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## Constitutional guarantees and the distribution of power and wealth

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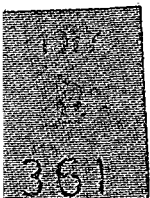
CONSTITUTIONAL GUARANTEES  
AND THE DISTRIBUTION OF POWER AND WEALTH

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Nr. 81

DISKUSSIONSBEITRÄGE

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## Abstract

### CONSTITUTIONAL GUARANTEES AND THE DISTRIBUTION OF POWER AND WEALTH

Given the constitution of a particular society, this constitution needs to be adopted to changing social realities. This may be achieved by either interpretation or amendment. This paper seeks to provide an analysis of the Process of the Interpretation of the Constitution (PIC), by which constitutional norms are not only applied and adopted to changing circumstances but essentially changed in content. The model of a System of Interpretation of the Constitution (SIC) is advanced in order to specify the conditions, under which constitutional change by interpretation will take place, and to indicate the directions, in which the authentic interpretation of the constitution will shift. SIC is described by 15 assumptions, with the distinction being made between different "scenarios" of constitutional change by interpretation (see Propositions I - III). The relevance of this paper lies in the attempt to demonstrate the social consequences of using SIC as a mechanism to resolve social and political conflicts - rather than employing conventional public choice procedures.

CONSTITUTIONAL GUARANTEES AND THE DISTRIBUTION  
OF POWER AND WEALTH

Jürgen Backhaus<sup>+</sup>

I. Outset

Over the last decade, more and more economists have shown an interest in the fundamental rules of society <sup>1</sup>. There has been an emphasis on the analysis and derivation of "optimal" constitutional rules, agreed upon by individuals under conditions of limited knowledge so as to abstract from present (and presumably "unjust") states of society, the distribution of power, wealth and opportunities. There has, however, been little interest in institutional devices to enforce constitutional rules, whether agreed upon or not, in the context of modern democratic societies. There is, on the other hand, a growing uneasiness with the social

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Helpful comments have been made by James M. Buchanan, Bruno S. Frey, Gérard Gäfgen, Victor Goldberg, Chris Goodrich, Warren J. Samuels, Gordon Tullock and Dick Wagner. I should like to thank these persons as well as various audiences for stimulating critique and discussions. Further comments are invited.

<sup>1</sup> See, for example, J. M. Buchanan, G. Tullock, The Calculus of Consent (Ann Arbor, 1962); D. W. Rae, "Decision Rules and Individual Values in Constitutional Choice", American Political Science Review 40 (1969); W. J. Baumol, Welfare Economics and the Theory of the State (London, 1965); pp. 39 - 45. The appearance of J. Rawls' A Theory of Justice (Oxford, 1971), finally has caused an outburst of literature which neither can nor need be cited here.

arrangements and institutions designed to protect and enforce the constitutional consensus <sup>2</sup>.

This paper sets out to provide an analysis of the interpretation of the constitutional process by which the constitutional norms are not only applied and adapted to changing circumstances but essentially changed in content. The analysis concentrates on a rather specific example, a norm which has a clearly demonstrable impact on different identifiable interests. The approach is, however, easily generalizable and may be applied to any constitutional norm specific enough to foster a clash of interests. The analysis undertaken is - in contrast to the debate on constitutional issues cited earlier - clearly positive. No normative conclusions are arrived at nor desired, rather it seeks to present strategic considerations concerning constitutional litigation <sup>3</sup>.

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<sup>2</sup> J. M. Buchanan, *The Limits of Liberty* (Chicago, 1975); p. 116: "Political constitutions which are at all explicit normally require more inclusive rules for change in the constitution than for ordinary collective decisions. In practical fact, basic legal rules are modified through long observed but condoned departures from explicit rules, through judicial fiat, through legal precedent, through encroachment by legislature on what should be the separated function of constitution making, and through numerous other instruments. ... Such non-agreed changes ... have little claim<sup>0</sup> to be called 'legitimate' ". See also with reference to the US Supreme Court, N. Glazer, "Toward an Imperial Judiciary", Public Interest 41 (1975).

<sup>3</sup> These strategic conclusions are, however, not normative but "technical" propositions.

## II. The Situation of Conflict

In western style democracies with majority voting procedures <sup>4</sup> and constitutional guarantees to minority groups, there is always an incentive for vote maximizing governments to please the majority and take away privileges from the minority, even when it is in the best (long run) interest of society as a whole to stick to the constitutional consensus.

The constitutional guarantees of individual property may serve as an appropriate example. These allow for expropriation of individual property by the government only in certain cases where the 'public interest' is involved, and only when accompanied by 'just compensation' <sup>5</sup> preventing redistribution <sup>6</sup>.

But an important exception for industrial property is usually included in the constitutional document: Socialization of land, natural resources and the means of production is (in the European constitutional context)

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<sup>4</sup> Key elements of this type of society might be: (1) Competition of political parties, (2) majority voting procedures, (3) guarantee of individual liberties, (4) institutional arrangements for the effective enforcement of these guarantees.

<sup>5</sup> This tends to be interpreted as meaning the market values of the taken property.

<sup>6</sup> In fact, this statement does not completely hold true; as the market value of a particular share lies below the individual valuation by its particular owner - otherwise, he would sell at the prevailing market price - there is some type of redistributing rents occurring. There will be no regard to this in the following as the argument would only be reinforced by this observation.

constitutionally viable, and permissible with only trifling compensation necessary <sup>7</sup>.

Somehow, in the course of time, this constitutionally opened channel of action has a tendency to be narrowed drastically in the process of interpreting the constitution.

