

Chapter One: Introduction to Constitutionalism

On May 10, 1776, the Second Continental Congress passed a resolution recommending that each colony draft and ratify a state constitution.¹ Citizens were requested to “adopt such government as shall, in the opinions of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.”² Reaction was so overwhelming that John Adams regarded this call as “the most important resolution that was ever taken in America.”³ Americans paraded in joy on the streets of Philadelphia, eager to get on with the work of self-government. Within a year, every colony but Rhode Island and Connecticut had established a new constitution.

Government in the United States is constitutional government. Written constitutions, citizens of all political persuasions have historically agreed, are fundamental law, higher than ordinary law made by legislatures or common law announced by justices. Federal, state, and local authorities exercise power legitimately only when they have constitutional authorization. This American commitment to constitutionalism extends far beyond traditional governing institutions. Many institutions in civil society, such as the local chess club and the P.T.A., have a constitution that creates, empowers and limits the leadership and membership.

This commitment to constitutionalism masks very fundamental disputes over what a commitment to constitutionalism entails. Contemporary candidates for the presidency are routinely asked whether they will appoint justices to the bench who support *Roe v. Wade* (1973), the decision which held that the constitution protects abortion rights, or who are “strict constructionists.” Other constitutional questions lurk just beneath the surface of these common controversies. These questions are:

1. WHAT IS A CONSTITUTION?
2. WHAT PURPOSES SHOULD CONSTITUTIONS SERVE?
3. HOW SHOULD CONSTITUTIONS BE INTERPRETED?
4. HOW SHOULD CONSTITUTIONAL DISPUTES BE RESOLVED
5. HOW ARE CONSTITUTIONS, RATIFIED, CHANGED, AND REPUDIATED?

Many Americans think basic questions of constitutional theory have easy answers. The Constitution of the United States is the fundamental law of the land. That constitution limits government and protects basic rights. The Constitution of the United States consists of the written text ratified in 1787-89 and amendments passed according to the procedures set out in Article V. Article VII details the procedures for ratifying the Constitution⁴ and Article V details the only legitimate means for amending the constitution.⁵ The Supreme Court resolves constitutional controversies. The decisions of that tribunal on constitutional questions bind all other governing officials. Having constitutional controversies resolved by the branch of government with life-tenure members best guarantees that all exercises of government authority rest on sound constitutional principles and not merely on short term political needs. Americans should venerate the constitution as the primary source of our prosperity and liberty.

¹ For a more extended discussion of the materials in this chapter, see Howard Gillman, Mark A. Graber, and Keith E. Whittington *American Constitutionalism: A New Introduction* (New York: Oxford University Press, 2010).

² *Journal of the Second Continental Congress*, vol. 5 (1776), 342.

³ David McCullough, *John Adams* (New York: Simon & Schuster, 2001), 109.

⁴ “The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”

⁵ “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.”

Government officials should respect the constitution because the constitution is law, although, alas, too many politicians and citizens are prone to substitute their policy preferences for constitutional commands. The only constitutional question open to serious debate in many courses on the American constitution is the proper method for interpreting the constitution.

In our view, basic constitutional questions are more difficult and more important than these common answers suggest. American during the eighteenth and nineteenth centuries routinely asserted that unwritten constitutional principles limited governing officials. The Constitution of the United States was intended to empower as well as limit. The text simultaneously expresses national aspirations while providing a framework designed to enable persons with very different political principles to share the same civic space. The framers thought that our constitutional system would be best maintained by a well-designed constitutional politics rather than by declarations of constitutional law. The present near judicial monopoly on constitutional decision making is partly the result of an evolutionary process that began in the late nineteenth century. Many constitutional practices that Americans now take for granted are products of long historical struggles and have not been adopted by other constitutional democracies. Prominent contemporary constitutionalists reject as simple minded the notion that Article V prescribes the only legitimate means for constitutional change in the United States. Despite having constitutional provisions for amending the constitution similar to ours, constitutional courts in India and Germany have insisted that amendments inconsistent with the general tenor of the constitution are not legally binding. Leading political scientists and constitutional commentators have recently published books asserting that the Constitution of the United States is responsible for many ills of American society.⁶ One of us maintains that constitutional defects caused the Civil War.⁷

These questions are more difficult precisely because there is more to constitutionalism than mere textual interpretation. In our view, constitutionalism is a distinctive form of politics and governance, and thus an understanding of how constitutionalism works in practice must be informed by knowledge of actual political processes within constitutional systems. Rather than claim a dramatic separation of law and politics, we believe that constitutions structure ordinary politics and that ordinary politics structures how constitutional systems operate. Sometimes these relationships seem straightforward. The Constitution of the United States declares that in order to be eligible for president a person must be thirty-five years old, and not much time is spent arguing how to be faithful to that requirement. Sometimes the influence on ordinary politics is structural and strategic. Candidates for the presidency in the United States spend inordinate amounts of money and time in a few swing states because Article II requires a majority of electoral votes rather than a majority of popular votes. Change the constitutional rules for electing the president, and the politics of presidential elections will change. The Constitution encourages legislative compromises and consensus-building, privileges the status quo, and empowers political actors who are authorized to make the first official decision on many issues. Policy proposals must run a difficult obstacle course before becoming settled law. Many opportunities exist for affected interests to influence, slow or defeat legislation that might affect them. Divided government, Senate filibusters, presidential veto threats, and judicial review can all slow and moderate policy swings and encourage negotiation and consensus-building within the legislative process. Then again, as we will see, the difficulty of passing legislation sometimes leads presidents and justices to take the initiative with more immoderate unilateral decisions. In short, the more you pay attention to the significance of constitutional design the more ubiquitous and complicated becomes the Constitution's influence on politics.

As for the influence of ordinary politics on the workings of the Constitution, we note that from the beginning of the Republic experts, public officials, and the general public have argued about the meaning and purpose of the Constitution and its provisions, and these arguments often align with conventional political attitudes and affiliations. The Constitution declares that government institutions

⁶ See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (Oxford University Press: New York, 2006).

⁷ See Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press: New York, 2006).

may not lawfully impose “cruel and unusual punishments,” but conventional liberals and conservatives have different views on what constitutes cruel treatment. Presidents and senators use explicitly political (mostly partisan) criteria when considering appointments to the Supreme Court, precisely so that justices will advance their preferred understanding of how the Constitution should be interpreted—and there is no reason to think that an admonishment in the *Harvard Law Review* will suffice to change judicial practice. When ordinary politics leads political institutions to be controlled by different political parties it is more likely that inter-branch constitutional disputes will arise. Abraham Lincoln had very different understandings about the constitutionality of secession and slavery than the other three candidates for president in 1860. Change the result of the national election that year, and American constitutional history would likely have taken a very different path. Rather than view examples such as these as corruptions of pure constitutionalism, we see them as central to an understanding of the actual workings of constitutional government.

Students of constitutional systems must accept as natural and inevitable the reciprocal relationship between constitutional politics and ordinary politics. The point of constitutional studies should be to illuminate these relationships, not disguise them by focusing too narrowly on how to find right answers to constitutional disputes. Toward that end it is useful to point out that, while the co-authors of this text agree that the study of American constitutionalism extends far beyond constitutional law, we have no common political program. Indeed, we disagree on the best answers to just about every question of constitutional interpretation discussed in this book. Given our disagreements, we profess to having no aspiration that readers of this text will reach right answers to the most pressing answers of constitutional government. Our hope is simply that we may promote more informed answers to other important questions regarding the political practice of constitutionalism.

I. What is a Constitution?

Although constitutionalism has a long tradition in politics and political theory, substantial disagreement exists over when that tradition began and what constitutes that tradition. Many commentators believe the constitutional tradition began in ancient Greece. They see Aristotle’s *Politics* as the first great work of constitutionalism and identify constitutionalism with the study of political regimes. Others find the first seeds of constitutionalism in ancient Rome and the middle ages. Constitutional regimes developed as rulers became committed to governing consistently with certain fundamental legal principles and the rule of law. A third understanding of constitutionalism developed in England and the United States during the seventeenth and eighteenth centuries. The liberal constitutionalism of the Enlightenment was committed to limited government and individual liberty, to the notion that governing institutions could not pass certain kinds of laws.

Contemporary constitutional authority is grounded on law. The constitutional commitment to rule of law requires that governing officials be chosen on the basis of preexisting legal standards and that government officials act only when their conduct is sanctioned by preexisting legal standards. A person may claim the constitutional authority to act as President of the United States only when that person has obtained office following the rules laid down in Article II, is proposing to exercise an executive authority vested by Article II, and is exercising that authority consistently with other rules laid down in the Constitution. Political actors have no legal authority when they take actions inconsistent with these standards.

Ancient Constitutionalism. Political thinkers in ancient Greece and Rome used the term “politeia” or “constitutio” when referring “to the total composition, the shape or form of the state.”⁸ Ancient constitutionalism focused on the *telos* of a polity, the particular goods and vision of the good life that polity sought to promote. The first sentence of Aristotle’s *The Politics* declares, “Every state is a

⁸ Graham Maddox, “A Note on the Meaning of ‘Constitution.’” *American Political Science Review* 76 (1982): 806.

community of some kind, and every community is established with a view to some good.”⁹ Ancient constitutionalists studied how social institutions were internally organized and interacted with other social institutions to generate a good society. They were particularly interested in political socialization, the practices by which citizens developed political identities, interests, and values. American constitutionalism, in this sense, is characterized by a two party system and consumerism, as well as the institutions explicitly laid out in Articles I, II, and III. Constitutional analysis, from this Aristotelian perspective, must take as a given both the Bill of Rights and the broader political culture of the United States. Steven Elkin makes such an assertion when he points out that while “a commercial republican regime” may not be “the best regime,” such a society may be “the best regime for the kind of people we are with our history and capacities.”¹⁰ An ideal people might be less concerned with material prosperity than Americans, but any political order which fails to “grow the economy” is unlikely to survive in the United States.

