Constitutional Theory and the Faces of Power

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ABSTRACT: Constitutional theory has been decisively shaped by the image of the conflict between the Supreme Court and the political branches during the New Deal. Constitutional scholars have focused their attention on the ways in which the Constitution acts as a higher law constraining political actors and the pros and cons of a countermajoritarian Court armed with judicial veto. Like political scientists who studied the "first face of power," constitutional scholars have been most interested in explicit decisions that block others from exercising their political will. Constitutions shape political outcomes by other means, however, and constitutional scholars need to examine these other faces of constitutionalism. Notably, constitutions also help structure how political preferences are expressed and help constitute political preferences.

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Modern constitutional theory was born at the intersection of *Lochner* and *Brown*, and Alexander Bickel was present at the creation. Bickel was one of a number of scholars who struggled to make sense of the Warren Court's increasing activism on behalf of progressive causes in light of the earlier progressive critique of judicial activism in the first decades of the twentieth century. Bickel captured this inherited understanding of the Court and the power of judicial review in his vision of the "counter-majoritarian difficulty."[1] For veterans of President Franklin Roosevelt's struggle with the Court over the constitutionality of the New Deal, such as Justice Felix Frankfurter for whom Bickel clerked, the *Lochner* Court was clearly and fundamentally a countermajoritarian institution. In this view, the Court stood against democratic majorities, asserting the rights and interests of individuals and the politically defeated against the public welfare. For the New Dealers and a generation of progressives, elections and the will of popular majorities were the touchstones of political legitimacy. The renewal of judicial activism in such cases such as *Brown* may have operated to the immediate benefit of progressive causes, but it was a troubling challenge to democratic values and the commitment to popular rule. The *Lochner* Court had reshaped common understandings of how a constitutional government works and introduced the belief in a basic tension between constitutionalism and democracy that framed the scholarly reception of *Brown*.

The image of a powerful court capable of vetoing the political actions of popularly elected legislative majorities stands near the center of our modern conception of constitutional government, though subsequent commentators have evaluated the substantive merits of particular exercises of judicial review differently. The countermajoritarian Court is the starting point for much of modern constitutional theory. Though countermajoritarianism is an important feature of constitutionalism and well worth studying, it should not monopolize the agenda of constitutional theory. The countermajoritarian framework is not always adequate for understanding even its paradigm case, the explicit use of the judicial veto to strike

[1] Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), 16.

down legislation. Equally importantly, constitutions affect political behavior and outcomes through a variety of mechanisms that do not adhere to the countermajoritarian framework. Constitutional theory has tended to focus on the legal to the exclusion of the political, and as a consequence has ignored important aspects of how constitutionalism works in practice. The countermajoritarian framework is adequate neither for understanding how constitutional government works nor for evaluating the exercise of judicial review. Rather than being the central organizing theme of constitutional theory, countermajoritarianism should be one of many. The countermajoritarian Court should be understood as only one dimension of constitutional power to direct political outcomes. There are significant empirical and normative issues to be explored along each of these dimensions.

This paper considers the limitations in traditional constitutional theory and the possibilities of future research into the ways in which the Constitution structures political results other than through an explicit judicial veto. In the first section, I develop the characteristic "higher law" perspective on the Constitution and identify some limitations of that perspective. In the second section, I consider several aspects of the Constitution as a structure of constraint on politics, emphasizing the ways in which political structures affect how political preferences are aggregated and expressed and the resources and incentives that guide political action. In the third section, I note several ways in which the Constitution helps to nurture and maintain a particular form of politics consistent with constitutionalist ends. Bickel began his seminal work with an examination of John Marshall's defense of judicial review and explanation of the relationship between law and the Constitution.[2] For most of the twentieth century, we have focused on John Marshall's Constitution. This paper seeks to reemphasize what might be regarded as James Madison's Constitution, a constitution embedded in politics.

Judicial Review and the Countermajoritarian Constitution

[2] Bickel, 1.

Judicial review became a newly prominent feature of constitutional government during the *Lochner* era in the late nineteenth and early twentieth centuries. The power of the courts to strike down laws that were contrary to the requirements of the Constitution was well established by the middle decades of the nineteenth century. Moreover, this extraordinary and textually implicit power had largely been justified and accepted as a routine aspect of the judicial function under a written, legal constitution. Nonetheless, it was not until the later decades of the nineteenth century that the power of judicial review was regularly employed and used against the federal as well as the state governments. The Supreme Court moved from invalidating fewer than one state law per year prior to the Civil War to invalidating nearly four per year by the turn of the century and more than a dozen per year in the 1920s. Similarly, the Court began to regularly invalidate federal laws, at a pace of about four per decade in the latter half of the nineteenth century but increasing drastically during the battles of the 1920s and 1930s. In addition to aggressively constraining the powers of various government bodies, the Court also gave greater emphasis and legal content to constitutional guarantees of individual rights.

Unsurprisingly, constitutional theory responded to the rise of judicial review by placing it at the center of the scholarly enterprise. It was not until the early twentieth century that a specific term, judicial review, was coined to refer to the practice of the courts invalidating laws on constitutional grounds.[3] The substantive issue of how judicial review should be exercised was much disputed, of course. Even so, judicial review became an increasingly prominent feature of the American constitutional order. Not coincidentally, Edward Corwin recovered the "higher law" background of the Constitution during the same period.[4] In his 1938-1939 Messenger lectures, Charles McIlwain influentially defined constitutionalism as "a legal limitation on government" and noted that the "one institution above all others" that is essential to it is "an honest, able, learned, independent judiciary."[5] Others asserted that a

[3] Edward S. Corwin, "The Establishment of Judicial Review," *Michigan Law Review* 9 (1910): 102.
[4] Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review* 42 (1928-1929): 149, 365.
[5] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947), 21, 140. McIlwain fudged the central issue of the fight over the *Lochner* Court, preferring to sustain the "balancing of jurisdictio and gubernaculum" and concluding that the "two fundamental

constitution lacking this "fundamental law" quality is not a "true constitution," but merely a "nominal" or even a "façade" constitution.[6] Constitutionalism may be made to complement democracy, but they are always in tension.[7]