This strange phenomenon can be illustrated by various examples. As a matter of convenience, I refer to three german cases, which have been described in detail <sup>8</sup> and can therefore be referred to in this essay with only a few words.

a)

Otto Kirchheimer showed that by means of an extensive interpretation of the guarantee of individual property almost any positive state action had expropriative elements and consequently had to be accompanied by compensations. This extensive interpretation described and criticized by

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<sup>7</sup> See, for the Federal Republic of Germany, Art. 15 GG, for the Italian Republic Art. 41 CI.

<sup>8</sup> See the brilliant description as early as 1930 by Otto Kirchheimer (Die Grenzen der Enteignung, Berlin and Leipzig) for the evolution of the interpretation of Article 153 of the Weimar Constitution. Recently, the author of the present study has undertaken to show this tendency for two further cases, Article 41 of the Constitution of the German state of Hesse and Article 15 of the Bonn Constitution. See J. Backhaus, Politikwissenschaftliche Analyse Interpretatorischer Veränderungen von Verfassungsnormen, Paper presented to the Biannual Meeting of the German Political Science Association (D.V.P.W. at Duisburg, October 7 - 10, 1975), forthcoming in 17 Politische Vierteljahresschrift Dec. 1976.



Kirchheimer war partly backed by German Supreme Court (Reichsgericht) with disastrous consequences e. g. on urban planning.

b)

The german state of Hesse in 1946 proclaimed a new constitution, thereby socializing the main parts of its industries. Induced legal research established that because of its incompatibility with the existing body of legal reasoning, socialization by constitution (instead of by statute law) was impossible, and by casuistic interpretation the impact of the norm was thus reduced, that it eventually applied to only one major siderurgical enterprise as well as to five smaller railways which had to be highly subsidized.

c)

The Bonn Constitution (Art. 15) explicitly allows the socialization of land, natural ressources and the means of production; and the act of socialization has to state amount und procedure of compensations to be paid and granted in order to help the former owners to be reingrated into the new framework of social property. But it is now established legal 'knowledge' that by far not any means of production is socializable, that the compensation to be paid has at least to be the market value and that socialization should not only serve but be necessitated by the public interest, which is not only to be determined by the legislator but also by the Supreme Court (Bundesverfassungsbericht).

The particular example of the socialization of industries is chosen because it illustrates a deep constitutional conflict involving a dramatic clash of far divergent interests. A government pursuing this kind of policy will be "extreme" in the sense that it will differ markedly from its predecessors. This situation clearly demonstrates the principles underlying the continual struggle of the reinterpretation of the constitution.

In what follows, a model is presented which shows how this constitutional conflict may be resolved with the reconciliation of clashing interests; the resulting interpretation of the constitution describes the outcome of the conflict.

The model is intended to generate some insights into the process of the interpretation of the constitution, which is regarded as a public choice process. PIC determines the exclusion and the inclusion of alternative courses of action to be pursued by government and this predetermines the actual choice among alternative policies to be made by any administration. Therefore, PIC will sometimes turn out to be a public choice process by far more important than voting and elections.

The particular example used is of interest only insofar as it can serve to illustrate the abstract exposition and allows the empirical corroboration of the postulates derived from the theoretical model. The relevance of the abstract model is not limited to the particular examples cited.

A word on the methodology adopted might be of interest. The line of analysis pursued here is distinct from the most frequently adopted methodological procedures in economic science: postulating assumptions, deriving propositions, subjecting these propositions to empirical tests. In this case, the contentional variations (by interpretation) of constitutional norms are not readily quantified; so the empirical test is not straightforward.

Therefore, the analysis is shaped to postulate suppositions, which are assumptions subjectable to empirical tests, and conditional premises, which specify the situations, for which the analysis holds <sup>9</sup>. Also, for reasons specified later, two counterfactual assumptions are postulated; these are called principles. From these suppositions, principles and premises, propositions are derived. If the suppositions postulated hold empirically and the premises are relevantly, specified logically correct deduced propositions must hold true.

Verification (lack of falsification) of the suppositions therefore corroborates the propositions. The propositions

<sup>9</sup> The word 'assumption' is avoided in this context, because in Friedman's succession (see Milton Friedman, *The Methodology of Positive Economics*, pp. 3 - 43, in his *Essays in Positive Economics*, Chicago 1953) it is commonly believed that assumptions need neither be tested nor testable. In this model, however, the testability of the assumptions employed is essential for the reasons stated above. Criticism should therefore center on the empirical validity and explanatory power of these testable assumptions. Therefore, the empirically testable assumptions used are preferred to be called 'suppositions', following a suggestion made by James M. Buchanan.

derived are, however, also testable. In view of the difficulties of quantification, it is necessary to resort to "storytelling" <sup>10</sup>. This is empirically as sound a procedure as any other which leads to clearly refutable results. Storytelling is most commonly used as a first step in order to enter a relatively underdeveloped area of research and therefore is appropriate also in this case. The disadvantage is, however, that you cannot tell as many stories as may be needed to meet common statistical standards. Moreover, the effort of checking the results is higher (especially because of the language barrier), but the same holds true for much of the statistical material usually presented <sup>11</sup>.

### III. The System

The task of the authentic interpretation of the constitution in western style democracies is constitutionally ascribed to the judicature, especially to the Constitutional Court; but it would be grossly misleading to think of this court as the socially unconnected, uninvolved and independent interpreter of old texts in search of answers to modern questions, as might be believed if one took popular philosophies at face value. The authentic interpretation

<sup>10</sup> For details of this procedure see: B. Ward, What's Wrong with Economics (New York, 1972), Chapter 12.