Constitutions as Fundamental Law. Constitutions are commonly regarded as higher or fundamental law. Constitutions authorize the making of ordinary law and determine how ordinary law is made. Constitutions provide the foundations for ordinary lawmaking by establishing the rules for determining who makes the law, setting out the processes by which those governing officials may make laws, and limiting the laws those governing officials may enact. Article I, for example, provides for a House of Representatives that is elected every two years, requires all bills to pass the House (and Senate) by a majority vote, and forbids the House from creating titles of nobility. In sharp contrast to certain strands of ancient constitutionalism, constitutional principles and rules are regarded as legally binding. No person has any legal obligation to obey an official decree not sanctioned by the constitution. The historian Charles McIlwain observes that in constitutional government, “any exercise of authority beyond these limits by any government is an exercise of ‘power without right.’”¹¹

The constitutional commitment to fundamental law entails a commitment to the rule of law. Rule-following, the legal theorist Frederick Schauer points out,

foster(s) the interrelated virtues of reliance, predictability, and certainty. . . . [D]ecision-makers who follow rules even when other results appear preferable enable those affected to predict in advance what the decisions are likely to be. Consequently, those affected by the decisions of others can plan their activities more successfully under a regime of rules than under more particularistic decision-making.¹²

Persons in regimes that respect the rule of law at all times know the legal consequences of contemplated actions. All citizens are capable of learning in advance what conduct government permits, what conduct government sanctions, and how severely government sanctions that conduct. This legal regularity enables people to preserve their liberty by acting consistently with known laws.

Liberal Constitutionalism. Liberal constitutionalists identifies constitutionalism with a system of “protected freedom for the individual.” Giovanni Sartori, a leading proponent of this constitutional understanding, regards a constitution as “a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a ‘limited government.’”¹³ Constitutionalism, so conceptualized, is more than a commitment to the rule of law. Prominent contemporary thinkers reject claims that just “any plan of government amount(s) to a constitution.” Constitutions establish textual and practical protections for certain liberties. “For a constitutionalist,” Walter Murphy and his co-authors insist, “a law enacted by a Congress chosen after

⁹ Aristotle, *The Politics and the Constitution of Athens* (New York: Cambridge University Press, 1996), 11.

¹⁰ Stephen L. Elkin, *Reconstructing the Commercial Republic* (Chicago: University of Chicago, 2006), 10.

¹¹ Charles Howard McIlwain, *Constitutionalism* (Ithaca: Cornell University Press, 1947), 11.

¹² Frederick Schauer, *Playing By the Rules* (New York: Oxford, 1991), 254.

¹³ Giovanni Sartori, “Constitutionalism: A Preliminary Discussion,” *American Political Science Review* 56 (1962): 855.

open public debate and free elections and signed by a President similarly chosen would still be illegitimate if it violated a fundamental guarantee, such as the right to free exercise of religion.”¹⁴

Liberal constitutions protect two kinds of rights. The first, fundamental rights, are thought to exist apart from the constitution. Political liberalism is committed to some version of universal rights, the claim that persons have some rights simply by virtue of their being persons. These rights may be “endowed by the[] Creator,” as Thomas Jefferson maintained, or inherent in some aspect of the human condition, as many philosophers believe. Liberal constitutions recognize and guarantee these fundamental rights, but do not “create” them. The second, sometimes known as positive rights, are created by the constitution or laws passed under the constitution. They are contingent, rather than essential, features of a liberal constitutional scheme. The right to bring a lawsuit in a lower federal court could not have existed before the constitution because the constitution provides the legislative authority necessary to establish lower federal courts. State legislatures routinely establish new positive rights such as the right to swim in a public pool or the right to deduct charitable contributions when paying income taxes. Unlike fundamental rights, no constitutional problem exists when positive rights are repealed by statutory revision or constitutional amendment. Rights created by government may be abolished by government. Distinguishing fundamental rights from these sorts of positive rights, and correctly identifying fundamental rights and their implications, are often difficult and controversial tasks.

II. Constitutional Purposes

Fundamental laws that limit government serve many purposes, but impose costs. Good constitutions provide governing officials with necessary power and organize politics, enable governments to make credible commitments to investors and foreign powers, prevent self-dealing by governing officials, promote deliberation on the public interest, enable a society to realize its aspirations, and facilitate compromises among persons who disagree on national aspirations. Constitutionalism also entails some rule by the dead, not normally considered a virtue in a democratic regime.¹⁵ Americans are not constitutionally free to decide whether an established state religion, all things considered, promotes the public good. We must instead determine whether that policy is consistent with some words ratified more than two-hundred years ago by men who owned slaves and wore wigs. New Yorkers who think state equality in the Senate is responsible for inefficient and unjust allocations of federal funds are not constitutionally free to secure alternative institutional arrangements. If we wanted to change those rules, we would have to go through the more arduous task of changing the Constitution.

Empowering Officials and Organizing Politics. Constitutions both limit and empower government. In modern political systems, constitutions provide legitimacy in the eyes of domestic and international audiences, in part because they normalize the political process. Constitutions empower government by establishing the background rules that enable ordinary politics to take place. The political theorist Stephen Holmes highlights this function of constitutionalism when he points out how “constitutions may be usefully compared to the rules of a game.”¹⁶ Just as the rules of baseball enable persons to play the game and the rules of grammar enable persons to speak English, so constitutional rules enable persons to engage in democratic politics. Constitutional rules help us determine when someone’s idea becomes a statute with the force of law and whether a government official has lost his right to rule. A constitution settles some issues so that we can focus on others. Rather than spending time arguing

¹⁴ Walter F. Murphy, James E. Fleming, Sotirios A. Barber, and Stephen Macedo, *American Constitutional Interpretation*, Third Ed. (New York: Foundation Press, 2003), 48-49.

¹⁵ The U.S. Constitution was mostly written in 1789, but would pose the same obstacle of dead political majorities obstructing present ones if it had been written in 1989. For a provocative discussion, see Andrei Marmor, “Are Constitutions Legitimate?” *Canadian Journal of Law and Jurisprudence* 20 (2007): 69, and Thomas Jefferson’s letter to Samuel Kercheval in Chapter Four below.

¹⁶ Stephen Holmes, *Passions and Constraints* (Chicago: University of Chicago Press, 1995), 163.

about how to elect a president (or whether to have a president) or whether to have a state religion or whose orders army officers ought to follow, our politics can revolve around substantive issues. The absence of a constitution would not result in unlimited legal power, but anarchy.

Rule of Law and Credible Commitments. The rule of law facilitates material prosperity, international relations, and peaceful cooperation. Governments can always promise that they will respect rights; constitutional institutions make those promises more credible. As a result, skeptical constituencies might buy into a new political system, and a society may achieve gains in overall welfare. Constitutions enable governments to make the guarantees necessary to entice private investors and lay the foundations for commercial development. Douglass North and Barry Weingast insist that “(f)or economic growth to occur the sovereign or government must not merely establish the relevant set of rights, but must make a credible commitment to them.”¹⁷ Persons considering buying government bonds must have some confidence they will be repaid. Soldiers must have some confidence they will receive promised wages. Financiers and entrepreneurs must have some confidence that their investments will not be expropriated or annulled. Foreign nations must have some confidence that international agreements will be respected. Political minorities must have some confidence that they will not be oppressed by political majorities. Thus, the supremacy clause of the U.S. Constitution reassured foreign governments that treaty obligations would be enforced in federal courts, the Bill of Rights reassured anxious anti-Federalists that they should make their peace with the new terms of union, and the proposed apportionment of the seats in Congress convinced small state and slave state representatives in the Philadelphia Convention that their interests would be protected in the more powerful national government created by the Constitution.

Preventing Self-Dealing by Governing Official. Many constitutional rules and practices are designed to prevent self-dealing by governing officials. Robert Michels’ famous “iron law of oligarchy” postulated that all political leaders have different interests than their constituents.¹⁸ Well designed constitutions help guarantee that when conflicts arise between the rulers and the ruled, they are resolved in the public interest. Without fixed constitutional rules, incumbents may unfairly entrench themselves in office by manipulating electoral arrangements. Elected officials may not be the best judges of whether speech criticizing their performance should be prohibited. Some constitutional rules and practices prevent self-dealing by popular majorities. Constitutional guarantees of equality require that popular and legislative majorities govern by general rules that apply to majorities and minorities alike. Majorities determine whether abortion should be banned or whether troops shall be sent into combat, but they may not prohibit only Baptists from terminating pregnancies or draft only poorer persons to fight a war. “There is no more effective practical guarantee against arbitrary and unreasonable government,” Justice Robert Jackson declared, “than to require that the principles of law which government impose upon a minority must be imposed generally.”¹⁹

Promoting the Public Interest. Constitutions seek to structure a political process that facilitates deliberation and intelligent public policy. American constitutionalism has three features that promote the public interest. The first is the constitutional system for selecting governing officials. “The aim of every political constitution,” James Madison wrote, is “first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society.”²⁰ Madison defended large geographic legislative districts because he thought that such electoral units increased the number of worthy candidates and forced voters to transcend parochial concerns when making electoral choices. The second is the division of power among the national executive, legislature, and judiciary as a means for promoting intelligent legislation in the public interest. If two, three, and four heads are better than one, then requiring legislation to be approved by the Senate, House of Representatives, President, and

¹⁷ Douglass C. North and Barry R. Weingast, “Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England,” *Journal of Economic History* 49 (1989): 803.

¹⁸ Robert Michels, *Political Parties* (New York: Free Press, 1968).

¹⁹ *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

²⁰ James Madison, “No. 57,” in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), 350.

Supreme Court is likely to yield particularly intelligent law. “(T)he separation of powers,” political scientist Stephen Elkin writes, “sets up an institutional structure in which national lawmaking must revolve around the efforts of the branches to convince one another of the merits of its views.”²¹

Federalism is the third constitutional means for promoting intelligent decision-making. The division of power between the federal government and the states ideally enables policy to be made by legislators most familiar with the relevant issues and with the incentives to act on them. National issues are resolved by national officials who have developed expertise in national problems. Local issues are resolved by local officials who have expertise in local problems. Federalism allows for policy experimentation and diversity as local officials respond to local conditions, pressures and sentiment, whether such policy choices eventually spread nationally or remain purely local.