Especially within judicial discourse, the Constitution is centrally regarded as an external constraint on political action. The Constitution is a second-order constraint on first-order preferences, coming into play only after those preferences are formed and registered and significant only to the degree that its requirements contradict those preferences. As John Marshall noted in *Marbury*, if the legislature could control or "alter" constitutional meaning then the effort to bind legislative power with a written constitution would be "absurd" and the constitutional project would be "reduce[d] to nothing."[8] "[C]onstitutionality became an external, continuously operating legal restraint on legislative and majority will analogous to the restraint of ordinary law on individuals."[9] As a later Court deduced from that assumption, it is an "indispensable feature of our constitutional system" that the constitutional interpretations "enunciated by this Court" must be "the supreme law of the land."[10] The Court stands not only outside of politics, but also outside of government. The New Dealers acutely felt that separation, and in his brief introduction to his public papers Franklin Roosevelt repeatedly and explicitly juxtaposed "the Court" and "the Government."[11]

Embedded in this understanding of the Constitution is a separation and antagonism between democracy and constitutionalism. Constitutionalism is understood to be a check on democratic power,

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correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary power and a complete political responsibility of government to the governed." Ibid., 146.

[6] Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," *American Political Science Review* 56 (1962): 855, 861.

[7] Walter F. Murphy, "Constitutions, Constitutionalism, and Democracy," in *Constitutionalism and Democracy*, eds. Douglas Greenberg, et al. (New York: Oxford University Press, 1993), 3-7.

[8] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 178 (1803).

[9] Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990), 119.

[10] Cooper v. Aaron, 358 U.S. 1, 18 (1958). See also, Baker v. Carr, 369, U.S. 186, 211 (1962); Powell v. McCormack, 395 U.S. 486, 521 (1969); U.S. v. Nixon, 418 U.S. 683, 704 (1974); City of Boerne v. Flores, 521 U.S. 507, 529 (1997); United States v. Morrison, 529 S. Ct. 598, 617n7 (2000).

[11] Gary D. Glenn, "The Venerable Argument against Judicial Usurpation," in *The End of Democracy II*, ed. Mitchell S. Muncy (Dallas: Spence Publishing, 1999), 121.

represented institutionally as the legislature. Indeed, "majority tyranny" is usually regarded as the animating problematic of American constitutionalism.[12] Especially in the twentieth century, the substantive constraints on political majorities have often been rendered in terms of individual rights. Ronald Dworkin has prominently articulated this view, stating that "individual rights are political trumps held by individuals."[13] American constitutional theory "is not a simple majoritarian theory. The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest."[14] Constitutionalism allows individuals to effectively veto, or trump, the actions of democratic majorities.

As much as anyone, Alexander Bickel launched constitutional theory into a debate over the countermajoritarian court and higher law constitutionalism. Still in the shadow of the New Deal, Bickel thought such countermajoritarianism posed a profound "difficulty."[15] Others who set their sights by the light of the Warren Court instead saw a countermajoritarian promise, a "promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice."[16] In either case, it is Bickel's understanding of nature of American constitutionalism that has set the terms of the scholarly debate. To Bickel, it seemed an obvious "reality" that the Court "exercise control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens." Constitutionalism and judicial review is simply "undemocratic."[17] Although Bickel coined the phrase "countermajoritarian difficulty," he did not have to work hard to convince twentieth

[12] See also, Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago: University of Chicago Press, 1990), 183-189.
[13] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), xi. Robert Nozick offered a less telling but similar metaphor of rights as "side constraints." See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 29.
[14] Dworkin, *Taking Rights Seriously*, 132-133. See also, Ibid., 194 ("A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.").
[15] Bickel, 16.
[16] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 71.
[17] Bickel, 17. See also, Bickel, 27 ("Democratic government under law – the slogan pulls in two opposed directions").

century constitutional scholars that countermajoritarianism was the correct depiction of constitutionalism and the Court.

Bickel was undoubtedly most influenced by the memory of the *Lochner* experience, but his focus on the judicial veto was consistent with the ascendant mode of political analysis. Political scientists of the same period, led by Bickel's Yale colleague Robert Dahl, were centrally concerned with the exercise of "power." Dahl himself tended to be skeptical of the significance of the Constitution in American politics and, with unfortunate timing at the dawn of the Warren Court, questioned the likelihood of genuinely countermajoritarian behavior by the Supreme Court.[18] More important for present purposes, however, is how Dahl understood power to be exercised. Speaking for a generation of behavioralist political scientists, Dahl provided a classic formulation of power: "*A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do."[19] Given that a central tenet of behavioralism was that social science should be concerned with observable external behavior, power could only be known in the context of "concrete decisions," direct interventions in which the powerful turned aside the expressed preferences of the powerless.[20] Judicial review is a perfect fit for such an analytical perspective. We know the Constitution through its manifestation in the judicial veto, when the powerful Court strikes down the expressed will of a legislative majority. The Constitution is "powerful" to the extent that the Court can and does turn aside such majority decisions and establishes a legal outcome distinct from what the legislature would have created.

Constitutional theory has been primarily absorbed with debating the pros and cons of this "first face" of constitutional power, the concrete decisions of the Court altering and restraining political outcomes. This is an important and valuable debate, for the Court is an important institution in American politics and judicial review raises interesting questions for democratic theory. The Constitution does sometimes

[18] Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), 135 ("if constitutional factors are not entirely irrelevant, their significance is trivial as compared with the non-constitutional"); Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 284.
[19] Robert A. Dahl, "The Concept of Power," *Behavioral Science* 2 (1957): 201-202.

serve as a higher law, and the Court does sometimes behave in a countermajoritarian fashion. These are notable dimensions of American constitutionalism and worthy of study.[21]

The nearly exclusive scholarly attention to this first face of constitutional power is problematic, however. For instance, the embrace of the countermajoritarian framework of constitutionalism discourages investigation into its descriptive assumptions. That the Constitution serves as a higher law and the Court as a countermajoritarian institution are treated as axioms rather than propositions. Both propositions are open to doubt. Dahl's own pioneering work raised questions about whether the Court is likely to oppose, or oppose successfully, clear political majorities. Although Dahl's own study is open to methodological and theoretical criticism,[22] other empirical research similarly casts doubt on the reality of a strongly countermajoritarian Court.[23] In practice, the Court may be more likely to go with the prevailing political winds than lean against them. The imagery of the New Deal confrontation with the *Lochner* Court may be misleading rather than enlightening in guiding us toward an understanding of the role of the judiciary in a constitutional system.