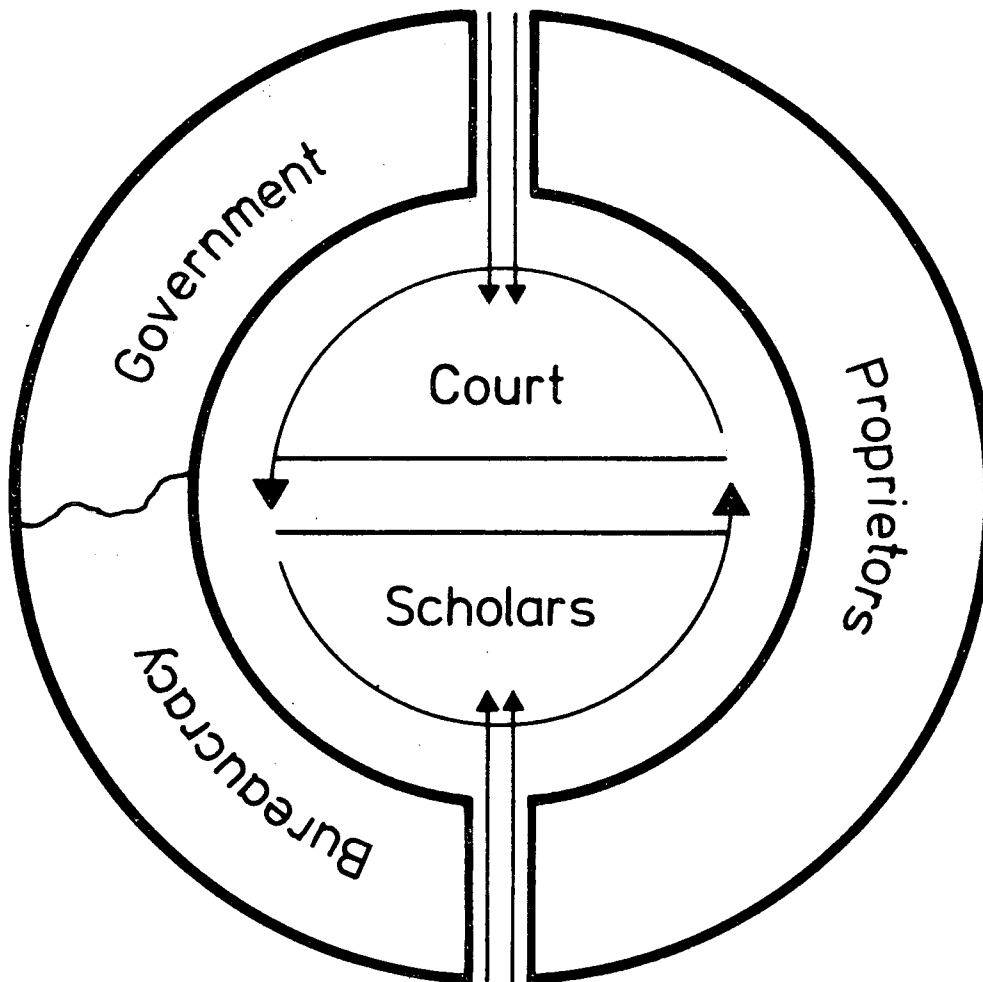
<sup>11</sup> For the propositions derived in this paper, evidence in the form of three stories told can be cited. See Footnote 8. Similar examples could, of course, also be referred to (e. g. the legal disputes under the Allende administration in Chile 1970 - 1973), but space limits forbid this at the moment.

of the constitution is to be seen rather as the output of the complex system of the interpretation of the constitution (SIC) consisting of:

- the demand side:
  - the parties interested in an authentic interpretation which will resolve their clash of interests (in terms of diagram I called the system's shell);
- the supply side (the core of SIC):
  - the consitutional judiciary, which finally resolves the conflict pronouncing its verdict, and
  - the producers of alternative interpretations.

The system might be illustrated by the following diagram:

Diagram I. The System of the Interpretation of the  
Constitution (SIC)



The diagram describes the situation: the core of the system consists of the legal institutions for the interpretation of the constitution, while the shell represents the interested parties, which seek to influence the contentional output of the inner system, the core.

### The Actors

The eventual outcome of the power struggle between government, trying to pursue its policy of redistribution via expropriation, and the proprietors, trying to defend their interests, depends on the behavior of the various actors involved. The next step is therefore to describe the different actor's behavior.

#### The System's Shell.

It is observed that the interested parties will try to influence the process of the interpretation of the constitution not only by means of appearing in court and presenting their arguments (which is obvious and legally required) but also by influencing the scholarly community, generating alternative ideas for the interpretation of the constitution. Behavior of the interested parties will be governed by strategic considerations in view of the desired interpretation. This is a behavioral assumption, denominated supposition 1 (strategic litigation).

The executive in this model is assumed to be primarily and unambiguously interested in pursuing its predetermined policy. This policy is further assumed to be extreme in the sense of leading to a constitutional conflict. In our example this policy aims at expropriation of industrial property.

In this case, two problems might arise:

Supposition 2 (legitimacy deficit). An extreme government, recently come to power, will face a deficit of legitimacy and so be anxious not to incur a defeat in the Constitutional Court. A legitimacy deficit is defined as the difference between formal political power and the actual potential of implementing a particular policy. The legitimacy deficit is positively related to the degree of government's "extremeness", negatively to its period in power without its legitimacy being openly questioned. This supposition therefore loses importance the longer administrations stay in power.

Legitimacy might be generally considered as the non-pecuniary potential to attain desired outcomes in public choice processes<sup>12</sup>. Individuals, lacking further information, expect a correspondence between their wishes and the activities of the party or group to which legitimacy is attributed.

Usually, the legitimacy of a government will mainly depend on the way it came to power. In this essay it is, however, throughout assumed that the extreme administration assumed power according to the procedure established by constitution and tradition of that particular society. (Otherwise, the dispute over the interpretation of the constitution would be almost meaningless).