National Aspirations. Constitutions typically embody national aspirations. We may aspire to be the sort of people who protect fundamental rights, have a vigorous economy, or rule the world. As is the case with all aspirations, we do not always act consistently with our notions of the best life or good regime. Students aspiring to go to law school have been known to miss class or skimp on their readings when tempted by a movie, ballgame or other activities that cannot be mentioned in a family friendly text. Nations have been known to adopt policies that, upon reflection, do not seem consistent with their notions of justice. Few Americans presently think the decisions made to intern Japanese-Americans during World War II reflected the best American values. The constitutional text, framers hope, constantly reminds political leaders and citizens of national aspirations in ways that promote their realization. The First Amendment enables political dissenters to assert a right to free speech and requires political leaders to at least explain why their actions do not violate that cherished liberty. Abraham Lincoln in 1857 emphasized the aspirational function of constitutive texts when articulating the foundations for the constitutional commitment to the abolition of slavery. The assertion that “all men are created equal,” he stated

was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, nor for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should reappear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.²²

Constitutions as Compromises. Successful constitutions are typically compromises between persons and political movements representing very different interests and national aspirations. The compromised character of many constitutions is something of the inverse of the aspirational function. Constitutional aspirations reach above our disagreements and appeal to the “better angels of our nature.” Constitutional compromises reflect the ways in which we live with our disagreements. They introduce discordant notes into the harmony of the constitutional system. The price of national unity or peaceful coexistence in a society with diverse interests and values may be a less coherent constitution. Those who consider themselves more virtuous may have to make concessions to those that they regard as less virtuous. Imperfections, expediencies, and ambiguities may have to be tolerated in order to build support for a constitution that will be broadly acceptable. Article IV, Section 2 required free state citizens to return fugitive slaves to their Southern owners. The “federal ratio” compromised slave state and free state interests in apportioning House seats and electoral college votes.²³

²¹ Elkin, 35.

²² Abraham Lincoln, “Speech at Springfield, Illinois, June 26, 1857,” in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, vol. 2 (New Brunswick, NJ: Rutgers University Press, 1953), 406.

²³ In the apportionment of seats to the House of Representatives, states received a number of seats based on the population of their free inhabitants and three-fifths of their enslaved inhabitants. States receive the number of votes

III. Constitutional Interpretation and Decision Making

American constitutionalists engage in two distinctive debates over constitutional interpretation. Normative controversies rage over the best method for ascertaining what the Constitution of the United States means. Law professors, justices and others debate whether constitutional provisions mean what they meant when ratified, how one determines that meaning, and how decisions about constitutional issues ought to be made. A second controversy rages over whether any of these normative theories of constitutional interpretation actually explain constitutional decision making. Prominent political scientists insist that constitutional decision makers are interested only in making good policy. Their constitutional arguments merely mask conclusions reached on other grounds. The stakes in these debates are the influence of constitutionalism on politics. At one extreme is the common view that legal and policy arguments are theoretically distinct, that notions of good policy should play no role in constitutional analysis. At the other extreme is the equally common view that no practical difference exists between legal and policy arguments, that persons using common methods of constitutional interpretation and construction can find a rationale to support whatever policies they believe best. We believe the relationship between law and politics is more complex. The forms of constitutional arguments discussed are best understood as practices that constrain and structure value voting, not as devices that assure a complete separation of law and politics.

Constitutional Arguments. The constitutional text plainly resolves some matters, while leaving others open for debate and investigation. No serious claim can be made that the latest Heisman trophy winner is constitutionally eligible to be the next president of the United States. The president, Article II, plainly states, must be at least 35 years old. The constitutional status of federal laws imposing capital punishment cannot be discerned as easily. The Eighth Amendment forbids “cruel and unusual punishments,” without specifying what specific punishments are cruel and unusual or elaborating any elements of a cruel and unusual punishment. Various approaches are frequently used for understanding the meaning of such less clear aspects of the Constitution.²⁴

Originalism. Historical or originalist arguments maintain that constitutional provisions mean what they meant when they were ratified. Thomas Jefferson advised Supreme Court Justice William Johnson, “[o]n every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates and, instead of trying what meaning may be squeezed out of the text or invented against it, conform to the probable one in which it was passed.”²⁵ Proponents of originalism sometimes refer to the original “intentions” underlying constitutional provisions, but most now emphasize original “meanings.” As the constitutional law scholar Randy Barnett describes the original meaning approach, “[e]ach word must be interpreted the way a normal speaker of English would have read it when it was enacted.”²⁶ What matters is the public meaning of the constitutional text at the time the provision was ratified, not private understandings between particular framers, specific goals or applications the framers might have had in mind, or what that constitutional language might mean in the present. Originalists dispute how to interpret such relatively abstract clauses as the declaration that “Congress shall make no law . . . abridging the freedom of speech.” Some insist that this provision should be interpreted as protecting only those free speech rights that persons in 1791 believed were constitutionally protected. Others believe that such provisions should be interpreted as stating a general principle, but not any specific application of that principle. Jack Balkin, a leading

in the electoral college equal to their number of seats in the House and the Senate.

²⁴ There is no single typology of methods of constitutional interpretation, but a useful discussion of some common forms of constitutional argument can be found in Philip Bobbitt, *Constitutional Fate* (New York: Oxford University Press, 1982), 3-119.

²⁵ Thomas Jefferson, “To William Johnson, Jun 12, 1823,” in *The Writings of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 10 (1899), 231.

²⁶ Randy E. Barnett, *Restoring the Lost Constitution* (Princeton: Princeton University Press, 2004) xiii.

advocate of the latter approach, asserts that “(t)he task of interpretation is to look to original meaning and underlying principle and decide how best to apply them in current circumstances.”²⁷ Thus, when considering whether the constitution protects abortion, some originalists would consider only whether the framers of any provision believed that provision protected abortion rights, while Balkin would consider what principle of equal protection the framers of the Fourteenth Amendment meant to entrench but would then make an independent judgment as to how those principles apply to the case of abortion.

Textualism. Textualist arguments generally emphasize the specific language of the Constitution, the relationship among the terms used, and the common meaning of those terms. Against Thomas Jefferson’s suggestion that interpreters should be guided by the understanding of those who adopted the Constitution, Justice Joseph Story objected that interpreters should look only to “what is written” not to “scattered documents” and “probable guesses” about what those who adopted it meant. “It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text.”²⁸ Some textualists place the constitutional language within the specific context of the time of its drafting, for example, by making use of eighteenth-century dictionaries.²⁹ Other textualists focus on the language without regard to any particular historical context, making ready use, for example, of modern dictionaries. A leading contemporary textualist “believes it is inappropriate for judges to strike down statutes on the basis of anything other than a principle fairly inferable from the constitutional text (although such principle need not have been present in the conscious minds of the framers.)”³⁰ The most famous textual argument in American constitutional history is probably Justice Hugo Black’s claim that the First Amendment prohibited all speech regulations, no matter how dangerous the speech, because the text stated “Congress shall make no law . . . abridging the freedom of speech.” “(N)o law,” Black bluntly stated, “means no law.”³¹ Black did not do extensive historical research on free speech practices in 1791 or on the general principle the framers might have constitutionalized. That the text said “no law” was good enough for him.

Doctrinalism. Doctrinal arguments resolve contemporary constitutional controversies by interpreting past precedents. Rather than focusing on the constitutional text or what constitutional language meant when adopted, doctrinal arguments focus on what government officials, particularly judges, have said about the Constitution over time. Persons employing doctrinal argument rely on analogies to previous constitutional decisions. They claim that the principle underlying past decision, known as the holding of the case, provides the standard for interpreting the Constitution in future cases. If the justices have declared the Constitution protects the right to burn the flag of the United States, then the same principle should compel the justices to declare that the Constitution protects the right to burn a map of the United States or a flag of the state of Texas. This emphasis on interpreting precedent and extending principles articulated in one case to analogous cases is characteristic of the common law method of reasoning that the United States inherited from England. Early twentieth century commentators like Justice Oliver Wendell Holmes emphasized the ability of this sort of reasoning to allow the law to develop and grow over time as judges apply, extend, and adjust legal principles as new cases arise. In his view, “when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”³²

²⁷ Jack M. Balkin, “Original Meaning and Abortion,” *Constitutional Commentary* 24 (2007): 293. Note that like many recent scholars, Balkin attempts to ground a right to abortion, in part, in an equality argument rather than a right-to-privacy argument as the Court did in *Roe v. Wade*. See also, Mark A. Graber, *Rethinking Abortion* (Princeton: Princeton University Press, 1996).

²⁸ Joseph Story, *Commentaries on the Constitution of the United States*, vol. 1 (Boston: Hillard, Gray, 1833), 391.

²⁹ For historically oriented textualist approaches, see Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997); Akhil Reed Amar, *The Bill of Rights* (New Haven: Yale University Press, 1998).

³⁰ Leslie Friedman Goldstein, *In Defense of the Text* (Savage, MD: Rowman & Littlefield, 1991), 3.

³¹ Edmund Cahn, “Justice Black and First Amendment ‘Absolutes’: A Public Interview,” *New York University Law Review* 37 (1962): 549, 553-54.

³² *Missouri v. Holland*, 252 U.S. 416, 433 (1920). See also, David A. Strauss, “Common Law Constitutional

Frequently, controversy exists over the constitutional principles announced in past decisions. Chief Justice Roberts in 2007 insisted that local officials should not use race when assigning children to various high schools because in “*Brown v. Board of Education . . .*, we held . . . government classification and separation on grounds of race themselves denoted inferiority.” Justice Breyer responded with a contrary doctrinal argument, insisting that race conscious assignment plans “represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education . . .* long ago promised.”³³ Doctrinal arguments may include citations to previous legislative and executive decisions. The justices in *Youngstown Sheet & Tube Company v. Sawyer* (1952) disputed whether past executive practice was consistent with President Harry Truman’s decision to seize steel mills without congressional authorization. Doctrinal arguments are powerful in constitutional law, but precedents do not have the same binding force as text. The doctrine of *stare decisis* indicates that courts should generally adhere to the principles laid down in their previous rulings, but the doctrine is not absolute. Constitutional decisionmakers may not disregard constitutional provisions, but they may overrule precedents they believe wrongly decided.