Similarly, the higher law model of constitutionalism is theoretically problematic. The legalistic constitutionalism framework assumes the existence of effective and unproblematic external sanctions on transgressors. As Sylvia Snowiss has noted, "unlike statutes, a constitution contemplates compliance, not

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[20] Robert A. Dahl, "A Critique of the Ruling Elite Model," *American Political Science Review* 58 (1958): 464.

[21] I have contributed to this literature myself. See Keith E. Whittington, *Constitutional Interpretation* (Lawrence: University Press of Kansas, 1999).

[22] See, e.g., Richard Funston, "The Supreme Court and Critical Elections," *American Political Science Review* 69 (1975): 795; Jonathan D. Casper, "The Supreme Court and National Policy Making," *American Political Science Review* 70 (1976): 50; Bradley C. Canon and S. Sidney Ulmer, "The Supreme Court and Critical Elections: A Dissent," *American Political Science Review* 70 (1976): 1215; David Adamany, "Legitimacy, Realigning Elections and the Supreme Court," *Wisconsin Law Review* 1973 (1973): 790; John B. Gates, *The Supreme Court and Partisan Realignment* (Boulder, CO: Westview Press, 1992).

[23] Gerald Rosenberg, "Judicial Independence and the Reality of Political Power," *Review of Politics* 54 (1992): 369; Barry Friedman, "Dialogue and Judicial Review," *Michigan Law Review* 57 (1993): 91; William Mishler and Reginald Sheehan, "The Supreme Court as Countermajoritarian Institution? The Impact of Public Opinion on the Court," *American Political Science Review* 87 (1993): 87; Mark A. Graber, "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Power," *Constitutional Commentary* 12 (1995): 67; Michael Klarman, "Rethinking the Civil Rights and Civil Liberties Revolution," *Virginia Law Review* 82 (1996): 1.

violation" and judicial enforcement of society's law against private individuals is conceptually quite different than judicial enforcement of a constitutional rule against a sovereign power that no longer regards the posited rule as authoritative.[24] The emphasis on non-political enforcement of external constraints can also obscure the difficulty of identifying the relevant constraint. Whether conceptualized as an interpretative problem of understanding contested constitutional requirements[25] or a philosophical problem of determining which rights should trump,[26] the substantive content of higher law constitutionalism is unavoidably controversial. Not only do we have divergent first-order political preferences (about, for example, the common interest), but we also have divergent preferences as to appropriate second-order constraints. Such difficulties raise the disturbing possibility that constitutionalism does not work, or at least does not work in the manner envisioned by most constitutional scholars. Moreover, they suggest that much of the normative constitutional theory debate is built on flawed foundations.

Probably more important than the possibility that the first face of constitutional power is a myth is the possibility that it does not fully account for the operation of constitutional government. The most fruitful questions may be when and how the Constitution can shape political outcomes, not whether it can operate as a constraining fundamental law. The legalistic understanding of constitutionalism has blinkered our perspective and narrowed our research agenda. Constitutional scholars have tended not to look past the first face of constitutional power to observe or take seriously the other ways in which constitutions might be politically effective. Just as the examination of political power in the Dahlian mode was soon supplemented by studies of other dimensions, or faces, of power,[27] so constitutional scholars should

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[24] Snowiss, 199. See also, Stephen M. Griffin, *American Constitutionalism* (Princeton: Princeton University Press, 1996), 13-15.

[25] See, e.g., James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (1893): 139-149.

[26] See esp., Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

[27] See, e.g., Peter Bachrach and Morton S. Baratz, "Two Faces of Power," *American Political Science Review* 56 (1962): 942; Bachrach and Baratz, "Decisions and Nondecisions: An Analytical Framework," *American Political Science Review* 57 (1963): 632; Steven Lukes, *Power: A Radical View* (London: Macmillan, 1974); Jack Nagel, *The Descriptive Analysis of Power* (New Haven: Yale University Press, 1975); John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*

supplement discussion of the exercise of judicial review with an appreciation of other dimensions of constitutionalism. Exploring different facets of constitutionalism would not only open up the empirical research agenda, but would also have relevance for normative debates over the substance of constitutional principles and the nature of constitutional government.

A Structure of Agency and Constraint

The Constitution can be conceptualized in ways other than as a higher law. Most notably, it can be viewed as a political structure. In one sense, this is trivially true, and as a consequence it has often been dismissed by those most interested in constitutionalism. Every government, by necessity, has a structure that can be described and categorized. Every government has a constitution, even if not all governments adhere to constitutionalism. The higher law concept seems to more directly distinguish constitutional governments from the constitutions of governments.

The structural perspective should not be dismissed so quickly, however. For one thing, an accurate understanding of the operation of the structural constitution is often essential to debates over the higher law constitution and judicial review. Even the basic empirical questions of whether and how a written constitution can in fact serve as an effective fundamental law point us toward the need for political and structural analysis. The mechanics of an operating constitutional system, and not just the correct principles of the fundamental law, should be of great concern to constitutional scholars.

More basically, the structural perspective need not be at odds with the legalistic perspective. The idea of the structural constitution is often traced back to Aristotle and regarded as merely "descriptive."[28] As such, it is thought to neglect the particular substantive "function of a constitution," "establishing and

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(Urbana: University of Illinois Press, 1980); Jeffrey C. Isaac, "Beyond the Three Faces of Power: A Realist Critique," *Polity* 20 (1987): 4; Douglas W. Rae, "Knowing Power: A Working Paper," in *Power, Inequality, and Democratic Politics* (Boulder: Westview Press, 1988); Clarissa Rile Hayward, "De-Facing Power," *Polity* 31 (1998): 1.