A significant gap between formal power (e. g. majority of votes in parliament) and actual potential to attain a desired result in the public choice process might occur, when

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<sup>12</sup> See also Victor Goldberg, On Positive Theories of Redistribution, unpublished paper, Center for Study of Public Choice (VPI & SU), p. 10.



structural change (which has components of a public good) in principle is desired by a majority of voters, while particular changes affecting identifiable, organized and well defined groups will be opposed by these groups. Insofar as a program of structural change consists of a whole set of particular policies, there may majority approval to the whole program be combined with majority opposition to any part of it.

An 'extreme' administration differing markedly from its predecessor will face this dilemma: on the one hand, everyone expects and a majority authorized a policy of structural (e. g. institutional) change, on the other hand this very expectation reduces the correspondence between private interest and anticipated public policy insofar as the policy conflicts with particular private interests.

A legitimacy deficit is accordingly defined as the difference between formal political power and the actual potential of implementing a particular policy (against the opposition of the interest groups involved).

Premise 3 (budget constraint). The government in this model faces a budget constraint necessitating use of the constitutional prerogative in question. In view of this budget constraint, government cannot, in our example, simply buy out the owners of the industries to be socialized.

In our example the observed budget constraint has a specific interpretation. The payment of considerable compen-

sation would counteract the effect of redistribution of power and wealth and would therefore directly contradict the aim pursued.

Bureaucracy's role in this case is far from unambiguous. The bureau involved is the ministry of justice (attorney general); its officials are occupied with specialized activities, covering the preparation of acts to implement government's policy, negotiations with proprietors' representatives, and finally government's litigation and the preparation of its case in court. The head official is clearly dependent on government, his future (promotion, etc.) will depend on his success in implementing the governing party's policy. He will suffer considerable damage, if the political executive finds out that he did not facilitate the achievement of the executive's ambitious (extreme) policy. The head official, however, will face serious difficulties when it comes to his staff. As Anthony Downs observed, bureaus use ideologies as a means of coordinating and harmonizing the various activities undertaken by the office <sup>13</sup>. The bureau concerned in this example fits the one envisioned in Downs' analysis. It is rather large and undertakes a wide variety of rather specialized and not easily controllable activities. In this case a coherent and sound ideology is vital for the proper functioning of the

<sup>13</sup> A. Downs, Inside Bureaucracy (Boston, 1967), Chapter 19.

bureau. When, however, suddenly a bureau's ideology becomes outmoded, the central mechanism of coordination breaks down. This will certainly be the case in our example, because the new and extreme administration has to take over its predecessor's bureaucracy. Adopting, changing and transforming the old ideology to a more suitable one which meets the new requirements is a time-consuming activity. Meanwhile, the bureau is not totally at the head official's disposal. There will be inconsistent behavior and an adherence of staff officials to the former party's political aims. This results in supposition 4 (ideological delay). Bureaus harmonize the actions of their various officials and departments by means of specific bureaucratic ideologies. To implement a new ideology is a time-consuming activity. Similarity between the government's and the bureaucracy's ideology is positively related with the length of the government's stay in power <sup>14</sup>.

It is in the owner's interest to protect their property. Given an impending expropriation, they will at least try to gain maximum compensation. (This is of course precisely what government cannot offer - see premise 3 (budget constraint)).

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<sup>14</sup> In the context of this model, ideology is not only relevant to bureaucracies. Ideologies might also govern the behavior of the interpreters of the constitutional norms as well as the judges in deciding on the 'authentic' interpretation of the constitution. These aspects are, however, omitted from the analysis for simplicity's sake. An analysis of the production of ideologies has been recently undertaken by Gérard Gäfgen, *Zur Ökonomik der Ideologiebildung: Eine analytische Vorstudie*, pp. 163 - 182, in: Heinz Sauermann & Ernst-Joachim Mestmäcker (eds), *Wirtschaftsordnung und Staatsverfassung, Festschrift für Franz Böhm*, Tübingen 1975.

Both defense of individual property and pursuit of maximum compensation can be achieved by means of challenging the government in court and preparing the legal ground in one's own favor. Apart from investing in the protection of the endangered property, owners may try to liquidate the property and try to transfer it into non-expropriable forms of property or consumption goods.

In an extreme case where expropriation is certain - i. e., where legal activity will not prevent the implementation of government policy - such activity may nevertheless be useful, insofar as the level of compensation has yet to be determined. In this context, investment in non-legal activities (e. g., overthrowing the extreme government) may become more and more important. This political activity alternative will not be considered here. Insofar as this is the case, the analysis is partial <sup>15</sup>.

The higher the a priori probability of losing in court, the more the owners will invest in their legal defense. The result is not as paradoxical as it might seem. The owners maximize the expected utility they derive from their industrial property. This utility clearly approaches zero if they are sure to be expropriated in the near future. In this case, any investment is to them virtually costless, as enterprises'

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<sup>15</sup> There may occur situations, however, in which political lobbying becomes difficult: consider an extreme administration which has recently come to power and is unwilling to have any informal contact with the "abhorred" enemy (who will certainly direct his efforts towards bureaucracy, inherited from the former less extreme government).

debts will be expropriated as well. Thus, in the case of certain defeat, the owner faces a budget constraint equal to the value of his endangered property, the value of which will usually be a multiple of the possible investment in legal defense. The surer the a priori chance of winning in court however, the less incentive the owner has to invest in legal defense. In this case, much less defense is in fact needed. This behavioral characteristic might be referred to as supposition 5 (inverse investment behavior) <sup>16</sup>.

#### The System's Core.

Two basic assumptions are postulated to describe the behavior of lawyers operating within the system's core.

Principle 6 (non-interestedness). It is assumed here that the core of the system, the judiciary and the scholarly community, is not interested in the matter itself, but acts according to some notion of the adequacy of the final solution, and some peculiarities of the "due process" requisite. This does not imply assumption about altruism or abnormalities with respect to any individual lawyer. It is assumed, on the contrary, that the system is efficiently <sup>17</sup> organized in the sense that individual utility maximizing on the part

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<sup>16</sup> Because of the incomplete analysis of the alternative investment choices undertaken in this context, the inverse relationship holds only partially.