Structuralism. Structural arguments are concerned with drawing out the implications of the general arrangements of the constitutional order and the relationships among governing institutions. Basic structural principles of the Constitutions such as “separation of powers,” “democracy,” or “federalism” are not stated explicitly and fully in the constitutional text, but they are evident throughout the Constitution. Structural arguments take textual features of the Constitution as their starting point and seek to develop the logic of those textual principles and how they must operate. Charles Black, who called attention to such forms of argument, noted how structural arguments do not simply try to provide an “exegesis of [a] particular textual passage” but instead provide an “inference from the structures and relationships created by the constitution in all its parts or in some principal part.”³⁴ Such arguments have an historical orientation, examining, for example, whether there was a background principle of state sovereign immunity from lawsuits built into the federal system. Others are more abstract and examine, for example, whether national governmental entities must be free from the state taxing power in order to preserve the independence and power of the federal government. Justice Scalia’s opinion in *Printz v. United States* (1997) is a good example of a structural argument. *Printz* struck down a federal requirement that local officials implement a federal gun control regulation. Scalia acknowledged that “there is no constitutional text speaking to this precise question,” but he insisted that Congress could not mandate that state officials enforce federal laws. The Constitution “contemplates that a State’s government will represent and remain accountable to its own citizens” and preventing the federal government from “impress[ing] into its service – at no cost to itself” the police officers to which local citizens have assigned other tasks is essential to maintaining a “healthy balance of power between the States and the Federal Government.”³⁵

Prudentialism. Prudential arguments examine the costs and benefits of different constitutional policies. Justice Robert Jackson made a famous prudential argument in a dissent in *Terminiello v. City of Chicago* (1949) when criticizing a decision protecting speakers who directed abusive language at their audience. “[I]f the Court does not temper its doctrinaire logic with a little practical wisdom,” Jackson warned, “it will convert the constitutional Bill of Rights into a suicide pact.”³⁶ Prudential arguments are often employed when constitutional decision makers believe that their decisions are likely to be disobeyed. Legal scholar Alexander Bickel, a leading proponent of constitutional prudentialism, urged

Interpretation,” *University of Chicago Law Review* 63 (1996): 877; Stephen M. Griffin, “Rebooting Originalism,” *University of Illinois Law Review* 2008 (2008): 1185.

³³ *Parents Involved in Community Schools v. Seattle School District*, 127 S. Ct. 2738, 2767, 2800 (2007).

³⁴ Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University, 1969), 7.

³⁵ *Printz v. United States*, 521 U.S. 898, 905, 920 (1997).

³⁶ *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949).

justices to rely on a variety of doctrines to avoid adjudicating hot-button constitutional issues.³⁷ Justice Jackson made a prudential argument in *Korematsu v. United States* (1944) when unsuccessfully urging his colleagues to avoid determining the constitutionality of the executive decision detaining Japanese-Americans during World War Two. “If we cannot confine military expedients by the Constitution,” he wrote, “neither would I distort the Constitution to approve all that the military may deem expedient.”³⁸ The pressures of the situation might have necessitated that the Court was going to uphold the government’s actions. The question for Jackson was how to do allow the government to act without creating damaging repercussions.

Aspirationalism. Aspirational arguments interpret constitutional provisions in light of the fundamental principles of justice underlying the constitution. Legal theorist Ronald Dworkin, the leading proponent of this form of constitutional reasoning, insists that constitutional decisionmakers have an obligation to make the constitution “the best it can be.”³⁹ They do so, he believes, by discerning what general principles best justify American constitutional practice, and then determining whether particular governmental practices are consistent with that normative commitment. Justice William Brennan, a long-time leader of the liberal wing of the Court from Eisenhower to the first Bush administration, was a vocal advocate of the aspirationalist approach. In his view, the “Constitution is a sublime oration on the dignity of man, a bold commitment by the people to the ideal of libertarian dignity protected through law,” and constitutional interpreters should act accordingly.⁴⁰ Justice Kennedy’s opinion in *Lawrence v. Texas* provides a good example of an aspirationalist argument. Kennedy declared, “(i)n our tradition the State is not omnipresent in the home.” “[T]here are other spheres of our lives and existence outside the home,” he continued, “where the State should not be a dominant presence.”⁴¹ From these principles, Kennedy deduced that government could not prohibit consenting adults from engaging in private homosexual acts.

The Politics of Constitutional Argument. The extent to which any theory of constitutional decision making influences constitutional practice is controversial. The legitimate forms of constitutional argument may generate arguments for any policy position Americans might wish to defend. Two prominent law professors declare, “(t)he range of permissible constitutional arguments now extends so far that a few workable ones are always available in a pinch.”⁴² Consider how often in the materials presented in this book you will find all parties to a constitutional debate insisting that history, text, and fundamental principles justifies their position. Perhaps there is a core of issues about which there seems to be little disagreement and the constitutional answers seem easy, but there are many other important issues that present “hard cases,” and those are the ones that occupy the attention of courts and political leaders. The boundary between the “hard cases” and the “easy cases” is not stable over time. Today’s off the wall argument might become a majority opinion on the Supreme Court in a generation’s time – or less.

Even if legitimate methods of constitutional decision making constrain in theory, political actors may not make good faith efforts to interpret the Constitution when they know the best interpretation of the Constitution is inconsistent with their policy preferences. Conservatives charge liberal pro-choice advocates with failing to respect the original meaning of constitutional provisions when manufacturing out of thin jurisprudential air a due process right to abortion. Liberals charge conservatives with grossly distorting precedent in order to hand George W. Bush the 2000 presidential election.

The Attitudinal Model. Many prominent political scientists think the evidence convincingly establishes that constitutional arguments do not constrain constitutional decisionmakers. Jeffrey Segal

³⁷ Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill Company, 1962), 111-198.

³⁸ *Korematsu v. United States*, 323 U.S. 214, 244 (1944).

³⁹ Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986), 53.

⁴⁰ William J. Brennan, “The Constitution of the United States: Contemporary Ratification,” *South Texas Law Review* 27 (1986): 438.

⁴¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴² Pamela S. Karlan and Daniel R. Ortiz, “Constitutional Farce,” *Constitutional Stupidities, Constitutional Tragedies* (New York: New York University Press, 1998), 180.

and Harold Spaeth, the leading proponents of the attitudinal model of judicial decisionmaking, insist that what are advertised as legal rulings are, in fact, based almost entirely on policy preferences. “[J]ustices,” they write, “make decisions by considering the facts of the case in light of their ideological attitudes and values. . . .”⁴³ Supreme Court justices, in this view, are particularly well positioned to act on their ideological attitudes and values. Unlike legislators, they cannot easily be held accountable for their decisions by voters, or any other political actor. Unlike lower court judges, their decisions are not reviewed by other courts and cannot be easily overturned. Modern Supreme Court justices also spend their time hearing difficult and politically meaningful cases. The cases that reach the Supreme Court are precisely those in which the law is unclear and political values might matter. As a result, justices are likely to decide cases in a manner consistent with their own political values.

Proponents of the attitudinal model common array the justices on a standard left-right political spectrum. Such arrays highlight how the justices routinely form durable voting blocs that hold together across a range of issues and apparently different legal contexts. The Supreme Court makes decisions by majority rule, which magnifies the power of the median justice (the justice occupying the ideological center of the Court). Figure 1-1 illustrates a distribution of justices on that scale. The nine justices are placed in ideological “space” from most liberal on the left to most conservative on the right. In this illustration, the justices are placed on the scale based on their voting behavior during the 1974 term of the Court. Notice that the justices on the Burger Court at this point formed three distinctly visible blocs. Justices William O. Douglas, William Brennan, and Thurgood Marshall occupied the liberal wing, with Douglas often out on his own and Brennan and Marshall a tight pair. At the other end of the spectrum, Chief Justice Warren Burger and Justice William Rehnquist formed a looser conservative bloc with Rehnquist holding down the Court’s right wing. In the center, Harry Blackmun and Lewis Powell form a more conservative pairing and Potter Stewart and Byron White sharing space at the median. This alignment was typical. We can see who the swing voters on the Court were, and which justices tended to vote together. We can also see the importance of changing a justice. The next year, Douglas was replaced by John Paul Stevens, who could be placed on this figure just to the left of Stewart. The Court traded a strong liberal for a centrist liberal. Although that appointment did not shift the median on the Court, it was consistent with the general drift of the appointments to the Court in the 1970s and 1980s as relatively liberal justices departed the Court and were replaced by more conservative justices appointed by Presidents Nixon, Ford, Reagan and Bush. Figure 1-1 also places the president and the Senate on the same left-right scale as the justices in 1974. It is not surprising that the president and Senate would agree to appoint a justice that looked more like Stevens than Douglas when given an opportunity.⁴⁴ Such differences have substantive consequences. Over the course of his career, for example, William Brennan voted in favor of civil liberty claims arguing in favor of such things as expanded rights for criminal defendants, a broad right to privacy, robust protections for free speech and a sharp separation of church and state more than three-quarters of the time. William Rehnquist voted in favor of such claims less than a quarter of the time.⁴⁵

Insert Figure 1-1

The Strategic Model. The attitudinal model of judicial decisionmaking assumes that the

⁴³ Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002), 110.

⁴⁴ By the time of Douglas’s departure from the Court in 1975, the Senate had shifted to the left and Gerald Ford had replaced Richard Nixon in the White House. After Watergate, the president was not well positioned to push for a justice closer to his preferences rather than to the Senate’s.