[28] E.g., Carl J. Friedrich, *Constitutional Government and Democracy* (Boston: Little, Brown, 1941), 120.

maintaining effective restraints on political and governmental action."[29] But a concern with constitutional structure need not be so sharply separated from a concern for constitutional purpose, and as students of political institutions recognize structures are often purposive and substantive. Political institutions generally operate to privilege some outcomes at the expense of others. As E.E. Schattschneider observed, "all forms of political organization have a bias in favor of the exploitation of some kinds of conflict and the suppression of others because organization is the mobilization of bias . . . . The function of institutions is to channelize conflict, but they do not treat all forms of conflict equally."[30] "Some issues are organized into politics while others are organized out."[31] Constitutional structures need not be understood as part of a general political background against which the distinctive qualities of a fundamental law operate. Constitutional structures may be a systematic part of the maintenance of effective restraints on political power and as central to the function of liberal constitutionalism as the legalized constitution. By organizing some issues and results out of politics, the structural constitution *ex ante* limits the actions government takes rather than *ex post* vetoing the actions that the government has already taken. In structuring the political process, the constitution can oblige the government to restrain itself.

A primary feature of a constitution is the distribution of political resources by prescribing "the legitimate distribution, types, and methods of control among government officials."[32] A constitution helps specify who has political power, what that power consists of, and how it might be employed. It creates a discourse of political authority and a hierarchy of favored political goods. Although the distribution of constitutional powers may be defined relatively formally and abstractly, it nonetheless has specific and recognizable consequences. As Dahl (too strongly) notes, "Constitutional rules are mainly significant because they help to determine what particular groups are to be given advantages or handicaps in the political struggle."[33]

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[29] Friedrich, 112, 119.
[30] E.E. Schattschneider, "Intensity, Visibility, Direction and Scope," *American Political Science Review* 51 (1957): 933, 935-936.
[31] E.E. Schattschneider, *The Semi-Sovereign People* (Hinsdale, IL: Dryden Press, 1960), 71.
[32] Dahl, *Preface*, 135.
[33] Dahl, *Preface*, 137.

The power of constitutional review of legislation by judges can be seen as a special case of this more general phenomenon. A certain class of government officials (judges) may be empowered to lay aside legislation as inconsistent with prior, more fundamental legal commitments. Such officials may be selected by a variety of mechanisms from various pools of qualified candidates, and the particular selection mechanism and requirements are likely to affect the substantive decisions of such an institution.[34] Judges do not possess a general discretionary veto power, but rather possess a veto that has a limited set of triggers and thus encourages a specific kind of institutional discourse concerned with identifying when the veto should be exercised and justifying those decisions to various external constituencies. The judiciary has a particular "institutional mission" that is reflected and reinforced by its internal norms and routines.[35] American-style judicial review empowers private individuals to initiate that decision-making process through normal litigation. Other constitutional systems restrict access to the constitutional courts to various government officials, with potential consequences for political results.[36] Even given relatively open access to the courts, individuals and groups have differential capacity to effectively exploit that political resource – whether because they lack the organization and skill to mobilize the law, or because they lack the adequate footholds in the existing texture of the law. The courts may be institutionally distinctive, but they are still institutions wielding particular political powers under particular political conditions. Although higher law constitutionalism may have particular philosophical appeal, it operates as an effective restraint on government power only through a set of political institutions.

[34] The persistent conservatism of Chilean judges, for example, is largely a function of an institutional structure that isolates judicial selection from the larger political environment and allows the Chilean judiciary to perpetuate its ideological origins in pre-democratic Chile. Elisabeth C. Hilbink, "Legalism Against Democracy: The Political Role of the Judiciary in Chile, 1964-1994," (Ph.D. diss., University of California at San Diego, 1999).

[35] Howard Gillman, "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," in *Supreme Court Decision-Making*, eds. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999), 78-86.

[36] See, e.g., Georg Vanberg, "Abstract Judicial Review, Legislative Bargaining, and Policy Compromise," *Journal of Theoretical Politics* 3 (1998): 299.

The U.S. Constitution creates a variety of institutions, empowering them with different resources and concerns, and making them responsive to different influences and constituencies. Although the particular distribution of political resources that go into the institution of judicial review – the judicial veto, individual rights to constitutional litigation, the fundamental law authority of constitutional claims – are important, they are not the only political resources that may be effectively used to shape and constrain political outcomes. Indeed, simply viewed in terms of the capacity to shape government activities, the resources available to the courts may be less formidable than those available to other political institutions. The courts may only appear particularly important because of the location of their actions near the end of the sequence of political decisions and because of their peculiarly explicit constitutional discourse. The ultimate sustainability of a constitutional polity may depend more heavily on how nonjudicial political resources are more routinely employed.

The familiar constitutional separation of powers is only part of that institutional story. The Constitution functionally divides the government, distinguishing legislative, executive and judicial officers. As the *Federalist* noted, such a division may prevent political power from being concentrated into one set of hands. Likewise, the separation of powers may harness the power of individual self-interest to the interests of office, pitting ambition against ambition as government officials jealously guard their prerogatives from the encroachment of others.[37] Over time, however, functional separations have blurred, calling into question the significance of the classic eighteenth century constitutional doctrine. By the mid-twentieth century, presidential scholar Richard Neustadt famously dismissed the importance of such formal divisions, describing the American system in standard behavioralist fashion as one of "separated institutions *sharing* powers."[38]

Nonetheless, the political institutions that perform constitutional functions importantly structure political outcomes. Politics involves collection action. As the economic new institutionalism has emphasized, the outcome of collective action is crucially shaped by the manner in which individual

[37] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961), No. 51, 321-322.

preferences are aggregated and the strategies that individuals are induced to follow in order to advance their goals.[39] Political structures generally, therefore, provide the strategic context within which individuals operate by "laying down the rules according to which (1) players are identified, (2) prospective outcomes are determined, (2) alternative modes of deliberations are permitted, and (4) the specific manner in which revealed preferences, over *allowable* alternatives, by *eligible* participants, occurs."[40] According to *Marbury* at least, the Constitution made the Court a player eligible to restrict the range of allowable policy alternatives under specific conditions. But this is obviously only a small part of the overall policy-making game that the Constitution has helped structure.

