy and Constitutional Theory adopted this discourse, transforming it into a normative claim to be universally assumed by judicial review. Indeed, the minority-protective jurisprudence around the globe is rich. Even so, as previously stated, a property cannot be aprioristically assigned to any institution. It is a character of the whole or of one of its aggregates, which arises due to collective patterns of behavior, not due to the deontological conceptions underlying this specific focal point.

In the U.S.²¹, in Brazil²², and Colombia²³, empirical research challenges this normative claim, by supporting with evidence that judicial review has been quantitatively majoritarian rather than counter-majoritarian. Again, according to our theoretical premises, the chain of interactions within the political order may induce institutions to play distinct roles from the original plan. The future of the political order’s dynamic is unpredictable: institutions designed to activate some properties may deliver other results, or even change their roles over

²⁰ See Matthew Stephenson, “When the Devil Turns...”: *The Political Foundations of Independent Judicial Review*, 32 *Journal of Legal Studies* 59 (2003);

²¹ Matthew E. K. Hall and Joseph Daniel Ura, "Judicial Majoritarianism," *The Journal of Politics* 77, no. 3 (July 2015): 818-832.

²² Juliano Zaiden Benvindo e Alexandre Araújo Costa, *A Quem Interessa o Controle Concentrado de Constitucionalidade: o Descompasso entre Teoria e Prática na Defesa dos Direitos Fundamentais*, Working Paper, Universidade de Brasília (April 1, 2014). Available at SSRN: <https://ssrn.com/abstract=2509541>, or <http://dx.doi.org/10.2139/ssrn.2509541>.

²³ David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 *Harvard International Law Journal* 319 (2010); David Landau, *The Reality of Social Rights Enforcement*, 53 *HARVARD INTERNATIONAL LAW JOURNAL*, 2012, 191.

time. In practice, the same design of judicial review may function divergently in different countries, since no institution has inherited profile.

Plus, two last hypotheses must be considered. First, not all conflicts before courts encompass a dispute between majorities and disempowered minorities. Many fundamental rights involve interests of majorities (or democratic interests), what would partially justify the empirical findings. Second, as legitimacy is not an inherited and implicit character of judicial review itself, it may be the case that a system of judicial review could not obtain diffuse support from the political agents if *all* the rulings issued by the Constitutional Court held minority-protective character. Judicial review, as any other focal points of coordination, seeks to introduce self-enforcing mechanisms into the political order, in order to build social commitment to its outputs. However, counter-majoritarian rulings are likely to be unpopular and to attract criticism to the courts, impeding judicial review from achieving diffuse support²⁴. Thus, majoritarian rulings might help the court to build strong political capital, in order to neutralize a criticism against punctual counter-majoritarian holdings without critically damaging the legitimacy of the whole system.

Fifth, judicial review is as political as any other institution introduced by the constitution²⁵. Constitutional theorists tend to treat judicial review as a legal institution, whose nature would differ from political ones. Nonetheless, the fact that judicial review encompasses a distinct decision-making process as well as a collection of constraints regarding language and reasoning does not change its nature. It continues to function as a focal point of coordination. For sure, focal points differ from one another, emit distinct outputs, and receive distinct inputs, but as any organization designed by the constitution, judicial review comprises a set of norms that entrench valued behaviors and interests.

Sixth, judicial review is not always a collaborative institution. Constitutional theorists have overemphasized a dialogical approach between courts and other political institutions, by which they collaborate with one another to achieve constitutional enforcement. This would be the ideal picture of a sustainable political order, but I argue that it does not depict the complexity of the interactions that take place between the components of the system.

As mentioned in the previous sections, political actors, institutions, and other components can interact in different ways - cooperative, competitive, predateive, and even

²⁴ Daryl Levinson, *Parchments and Politics: The Constitutional Puzzle of Constitutional Commitment*, 124 Harvard Law Review 658 (2011), p. 715.

²⁵ *Idem.*

parasitic, among others. All these relationships give rise to patterns of collective behaviors. Dialogical accounts presume that a cooperative relationship is always desirable, but this might not be the general case.

Social Sciences bring experiences of how competitive interactions within a political order may give rise to desirable systemic properties. Acemoglu argues that inclusive political institutions come from a ‘balanced increase in state capacity and the distribution of power’²⁶. His equation seems to pose two inversely proportional variables in a dynamic interaction. On the one hand, state capacity requires centralizing power to emerge. On the other hand, distribution of power demands decentralizing power from the state, which occurs as long as strong informal institutions and social norms block state capacity. Thus, according to Acemoglu’s empirical analysis, inclusive institutions only emerge when society becomes strong enough to entail a competitive relationship with the state²⁷. As a result of this interaction, society ends up imposing the state to build institutions that comply with former’s interests.

Predicting a situation in which a predatory or a parasitic relationship between institutions is desirable might not be impossible. Overall, constitutional coordination does not rely only on cooperative relationships. Different issues demand different kinds of responses. Systemic properties may emerge from any kind of relationship, depending on foreseeing the correct incentive to achieve constitutional enforcement. For this reason, instead of *collaborative*, our approach prefers *coordinative* goal; instead of *dialogue*, our approach adopts *interaction*.