⁴⁵ Jeffrey A. Segal, Lee Epstein, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium*, 4th ed. (Washington, D.C.: CQ Press, 2006), 534-35. For details on Rehnquist and Brennan, see Keith E. Whittington, “William H. Rehnquist: Nixon’s Strict Constructionist, Reagan’s Chief Justice,” in *Rehnquist Justice*, ed. Earl M. Maltz (Lawrence: University Press of Kansas, 2003); Frank I. Michelman, *Brennan and Democracy* (Princeton: Princeton University Press, 2005).

justices are free to act on their sincerely held values. If Rehnquist is conservative, he will act accordingly. If he is far more conservative than the other justices, as he was on the early Burger Court, then he will frequently file lone dissenting opinions to express his disagreements with all the other justices. The strategic model suggests that, despite their protections, the justices might adjust their behavior to take into account the behavior of other actors. Justice Brennan famously joked that with five votes he could do anything. Brennan was not satisfied with voicing his ideal vision of the law in dissent, if he could make a majority that could implement a slightly less ideal doctrine. He was not satisfied with voicing his ideal vision of the law in dissent, if he could make a majority that could implement a slightly less ideal doctrine. It would be easy for Brennan in 1974 to write an opinion that would win the support of Thurgood Marshall. The question is how many compromises would Brennan be willing to make in his own view of the law in order to write an opinion that would also win the support of Stewart and White, or even Blackmun or Powell. Majority opinions in particular are the subject of frequent and often extensive negotiation among the justices as they seek to adjust the content of the opinion to reflect a view of the law that a majority will find acceptable, if not perfect.

A justice who is concerned about the law that will be adopted and implemented will need the cooperation of colleagues on the bench, lower court judges, legislators, executive branch officials, and ultimately the citizenry, and justices may make some accommodations to try to win that cooperation. Lee Epstein and Jack Knight, two of the two leading proponents of this approach, observe that justices can realize their policy preferences only when other governing officials cooperate by implementing judicial decisions, appointing like-minded justices to the bench, and not weakening the constitutional and statutory foundations of judicial independence. "If their objective is to see their favored policies become the law of the land," Epstein and Knight assert,

they must take into account the preferences of other actors and the actions they expect them to take. Failing to do so may have undesirable consequences: Congress could replace their most preferred position with their least, or the public may refuse to comply with a ruling, in which case their policy fails to take on the force of law.⁴⁶

Look again at Figure 1-1. The median members of both the Senate and the House of Representatives in 1974 are only moderately liberal, and the president is relatively conservative. If the Court were to follow Justice Brennan down his preferred path of the law at that point, the justices would have been outside the political mainstream and invited political backlash. Until Nixon added more conservative justices such as Burger and Powell to the Court during his first term of office, the Court had come under increasing pressure from politicians in the late 1960s and early 1970s.⁴⁷

Considerable evidence exists that justices engage in strategic decisionmaking. The Supreme Court refrained from deciding whether Lincoln's use of martial law was constitutional until after the Civil War had ended. John Marshall's refusal to issue a writ of mandamus in *Marbury v. Madison* (1803) is widely regarded as rooted in his belief that such an order would not be obeyed. Marshall explicitly acknowledged engaging in strategic behavior when, acting as a circuit justice, he refused to discuss the constitutionality of a Virginia law forbidding black seaman from entering the state. "As I am not fond of butting against a wall in sport," he informed Justice Joseph Story, he "escaped" having to rule against the state on constitutional grounds by settling the case through an act of statutory interpretation.⁴⁸

⁴⁶ Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998), 15.

⁴⁷ Edward Keynes, with Randall K. Miller, *The Court vs. Congress* (Durham, NC: Duke University Press, 1989); Donald Grier Stephenson Jr., *Campaigns and the Court* (New York: Columbia University Press, 1999), 163-189; Gerald N. Rosenberg, "Judicial Independence and the Reality of Political Power," *Review of Politics* 54 (1992): 369; Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change* (Chapel Hill, NC: University of North Carolina Press, 1992).

⁴⁸ John Marshall, quoted in Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston: Little, Brown, 1922), 86.

The Legal Model. Proponents of the legal model of constitutional decision-making believe that history, text, and precedent influence constitutional decisionmakers, even when they do not provide answers to all possible constitutional questions.⁴⁹ The judicial process involves casting decisions in terms of constitutional arguments, but there is a further question of just how much legal materials shape and influence judicial outcomes. This question can be approached at various levels. Certainly the bare text “Congress shall make no law . . . abridging freedom of speech” did not by itself determine how Brennan or Rehnquist decided free speech cases, since they often reached quite different conclusions about the implications of the free speech clause. Nevertheless, Brennan and Rehnquist had distinct constitutional and judicial philosophies that led them to different interpretations of the constitutional text. The more subtle and interesting question for the legal model is whether judges and other political actors apply those constitutional philosophies consistently, and when they might deviate from them. If Justice Scalia says that judges should be guided by the original meaning of the Constitution, is he willing to follow the historical evidence when it leads to liberal results? Scalia has shown a somewhat surprising liberal streak in criminal justice cases, where he sometimes emphasizes historical arguments on behalf of defendant rights. But he has also been criticized for ignoring historical evidence elsewhere, as with in the constitutionality of affirmative action under the Fourteenth Amendment. If a judge advocates restraint when exercising judicial review, does she consistently defer to the legislature or only to the policies that she finds substantively desirable? If a constitution is amended or a statute is revised, do judges change how they interpret and apply the law in light of those new legal materials?⁵⁰ Political actors often marshal legal arguments to try to accomplish their political objectives. But they also struggle with legal arguments, and they have their political objectives and strategies shaped by the availability and plausibility of legal arguments. Abraham Lincoln, for example, believed that slavery was an atrocious evil, but he also thought that the Constitution did not allow congressional interference with slavery in the states and thought the free states were obliged to return fugitive slaves to their masters.

Historical Institutionalism. Many scholars associated with the historical/institutionalist school of political science insist that attitudinal, strategic, and legal models take too narrow a perspective on constitutional decision-making.⁵¹ To begin with, they think that most constitutional decisions are based on a complex mix of attitudinal, strategic and legal factors, so that authorities are trying to make the best decision that can be implemented within the parameters of what they sincerely believe is permitted by the legal text, history and precedent. Moreover, good reason exists for thinking that the attitudinal, strategic and legal elements of a decision cannot be neatly isolated. Consider the difference between peeking and bluffing in poker. Both are strategic behaviors, but only one is legal. Various constitutional rules permit strategic behavior, such as the rules allowing the Supreme Court to decide on any grounds whether to issue a writ of certiorari. Many constitutional commentators insist that constitutional decision makers have a *legal* obligation to act on their best understanding of abstract principles, in which case Justice Marshall’s repeated insistence that the death penalty was cruel and unusual punishment was simultaneously legal and attitudinal.

Historical institutionalists are also more interested in knowing why persons with particular policy preferences and constitutional visions were in positions of constitutional authority at a particular time, and not simply what a particular Supreme Court justice thought about pornography or originalism. Such approaches explain constitutional decisions as consequences of particular political, historical, ideological,

⁴⁹ For an extended discussion, see Lief Carter and Thomas Burke, *Reason in Law*, 8th Ed. (New York: Longman, 2009); Howard Gillman, “What’s Law Got to Do With It? Judicial Behavioralists Test the ‘Legal Model’ of Judicial Decision Making,” *Law and Social Inquiry* 26 (2001): 465.

⁵⁰ See Jeb Barnes, *Overruled?* (Stanford: Stanford University Press, 2004); Mark J. Richards and Herbert M. Kritzer, “Jurisprudential Regimes in Supreme Court Decision Making,” *American Political Science Review* 96 (2002): 305.

⁵¹ For an extended discussion, see Rogers M. Smith, “Historical Institutionalism and the Study of Law,” in *The Oxford Handbook of Law and Politics*, eds. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (New York: Oxford University Press, 2008); Ronald Kahn and Ken I. Kersch, *The Supreme Court and American Political Development* (Lawrence: University Press of Kansas, 2006).

and institutional contexts. Constitutional decisions are typically connected to long term regime commitments. Warren Court liberalism was deeply rooted in the liberalism of the New Deal/Great Society coalition that dominated American politics from 1932 to 1968. History creates some constitutional options while foreclosing others. Although an initial reading might suggest that free speech is better conceptualized as one of the “privileges and immunities” of American citizens rather than an element of due process of law, a series of precedents dating from the *Slaughter-House Cases* (1873) legally foreclosed the former as a basis for protecting political dissent while establishing the former as the provision most likely to provide grounds for declaring state restrictions on speech unconstitutional. Constitutional decisions reflect broader ideological trends. Justice Brown’s assertion in *Plessy v. Ferguson* (1897) that “[l]egislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences” was rooted in the common assumption of the time that “stateways cannot change folkways.” Institutional positions similarly influence constitutional perspectives. Justices have historically had more solicitude for the rights of criminal suspects than elected officials. They certainly have been more commitment to the constitutional powers of the federal courts.

These broader political, historical, ideological and institutional contexts help explain certain facets of constitutional development. Many of the constitutional arguments women made when demanding the right to vote during the late nineteenth century were based on premises entirely different than cotemporaneous arguments designed to provide persons of color with greater access to the ballot. By comparison, when the women’s movement during the 1960s began insisting that certain gender discriminations be declared unconstitutional, their arguments drew very close parallels between race discrimination and sex discrimination. In neither instance were proponents of women’s rights making arguments on purely abstract considerations. Rather in both cases, legal activists fashioned arguments about the rights of women in light of other constitutional arguments that were succeeding or failing at the time.

IV. Constitutional Authority

When disputes arise over whether a person may be constitutionally executed or whether the Constitution permits the United States to purchase Louisiana from France, some governing official, governing institution, or combination of governing officials must determine authoritatively whether the proposed action is constitutional. That decision need not establish a principle that binds all constitutional actors for all time. Many constitutional commentators wax poetic on the virtues of “leaving things undecided.”⁵² Nevertheless, what to do in the immediate present must be resolved. Whether a condemned prisoner may be constitutionally executed without delay cannot be left unsettled, even if the future controversies may be decided differently. Some constitutional decisions are almost impossible to reverse. Contemporary Americans who come to the conclusion that President Jefferson acted unconstitutionally when purchasing Louisiana cannot easily declare that the regions west of the Mississippi River are no longer a part of the United States.

Everyone interprets the Constitution, but not everyone has the authority to settle constitutional disputes. The process of constitutional interpretation is open-ended. Various actors and institutions can and do participate in that process. Nevertheless, not everyone can authoritatively settle constitutional controversies. In principle, any of the three branches of government could be the ultimate interpreter of the Constitution.⁵³ Prominent Americans before the Civil War insisted that individual states had the power to determine whether national legislation was constitutional. After the Civil War, however, claims that states, the national executive or the national executive had the power to settle constitutional disputes faded from political prominence, although such arguments continue to appear in the law reviews.