A notable feature of this "strategic context" perspective is that the significance of constitutional institutions may vary over time. The structure of politics constrains the actions of government in understandable and predictable ways, but not necessarily in ways that were originally intended. Over the course of American history the design of the U.S. Senate, for example, has had important consequences for policy outcomes.[41] For those who drafted the Constitution, the design of the Senate was to provide an added measure of wisdom and deliberation to the Congress and an added measure of security and influence for the small states in the new, "more perfect union." The particular electoral rules governing the composition of the Senate had expected consequences for the legislative outputs that would emerge from the new Congress, and they were designed with an eye toward directing that output toward the

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[38] Richard E. Neustadt, *Presidential Power* (New York: John Wiley and Sons, 1960), 42

[39] See generally, Keith Krehbiel, "Spatial Models of Legislative Choice," *Legislative Studies Quarterly* 13 (1988): 259; Terry M. Moe, "Political Institutions: The Neglected Side of the Story," *Journal of Law, Economics, and Organization* 6 (1990): 213.

[40] Kenneth A. Shepsle, "Studying Institutions: Some Lessons from the Rational Choice Approach," *Journal of Theoretical Politics* 1 (1989): 131, 135. See also, Sue E. Crawford and Elinor Ostrom, "A Grammar of Institutions," *American Political Science Review* 89 (1995): 582; Roger B. Myerson, "Analysis of Democratic Institutions: Structure, Conduct and Performance," *Journal of Economic Perspectives* 9 (1995): 77.

[41] Similar analyses could be made for the restraining effects of American federalism. See, e.g., David Brian Robertson, "The Bias of American Federalism: The Limits of Welfare-State Development in the Progressive Era," *Journal of Policy History* 1 (1989): 261; Barry R. Weingast, "Constitutions as Governance Structures: The Political Foundations of Secure Markets," *Journal of International and Theoretical Economics* 149 (1993): 286; Keith E. Whittington, "Dismantling the Modern States? The Changing Structural Foundations of Federalism," *Hastings Constitutional Law Quarterly* 25 (1998): 483.

substantively desirable (and reducing the probability of substantively undesirable legislation).[42] Those resources were soon exploited, however, to restrain government in other unexpected ways. For example, the Senate became the crucial bulwark for the South's defense of slavery.[43] For a time, the constitutional structure of the Senate made the territorially expansive but relatively underpopulated South politically powerful and constrained the set of possible federal policies.[44] When the South was temporarily excluded from Congress during the Civil War and Reconstruction, Northern Republicans acted to exploit the structure of the Senate to consolidate their new policymaking power and tilt the protections of the political constitution the other way. Between 1861 and 1876, five new, safely Republican but sparsely populated states were admitted to the union.[45] The stacked postbellum Senate gave the Republicans an important veto on federal policy even after the Democratic South rejoined the Congress and the Republicans lost control over the House of Representatives and the popular presidential vote.[46] This political arrangement insured that "as long as the Republicans sought to protect them, the policies begun in the 1860s would remain throughout the remainder of the century."[47]

The American political system provides a multitude of access and veto points. One consequence of distributing political power widely in a constitutional system is that it becomes relatively difficult to pursue broadly tyrannical or narrowly majoritarian policies. The U.S. Constitution adopts rules that favor compromise and consensus. "Gridlock occurs, and occurs often," because the constitutional procedures

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[42] On the creation of the Senate, see generally Elaine K. Swift, *The Making of an American Senate* (Ann Arbor: University of Michigan Press, 1996), 9-82.
[43] See generally, Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Princeton: Princeton University Press, forthcoming).
[44] See also, David M. Potter, *The South and the Concurrent Majority* (Baton Rogue: Louisiana State University Press, 1972).
[45] Charles Stewart III and Barry R. Weingast, "Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development," *Studies in American Political Development* 6 (1992): 223, 256. A population that would otherwise entitle a state to one House seat had been the historical standard for population readiness for statehood. Most severely, Nevada, which was admitted in 1864, did not meet that standard until 1970.
[46] Stewart and Weingast, 247 ("In the ten congressional elections from 1874 to 1892, the Democrats always out-polled the Republicans in House elections, and in the five presidential elections during this period, the worst the Democrats did was a popular vote tie in 1880"). The Republicans lost control of the Senate for a total of only four years between secession and the turn of the century.
[47] Stewart and Weingast, 248.

for creating national policy make it difficult to alter a reasonably moderate status quo.[48] "[W]hen gridlock is broken, it is broken by large, bipartisan coalitions – not by minimal-majority or homogeneous majority-party coalitions."[49] The eventually successful coalitions behind important pieces of legislation are broad, averaging 82 percent of the Congress on all important postwar legislation and even averaging 78 percent of the Congress on such legislation passed during unified governments in which one party holds both Congress and the presidency.[50]

Although the constitutional structure of the legislative process works to prevent the adoption of narrowly majoritarian policies that negatively effect sizable minorities, it does so in a routine and largely unnoticed fashion. Whereas the first face of power, and traditional constitutional theory, has focused on explicit events in which the expressed majority will is displaced by a judicial veto, the second face of power calls our attention to "non-events" in which power is quietly exercised so as to keep the majority will from even being expressed in the form of legislation. Power is also exercised, and majority will is systematically restrained, by "confining the scope of decision-making to relatively 'safe' issues."[51] Analytically, such "mobilization of bias" can be hard to observe. One virtue of institutional analysis is that it can call attention to such built-in biases. Effective political power, and constitutional restraint, resides in structure and not just in action. Distributing political resources to various actors necessitates that their interests be taken into account in policymaking. As a consequence, "power can work through anticipation, so a power relationship may exist even absent visible compulsion."[52] As one study of the presidential veto power notes, "the concept of the second face of power clearly suggests that *the veto* (a

