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The Movement of Powers in Government: Schelling-Style Equilibrium and the Constitutional Doctrine of Separation of Powers

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Abstract

The paper sets out to understand the constitutional doctrine of separation of powers in the face of change. To capture the dynamics of the doctrine we turn to a Machiavelli inspired conflict-centered view of politics and proceed to analyze conflict as a Schelling-style mixed-motive game, proposing that constitutional law generates focal points that endogenously shift the lines of power. These arguments are made with empirical support from our previous work centered on the Indian Constitution, which aimed to pinpoint economic costs that are traceable to the violation of separation of powers. To understand constitutional law as a focal point as well as the argument that such focal points themselves end up re-ordering the legal order, we work with a conception of law that draws on the work of legal institutionalists in particular homing in on the formulation of law suggested by the Italian jurist Santi Romano. In effect, the paper highlights a set of narratives that tease out patterns, which are read as Schelling style mixed motive games, but this is not the only point of the paper, rather through this telling it aims to present a method of approaching an institutional analysis of separation of powers – it suggests a replication of such analysis in the many instances where the separation of powers is in operation to see the many variegated outcomes.

Key Words: Separation of Powers, Constitutional Law, Schelling style mixed-motive game, focal point, Indian Constitution

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Introduction

In current times the balance of powers or what is more widely referred to as the *separation of powers* in government is obviously topical on account of political developments in putative democracies across the world. While we do not engage with current events as such, particularly the centralization of authority in the hands of present-day strongmen, we hope that our reflections on the separation of powers will speak more generally to contexts beyond those used to illustrate our points. Our endeavor originates in studying the effect of the constitution on the economy, and particularly the role played by the doctrine of separation of powers in constitutional governance.

The classic constitutional political economy scholarship, such as the work by Buchanan and Tullock, works with a contractarian imagination of the constitution – not quite emphasizing the role of federalism and/or separation of powers in upholding the rights guaranteed by the social contract (Buchanan and Tullock, 1962). If the tensions of social, political and economic flux are acknowledged – the ever-changing agendas of plural groupings or the transformations induced by technological change, we need to explore approaches to constitutions that are not overly, or rather only, committed to foundational ends. One way to do this is to recognise that constitutions prominently dictate the locations of power, appreciably determining whether the constitutionally mandated structure of governance tilts towards a system characterised by *multiple repositories of power* [1](Greene, 1996). Prominent expressions of such *multiple repositories of power* include federalism and the separation of powers, and it is particularly the doctrine of separation of powers that is our concern here.

Clearly, decreeing the presence of separation of powers is not tantamount to its neat operation in practice and an important agenda of this paper is to confront the question as how to analytically understand the doctrine in the face of change. To capture the dynamics of the doctrine we turn to a Machiavelli inspired conflict-centered view of politics and proceed to analyze such conflict as a Schelling-style mixed-motive game, proposing that constitutional law generates focal points that endogenously shift the lines of power. These arguments are made with empirical support from our previous work centered on India that aimed to pinpoint economic costs, traceable to the violation of separation of powers. To understand constitutional law as a focal point as well as the argument that such focal points themselves end up re-ordering the legal order, we work with a conception of

[1] The phrase *multiple repositories of power* is proposed by the American legal scholar Greene to counter foundational interpretations of the American Constitution (democracy and rights) by suggesting that the American Constitution is irreducible because it sees such foundational claims as irresolvable. Instead, he suggests that *multiple repositories of power* in the American Constitution act as a "governing concept not only with regard to the structure of government and the structure of rights, but also with regard to the justificatory practice that undergirds those structures."(Greene, 1996 pg. 293) While this proposition is made in relation to the American Constitution, it is of general value - a constitution that supports *multiple repositories of power* resolves conflicts (particularly conflicts between rights and majority politics) somewhat differently from one that encourages less diffused power.

law that draws on the work of legal institutionalists (as imagined in the works of Romano, 2017; Schmitt, 2004; Mortati, 1998 and Sforza, 1929 - to mention a few names[2]), in particular homing in on the formulation of law suggested by Romano. Essentially, the paper spells out a set of narratives that tease out patterns, which are read as Schelling style mixed motive games, but this is not the only point of the paper, rather through this telling it aims to present a method of approaching an institutional analysis of separation of powers. In effect the variegated purpose of the paper is to suggest a replication of such analysis in the many instances where the separation of powers is in operation.

The plan of the paper is as follows: In Section I of the paper, we begin by sketching a select genealogy of the doctrine of separation of powers and follow it up with a discussion that uses our previous work on the social costs that arise when the doctrine is violated – drawing on the rich Indian constitutional experience. The first section of the paper is in effect a review of sorts of the salient features of the doctrine of separation of powers and the consequences of violation of the doctrine. Following up on this by using the empirical anchors so recounted, in Section II we develop our engagement with the doctrine by taking into account that the movement of political, social and economic life is dynamic and full of conflict. In this we find the political imagination of Machiavelli that places conflict at the centre of politics helpful to look at the doctrine of separation of powers from a dynamic perspective. Using the insights so gathered, we discuss how a Schelling style focal equilibrium associated with a mixed motive game can be imagined, thereby gaining an insight into the governance of the inherent conflict characterising the balance of powers. Since we argue that constitutional law plays a vital role in this, we turn to a legal institutionalist definition of law, in particular the work of Romano, to develop a sense of the role of law in instituting the contours of power within a state. We conclude by reviewing our arguments and speculating on further development along these lines.

Section I

I.1 Brief Historical Background[3]

Perhaps the oldest rendition of the separation of powers doctrine emphasises the *rule of law* aspect of the doctrine – one of the key clauses of the Magna Carta, the document that reigned in King John (1166-1216), says " No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land." (The contents of the Magna Carta, UK Parliament) This clause

[2] A comprehensive account of legal institutionalists here would overwhelm the discussion but a recent work by Croce and Goldoni emphasizing the salient features of this genre of jurisprudence is helpful (Croce and Goldoni, 2020).