⁵² See Cass R. Sunstein, *One Case at a Time* (Cambridge: Harvard University Press, 1999).

⁵³ Mechanisms, such as constitutional amendments or referenda, that would put this role outside the three branches of government are also possible.

Debates about constitutional authority for the past 150 years have been between proponents of judicial supremacy and departmentalism.

Judicial Supremacy. Most Americans regard the Supreme Court as the institution authorized to resolve disputes over the Constitution. The Supreme Court is commonly thought to have both the power to interpret the Constitution when adjudicating specific cases and the power to provide authoritative constitutional standards for other governing officials. Judicial review is the power to ignore unconstitutional acts when resolving cases. Judicial supremacy is the power to establish principles that bind all other actors. With few exceptions, Supreme Court justices have asserted that their institution has the final authority to determine what the Constitution means. When doing so, the justices may be reluctant to assume that other government officials have actually violated the Constitution, but they do not generally assume that other political actors have a different or better understanding of the Constitution than do the justices. The justices may defer to the actions of other officials, but they are reluctant to defer to the constitutional interpretations of other officials. When state officials in Arkansas questioned the correctness of *Brown v. Board of Education* (1954) and suggested that they would not comply with it, Chief Justice Earl Warren treated them to a stern civics lecture. “[T]he federal judiciary is supreme in the exposition of the law of the Constitution,” he stated, “and that principle has . . . been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”⁵⁴ Proponents claim judicial supremacy is a necessary ingredient of constitutionalism. If the constitution is fundamental law, they believe, then the primary responsibility for interpreting the Constitution should be vested in the judiciary, the institution responsible for interpreting the law. As Justice Kennedy recently asserted, “(i)f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’”⁵⁵

Departmentalism. Throughout American history, prominent political leaders have asserted an equal right to constitutional authority. President Lincoln vigorously denied that his administration had a constitutional obligation to respect *Dred Scott v. Sandford* (1856), which ruled that the federal government could not ban slavery in the territories. “[T]he candid citizen must confess that if the policy of the government . . . is to be irrevocably fixed by decisions of the Supreme Court,” he contended in first inaugural, “the people will have ceased, to be their own rulers.”⁵⁶ Lincoln thought he and his administration were bound by the legal decision in the court case between Dred Scott and John Sandford. The government could not forcibly free Scott, if the courts held that he was legally bound. But the government did not have to accept the “political rule” that the Supreme Court had laid down in the case. When in power, the Republicans did not hesitate to ban slavery in the federal territories and the District of Columbia or recognize free blacks as U.S. citizens despite *Dred Scott*. Departmentalists believe that all institutions have an equal right to interpret the Constitution. They maintain that judicial supremacy is not a necessary element of constitutionalism but instead subverts constitutionalism. Judicial supremacy invites politicians to ignore their own constitutional responsibilities and allows unchecked judges to warp constitutional principles through abuse or misinterpretation. James Madison explained, “As the legislative, executive, and judicial departments are co-ordinate, and each equally bound to support the Constitution, it follows that each must, in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it.”⁵⁷ The several branches should and will often reach agreement on the proper interpretation of the Constitution, but the supremacy of judicial interpretations in this view should not be automatic or assumed.⁵⁸

⁵⁴ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁵⁵ *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997). For a leading scholarly defense of judicial supremacy, see Larry Alexander and Frederick Schauer, “On Extrajudicial Constitutional Interpretation,” *Harvard Law Review* 110 (1997): 1359.

⁵⁶ *Lincoln*, 4:268.

⁵⁷ James Madison, “To Mr. ___, 1834,” in *Letters of Other Writings of James Madison*, vol 4 (Philadelphia: J.B. Lippincott, 1867), 349.

⁵⁸ For a discussion of the history and politics of departmentalism, see Keith E. Whittington, *Political Foundations of*

The Countermajoritarian Difficulty. Debates over constitutional authority for the last fifty years have been shaped by a concern with the “countermajoritarian difficulty.” Summing up the thinking of Progressives and New Dealers, the law professor Alexander Bickel wrote in the middle of the twentieth century, “[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”⁵⁹ The courts, armed with an unqualified power to veto legislation, are “countermajoritarian” – that is, antidemocratic – institutions. Judicial review is antidemocratic in the sense that it empowers a small, elite body of unaccountable individuals to undo the policies that have emerged from the democratic process, and it is antidemocratic in the sense that its animating mission is often thought to be to resist democratic majorities and their policy preferences.

The charge that judicial review is antidemocratic has framed debates about the courts since the Populist era in the late nineteenth century. One set of modern scholarly debate revolves around efforts to justify judicial review and establish how the power can be legitimately used. There are several common responses to the countermajoritarian difficulty. One approach is to find a democratic foundation for judicial review. Arguments in this vein contend that the courts should only use the power of judicial review to enforce principles that have been clearly endorsed by the people, either at the time of the founding or subsequently.⁶⁰ A second approach is to use judicial review to make democracy work better. Arguments in this mode point out the ways in which judicial review might be used to improve the functioning of democratic institutions and not just obstruct them. Judges might, for example, insure that politicians do not silence critics. Chief Justice Harlan Fiske Stone, for example, argued that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” should “be subjected to more exacting judicial scrutiny” than other types of legislation.⁶¹ A third approach is to simply embrace the antidemocratic character of courts and argue that majority rule is not the only political value that our society should seek to protect and uphold. In this view, judges should stand up for substantively important rights and values even if those values are not popular.⁶² Others are more skeptical of these efforts to reconcile democracy and judicial review. Some, therefore, argue that the courts should be deferential or exercise “judicial restraint” and use the power of judicial review only sparingly, for example when the political branches have made a clear constitutional mistake.⁶³ Some argue that “the people” should play a more active and ongoing role in constitutional interpretation and in checking judges.⁶⁴ And some have contended that judicial review simply cannot be squared with democracy. Political theorist Jeremy Waldron concludes, “[w]hen citizens or their representatives disagree about what rights we have or what those rights entail, it seems something of an insult to say that this is not something they are to be permitted to sort out by majoritarian processes, but that the issue is to be assigned instead for final determination to a small group of judges.”⁶⁵ The institution of judicial review is well entrenched in the United States at this point, but the debates over how the power of judicial review can be justified and how it should be exercised remain intense and unsettled.

Even as these normative debates over how judicial review should be used continue, many commentators now question whether the countermajoritarian difficulty provides the right framework for thinking about constitutional authority and judicial power. A half century ago the political scientist

Judicial Supremacy (Princeton: Princeton University Press, 2007).

⁵⁹ Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), 17.

⁶⁰ This was Bickel’s own solution to the difficulty. For some recent efforts of this sort, see Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1991); Keith E. Whittington, *Constitutional Interpretation* (Lawrence: University Press of Kansas, 1999).

⁶¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152n4 (1938). The classic scholarly elaboration of this argument is John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).

⁶² See Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985).

⁶³ A modern version of this view can be found in Robert H. Bork, *The Tempting of America* (New York: Free Press, 1990).

⁶⁴ See Larry D. Kramer, *The People Themselves* (New York: Oxford University Press, 2004).

⁶⁵ Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999), 15.

Robert Dahl observed, “it would appear . . . somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”⁶⁶ Federal judges are nominated and confirmed through a political process, and presidents are unlikely to select individuals for the bench whose constitutional philosophies are at odds with their own. When liberals control the White House and Senate, as they did in the 1930s and 1960s, they appoint liberals to the Supreme Court. When conservatives hold greater sway, as they did in the 1920s and 1980s, they appoint conservatives to the Court. With some lag, the center of the Court tends to sit in the political mainstream of its particular historical era. Moreover, the sitting justices tend to adapt to public sentiment and the broader currents of the political culture and to share the common prejudices and values of their time. As Justice Benjamin Cardozo observed, the “great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”⁶⁷ Figure 1-2 illustrates this dynamic. It maps a measure of the overall liberal tendency of public opinion and a measure of the liberalism of Supreme Court decisions in the latter half of the twentieth century.⁶⁸ The relationship is clearly not perfect. Although the Court followed the public mood in a more conservative direction in the 1970s, it did not rebound as strongly in a more liberal direction as public opinion did in the late 1980s and early 1990s. Overall, such patterns suggest a Court with interesting relationships to political movements, not one that simply stands outside or against them. Dahl anticipated that justices recruited through a political appointments process might simply do nothing. If they shared the values of government officials, then they should find little reason to strike down legislation. Of course, justices do vote to strike down legislation. But some scholars have argued that this does not necessarily mean that the Court is out-of-step with other political actors. Elected officials frequently encourage the Court to exercise the power of judicial review and to take the lead in interpreting the Constitution. They often lay the groundwork for the justices to develop particular lines of doctrine. The Court often acts when there are divisions among political leaders over the policy at issue or relatively little political support for the policy that is being struck down. Judicial review still raises important and difficult normative questions, but the politics of judicial review is more complicated than the counter-majoritarian image of an isolated Court standing up against a united political majority.⁶⁹

Insert Figure 1-2 here

The Politics of Constitutional Authority. American constitutionalism for more than two hundred years has witnessed ongoing contests for constitutional authority. Sometimes these struggles pit judges against elected officials. More often, elected officials empower courts to declare constitutional meanings. They staff courts with justices willing to declare constitutional limits on government power, they pass laws facilitating constitutional challenges to federal and state laws, and they pass vague legislation that may force courts to make policy in the guise of statutory or constitutional interpretation. Presidents do not nominate individuals to the Supreme Court who are pledged to always uphold laws against constitutional challenge. Elected officials have various reasons for supporting judicial power. National government officials may want to keep local political majorities in line. Political moderates may want to avoid difficult decisions that divide their own political supporters. Party leaders with a tenuous hold on elected office may want the insurance that courts will protect some of their interests when they

⁶⁶ Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy Maker,” *Journal of Public Law* 6 (1957): 291.

⁶⁷ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 168.

⁶⁸ See also, Kevin T. McGuire and James A. Stimson, “The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences,” *Journal of Politics* 66 (2004): 1018.