<sup>17</sup> The concept of efficiency used here is not social efficiency, of course, but efficiency concerning the system's specific values, as pointed out above.

of the system's members leads to behavior and decisions strictly in accordance with the proclaimed and internalized ideas of the judiciary; i. e., justice and the "adequateness" of its decisions and rulings. This observation is not very realistic, it is probably counterfactual - but intentionally so. In order to demonstrate the social consequences of using SIC as a mechanism for solving social and political problems and deciding among alternative policies (instead of pointing to other mechanism as, e. g., public choice procedures or markets) stress should be laid on the properties of a properly functioning system instead of pointing to specific failures and judicial idiosyncrasies <sup>18</sup>.

Supposition 7 (external impulses). It is observed that lawyers do not decide problems which they pose themselves; on the contrary, the problems they have to solve are posed from outside. For the courts, this is apparent. Courts can avoid problems, but they can decide problems which are not explicitly put before them only to an extremely limited extent (by obiter dicta ruling).

<sup>18</sup> By the way, this assumption can easily be accepted by lawyers, who would be opposed to the analysis of their behavior in terms of an economist's approach of this analysis; conclusions drawn from this weak assumption are much more interesting because of their general importance. Therefore, there is no need for endangering the interdisciplinary communication between economists and lawyers by postulating assumptions which run counter to lawyers' professional ethics, even if these assumptions were more realistic.

For the university lawyers, this observation is less apparent. I do not know of any research supporting or questioning this supposition. In the absence of any published evidence, it may suffice that the assumption is clearly testable and refutable.

From my own experience I infer that more than 9/10 of all legal research undertaken at German universities is externally induced. Most law professors also serve as lawyers in tricky cases which need much research and preparation. All law professors who I know serve as counsels to a variety of institutions, both public, semi-public and private. This peculiarity stems from a problem inherent in legal methodology, which can only serve to develop very general principles, but for practical reasons cannot solve unposed problems in advance, because the set of actually occurring problems of conflicts between different principles and rules is only a tiny fraction of the set of possible problems. Research in advance therefore can only be carried out to an extremely limited degree <sup>19</sup>.

The production of alternative ideas stems exclusively from the scholarly community; from specialists in constitutional law, on whose output of ideas the constitutional judiciary

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<sup>19</sup> From the low degree of publicness of legal research stems a pecuniary advantage, which could not be realized by doing research in advance.

in annually deciding a multitude of cases in various fields is heavily dependent - supposition 8 (source of interpretative ideas) <sup>20, 21</sup>.

This is simply the result of a division of labor, thus permitting specialization and productivity gains <sup>22</sup>.

The scholarly community is affiliated with universities, both public and private.

The Constitutional Court is formed out of judges, who cannot be reelected and who have practically been chosen by the political parties according to their strength in parliament<sup>23</sup>. The court's prerogatives are only vaguely laid down in the constitution itself, but more precisely in the court's fundamental statute, which is open to amendments by a simple majority decision of parliament. The judges will be former university professors and high ranking officials, and, if their term is limited to a specified number of years, will return to similar positions after having served their term or may as well retire. From this, two more observations follow.

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<sup>20</sup> It may not always be easy to verify this observation, as courts more often than not do not cite their sources. Knowledge of the relevant legal literature will, however, make verification easily possible.

<sup>21</sup> Concerning the american situation, it has been pointed out to me that not only legal scholars but scholars in any discipline relating to the specific problem posed before the court will find themselves in a situation similar to the one described for the scholarly community of lawyers in view of my german experience. This will be of some importance if the analysis is applied to the american scene.



Supposition 9 (judicial dependency). Judges in the constitutional court, by virtue of their being appointed by government, will be ideologically attached to the appointing administration's political position. (This follows from rational government's appointing decisions).

Supposition 10 (judicial power constraint). The possibility of the constitutional court's power being curbed by parliament amending the constitutional court's statute will limit judicial discretion.

If in general therefore judges will be inclined to favor (present and former) executive's positions, the court in its main reasoning will - on the other hand - follow the arguments presented to it by the conflicting parties according to the adversary system adopted in western judicature. The court adopts all legal opinions presented before it and forms a coherent opinion out of the bundle of ideas offered.

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22 Productivity is not easily measured; it should be a quantitative measure (quantity to be given by number of appeals) as well as a qualitative measure (quality being seen in terms of the degree of adequateness of the constitutional ruling with respect to the specific situation under consideration). The adequateness is, of course, highly debatable, involving political values and interests. Furthermore, even the number of problems (cases considered) is not externally given, but is dependent upon the expected adequacy of the court's decisions.

23 This is a more or less accurate generalized description of the german institutional framework. There are, however, variations as to the precise constitutional arrangements. Judges may be appointed by the chief of the executive only. Therefore the representation of different parties will occur over time (provided there are variations in the relative strength of the various parties big enough to secure changes in the political executive as well) and will not necessarily reflect the actual strength of various groups in any given period.

This may be referred to as supposition 11 (reconciliation). The constitutional court will try to reconcile all legal arguments advanced, and thus form a coherent constitutional interpretation.

Therefore, the completeness of the array of possible constitutional interpretations is of strategic importance for the achievement of a "balanced" interpretation.