[3] This account is both selective and tilted towards the common law tradition. While a more comprehensive account would include an account of separation of powers from a civil law perspective (see Vile, 1967), but here we lean in towards a common law genealogy since key innovations in the idea of *separation of powers* originated in England.

is intimately connected with the idea of separation of powers because it calls for a body other than the king to sanction the deprivation of a person of his rights by following established law, in other words rights could be taken away by the King "only through institutional coordination" (Chapman and McConnell, 2012 pg. 1683). In the early modern period this idea came to the forefront in seventeenth century England during the reign of James I where feudal laws were repurposed by the common law lawyer Sir Edward Coke, arguing that laws formed in times immemorial gave rise to an ancient constitution that allowed immunity from the king's prerogative action (Pocock,1987). Of course, this was countered by James I with the argument that since the power of the King was divinely sanctioned, the king's prerogative could create law and since the King can create law, he was above it. This position was clearly antagonistic to Parliament and though this did not lead to an unsurmountable crisis for James I, the tussle between Parliament and the King Charles I for supremacy famously ended with the execution of the King and the ascension of Parliament as the sole ruler. Over the Long Parliament there was an explicit discussion on separation of powers recognising that the legislative power was separate or distinct from the executive – the discussion centring the Parliament as a legislative body and not as an executor of laws (Gwyn, 1965). It needs to be realised that in this imagination the judicial and the executive were thought of as one function – the bifurcation being highlighted only many years down the line.

The checks and balances dimension of separation of powers came to the fore prominently after the Long Parliament – over the Restoration Parliament continued being the prime legislating authority but now the King could veto the legislation in the public interest. After the Glorious Revolution, there is also a sense that offices should not be held simultaneously across branches because if they lie in one person checks cannot be instituted – for instance its asked if the Speaker was also the Lord of the Treasury, how could he function both as Speaker and investigate the mismanagement of public funds. Such ideas were reflected in the writings of Bolingbroke (one can think of him as a blogger of the time) blending ideas of mixed monarchy, checks and balances and the separation of powers. This work was probably read by Montesquieu, and the doctrine was presented in a schematic format incorporating these elements and adding an independent judiciary to the other two powers in his widely influential work *The Spirit of the Laws* (Gwyn, 1965). Montesquieu, of course, has a presence in the American Constitution – one overt mention of him is in *The Federalist Papers* when Madison tells us in The Federalist Papers No. 47 (as he argues for the separation of powers in the American Constitution), that "The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind" (Hamilton et al. 1999 pg. 269).

While the doctrine of separation of powers is widely considered an essential feature of American Constitution, the phrase itself is absent in the constitution and can be inferred from the constituent documents (such as The Federalist Papers) and the pronouncements of the American Supreme Court. Unlike the American system with three distinct branches of government, the separation of powers in the Parliamentary system works with a different nuance but is not so different in terms of the separation of powers. The Parliamentary system with its apparent welding of the executive

with the legislature is not lacking checks and balances – often enough the legislature can reign in the executive, and though the same person could be both a legislator and a member of the executive, dissimilar functions are performed as a legislator and as a member of the executive. If there is also an independent judiciary, then the separation of powers is as much an element of the Parliamentary system as it is of an American style Presidential system (Gwyn 1986). This is an important point to make because many countries across the world, including India (from where, we primarily use examples to illustrate our points in the paper) have Parliamentary systems – in fact the separation of powers is an indispensable component of systems of government, wherever the liberal constitution has travelled (Singh, 2026 forthcoming).

I.2 Two Facets of Separation of Powers: Structural and Functional

Having noted the ubiquitous presence of the doctrine of separation of powers, the question we set ourselves is to ask if we can discern the impact (consequence) of the doctrine in operation. We do this by pointing to two dimensions of the doctrine – one the *structural* dimension and second the *functional* dimension, which allow us to construct an analytical device such that the simultaneous interplay between these two dimensions allows us to speak of the nature of social costs that are produced when the doctrine is violated. To illustrate these two dimensions, we draw from some classic renditions of the doctrine, turning first to the structural element by referring to Montesquieu and for the functional element we turn to Adam Smith.

Montesquieu placed the functions of the branches of government in the form that we are cognizant with them today – the legislative, executive and judicial, signaling their equal importance. In this scheme the legislature makes general rules - exercising the general will, the judiciary applies these rules to individuals and the executive broadly establishes public order. The identification of separate functions was used to argue that the separation of powers upholds the norm of liberty. To quote a passage that has a clear aphoristic ring and is iconic –

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression (Montesquieu, 1999 pg. 173).

Apart from mitigating tyranny with independent branches, Montesquieu spoke of checks and balances, largely in terms of the veto from the King-in-Parliament (King presiding over Parliament but not a part of Parliament), probably giving the American founders the idea of an executive entirely independent of the President (Vile, 1967). The judiciary is absent in the discussion around checks and balances in *The Spirit of the Laws* and the prominent role of the judiciary found in the American Constitution (and mimicked elsewhere) is well beyond the framework suggested by Montesquieu and is a creation of the American Founders (Zuckert,

2004). While the precise details of checks and balances are placed in the institutional imagination of the time, the idea that concentration of powers in one branch of government leads to tyranny and is against liberty has a ring that has come to typify the content of separation of powers. We suggest that this dimension represents a *structural interpretation* of separation of powers that particularly highlights the point that the doctrine works *contra* the concentration of power in any one body of the government.

The articulation of the separation of powers in many of the discussions across history has tended to be partial, vague and even perfunctory in relation to drawing the boundaries between the branches of government. To get an (analytical) account of separation of powers that emphasizes the functions performed by the branches of government, we turn to Adam Smith.

Adam Smith tells us in *The Wealth of the Nations*:

> "The separation of the judicial from the executive power seems originally to have arisen from the increasing business of the society, in consequence of its increasing improvement. The administration of justice became so laborious and so complicated a duty as to require the undivided attention of the persons to whom it was entrusted. The person entrusted with the executive power, not having leisure to attend to the decision of private causes himself, a deputy was appointed to decide them in his stead (Smith, 1887 Vol II pg. 240)."

In other works, such as the *Lectures on Rhetoric and Belles Lettres* (which consists of notes taken down by two students while Smith lectured) (Smith, 1985) and *Lectures on Jurisprudence* he echoes the passage from *The Wealth of Nations*, reiterating the view that the three powers (Legislative, Judicial and Executive) initially "belonged to the whole body of people" but these powers separated over time largely as a consequence of increasing complexity of society (Smith 1982). Thus, Adam Smith carried an understanding of separation of powers that says that the very act of exercising a power over time creates the specialization of skills.