In sum, as courts may assume distinct roles in contexts and issues, constitutional adjudication should accommodate and discipline context-based combinations of procedures, structures, and remedies, rather than holding a universal formula of review. To avoid what I have called elsewhere *mis-enforcement of rights*²⁸, plasticity in dealing with strategic actors and institutions may improve the performance of courts towards the sustainability of the political order. This open perspective would require theorists to analyze **1)** types of non-linear interactions among judges, courts, and other political actors and institutions; **2)** aggregates that emerge from these interactions and acquire properties that exceed their components’

²⁶ Daron Acemoglu and James A. Robinson, *Paths to Inclusive Political Institutions*. <https://economics.mit.edu/files/11338>. See also Daron Acemoglu & James Robinson, *Economic Origins of Dictatorship and Democracy* (Cambridge University Press, 2006).

²⁷ *Idem*.

²⁸ I call *mis-enforcement of rights* a scenario resulting from non-justified distributive and aggregate effects due to the judicial protection of a target group. I previously developed this concept in *Beyond Minimalism and Usurpation: Designing Judicial Review to control the mis-enforcement of socio-economic rights* (LL.M. Thesis, April 2016, on file with the Harvard Law School Library), regarding judicial enforcement of socio-economic rights.

properties; **3**) impacts of judicial review over political order and on judicial review itself; and **4**) overall reactions, either to enhance (positive feedback) or to weaken (negative feedback) judicial independence²⁹.

5. Conclusion: an agenda for further development

An important agenda for constitutional theorists involves reconciling Constitutional Theory with Political Science. Over the past decades, the latter has brought empirical findings that challenged ideational discourses adopted by the former, requiring a re-reading of hitherto unquestioned dogmas regarding constitutionalism and judicial review.

This work developed three basic premises that re-frame the relationship between the legal and the political orders, which can be summarized as follows:

a) A constitution, along with the institutions that it designs, is integrated into a complex, polycentric, and dynamic political order. As focal points of coordination, they interact with all components of social life. However, because political actors can adapt their behavior and can learn from past experiences, static equilibrium is never achieved, since the interactions in which they engage continuously reshape the political order - including the constitution itself;

b) Within the constitutionalist project, the sustainability of the political order relies on the capacity of a constitution to be integrated with existing institutions. The constitution may do so by introducing new political institutions that absorb systemic tensions and redistribute power between players. As political institutions depend on collective behavior to activate their properties, analyzing the interactions between institutions and their environment becomes an essential step in constitutional design;

c) Designed to protect a constitution against the tensions of the political process, judicial review has been mistakenly depicted as a *central, essential, definitive, counter-majoritarian, apolitical* and *collaborative* institution. In fact, judicial review may play distinct roles in contexts and issues, developing a variety of properties that accommodate context-based combinations of procedures, interpretation rules, and remedies, rather than a universal formula

²⁹ See Adrian Vermeule, *The System of the Constitution* (Oxford University Press, 2011); Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 Geo. L.J. 159 (2016); for another seminal work on this topic, see Ruhl, *Law's Complexity: A Primer*, 24 Georgia State University Law Review 885 (2012).

of adjudication. Plasticity in dealing with strategic players and institutions may improve the performance of courts towards the sustainability of the political order.

This paper begins a project of theoretical alignment of ideational discourses with actual power dynamics. While reproducing normative arguments mostly embodying abstract, ideal moral obligations³⁰, Constitutional Theory has disregarded descriptive accounts of how constitutions and courts build sociopolitical commitment. However, constitutions achieve diffuse support not only through assessments of justice and of procedural fairness, but also through assessments of their capacity to promote political coordination³¹. Indeed, constitutions enhance their ability to regulate the political process as long as they succeed in providing individuals with incentives to align self-interests with institutional values. Both institutions and ideational discourses play an important role in this endeavor. For this reason, the more responsive to power interactions Constitutional Theory is, the more efficient its normative arguments become in giving rise among citizens a shared sense of constitutional obligation that ultimately sustains the political order. This is exactly where the importance of Constitutional Theory lies.

³⁰ See Cass Sunstein, *There Is Nothing that Interpretation Just Is* (August 29, 2014). Available at SSRN;

³¹ See Daryl Levinson, *Parchments and Politics: The Constitutional Puzzle of Constitutional Commitment*, 124 *Harvard Law Review* 658 (2011); Richard Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 *Harv. L. Rev.* 1693 (2008); Bary Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *American Political Science Review* 245 (1997); James Fearon, *Self-enforcing Democracy*, (Aug. 24, 2006) (unpublished manuscript) (on file with the Harvard Law School Library); Daron Acemoglu, *A Theory of Political Transitions*, 91 *The American Economic Review* 938 (2001); Pavlos Eleftheriadis, *Power and Principle in Constitutional Law*, 45 *Netherlands Journal of Legal Philosophy* (2016); Daryl Levinson, *Foreword: Looking for Power in Public Law*, 130 *Harvard Law Review* 31 (2016).