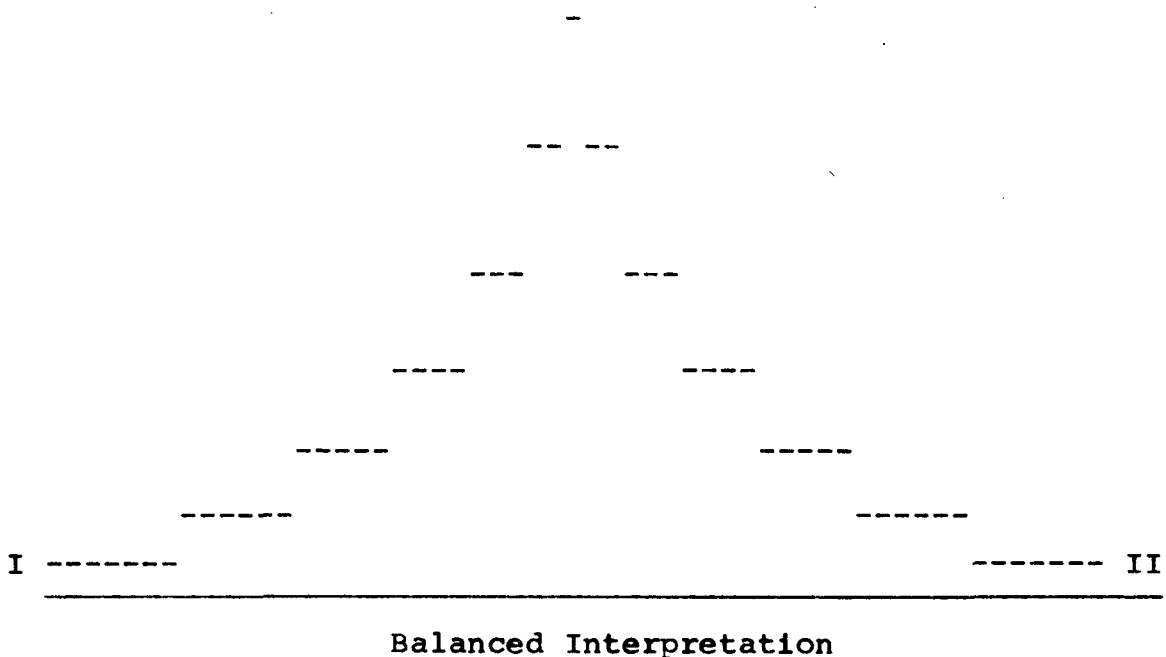
In sum, the court will generally try to do both things: endorse the government's position, and try to harmonize the conflicting arguments presented as well.

The scholarly community of law professors is almost exclusively affiliated to law schools and universities; it is assumed here that the universities do not exert specific pressure on individual researchers to favor specific contentional results. This may not, of course, seem to be entirely plausible. The argument holds, however, in terms of this "ideal" situation, as the final result is not dependent on assumptions which run counter to someone's professional ethics. If, however, it is postulated that there exists political and social pressure as to the results of individual legal research, competition between universities of different background and political ideals may be assumed to generate a wide array of alternative possible interpretations. Principle 12 (variety of legal opinion).

#### IV. Interaction

Assume that the constitutional norm in question has up to now not been the subject of intensive legal research. It is possible to imagine a wide range of interpretation within which any lawyer may form himself an a priori opinion (before undertaking further research). The distribution of a priori opinions between extreme points I and II may be normal as illustrated below:

Diagram II



In our example, I denotes the position of the extreme administration, II the interpretation favoring most the owners' interests.

The process of the interpretation of the constitution, which

eventually decides which policy is to be carried out, will subsequently be described and explained by a sequence of three suppositions.

The interested parties will sponsor university research. According to their specific interests, the parties select their researchers in view of the a priori opinions these may have expressed. From the point of view of the researcher, further work in this field will confirm his a priori opinion<sup>24</sup>. If, in this situation, the court has to decide the conflict, it will according to suppositions (9) - (11) reconcile all arguments presented, favor the present administration's view so far as supposition (10) suggests, and moreover, express a certain bias toward the appointer-government's interpretation (9). Consider, however, the long-range impact of an externally induced process of research, untermiated by the constitutional court's decision.

Initially, any researcher will publish his opinion in scholarly journals. Thus a lawyer unspecialized in the field will become aware of problems concerning the interpretation of this norm.

Supposition 13 (legal consciousness). The ratio of lawyers holding (unconsciously) a priori opinions to those conscious

<sup>24</sup> This assumption is by no means necessary, but facilitates the analysis. We need only postulate a certain probability of the researchers' confirming their a priori opinions. There is no reason why these probabilities should differ for right wing or left wing researchers. Therefore, the final outcome does not change with this simplifying assumption.

of the problem of interpretation, but as yet undecided, is negatively related to the quantity of research published. The more that is published the more lawyers will become aware of intrinsic problems of interpretation.

Teaching will result in a further proliferation of the interpretation arrived at. The students of today will be the judges, officials, lawyers and law professors of tomorrow. Published results will be read and to a certain degree appreciated and shared. Thus, not only will there be lawyers aware of possible problems of interpretation (problem-conscious), but also more and more members of the profession will hold specific a posteriori opinions, these opinions being those which lawyers have either learned or read and appreciated.

Supposition 14 (confirmation). The ratio of those lawyers conscious of a certain legal problem to those holding a posteriori opinions ( $R_D^C$ ) is a negative function of time.

If the induced research had been sponsored equally over all possible a priori opinions according to their initial distribution, although legal knowledge would have certainly been deepened, the outcome would have only confirmed the a priori distribution. If, however, the research is sponsored in an unbalanced way, a shift in the legal consensus of opinion will take place. Consider a situation where the initiation of research is unbalanced (Figure I). Government

may face five different interest groups of owners (different industries) and any party may sponsor the research of two law professors <sup>25</sup>; in turn any law professor may teach ten law students annually. This results in a distribution of a posteriori opinions among practitioners (officials, lawyers, judges), which will become relevant when these persons have to apply the norm in question, as is shown below.