While this manner of *functional* understanding of separation of powers is somewhat unique to Adam Smith, his writing on the subject is also cognizant of the structural dimensions of the doctrine – there are passages in *The Wealth of Nations* as well as the *Essays on Jurisprudence* that speak of the violation of liberty if the separation of powers is not upheld. This tells us that these perspectives are complementary in constructing an overall sense of the doctrine. In a comprehensive analysis of the doctrine both perspectives are necessarily conjoined. The conceptual bifurcation of the doctrine into a structural and functional dimension is, in a sense, a heuristic device to enable the identification the economic consequences of the violation of separation of powers.

I.3 Formulating Separation of Powers Using the Method of Economics

If we take on board the *structural* conception of separation of powers, then it is the case that several formulations of the doctrine have used the methods of economics to make a series of theoretical propositions [a select list of such work includes – (Perrson et al., 1997) (Laffont, 2000) (Podovano

et.al, 2003) (Mishra and Anant, 2006)]. Broadly speaking this genre of work emphasizes the monopoly rents that accrue on account of any violation of the doctrine. While this is clearly important, it is important to also look at the *functional* dimension of the doctrine. To give substance to this aspect of the doctrine, let us follow Adam Smith and understand the functional interpretation of separation of powers as the specialisation of each branch of the government. If so, it raises the question as to what precisely such specialisation is. One answer is to say that the approach to processing information by each branch of the government is unique and special to that branch, and the type of information each branch processes marks the specialisation of the branch. It is widely suggested by classic liberal political philosophers that the legislature makes laws exercising a *general will*. The means of gathering the general will is of course the problem of aggregating the preferences of all those that comprise the political body. The ideal or representative legislature is presumably outfitted to capture the preferences of the voting population, and is therefore empowered to legislate laws, keeping in mind the distributional impact of such laws on the population. The courts are different from legislatures because they must make decisions that are applicable to the particular parties in actual cases and controversies, using their rather limited investigative powers in gathering information. They do not have the power to conduct a general investigation into, for example, business practices in an industry. The judiciary resolves disputes in cognisance of procedural, statutory and constitutional limitations. Since judicial decisions necessarily need to be perceived as being fair, judicial information is garnered from contesting parties in conformity with stipulated rules of evidence and procedure. Since the act of adjudication sorts through conflicting evidence to come up with a decision, one can perceive a court to be typically structured to make the decision under conditions of imperfect information. The executive executes the will of the legislature, implementing it by processing data that draws on scientific, epidemiological and statistical studies. The executive can be viewed as a hierarchical body that makes technical decisions in the face of incomplete information. Thus, it appears that three branches of the state are equipped to deal with different categories of information and should act at different stages and places in the hierarchy of nested decisions involved in social allocations. In fact, the possibly more significant inference could be that since the legislature, the executive, and the judiciary process uniquely distinct categories of information, the separation of powers doctrine acts to minimise *transaction costs*. The term *transaction costs* is being used analogously to usage of the term with reference to the institution of the market - as a cost of the pricing system [(Coase, 1937) (Coase 1960)]. Here it is the cost of processing categories of information in relation to the institution of the state. It follows from this that allocation problems in the state should be/end up paired with the appropriate institution to gain an efficient solution.

The formulation we have spelt out is schematic in nature – in practice there could be considerable overlap across different institutions of the kind of transaction cost they minimise. It must also be realised that transaction costs or the information costs in themselves are not static, often changing with technological change. For instance, it could be said that the representational benefits of national legislatures stand diminished on account of the growth in communication and transport. However, such qualifications do not fundamentally detract from the distinctions that we draw, because our central concern is to point to the core competency of the institutions designated by the

doctrine of separation of powers to process categories of information. It is also essential not to misinterpret our formulation as saying that transaction costs can explain or justify the doctrine of separation of powers. To take such a stance, it would require us to show how the presence of transaction costs leads to the separation of powers. Instead, we have used the notion of transactions costs, or more specifically the information costs of social decision-making, to deduce that problems confronting the State can be best solved by being placed in the appropriate niche carved out by the doctrine of separation of powers. The failure to uphold separation of powers in a functional sense allows one to define activism: Activism is a branch of the government extending its decision-making mechanisms on the grounds of privilege to problems that are the forte of some other branch. Thus, when the judiciary takes on the tasks of the executive – there is judicial activism or when the legislature takes on the task of the judiciary – legislative activism. The costs of such activism can either enhance or diminish social welfare (economically speaking), depending on the circumstances. If we conjoin this with the costs associated with the structural violation of the separation of powers doctrine, then we can get a sense of the social costs associated with the violation of the doctrine.

In a series of articles, we have tried to identify these social costs in a variety of situations in India – (Anant and Singh, 2002), (Anant and Singh, 2006), (Singh, 2006) (Singh 2014) and (Singh and Dash 2018). Over the next two subsections we summarise the contents of two of these works. One, recounts the progressive removal of the right to property from the chapter (Part III) of the Indian Constitution (Singh, 2006) and the second looks at the advent of Public Interest Litigation (PIL) in India (Anant and Singh, 2002). These illustrations form an empirical anchor for Section II of the paper that explores how the boundaries established by the doctrine of separation of powers are determined in the face of conflict and change.

I.3.1 The Removal of the Right to Property from the Chapter on Fundamental Rights in the Indian Constitution[4]

(i) The removal of the right to property from Indian constitution took place over several years. As initially drafted the Indian Constitution carried the fundamental right to property under Article 19(1)(f) subject to Article 31 that allowed the state to acquire property for a public purpose upon payment of compensation. The First Amendment, among other things, included qualifications in Article 31 by stating that no law providing for the acquisition of landed estates could be constitutionally challenged and by creating a repository of laws (the 9th Schedule) that were immune to judicial review. Some years down the line, the Seventeenth Amendment enabled land reform legislation by Indian states to be included in the 9th Schedule. While these measures were taken to effectuate land reforms, other constitutional amendments followed when the Supreme Court questioned the nature and adequacy of compensation when the government acquired property in a routine manner[5] – thus the Fourth Amendment introduced clauses in the constitution stating that a court cannot query the adequacy of compensation once a law had stated the sum or the

[4] This follows (Singh 2006).
[5] State of West Bengal v. Bela Banerjee, AIR 170 SC 1954 (Supreme Court, 1954).