[48] Keith Krehbiel, *Pivotal Politics* (Chicago: University of Chicago Press, 1998), 39.
[49] Krehbiel, 47.
[50] Krehbiel, 84-85; David R. Mayhew, *Divided We Govern* (New Haven: Yale University Press, 1991), 119-135. The latter figure is particularly interesting because presidential vetoes are rarely exercised in such circumstances (important legislation during unified government) but are fairly common for such legislation during divided government. Vetoes occur in about 2 percent of the former cases, but in about 20 percent of the latter. Charles M. Cameron, *Veto Bargaining* (New York: Cambridge University Press, 2000), 49. Cameron argues that such vetoes should be understood as part of a bargaining context, rather than as single shot "bullets" designed to kill legislation.
[51] Bachrach and Baratz, "Two Faces of Power," 948.
[52] Cameron, 84.

capability) can shape the content of legislation even if *vetoes* (uses of the capability) are rare."[53] The potential of a presidential veto or Senate filibuster requires legislatures to act to prevent them from becoming actualities, by for example only pursuing policies that can secure widespread support.

The constitutional structure of politics both enables government to take certain actions and channels political activity toward preferred outcomes, restraining government through the mobilization of the biases built into the system.[54] The "statistical democracy" that constitutional theorists often fear does not exist as an effective political force absent a particular institutional context that constitutes it.[55] Constitutions may either build up democratic politics on a narrowly majoritarian basis or force the development of broad-based, compromising coalitions. It may privilege certain actors and interests, or many actors and interests, through the distribution of various political resources, and not just through the formalization of fundamental law. In focusing on the drama of the occasional conflicts between the judiciary and the legislature, constitutional theory has neglected the routine operation of the constitutional system and the arguably more significant and effective restraints that it imposes on government.

Constituting Politics and Identity

There are many things that the government does not do. There are many things that it is almost unimaginable that the government would do. Some of those possibilities are off the political table because of the presence of the higher law Constitution and the promise of judicial review. But if the unimaginable were to become imaginable, the judiciary would be a thin reed upon which to rely. As James Bradley Thayer concluded, "under no system can the power of courts save a people from ruin; our

[53] Cameron, 19.
[54] Stephen Holmes has usefully highlighted how constitutions may channel political debate in constructive directions, such that constitutional restraints may facilitate positive government action. Stephen Holmes, *Passions and Constraint* (Chicago: University of Chicago Press, 1995).
[55] Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996), 20.

chief protection lies elsewhere."[56] The most important restraints on government are not realized when the Court occasionally strikes down actions that already have political support and that the government has initiated, but when possible actions are kept off the political agenda altogether and prevented from gaining significant political support.

Such considerations are relevant not only for defining the range of possible political action, but also for understanding the political commitment to constitutionalism itself. The power of judicial review is at least as parasitic on a general acceptance of constitutionalism as it is a mechanism for constitutional maintenance.[57] When the Court speaks in the name of the Constitution, we generally take that seriously as a source of political authority. Even if we disagree about the specifics of our constitutional commitments, we at least share a commitment to our "thin Constitution" that elevates the ideal of a limited, consensual government.[58] Rights are trumps only to the extent that most of the political community is willing to play that game, and in many communities they are not.

The textual Constitution may be important in this context to the extent that it educates.[59] The Constitution may matter to political outcomes not only in how it structures the expression of political preferences and offers incentives to induce certain preferred behavior, but also in how it helps shape political preferences themselves. In this educative function, the Constitution would motivate political actors to do right as well as restrain them from doing wrong. We in fact expect the Constitution to perform in this fashion in the courts. The Constitution offers relatively few means by which judges may be restrained from doing wrong, but we at least hope that it motivates judges to take positive action. In

[56] James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (1893): 129, 156. See also, Learned Hand, *The Spirit of Liberty* (Chicago: University of Chicago Press, 1960), 190.
[57] See also, Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace & World, 1955), 9 ("judicial review as it has worked in America would be inconceivable without the national acceptance of the Lockian creed, ultimately enshrined in the Constitution, since the removal of high policy to the realm of adjudication implies a prior recognition of the principles to be legally interpreted").
[58] Mark V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).
[59] It should be emphasized that the textual Constitution is likely to be a limited factor in this regard. In addition to being concerned with whatever impact the textual Constitution might have, constitutional

conducting their offices, we expect judges to learn from the Constitution and to take action based on their learning. This has at least been plausibly the case in the context of the judiciary, and it might well be the case in other contexts.

Put another way, in order to be effective the Constitution must be sticky. It cannot be readily abandoned, and it must help set the terms of the political debate. Political actors must find it easier to adhere to the terms of the Constitution than to violate them. In addition to serving as a fundamental law and to structuring political resources, the Constitution may also show a "third face of power," in which it shapes "conceptions of the necessities, possibilities, or strategies of conflict."[60] The Constitution may not only restrain democratic majorities by blocking or redirecting their demands, but it may also do so "by changing their demands and expectations."[61] There is no guarantee that a constitution will have such an effect, but the "Constitution is binding to the extent that it continues to make a political people by providing the grammar by which they speak authoritatively about their public values."[62] The difficulty is in determining why and how a constitution might be sticky in this way.

One way in which the Constitution might do this is by altering the expectations of political actors so as to bias them toward accepting and reinforcing the constitutional status quo. Once a constitution has been established, it may become what game theorists call a "focal point," which provides "some coordination of the participants' expectations" in a bargaining situation. In a situation in which some collective agreement must be reached such as policymaking, but in which there are a range of possible outcomes available, focal points bring the expectations of the relevant parties "into convergence and bring the negotiation to a close." It "is the intrinsic magnetism of particular outcomes, especially those that enjoy prominence, uniqueness, simplicity, precedent, or some rationale that makes them qualitatively

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theory should also be concerned with the broader, informal constitution of a polity. The political constitution is more than the text.