Figure I

<u>Years</u>	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u> ...	<u>21</u>
I	2	20	40	60	80	100	120	400
II	10	100	200	300	400	500	600	2,400
$R_d^C$ +	833	83	41	31	21	16	14	4

+ Ratio of problem-conscious to determined lawyers.

However, the total membership of the guild (practitioners as well as university law professors) may be held more or less constant and limited. Assume that the guild is held constant at about 10,000 graduates from law schools and universities. Then, the ratio of problem-conscious to determined lawyers ( $R_d^C$ ) will rapidly decline as shown in the third row. Of 14 lawyers, chosen by chance, in our example

<sup>25</sup> These figures, although fictively chosen in this example, are nevertheless realistic. In the case of the socialization in Hesse, referred to above (fn. 8), the owner-induced research at least outnumbered research induced by the government of Hesse five times. See for details Backhaus (op. cit.), p. 54.

after 7 years one will have a determined opinion. This will more often than not be the opinion of that party which has induced the most research; more specifically, the balance of induced research reproduces itself constantly and in unbiased fashion over time. If, for example, after 21 years the constitutional court has to decide upon the problem, with a jury of 8, two will have a determined opinion. In our example, of these two none will have opinion I (the probability that opinion I will be represented in the jury:  $11/36$ , the probability that opinion II will be represented:  $35/36$ ; the probability that only opinion II will be represented:  $25/36$ ; the probability, however, that only opinion I will be represented:  $1/36$ , that is, approximately 3 percent. Thus is is by accepted statistical standards certain that opinion I will not be represented in the jury singularly). If the remaining judges do not simply follow the majority's opinion (which they usually do) but follow instead the presented opinions according to their frequency, (I) will surely be defeated, and (II) certainly be established.

Supposition 15 (biased interpretation). Given an imbalanced research impulse, the deviation from the median interpretation of a posteriori opinions commonly held is a positive function of time. If, however, the constitutional court had decided earlier, the result might have been different. Consider the constitutional court deciding in period 1 with all

researchers acting as "amici curiae" (counsels to the court). Then, according to supposition 11, the court will try to reconcile all presented arguments. If the court gives each argument equal weight, the decision will finally result in a position one-third to the right of the median of balanced interpretation. The exact position will further be determined by the influences indicated in suppositions (9) - (10).

### V. Propositions

From these assumptions (suppositions, premises and principles), several propositions can be deduced. We may distinguish three different situations. (1) The process of interpretation of the constitution begins before the extreme administration comes to power; (2) the process begins at the same time as (or shortly after) it assumes power; (3) the process begins when the extreme administration is firmly established.

1. The first situation is of great practical interest. As only one party <sup>26</sup> (the owners) acts, the consensus of opinion is influenced asymmetrically and drifts to an extreme position (13 - 15). The next generation of judges, officials, lawyers and law professors will be unaware of any legal opinion differing from the extreme position reached. It should be

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<sup>26</sup> The administration in power will not show the slightest interest in influencing the process. But an extreme party, hoping to gain power some day, might. It could influence the process as well, a case excluded from analysis in this context despite its obvious importance. Extreme parties, moreover, often have a higher share of partisans in universities - even in law departments - than in the rest of the population.



noted that this result occurs without the slightest participation of the constitutional court <sup>27</sup>. The resulting interpretation in our example will be a high compensation requisite and/or the limitation of the applicability of the norm. Government, facing its budget constraint (3) will be barred from applying its once unquestioned constitutional prerogative. The protection of property and ownership will be complete <sup>28</sup>.

From this, proposition I follows:

An interested party can, in the absence of any counter activity, influence in the long run the process of the interpretation of the constitution so that the authentic interpretation of the constitution drifts to a desired extreme. To achieve this, there is no need for any explicit statement from the constitutional court.

Although this first situation is the simplest in terms of the model presented here, proposition I describes most cases of dramatic changes in the interpretation of the constitution which occur. At the same time the model explains

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<sup>27</sup> Extreme interpretations of the constitution must not therefore be necessarily attributed to an "imperial judiciary", as Glazer (1975, see Footnote 2) seems to imply.

<sup>28</sup> At least individually and for that moment. The institution (public good aspect) of individual ownership, however, may well have been endangered at the same time. It is quite improbable that the interpretation of the constitution can prevent a majority quest for expropriation in the long run; it might on the contrary lead to a constitutional crisis and, eventually, to a revolutionary change in the constitution.

why these changes are not noticed <sup>29</sup>.

2. The process may be initiated by either party: the extreme administration in pursuing its policy, the owners anticipating government's action. An administration, only recently inaugurated, will face a deficit of legitimacy (2); so it will be risk averse in court. Bureaucracy, still ideologically committed to the earlier executive's political goals (4), will act reluctantly and uneasily. This will prevent the implementation of optimal strategies of litigation.

The legal advice produced by the bureaus, and legal activity undertaken on behalf of the government will still be inspired by the former administration's ideology. Supposedly extreme (in the same sense as the administration, legal scholars (12) will not be consulted by bureaucracy - or only haphazardly - hence a limited range of possible arguments will be presented in court (consequence: 11) in particular the government will be denied its extreme wing of argumentation which will not be presented in court and therefore need not be reconciled with the remaining argumentation presented. At the same time the executive cannot

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<sup>29</sup> It need not be explained here whether potentially interested parties or groups enter PIC and why for some time they may not pay attention to the ongoing process of the interpretation of the constitution and its possible effects. Explaining this would be up to a different model. (A preliminary explanation might be a temporary lack of interest for the policy alternative concerned by its traditional or potential advocates). Stress is only to be laid on the very possibility of an interpretational change unnoticed by the public, upon which public it would be to approve changes in the constitution.

profit from the appointment of judges committed to the governing party. The extreme administration has to face its predecessor's judicial appointees, who are hostile to the new governing party. The legitimacy deficit (2) will severely limit the executive's ability to threaten to curb the constitutional court's power (10).