principles on which, and how, compensation was to be decided. Yet further changes centered around issues of compensation followed when the Banks were nationalized and the takeover contested in the Supreme Court, which said that the government cannot award 'illusory' compensation[6]. Around the same time a case reached the Supreme Court that questioned the constitutionality of the First, Fourth and Seventeenth, to which the court said that while the amendments will continue to be in place, parliament cannot take away or abridge any of the fundamental rights[7]. Spurred by these judgments the Twenty Fourth and Twenty Fifth Amendments to the constitution were put into effect, allowing the legislature to amend all parts of the constitution and the courts were barred from questioning the amount paid as compensation. Some of this was reversed by the Kesvananda Bharati judgment – a watershed judgment that said that a constitutional amendment could not change the 'basic structure' of the Constitution; in effect that means that an amendment cannot alter the supremacy of the constitution, republican democracy, secularism and federalism, or violate the separation of powers[8]. However, the judgment endorsed all property-related amendments, and it was forcefully upheld that the right to property was not a feature of the basic structure. This allowed the eventual removal of property as a fundamental right from the constitution by the Forty Fourth Amendment to the Constitution and its placement as a weaker statutory or constitutional right. Some of the economic consequences become plain if we view this in terms of violation of the doctrine of separation of powers.

The elimination of the right to property as a fundamental right from the Indian Constitution transferred crucial power from the judicial to the executive branch of the government to make decisions regarding government takeover of property. Since the valuation of acquired property was no longer justiciable after the constitutional amendment, this can be understood as a functional violation of the separation of powers. With the executive now enabled to make all valuation decisions, there is an undervaluation and resulting overproduction of the public purpose. Concurrently, it is also the case that the 'public purpose' is decided singly by the executive; with judicial review nonexistent on the issue, there is a structural violation of the doctrine of the separation of powers, since decisions are made largely by the executive. This encourages strategic initiatives (rent seeking) to arise and for such forces to appropriate the surplus generated ostensibly for the public purpose by the takeover of property. This is especially so since the undervaluation of compensation allowed by the functional violation of the separation of powers puts no curbs on the takings. This pooled violation of the separation of powers in both a structural and a functional sense produces significant social costs with respect to government takings in India.

I.3.2 Public Interest Litigation (PIL) in India[9]

(ii) If the contestation over the right to property in India is a manifestation of an executive/legislative dominance (an executive/legislative activism so to speak), then the constitutional structure has generated yet another imbalance, this time following from an extension

[6] Rustom Cavasjee Cooper v. Union of India, AIR 1970 SC 564 (Supreme Court, 1970).
[7] I. C. Golaknath v. State of Punjab, AIR 1967 SC 1643 (Supreme Court, 1967).
[8] Kesavananda Bharati v. State of Kerala, AIR 1973 SC SC 1461 (Supreme Court, 1973).
[9] This follows (Anant and Singh 2002) with updated illustrations.

of judicial power (judicial activism). In the 1980s the Indian Supreme Court while acknowledging that many people were endemically denied justice, decided to innovate with judicial procedure to permit access to justice. The key novelty in procedure was to remove the legal requirement of *standing* so that anyone could approach the courts on behalf of someone or a body of people. The remedies in this instance typically require affirmative action from a state authority and to the degree orders are not executed in this regard, the court appoints monitoring agencies. This type of litigation, referred to as Public Interest Litigation (PIL) replaces judicial procedure that gathers information using an adversarial process with one that provides information by parties (who also supervise remedies) selected by the court. While the initial PILs dealt with social-justice cases (undertrials incarcerated for years, bonded labor, people imprisoned in remand homes and women in protective custody), but, subsequently, this method of litigation has stretched to a variety of matters, including environmental problems, consumer affairs, property rights, the practices of municipal corporations, educational institutions, politicians and political parties, political questions concerning religious practices and citizenship questions – to name just a few – that have come to be presented before the courts (Bhuwania 2016). In this the Supreme Court exercises enormous power in deciding which PILs are chosen and how matters proceed as the case progresses.

Among other things, an extensive PIL regime has generated certain economic costs, which are most discernable if seen within the paradigm of costs generated on account of the violation of the doctrine of separation of powers.There is a strong functional violation of the doctrine because when a PIL is taken on board, the court is often enough dealing with issues that are not geared to judicial decision making, even with quasi-executive bodies set up by the court to process the information the specialization of processing necessary information may not match with the problem on hand. At the same time there is a structural violation because it is quite open for these bodies to be captured by rent-seeking enterprises. In fact, rent-seeking is intrinsically a part of PIL because the absence of locus standi empowers parties not directly connected with the suit to litigate. One illustration (among many) is a study that points to the role of PILs that have been initiated by rival builders or heritage trusts and, thus by definition, parties who are outside the contractual process, that have raised costs in the provision of much-needed housing in Mumbai (Gandhi et al., 2021).

The point that these two examples make – that when there is a violation of the separation of powers, social costs are generated on account of the disturbance to the structural and functional dimensions of the doctrine – can be multiplied by recounting multiple illustrations not only from India, but across all constitutional democracies anywhere. The violation of separation of powers generates an externality originating in the move to exercise an inappropriate power that results in an adverse effect on economic activity. The next essential step is to understand how can we think of the exercise of power more dynamically, in other words how can we understand the political track in relation to the separation of powers.

One way to think of the political trajectory in this context is to note that the doctrine of separation of powers not only separates categories of decision making but also requires interaction across the branches of the State; such interaction can be understood as a bargain, which in turn implies that interactions between the branches can be quite costly in terms of negotiating costs. Building on

this formulation Cooter has pointed out that this leads to trade-offs between strong and weak systems of separation in terms of the costs associated with bargaining – the insistence on strong separation of powers may minimise the type of costs we have highlighted in the previous section, but raise inter branch negotiation costs, while weak separation of powers may cut negotiation costs, it raises the costs associated with violation of the doctrine (Cooter, 2000) (Cooter and Gilbert, 2022). However, to phrase this as a bargaining issue and make the ultimate balance depend on a strategic equilibrium implicitly assumes either a consensual view of politics or one in which conflict is subject to stable bargains. It is often the case that political conflict is both more volatile and dynamic.