⁶⁹ See, for example, Mark A. Graber, “The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary,” *Studies in American Political Development* 7 (1993): 35; Howard Gillman, “How Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891,” *American Political Science Review* 96 (2002): 511; Keith E. Whittington, “‘Interpose Your Friendly Hand’: Political Foundations of Judicial Review by the United States Supreme Court,” *American Political Science Review* 99 (2005): 583.

are out of power. As you read the materials in this volume, you should consider whose interest are being served by appeals to the courts and what the implications of the judiciary's actions might be for other political actors.

Struggles for constitutional authority do not end when the judiciary speaks. Justices do not enforce their decrees. Elected officials often do not comply with constitutional orders in cases they believe wrongly decided. "Where there is local hostility to change," political scientist Gerald Rosenberg's study of judicial power concludes, "court orders will be ignored." In his view, "community pressure, violence or threats of violence, and lack of market response all serve to curtail actions to implement court decisions."⁷⁰ Many famous judicial decisions declaring laws unconstitutional had almost no immediate consequence. Ten years after *Brown v. Board of Education* was decided, less than 2 percent of African-American children in the Deep South were attending integrated schools.⁷¹ Judicial decisions prohibiting state organized prayer in public schools had little immediate effect on that religious practice in schools across the United States.⁷²

Judicial decisions shape, but do not end, political struggles over constitutional meaning. Political movements hardly ever fold their tents after sustaining judicial defeats. The Republican Party after *Dred Scott* remained committed to prohibiting slavery in the territories. Contemporary pro-life forces remain committed to reversing Supreme Court decisions prohibiting bans on abortion. Contemporary pro-choice forces remain committed to reversing Supreme Court decisions sustaining regulations on abortion. Constitutional conflicts are settled politically, not legally. Constitutional politics come to an end only when the political forces backing the losing issue concede defeat and lose political interest in the issue.

V. Constitutional Change

Problems of constitutional change seem simpler than problems of constitutional interpretation and authority. The relevant constitutional rules seem fairly unambiguous. "The Ratification of the Conventions of Nine States," Article VII plainly declares, "shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." Article V declares that when two-thirds of both Houses propose a constitutional amendment, that amendment becomes constitutional law if ratified by three-fourths of all State legislatures or by Conventions in three-fourths of all states, with Congress choosing the mode of state ratification. Two-thirds of the States may call a convention for proposing amendments that, again, must be ratified by three-quarters of all states. These apparently plain requirements, however, mask some difficult issues that have generated constitutional controversies in the United States and abroad

Creating Constitutions. Constitutions do not become authoritative sources of fundamental law merely because their internal conditions for ratification are satisfied. Otherwise, the authors of this book could write a new Constitution of the United States and condition legitimacy on our approval and that of our five best friends. Federalists acknowledged that their proposal to require ratification by nine states was quite different from the unanimous state approval for constitutional change set out in the Articles of Confederation. James Madison in *Federalist* 40 maintained that popular ratification compensated for any legal irregularities in the drafting process. The persons who framed the Constitution of the United States, Madison wrote,

must have reflected, that . . . since it is impossible for the people spontaneously and universally to move in concert towards their object; and it is therefore essential that such changes be instituted by some INFORMAL AND UNAUTHORIZED PROPOSITIONS, made by some patriotic and respectable citizen or number of citizens. . . . They must

⁷⁰ Gerald N. Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991), 337.

⁷¹ Rosenberg, 50.

⁷² Kenneth M. Dolbeare and Phillip E. Hammond, *The School Prayer Decisions* (Chicago: University of Chicago Press, 1971).

have borne in mind, that as the plan to be framed and proposed was to be submitted TO THE PEOPLE THEMSELVES, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities.⁷³

The constitutional scholar Akhil Amar has suggested that a new constitution would today be legitimate if a bare majority of American voters signed a petition for a national constitutional convention, a majority of the delegates at that convention approved the constitution, and that constitution was then approved by a national electoral majority.⁷⁴ Amar, and Madison, would argue that constitutions take hold and are considered legitimate not because they follow preexisting rules for how constitutional change should take place but because they are embraced by the people and accepted as legitimate.

Limits on Constitutional Change. Debate exists over whether an amendment ratified consistently with the procedures set out in Article V nevertheless be unconstitutional if that amendment was inconsistent with fundamental constitutional principles. Justice Frank Murphy in *Schneiderman v. United States* (1943) insisted that the constitutional amendment process allows citizens to fundamentally alter the constitutional regime, including transforming the United States into a communist dictatorship. “Article V,” he wrote, “contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent.”⁷⁵ Constitutional scholar Walter Murphy disagrees. He points out that the “word *amend* comes from the Latin *emendare*, to correct.” For this reason, Murphy maintains, “(a)bolishing constitutional democracy and substituting a different system would not be an amendment at all, but a re-creation, a re-forming, not simply of political structures but also of the people themselves.”⁷⁶ Perhaps not even a supermajority could constitutionally repeal the free speech clause or the Thirteenth Amendment’s prohibition of slavery. The possibility of unconstitutional constitutional amendments is not hypothetical. Constitutional courts in Germany, Nepal, South Africa, and India have declared constitutional amendments void on the ground that they are inconsistent with fundamental constitutional principles. In the United States, opponents of the Nineteenth Amendment asserted that principles of constitutional federalism implied that a majority of states could not use the Article V process to change the voting population of a minority of non-ratifying states by, for example, giving women the right to vote in those states. This claim was rebuffed by the Supreme Court in *Leser v. Garnett*, 258 U.S. 130 (1922).

Amending the Constitution Outside of Article V. Whether Article V provides the only procedures for constitutional amendment is also controversial. Bruce Ackerman maintains that a combination of political mobilization, elections, judicial decisions and “super-statutes” should be treated as valid constitutional amendments. Important historical events as the Jeffersonian victory in 1800, the success of the New Deal in 1930s, and the victory of the civil rights movement in the 1960s are such “constitutional moments.” The policies adopted during such periods of heightened popular mobilization should trump the constitutional text, and future judges should take their guidance from such policies as if they were written into the Constitution.⁷⁷ Ackerman’s critics insist that Article V is best interpreted as setting out the exclusive processes for constitutional amendment. As one critic argues, the constitutional provisions for amendment are “an example of yet another text the meaning of which is essentially clear.” Permitting committed popular majorities to amend the constitution going through the Article V process, he believes, might weaken the constitutional commitment to liberty. “If the Constitution is to continue to be the ultimate source that protects individual rights against encroachment by government power and political majorities, then the affirmative words in Article V must be understood to negative other

⁷³ Madison, “No. 40,” 253.

⁷⁴ Akhil Reed Amar, “Amending the Constitution Outside Article V,” *University of Chicago Law Review* 55 (1988): 1064-65.

⁷⁵ *Schneiderman v. United States*, 320 U.S. 118, 137 (1943).

⁷⁶ Walter F. Murphy, *Constitutional Democracy* (Baltimore: Johns Hopkins University Press, 2007), 506.

⁷⁷ Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1991).

conceivable modes of amendment.”⁷⁸

Constitutional Change without Constitutional Amendments. Constitutional changes do not always require constitutional amendment. The framers recognized that time would clarify some constitutional meanings. “All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation,” Madison wrote, “are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”⁷⁹ How executive-branch officials were to be removed from office was left undefined in the Constitution. Whether the President may unilaterally cashier an executive branch employee was the subject of immediate debate in the First Congress and periodic reconsideration afterwards. The understanding that federal judges should not engage in partisan politics, and that they cannot be impeached and removed from office for partisan reasons, dates from the failed impeachment of Justice Samuel Chase in 1805, not the drafting of Article III of the Constitution in 1787. New practices and principles develop that take on constitutional significance, such as the tradition that presidents would serve no more than two terms of office. When Franklin Roosevelt violated that tradition, Americans quickly formalized that prohibition by ratifying the Twenty-Second Amendment. Other aspects of constitutional change without amendment are more controversial. In 1900, all well-trained lawyers thought that state-mandated racial segregation was an acceptable practice under the equal protection clause of the Fourteenth Amendment. Within two decades after *Brown v. Board of Education* (1954), every well-trained lawyer recognized that government-sponsored racial segregation was hardly ever constitutionally valid. Effective constitutional requirements had radically changed, and yet no new constitutional text had been adopted. Some would argue that “the Constitution” had not changed, but earlier judges, government officials and lawyers had simply misinterpreted the equal protection clause. Others would argue that the underlying constitutional principles stayed the same, but the implications of those constitutional principles changed over time given new circumstances or even given new thinking. The Constitution does not change, but doctrines attempting to apply the Constitution do. Still others would argue that the Court, in cooperation with other government officials and particularly the president, had simply changed the constitutional rules. Perhaps the segregation question was like the question of executive removal, a matter to be “liquidated and ascertained” and potentially reversed in decisions like *Brown*. Perhaps segregation was acceptable under the original Fourteenth Amendment and *Brown* was part of a process of altering that amendment. How exactly such constitutional changes should be understood, how they should occur, and under what circumstances they are legitimate are all basic questions of American constitutionalism.

The Merits of Constitutional Change. Most framers believed fundamental constitutional change should be difficult and take place only when a broad societal consensus agreed on the constitutional flaw to be repaired. James Madison worried that frequent constitutional changes or constitutional conventions would “deprive the government of that veneration which time bestows on every thing.”⁸⁰ His friend, Thomas Jefferson, thought constitutional change should take place more often. “[L]aws and institutions must go hand in hand with the progress of the human mind,” he wrote. In Jefferson’s view, “as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”⁸¹ Contemporary Madisonians insist that experience has demonstrated why constitutions should be difficult to amend. Kathleen Sullivan writes,

it is a bad idea to politicize the Constitution. The very idea of a constitution turns on the separation of the legal and political realms. The Constitution sets up the framework of

⁷⁸ David R. Dow, “The Plain Meaning of Article V,” in *Responding to Imperfection*, ed. Sanford Levinson (Princeton: Princeton University Press, 1995), 127.

⁷⁹ Madison, “No. 37,” 229.

⁸⁰ Madison, “No. 49,” 314.