Owners, on the other hand, will present the whole range of possible arguments (1), (12) including their extreme wing of argumentation. The more they fear the implementation of the extreme administration's policy (of expropriation), the more they will invest in political and forensic lobbying (5). The resulting verdict of the constitutional court will be to the right of the median position of possible interpretations (11, 15). The executive will have to abstain <sup>30</sup> from the implementation of the intended policy in order to avoid a defeat in court, a defeat which it cannot afford at that time (2) but which seems to be very likely.

#### Proposition II

An extreme administration, recently inaugurated, will in the presence of active and powerful adversaries in constitutional litigation be only partly able to profit from its constitutional prerogatives.

The outcome will, however, be more favorable to the executive if it succeeds in prolonging constitutional litigation until new judges have been appointed. Gradually, it should also be possible to inspire bureaucracy with the new ideology as well, so as to secure effective collaboration. But this situation resembles more closely the case analyzed below.

3. The extreme administration may seemingly remain inactive with respect to the implementation of its extreme policy for some time after assuming power. After overcoming its initial legitimacy deficit (2), inspiring bureaucracy with the new ideology (4) and thus securing effective cooperation; and furthermore appointing judges committed to its party and policy (9), it will be able to effectively curb judicial discretion - thus preventing adverse verdicts (10). If the executive now initiates the constitutional battle, the outcome will be balanced - assuming effective litigation on both parts - or even biased in favor of the government, which can now secure the "government's bonus" (9. 10). For this strategy to be effective, a limited period of inactivity on the owners side is a prerequisite. An extremely effective policy of appeasement of owners' suspicions must accordingly have taken place. This corresponds to a phase of investment in legitimacy (2).

If the administration waits for as long as almost one term, however, the alarmed owners in view of the impending successful implementation of the government's policy will invest (5) not only in the constitutional but also in the political battle (before elections). This might be dangerous for government, damaging its reelection probabilities <sup>31</sup>.

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<sup>30</sup> The probable escape from this dilemma will be sought in regulating the industries concerned and settling out of court. This outcome is Pareto-optimal for the parties involved. The executive avoids an open defeat in court, implementing, however, at least an attenuated version of its program; the owners do not suffer losses but gain guaranteed and protected profits; part of the government's bureaucracy will finally gain power.

<sup>31</sup> This problem is excluded here. See Footnote 15.

Proposition III

An extreme administration being firmly established can effectively pursue extreme policies by taking advantage of constitutional prerogatives and, if the constitutional adversaries after its inauguration abstain from strategically influencing the process of the interpretation of the constitution and constitutional litigation for a certain period, can secure an authentic interpretation of the constitution very much biased in its own favor, stretching the wording of the constitution to its outer limits.

VI. Concluding Remarks

The process of the interpretation of the constitution has been shown to be politically neutral in the sense that there is no inherent political bias with respect to differing political viewpoints. The process, on the other hand, stabilizes whatever diverse impulses it receives. There is no evidence of a (second) supposition of reconciliation of political viewpoints (according to the supposition of reconciliation of legal interpretations) underlying the process, so unbalanced impulses (issued from whatever political direction) will be worked out. The imbalance will be stabilized as a new balance; imbalances are stabilized as such, not attenuated nor counterbalanced by the process itself.

Any counterbalance must come as the consequence of a new external impulse.

SIC is nevertheless no barrier to political and social change. There will be difficulties arising out of SIC concerning short-run policies extreme enough to induce constitutional controversy. SIC can however be employed as a



device for the long run implementation of far-reaching structural change. SIC is a delicate political instrument, it will only be useful as an operational device for the implementation of the policy of a specific political party or interest group if there is no opposing influence exerted on SIC by another party or group. Parties or groups unable to secure enough votes in the political process should try to gain access to SIC in order to pursue their political ends efficiently. For those parties or groups insufficiently important to attract much public attention (and opposed strategies of extensive litigation), SIC is a useful device. Under a shield of public ignorance, these groups can gain power and access to political decisions thus exerting an influence much in excess of their importance and weight in a democratic process of public decision making <sup>32</sup>.

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<sup>32</sup> For a related analysis see Randall Bartlett, Economic Foundations of Political Power, New York 1973.

### Appendix

In order to facilitate the analysis and critique of the model presented, a compilation of assumptions and postulates advanced in this paper is given:

- Supposition 1      (strategic litigation)
- Supposition 2      (legitimacy deficit)
- Premise 3          (budget constraint)
- Supposition 4      (ideological delay)
- Supposition 5      (inverse investment behavior)
- Principle 6        (non-interestedness)
- Supposition 7      ( external impulse)
- Supposition 8      (source of interpretative ideas)
- Supposition 9      (judicial dependency)
- Supposition 10     (judicial power constraint)
- Supposition 11     (reconciliation)
- Principle 12       (variety of legal opinion)
- Supposition 13     (legal consciousness)
- Supposition 14     (confirmation)
- Supposition 15     (biased interpretation)

#### Proposition 1:

An interested party can, in the absence of any counter-activity influence in the long-run the process of the interpretation of the constitution so that the authentic interpretation of the constitution drifts to a desired extreme. To achieve this, there is no need of any explicit statement from the constitutional court.

Proposition II:

An extreme administration, recently inaugurated will, in the presence of active and powerful adversaries in constitutional litigation be only partly able to profit from its constitutional prerogatives.

Proposition III:

An extreme administration being firmly established can effectively pursue extreme policies by taking advantage of constitutional prerogatives and, if the constitutional adversaries after its inauguration abstain from strategically influencing the process of the interpretation of the constitution as well as from constitutional litigation for a certain period, can secure an authentic interpretation of the constitution biased in its own favor, stretching the wording of the constitution to its outer limits.