Section II

II.1 Machiavelli

The political thinker who has best brought out the conflictual element of politics is Machiavelli. We pay particular attention to him, because apart from his insight into the nature of politics, his thought has been central in formulating the modern constitutional attempt at governing power. There is a voluminous literature around Machiavelli, a good deal of it produced in the formats of political theory/philosophy (but little in the realm of economics); and we draw selectively on this Machiavelli oeuvre to make our point. Machiavelli's formulation characterises politics as inherently conflictual, in contrast to Aristotle's idea of politics as consensus and thus the governing force of the polis (Wood, 1968) (Pedullà 2018). In the Discourses on Livy (a work in which he uses the events in Republican Rome to give voice to his political theory) Machiavelli argues that conflict is inevitable and if such conflict results in the harmonisation of interests of various groups in society it can lead to overall good, but when benefits are pulled and appropriated by an unrepresentative minority it is a corruption of the polity (Machiavelli, 1883). Machiavelli held the idea that people are not virtuous by default (they are easily corruptible) and therefore laws (that in fact rise out of conflict) are important to govern the conflict, so that conflict does not end in destruction. To be centrally noted in this context, following from the exemplar of ancient republican Rome held up by Machiavelli, a well-ordered state is defined by the institutions that are able to govern the conflict. To quote Lefort, the French political philosopher, the Tribunal in Ancient Rome set up by the plebs put "a limit to the insolence of the Grandees", and that "This ordine as he [Machiavelli] calls it, was of course the product of law, but we must consider that it was very different from other laws, because it supplied the basis of the constitution." (Lefort, 2012 pg. 226)

It is this consideration that was harnessed by the progenitors of the modern constitution – it is suggested that Montesquieu was greatly influenced by Machiavelli (Wood, 1968); it is also explicitly the case that the framers drew on the Machiavellian imagination while setting up the American Constitution (Pocock, 1975). In fact, one can patently see the reflection of Machiavelli in the famous quote of Madison in The Federalist Papers No. 51 when while arguing for separation of powers and checks and balances he says "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government

would be necessary." (Hamilton et al. 1999 pg. 290) In turn the reflection of Madison can be seen in Machiavelli when he says

> "They who lay the foundations of a State and furnish it with laws must, …assume that all men are bad, and will always, when they have free field, give loose to their evil inclinations; …When we do well without laws, laws are not needed; but when good customs are absent, laws are at once required". (Machiavelli, 1883, pp.19-20)

In all this, the resulting equilibrium is never static – a momentary equilibrium and soon enough a new conflict emerges, and new conflicts demand constant reordering. To build on this is to understand with the contemporary philosopher Esposito that the great insight of Machiavelli is that politics are tied "to the dynamics of institutions (Esposito, 2022 pg. 38)".

To look at the 'dynamics of institutions' - If we accept that the separation of powers is a constitutional device to govern political behavior and that the political is defined by conflict – then it stands to reason that the conflict between the various branches of the government can be analyzed by understanding how the lines drawn by the doctrine of separation of powers adjust in the face of conflict. We know from experience, sometimes these lines are strong and act to successfully contain the branches of government obliging them to perform their tasks within the constitutional frame – at other times these lines are much weaker, and the lines yield to encourage the branch seeking to gain power. It is our contention here that these lines are drawn variously, depending on the problem on hand but this characterization, while accurate, is too diffuse. We need identify some structure (but keeping to the idea that every situation creates its own context) on how we can understand the interaction between the branches. One way of imposing a structure is to think of the conflict between the branches as a mixed motive game suggested by Schelling in his book *The Strategy of Conflict* – this act of invoking the analysis advocated by Schelling is undertaken precisely because it helps us understand the endogenous shifting of boundaries (Schelling 1960).

II.2 Recapitulating the Schelling Formulation of Games

Before exploring how the interaction between the various branches of government can be thought of in terms of the mixed motive game, we review some of the prominent features associated with Schelling's understanding of games. To follow through with Schelling let us first consider interactions that are captured as games of coordination, where there is no conflict of interest but rather people need to coordinate to get ahead with living a life – say, to use one of the many examples proposed by Schelling, driving without hazarding a collision. The key issue in these instances is communication where direct knowledge of each other's actions is impossible, and coordination crucially depends on one's perception of what the other will do. As Schelling is at pains to tell us that this kind of tacit cooperation is not based on what is perceived on the average but rather associated with a sense of one's own guess as to what others are guessing – probably the best way to think of this is that everyone looks for a commonly understood clue to focus on so that an act of coordination can take place. To continue with our example of driving, in certain countries conventions has come into place that allows one to coordinate with everyone else to avoid collisions

while driving - by driving on the right/left side of the road. The key to Schelling's games of coordination is the understanding that focal points emerge to coordinate the actions of disparate individuals allowing them to 'concert' or enable a 'meeting of minds' (Schelling, 1960 pg. 57). In this Schelling acknowledges the importance of the social or cultural setting in which the communication takes place for what the focal point comes to be. In Schelling's imagination the polar opposite of these games of coordination are zero-sum games that capture pure conflict, where one party gains in exact terms of the loss of the other – one party is destroyed if the other party prevails. The interesting game for us is the mixed motive game which Schelling associated with "the non-zero-sum games involved in wars and threats of war, strikes, negotiations, criminal deterrence, class war, race war, price war, and blackmail; maneuvering in bureaucracy or in a traffic jam; and the coercion of one's own children…" (Schelling 1960, pg.83). For Schelling these were situations that combined conflict with an element of collaboration, where such collaboration is characterized as "tacit, if not explicit - even if only in avoidance of mutual disaster." (Schelling 1960, pg. 83) While conflict in the mixed motive game is patent, it is the interdependence, which is the interesting factor. The interdependence flows from two sources – one, that the parties need to communicate their intent to the other party and second, that the 'solution' to the bargaining problem confronting the parties requires them to choose from a wide variety of agreements – rather than have no agreement at all. Turning first to the communication across parties, Schelling is of the view that in most bargaining interactions direct talk is too opaque for effective communication – actions are better able to communicate more. He felt that parties watch each other's maneuvers while they may ostensibly talk – by making such moves they not only push the game along but also reveal each player's value system to the other player as well as unfold information about choice of actions available, particularly so because actual maneuvers commit players in a way speech cannot. We turn to Schelling precisely because of his deeply felt recognition that "bargaining games typically involve a dynamic process of mutual accommodation, rather than pure communication culminating in a crystallized agreement." (Schelling, 1960 pg.102) The second concern about how parties eventually choose to agree to a solution is also a facet (in fact a key facet) of the communication that takes place across the parties. Schelling felt solutions are found in a manner that is akin to how a focal point helps resolve the pure coordination problem, manifest in a convention, a pattern, a natural boundary …something that all parties focus on and settle at some point in their interaction. In all of this Schelling stresses the centrality of the idea that parties necessarily discern the many underlying patterns from how other parties are expressing themselves in their maneuvers and also influencing where and how a solution is achieved. In the same breath, Schelling points out that a mathematical structure will not be able to capture these patterns because, among other things, the value systems tend to be uncertain, disabusing us of the possibilities of making assumptions of symmetrical behavior. Thus, patterns will emerge from the very interaction of parties. It has been recognized this means methodologically moving away from deductive principles followed by standard game theory. Rather, as Sugden and Zamarrón note Schelling's insistence that "the study of mixed motive games is necessarily empirical" (Schelling, 1960 pg.162) is to be understood in the sense that it is rational by working in practice and not in the usual way that deduces rational behavior from axioms (Sugden and Zamarrón, 2006 pp.619-20). Schelling