[60] Gaventa, 19-20.

[61] Murray Edelman, *Politics as Symbolic Action* (Chicago: Markham Publishing, 1971), 8.

[62] William F. Harris II, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993), 118.

differentiable from the continuum of possible alternatives."[63] In a sense, the substantive content of the focal point is arbitrary. It is not the intrinsic worth of the focal point that makes it magnetic, but its cultural prominence. Once identified, individual expectations gravitate to the focal point, biasing collective action in that direction. The "ultimate focus of agreement did not just reflect the balance of bargaining power but *provided* bargaining power to one side or the other."[64] The influence of a "dramatic and conspicuous precedent," a mediator's proposal, or the results of "some previous but logically irrelevant negotiation" can drive collective action toward some predetermined outcome, even to the significant disadvantage of some seemingly powerful parties.[65]

The Constitution-as-coordinating-device can make existing constitutional arrangements self-enforcing, even in the face of significant disagreement on the substantively appropriate constitutional commitment. It is not simply that an arbitrary "something" is better than "nothing" – as when, for example, it is better to have some rule governing on which side of the road to drive than to have no rule.[66] It is also the case that once we have "something" it is hard to convert to "something else," even if the something else is *ab initio* substantively preferable. The coordinating effect is in addition to the usual difficulties of organizing support for a positive alternative to some default solution, such as the status quo. Indeed, the coordinating effect can help independently define the status quo as the default. It can be difficult to amend the Constitution not only because the existing constitutional text is protected by a supermajoritarian amendment procedure, but also because the existing constitutional text may come to

[63] Thomas Schelling, *The Strategy of Conflict* (Cambridge: Harvard University Press, 1960), 70.
[64] Schelling, 68 (emphasis added).
[65] Schelling, 68, 67. In the Philadelphia constitutional convention, the compromise on the three-fifths clause for taxation and representation was facilitated by the fact that the Confederation Congress had used the same "Federal ratio" in an earlier revenue proposal. Max Farrand, *The Framing of the Constitution of the United States* (New Haven: Yale University Press, 1913), 108 ("in the Massachusetts state convention, Rufus King very aptly said that 'this rule . . . was adopted, because it was the language of all America'").
[66] Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110 (1997): 1359, 1371; Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (New York: Oxford University Press, 1999), 14, 16, 18.

seem "natural" and "obvious" in a way that no alternative does.[67] Interests and expectations become defined in terms of the culturally conventional baseline, which then becomes relatively difficult to alter. New constitutional rules must overcome concerns about "tinkering with the Constitution," as well as be substantively justifiable on their own terms.

A constitution may also contribute to the ideological formation of those who live under it. In doing so, a constitution would not only restructure preferences by altering social expectations, but would also reshape preferences directly by redefining what is regarded as substantively good. The constitution could be only one source of ideological formation among many, but at best a constitution may operate to promote others to adopt its own values. If fully successful, democratic outcomes would be consistent with constitutionalism, obviating the necessity of external legal checks on democratic power.

At a micro level, individuals who occupy particular constitutional institutions may be socialized to behave in particular ways and to adopt the distinctive routines and perspectives of the institution. As well as constraining choices, institutions constitute preferences, such that "the goals actors pursue are shaped by the institutional context."[68] Institutions "influence the self-conception of those who occupy roles defined by them in ways that give those persons distinctively 'institutional' perspectives." In influencing the "senses of purpose and principle" that individual political actors hold, institutions reorient political behavior and can even impose a sense of "duty" and identify "inherently meaningful action."[69]

A constitution creates and is composed of sets of such institutions that orient individual office-holders toward pursuing distinctively constitutional ends. The institutional environment created by the Constitution is diverse, however. The particular institutional missions nurtured by the legislature and the judiciary, for example, are quite divergent. Although all of these institutional goals may be

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[67] Likewise, the supermajoritarian procedures are themselves difficult to displace – for example, by Akhil Amar's extraconstitutional majoritarian referendum. Akhil Reed Amar, "The Consent of the Governed," *Columbia Law Review* 94 (1994): 457.

[68] Kathleen Thelen and Sven Steinmo, "Historical Institutionalism in Comparative Politics," in *Structuring Politics*, eds. Sven Steinmo, Kathleen Thelen and Frank Longstreth (New York: Cambridge University Press, 1992), 8 (emphasis omitted).

[69] Rogers M. Smith, "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," *American Political Science Review* 82 (1988): 89, 95.

constitutionally important, they may not all be equally directed at preserving constitutionalism. The normative goals, operational routines, and discursive environment of the judiciary, defined in large part by the ideal of the higher law constitution, may make the courts particularly attentive to recognizing and enforcing the restraints on government and the rights of individuals.[70] On the other hand, the other branches of government may have constitutional virtues of their own. Even though some of those virtues (such as presidential concern with administrative efficiency or executive strength) may not be closely associated with or even in partial conflict with the ideal of constitutional restraints on political power, others (such as legislative concern with representation and deliberation) may well be more consistent with constitutionalism and yet may be underappreciated by a focus on the particular legalistic virtues of the courts.[71] The implicit operation of these institutions may also work to advance constitutional ends and restrict the range of political outcomes, for example by fostering a national perspective that detaches federal officials from more parochial interests and desires or by encouraging a greater appreciation for the virtue of tolerance.[72]

At the macro level, the people at large must also be constituted as constitutional citizens. To some degree, this may also be accomplished through political institutions that incorporate or involve the broad citizenry. Relatively open immigration, religious disestablishment, and common schools all help establish the social framework within which political attitudes are formed and "liberal virtues" are cultivated.[73] The political universe is composed of broad normative and symbolic orders, however, as well as formal institutions. The Constitution clearly contributes to, even if it does not dominate, the

[70] See also, Abram Chayes, "How Does the Constitution Establish Justice?" *Harvard Law Review* 101 (1988): 1026 ("the judiciary is the institutional custodian of justice"); Martin M. Shapiro, *Freedom of Speech* (Englewood Cliffs, NJ: Prentice-Hall, 1966); Terri Jennings Peretti, *In Defense of a Political Court* (Princeton: Princeton University Press, 1999).
[71] See also, Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987); Waldron, *Law and Disagreement*, 19-208.
[72] Evidence exists that legislators, among other political elites, tend to be more tolerant than the general public. The particular mechanisms by which tolerance is fostered have not been fully identified. See, e.g., David G. Barnum and John L. Sullivan, "The Elusive Foundations of Political Freedom in Britain and the United States," *Journal of Politics* 52 (1990): 719.
[73] See Stephen Macedo, *Liberal Virtues* (New York: Oxford University Press, 1990).

normative environment of American politics.[74] By tapping into, mobilizing, and transforming the ideological commitments dominant in a nation's politics, a constitutional system can help stabilize itself and advance its own goals.