⁸¹ Jefferson, “To Samuel Kercheval, July 12, 1816,” in *Writings*, 10:43.

government. It also sets forth a few fundamental political ideas (equality, representation, individual liberties) that place limits on how far any temporary majority may go. This is our higher law. All the rest is left to politics. Losers in the short run yield to the winners out of respect for the constitutional framework set up for the long run. This makes the peaceful conduction of ordinary politics possible. Without such respect for the constitutional framework, politics would degenerate into fractious war. But the more a constitution is politicized, the less it operates as a fundamental charter of government. The more a constitution is amended, the more it seems like ordinary legislation.⁸²

Contemporary Jeffersonians insist the same experience demonstrates the need for a far more majoritarian process for constitutional change. Sanford Levinson condemns “the ability of thirteen houses in as many states to block constitutional amendments desired by the overwhelming majority of Americans as well as, possibly, eight-six out of the ninety-nine legislative houses in the American states.” “[N]o other country—nor, for that matter, any of the fifty American states,” he observes, “makes it so difficult to amend its constitution.”⁸³ Both Sullivan and Levinson agree that the U.S. Constitution is presently one of the most difficult and most rarely amended constitutions currently in use.⁸⁴ They dispute whether this longevity is a constitutional virtue or vice.

VI. Constitutional Politics and Law

Throughout this volume, there will be many times when we wonder whether constitutionalism is anything more than a fancy label placed on ordinary, conventional, partisan politics. What does look like for constitutions to matter in a stronger sense? In our view, constitutions work (when they work), not by announcing clear rules that people can simply obey, but by constraining, constructing and constituting politics in distinctive ways. Constitutions constrain politics when citizens and governing officials subordinate their policy preferences to constitutional norms. Constitutions construct politics when citizens and governing officials follow the rules which determine whose policy preferences and constitutional understandings at any time are the official law of the land. Constitutions constitute politics when citizens and elected officials are socialized in ways that lead them to internalize constitutional values and regard constitutional processes as the only legitimate means for resolving legal and policy disputes.

In healthy constitutional regimes, the constructive and constitutive functions of constitutions play a far greater role than the constraining function of constitutional norms. In other words, it is more often the case that Constitution of the United States exerts its influence by shaping politics than by removing certain questions from politics. The Constitution shapes politics in part by creating a specialized language with which Americans talk and thinking about such issues as abortion. Instead of discussing “should abortion be legal,” we discuss “should *Roe* be overruled,” “does due process clause of the Fourteenth Amendment encompass the right to terminate a pregnancy,” and “do women need a right to abortion to enjoy the equal protection of those laws.” These questions are answered by governing officials selected according to constitutional rules. The Supreme Court established by Article III decides whether to overrule *Roe*. The president established by Article II nominates Supreme Court justices. The Senate established by Article I confirms those nominations. Prospective candidates for those offices have very different constitutional visions. These visions include beliefs about whether *Roe* and other cases were rightly decided, but also beliefs about legitimate methods of constitutional decision making, what institutions have the right to make authoritative constitutional

⁸² Kathleen Sullivan, “What’s Wrong with Constitutional Amendments?” in *The New Federalist Papers* (New York: W.W. Norton, 1997), 63-64.

⁸³ Sanford Levinson, *Our Undemocratic Constitution* (New York: Oxford University Press, 2006), 7, 160.

⁸⁴ Donald S. Lutz, “Toward a Theory of Constitutional Amendment,” *American Political Science Review* 88 (1994): 355.

decisions, and what are the legitimate forms of constitutional change. Who decides whether *Roe* should be overruled depends on both ordinary partisan processes and on the particular rules laid out by the Constitution. A Senate whose members are elected in particular states may have very different views about abortion than a Senate whose members were elected by a national majority. All of these are examples of how constitutions can matter for a political system, even in the absence of a clear, unambiguous command.

The framers of the American constitution understood that constitutional design was mostly about considering the kind of politics that would be generated within different structures of government. They also understood that one only achieves a thorough perspective on design only after one studies many different designs. This volume attempts to demonstrate the value of our approach within the confines of the American constitutional experience. But, along with the framers, we believe that constitutionalism as a topic for study invites the comparative analysis of different constitutional systems.

The past fifty years have witnessed a dramatic increase in the constitutionalization of politics. Countries as diverse as Nepal, South Africa, Hungary, and Israel have ratified new constitutions and established special institutions for implementing constitutional mandates. Most new constitutional regimes have adopted familiar features like a Bill of Rights and constitutional review.⁸⁵ Other aspects of American constitutionalism are not as popular. Few countries have adopted as strict a separation of powers as found in the United States, or the extremely difficult amendment process. These developments abroad are interesting in their own right and for the light they cast on American constitutionalism. By providing alternative frameworks for analysis, comparative constitutionalism exposes parochial assertions about American constitutional practice, and provide different frameworks for constitutional analysis and criticism. Comparative analysis is particularly useful for testing bald assertions, frequently made in the primary sources excerpted in this text, that some distinctive American practice is necessary for human flourishing, the rule of law, or preventing tyranny. For example, claims that the case or controversy requirement of Article III guarantees the concrete factual setting necessary for intelligent judicial evaluation might be revised in light of the European model of “abstract constitutional review,” common through much of the world, where constitutional courts decide on the constitutionality of legislative proposals before that legislation becomes enforceable law.

Simply taking note of this world-wide constitutional terrain should give us some perspective on how we should approach the study of the American constitutional system. There seems little analytic advantage to treating any one system as presumptively so perfect as to leave us wanting to ask only, “what would the framers expect us to do?” Veneration, if it is earned, can always come after understanding and analysis. The first step is to know how the American constitutionalism system has actually operated over time, both in relation to its declared purposes and to our interests and aspirations. This is what we hope to illuminate in the chapters to come.

Suggested Readings:

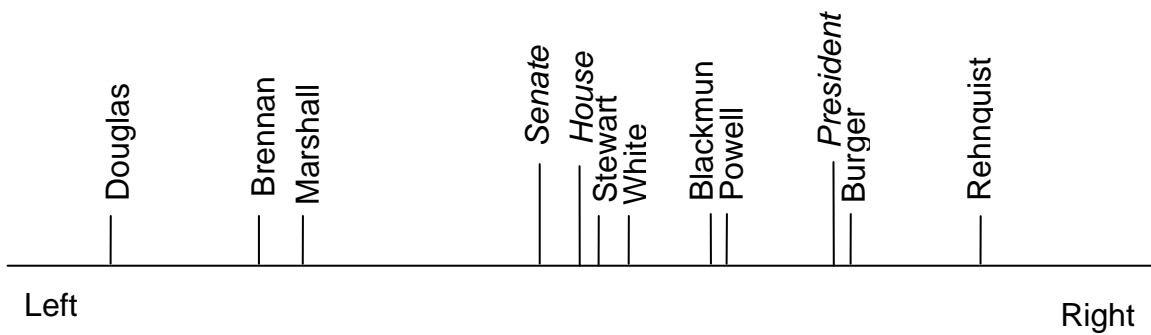
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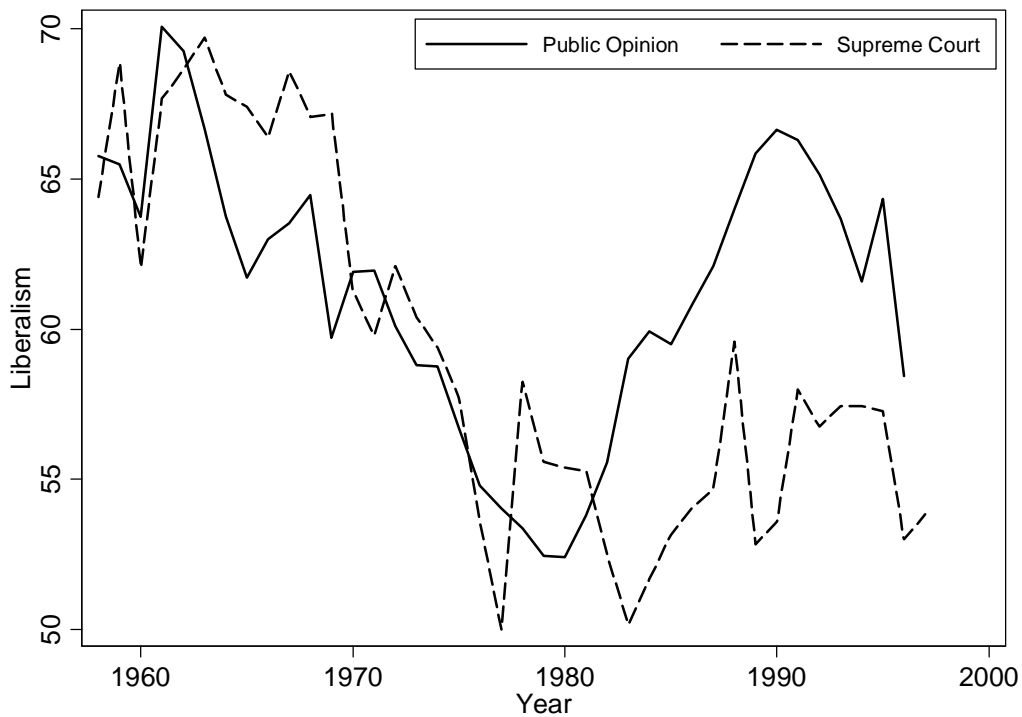
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Figure 1-1: Left-Right Distribution of Justices, Congress, and President in 1974



Sources: Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland, "Judicial Common Space", <http://epstein.law.northwestern.edu/research/JCS.html>; Keith T. Poole, "Common Space Scores, Congress 75-108," <http://voteview.com/basic.htm>.
 Note: House and Senate reflect the median members of the chamber.

Figure 1-2: The Supreme Court and Public Opinion, 1957-1997



Source: Kevin T. McGuire, "The Least Dangerous Branch Revisited," Replication Data, <http://www.unc.edu/~kmcguire/data.opinion.zip>.

Note: The two series are a public mood score and percentage of Supreme Court decisions in a liberal direction in cases reversing lower courts across three issue domains. The two series are scaled to public mood for presentation.