imposes no restrictions on the players reasoning – rather it is an inductive inference of rationality from its success. To follow through with Sugden and Zamarrón's comment on Schelling's methodology – they point to a connection between the pragmatic philosophy associated with William James and Charles Sanders Pierce where "the meaning of a concept is to be found in its practical consequences." (Sugden and Zamarrón, 2006 p. 620)

II.3 Thinking of Separation of Powers as a Schelling Style Mixed Motive Game

To describe separation of powers as a mixed motive game let us begin by thinking how the interaction between the branches is, indeed, a mixed motive game. It may first be noted that the lines drawn by the doctrine of separation of powers confine decisions of each branch of the government within the borders of constitutionally assigned categories. For this to prevail there would have to be either no conflict between the branches or if there were a conflict the lines would be automatically drawn. In a sense this is the imagination with which we can schematically think of the doctrine of separation of powers as a game of coordination if there was no conflict and where the convention emanating from the separation of powers doctrine keeps categories of decisions slotted in the correct department. Alternatively, the clockwork precision envisioned in the 18th century could be functioning so well that in the event of a conflict the checks and balances in place in the constitution act to ensure that the separation of powers prevail (on this see Wootton, 2018). While separation of powers may prevail along these lines in some contexts, in many others the conflict can be substantial, and the lines for containing each branch's powers are not easily or obviously drawn. The advent of values, particularly those that throw up issues that are antithetical to the values of liberal constitutions or when technological change that reorders social connections takes place, to name a few instances where some branch may act to reorder the lines. These are cases where the doctrine of separation of powers is violated or reordered. It is to these contexts that we turn where one branch moves to take over the functions of the other branch - this is clearly a case of mixed motive games. To provide some structure to our discussion imagine a government seeking to expand their power by having a command over a series of regulatory decisions. The ensuing pattern of power is determined by the play between the branches of government - each branch, of course looks after its assigned tasks but in the process of actively regulating the economy one branch may find itself taking a lead that demands a spillover into another branch. (Say, like as discussed in the Indian case in Section I.3.1, when the executive branch, backed by a legislative majority, sought to further land reforms as well as a socialist economy, seeking to override the judiciary.) Typically, such spillovers generate a conflict - the conflict that should be governed and resolved by the play of the doctrine of separation of powers - it may be recalled that the act of setting up a regime of separation of powers is precisely to govern political interaction imagined in a Machiavellian sense. This governance of politics is in reality never exact for a number of reasons. One facet of this is, invoking Machiavelli, that without conflict the political order will harden and die out and it is the play of separation of powers that keeps political interaction alive. The governance of politics is also not exact because the design of regulation - the precise mixture of the legislative, executive and judicial - is not clear in the first instance as changes in values, technologies and historical circumstances keep occurring. In this ongoing process, as new designs

are initiated - a whole series of conflicts are generated. The resolution of some of these conflicts is obvious and well within the constitutional scheme but in other cases the conflict is more persistent and we need to think a bit more carefully on this. As in the Indian example regarding the fundamental right to property, the executive branch may want to proceed with a program that brings it into conflict with the judicial branch. Continuing with the Indian example, the judicial branch seeing lacunae in governmental function proceeds to enter into the domains of the executive and the legislative. This is clearly the very nature of the process as is evident in the historical narratives that are associated with the early days of the doctrine - over the Interregnum in Britain, the legislative branch sought to commandeer the other branches of the government. While outcomes are obviously going to be sensitive to the prevailing strength of the constitutional restraints, the big question is how do we characterize the overall game here - it is not obviously a pure game of coordination but nor is it a game of pure conflict either. It is very much a mixed motive game because the various parties are dependent on each other - they can only find a solution through a process of discovery (there is no a priori equilibrium or guarantee of joint maximization) - to quote Schelling the solution to the game requires that "the players must jointly discover and mutually acquiesce in outcome or mode of play that makes the outcome determinate. They must together find the "rules of the game" or suffer the consequences" (Schelling, 1960 pg.107). Minimally the consequences of not finding a determinate outcome in our case is to think of the complete takeover by one branch of the government - the coup by Parliament (the Interregnum), the dictator (the Emergency in India) and the judiciary (Iran). Once there is antagonism there has to be some form of communication and as Schelling has told us this communication is rarely through direct talks but rather through visible maneuvers taken by the players. Indeed, in many of the separation of powers interactions, the communication is often in the action taken by a branch in pursuance of their end. In fact, as may often be the case the aggressive party seeking to push a certain value may transgress boundaries by taking what Schelling labeled as salami tactics. There is a definite element of salami tactics in the slow takeover of the territory of the Supreme Court in India by increasingly amending Part III of the Indian constitution. At some point with the 'territory' associated with the right to property having been appropriated by the legislative and executive branches of the government. This made the judiciary dig in its heels by putting in place the Kesvananda Bharathi judgment[10] that ensured that the 'basic structure' of the Indian constitution could not be amended – this was possible because of the powers given to the Indian Supreme Court were invoked. The very same powers of the Supreme Court allowed the Court to expand its reach by transforming legal procedure to take on a host of concerns. These powers too have been exercised using salami tactics – initially by changing procedure to take on the violation of human rights but then proceeding to open up to host of economic and political issues. It needs to be prominently noted that the judiciary - particularly the Supreme Court in a liberal democracy, draws these lines by interpreting the Constitution - in the mixed motive game that is played, the lines provided by constitutional interpretation play a very important role in providing the focal point where things come to rest. It is interesting to think of the place where the lines have ultimately been drawn in

[10] Kesavananda Bharati v. State of Kerala, AIR 1973 SC SC 1461 (Supreme Court, 1973).

both these cases. In the case of the *fundamental right to property* it is the case that the 'right to property' was ceded to the legislature and the executive. But it may be noted that other essential features of the Indian Constitution came to be protected by the basic structure doctrine. The end result is that the line came to be drawn in a manner that deters the other branches from overreaching. Thus, this was an act (solution?), which could very well be identified as an act of deterrence in the sense Schelling uses the word - it influences intentions. Following Schelling further, as he tells us "Complying with a deterrent leaves things unchanged and leads to no sequel" (Schelling 1984 pg.321).

On the other hand, the exercise of power by the Indian Supreme Court in matters pertaining to PILs is perhaps compellent in the sense that that to compel someone is to make that person do something. Thus, the Indian Supreme Court is very much in the act of spelling out what should be done. Interestingly Schelling says, "And if a compellent threat is met by inaction, no event or initiative triggers or mandates the execution, while violation of a deterrent threat, unless softly or gradually done, initiates the action." (Schelling, 1984 pg.320) Indeed this may be manifest in the long drawn judicial monitoring committees that have accompanied some of the PILs in India.

Our illustration of the PIL in India should not of course suggest that is indicative of excessive power in the judiciary – in many instances the executive branch of the government has disproportionate power in its direction. For instance, when we turn to the delegation of legislation in India, the lines have been drawn to clearly favor the executive branch of the government. (Singh 2014) (Singh and Dash 2018) (Singh, forthcoming 2026).

We have gathered together select examples (and that too only Indian) but we think there is a point to getting a series of empirical narratives together – they follow suit from Schelling's insistence that "the study of mixed motive games is necessarily empirical (Schelling, 1960 pg.162)." Given our discussion, it can be suggested that the takeover of powers often follows salami tactics – where the game seems to come to a rest is very much dependent on the focal points produced by the constitution and its interpretation. In this, our resting points are various – sometimes deterrent and at other times compellent. Also, to be noted in this is that variety of values are pursued – none of them are in themselves going to be looking for economic normativity in itself – the impulses for removing the right to property was to push for speedy advance towards a socialist economy and similarly the impulse towards changing legal procedure was to deliver 'justice' to the poor. The problem is that all these configurations have external effects in so much so as separation of powers are violated – the externalities from political acts end up prescribing (constituting) economic regulation to take place according to the resulting configuration. Our endeavor is to see if the political acts can be understood using the rubric of Schelling's mixed motive game; and in this, by posing the problem in this manner, it opens up the potential of viewing constitutional law and the supreme court of a constitutional democracy in terms of constructing a focal point brought to the fore by Schelling.

II.4 A Reflection on Constitutional Law as a Focal Point

Can we think of extending and consolidating the proposition that is inherent to our illustration – that constitutional law understood in the widest sense is central to both framing strategies and providing focal points for equilibrium in conflicts associated with the separation of powers? To reflect on this, let us first note that we have analogously extended Schelling's thought on conflict that was geared to approach international conflict during the cold war and thus the question that arises is - how plausible is the analogy? The key word here is context – as per Schelling's insight the empirical setting in which the game is played has a profound influence both on the nature of strategies and what works as the focal equilibrium – "It is often contextual detail that can guide the players to the discovery of a stable or, at least, mutually nondestructive outcome." (Schelling, 1960 pg.162) The mutual construction of focal points is inevitable when sovereign powers confront each other in the international arena but the focal point has a different construction when there is an intra sovereign contest over the lines marking the separation of powers. While the empirical detail that Schelling discusses is mainly associated with the gain of physical territory in conflict, he also mentions other contexts where law and as he terms it the *casuistry* of law are important for the strategies and outcomes of the game (Schelling 1960 pp. 13-14 and pg. 284).

Indeed, the ideas associated with Schelling have been used to engage with the law. For instance, Basu views law as providing a focal point (salience) when the 'game of life' throws up multiple equilibria (Basu, 2018) - this is in line with standard mainstream game theory that uses the notion of focal points to solve the equilibrium selection problem (where the multiple equilibrium are typically Nash equilibriums). This makes use of the Schelling imagination of games as games of coordination but not his imagination of mixed-motive games.[11] The key idea in Basu and other work that emphasizes the *expressive* dimension of law (McAdams, 2017) (Cooter,1998), employs the notion of 'law as focal point' to highlight the transformation of, or more broadly focus on, the beliefs of individuals. This is an important insight on the role of law in an economy but is not sufficiently incorporative of the intra-state conflict that characterizes the dynamics of separation of powers. As we have argued understanding such dynamics requires an emphasis on the 'casuistry of law' to think of the equilibrium associated with the mixed motive game.

One way of approaching this perceived lacuna is to note that the idea of the law is external to *expressive law* analysis – the question as to what is law is either not raised or the legal positivist definition of law is accepted. If we take on the standard legal positivist approach that says law is but a subset of norms that have state sanction, we face an inadequacy in our project to analyze the separation of powers of government. The inadequacy flows from the proposition that the state sanctions rules/norms governing its own self – who or what is the state here? This is the type of aporia that has caused legal institutionalists to critique legal positivists and offer institution-oriented definitions of law (Croce and Godoni 2020). It is impossible here to engage with the whole genre of legal institutionalists or summarize positions, rather we concentrate on the understanding of law by the Italian jurist Santi Romano.

[11] As we have noted earlier in the paper that to follow Schelling on mixed motive games is to shift the focus from deductive reasoning to a more inductive orientation that understands rationality in practice.

Going against the standard legal positivist definition of law as norms or rules, Santi Romano thought of law as institution; he says "any legal order is an institution and vice versa any institution is a legal order" (Romano, 2017 pg.13) and that "there are as many legal orders as institutions" (Romano, 2017 pg.50). In this imagination an institution is the organization of connections across people (barring the simplest filial bonds), which are per se the legal order. The law is determined by the institution, in which it is materialized, to quote "the law is the vital principle of any institution, that which animates and holds together the various elements that compose it" (Romano, 2017, pg.22). To elaborate: he says that there are "religious, ethical, economic, artistic, educational institutions" but "however insofar as they are institutions all of them are legal entities." (Romano, 2017, pp. 23-24). In this view the state (along with everything else) "exists by virtue of law" and not on account of norms (Romano, 2017pg. 24). Thus, the law is anterior to everything – it is not a norm or complex of norms – though it can generate norms and rules.

Among other things this formulation provides a base for approaching legal pluralism (these include international law, the church, organized crime to just mention some out of the multiplicity of legal orders that enmesh with each other) but that is not our focus here. Instead, we turn to Santi Romano's discussion of public law within the frame of his encompassing approach to law to helps us instrumentally reach an analytic that will help address the problem on hand. While discussing public law he speaks of the legal relationships between various bodies of the state (distinguishing this from legal positivists views of law that typically see the state in terms of unitary sovereign power) and in this context says "among these bodies a host of acts takes place, along with procedures that are crucial to law, which attends to them minutely and makes them the object of its laws and measures of all sorts (Romano, 2017 pg. 42)" Further in this regard he says that the "primary problem" of the state legal order is "how to distinguish its agencies so as to coordinate, separate and group them, to put them in a hierarchy, to keep them in check, and so on (Romano, 2017 pg. 434)." In this regard he explicitly labels the three powers of the state as an institution, which together form the state as a whole – "Moreover, any set of these bodies and institutions [istituti] can be considered as an institution insofar as they are coordinated with each other, subordinated and unified, and also the so-called three powers of the state – the legislative, the executive and the judiciary powers, that, put together, constitute that broader institution that the whole state organization is (Romano, 2017 pg. 107)." This gives substance to his statement "the law is not only norm governing relationships, but first and foremost organization (Romano, 2017 pg. 43)".

Indeed if we turn back to Machiavelli, he saw the law (what Lefort refers to as the constitution) as an institution to govern conflict or to rephrase that the constitution (a structure of law) is instituted so that law can govern the conflict. In the contemporary liberal democracy the separation of powers is the constitutionally mandated legal order and coevally the institution. Now, as we have noted various branches of the state often overreach their functions and as we have noted the adjustment is not a clockwork mechanism that balances the organization but rather is best characterised by a Schelling mixed motive game where (the casuistry of) constitutional law helps draw the lines. As our examples have shown that the entire set of strategies, solutions in terms of lines drawn are

sensitive to the contexts of the problems that drive the dynamics of the situation. In a larger endeavour along these lines – more examples will generate knowledge of the patterns of strategies and solutions to the mixed motive game associated with the conflict over location and use of power across the three branches of government.

However, a more comprehensive endeavour has to incorporate the important point brought to the fore by Romano (actually, the pioneer of thinking about institutions, Machiavelli) – that the institution of separation of powers is a legal ordering. If such legal order alters, which it can through an inter branch conflict, this means that the institution is altered. Such alteration can be small or it can be entirely transformative. This then becomes the important utility of the rubric of the Schelling style mixed motive game with the solution or focal point placed in constitutional law. Such constitutional law in practice while it helps draw lines, the very lines can reformulate the legal ordering – most probably this is what captures the contemporary strong man phenomena (what was labelled as corruption by Machiavelli).

Romano makes a statement about constitutional law, which is of interest -

> "Constitutional law is not exhausted by the norms that regulate the relationships of the state; on the contrary, it first and foremost encompasses the state in itself and for itself, in its elements, structure, functions, which, like the legislative one, do not generate distinct and concrete relationships. This is the domain where the perspective of law as an institution is so decisive and comprehensive that neglecting or rejecting it almost implies annihilating constitutional law as a whole (Romano, 2017 pg. 47)."

Studying multiple situations that combine this insight with the notion that constitutional law provides a solution to the mixed motive game of conflict across branches of government, can give us patterns of the interplay of norms and at other times breaks or transformations to the legal order. It is important to discern these multiple patterns because they are constitutive of social, political and economic relations with consequences aplenty.

Conclusion

Thus, this paper can be seen as a call to look at innumerable conflicts that arise when branches of the government overreach their constitutionally mandated constraints. Such conflict, we have suggested over the latter half of the paper, is captured by thinking of the conflict in terms of a Schelling style mixed motive game. This can help us imagine up both the strategies as well as solutions in terms of focal points that emerge on basis of the context. In this we suggested that constitutional law, broadly imagined, is the source of the focal point or 'solution' to the conflict. From this perspective we have gone on to argue that if we understand law not as an external formation but following the lead of legal institutionalists - as anterior to human interaction, then (among other things) constitutional law is not just a series of norms but a source of institutional reordering when conflict substantially reorders relations across the branches of government – invariably through changes in the law. This perhaps helps us understand certain current day crises of all over the world.

Notwithstanding, the drama and immediate distress of strongmen, as we noted in the earlier part of the paper that formed the empirical spine of the paper, the violation of the doctrine of separation of powers (understood in both the structural and functional sense) is generative of social costs – that are some combination of misallocation on account of rent seeking and costs generated by processing information inefficiently. These costs can be substantial and vary with context – so once again this exercise of discerning the economic consequences of violation of the separation of powers is important to document and trace – often enough this lens provides an important window into the political economy.

Our paper is also an attempt to develop on the methodology offered by Schelling's rich approach to the study of games. As we study an institution as complex as the separation of powers it is difficult to render the underlying game (and surely game it is) into a mathematical form – precisely because it restricts the frame. As Schelling says "the mathematical structure of the payoff function should not be permitted to dominate the analysis" and "that some part of the study of mixed motive games is necessarily empirical (Schelling, 1960 pg. 162)." He goes on to say that the "empirical question" is not just a description of how people play the game. "It is a stronger statement: that the principles relevant to *successful* play, the *strategic* principles, the propositions of a *normative theory*, cannot be derived by purely analytical means from a priori considerations" (Schelling, 1960 pg.163) (italics in the original text). We think an empirical discovery of '*successful* play, the *strategic* principles, the propositions of a *normative theory'*, in the context/s we have brought to the fore is an important agenda to pursue.

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