Constitutionalism is probably viable only to the extent that it can reinforce and expand preexisting ideological commitments. "We the people" is simultaneously interpretive and constitutive.[75] But necessarily the "Constitution, each constitution and reconstitution, makes citizens in its own image . . . The citizens' conceptions of their identities, individual as well as collective, are irretrievably altered by the process of constituting themselves as a nation."[76] James Madison, who was skeptical of the value of the "parchment barriers" of a bill of rights, thought that ideological formation was one significant use of such statements in a popular government. He wrote to Thomas Jefferson: "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion."[77] In rejecting the usefulness of judicial review, Pennsylvania's Judge Gibson appealed to the "inestimable value" of a written constitution "in rendering its principles familiar to the mass of the people" and thereby building up the "inconceivably great" power of "public opinion" to restrain the government.[78] The greater the extent to which the Constitution's ideology becomes the culturally accepted "maps of problematic social reality and matrices for the creation of collective conscience," the more effectively the

[74] On that normative environment and its political consequences, see Hartz; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York: W.W. Norton, 1969); Rogers M. Smith, *Civic Ideals* (New Haven: Yale University Press, 1997); Seymour Martin Lipset, *American Exceptionalism* (New York: W.W. Norton, 1997); Aaron L. Friedberg, *In the Shadow of the Garrison State* (Princeton: Princeton University Press, 2000).

[75] See also, Stefan Voigt, *Explaining Constitutional Change* (Cheltenham, UK: Edward Elgar, 1999), 91-104; Mark E. Brandon, *Free in the World* (Princeton: Princeton University Press, 1998); Harris, 1-45, 114-163.

[76] Anne Norton, *Republic of Signs* (Chicago: University of Chicago Press, 1993), 128. As Norton emphasizes, this is more dialogue than dictate, as the constituted people actively interpret their constitutional inheritance.

[77] James Madison, *The Writings of James Madison*, ed. Gaillard Hunt, vol. 5 (New York: G.P. Putnam's Sons, 1905), 273.

[78] Eakin v. Raub, 12 Serg. & Rawle 330, 354-355 (Pa 1825)

Constitution can structure and restrain daily politics.[79] The Federalists were consciously active in creating just such an American political culture, one that would live "in the temper, the habits, and the practices of the people."[80]

In framing the discursive field of political battle, the Constitution tilts the surface in ways that benefit some interests and actors and hampers others. Presidential scholar Stephen Skowronek illustrates the dual nature of the normative institutional order in arguing, "different institutions may give more or less play to individual interests, but the distinctive criteria of institutional action are official duty and legitimate authority. Called upon to account for their actions or to explain their decisions, incumbents have no recourse but to repair to their job descriptions."[81] The normative order can both explain and legitimate political actions. Individuals take action because it is their duty, the proper way of behaving for someone in their situation. Regardless of the motives for their actions, however, they can also appeal to others to recognize that they are behaving in the conventionally proper way. Established normative commitments can justify behavior to others who would otherwise have no interest in supporting it.[82]

Constitutions may be able to alter political outcomes by providing additional publicly recognizable means of legitimation than might otherwise be available to particular actors and interests. Madison and Jefferson explicitly hoped to do this, looking to the written constitution to provide valuable symbols that could be exploited in political conflicts. Madison hoped that "a bill of rights will be a good ground for an appeal to the sense of the community," if the government were to usurp the boundaries of its powers. This was the same value that such written commitments might have in a monarchical government, "as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the

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[79] Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 220.
[80] Michael Lienesch, *New Order of the Ages* (Princeton: Princeton University Press, 1988), 164 (quoting Samuel Miller).
[81] Stephen Skowronek, "Order and Change," *Polity* 28 (1995): 91, 94.
[82] See also, John W. Meyer and Brian Rowan, "Institutionalized Organizations: Formal Structure as Myth and Ceremony," in *The New Institutionalism in Organizational Analysis*, eds. Walter W. Powell and Paul J. DiMaggio (Chicago: University of Chicago Press, 1991), 47-60; Paul J. DiMaggio and Walter W. Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," in *The New Institutionalism*, 70-76.

community."[83] Jefferson similarly thought that for the jealous state governments a "declaration of rights will be the text whereby they will try all the acts of the federal government" in the court of public opinion, and that the federal government might do the same if the states exceeded their proper bounds. Jefferson warned that those who resist government actions "must have principles furnished them whereon to found their opposition."[84] In contemporary politics, various social and political interests have appealed to the text and "wrapped themselves in the Constitution" to gain advantage in the public sphere.[85]

Beyond Bickel

The countermajoritarian difficulty has provided the organizing rubric for constitutional theory for much of the past half century. That framework has not always been a comfortable one. Some have questioned whether and why the judiciary's countermajoritarianism should be regarded as a difficulty at all. Others have raised doubts about the meaning of countermajoritarianism and whether the Court should even be described in that way. Despite recent efforts to shift the focus elsewhere, the Court remains at the center of academic constitutional theory and the Constitution is still largely conceptualized as our higher law.[86]

Judge Richard Posner has defined academic constitutional theory as "the effort to develop a generally accepted theory to guide the interpretation of the Constitution of the United States."[87] This effort assumes the importance of higher law constitutionalism and is often forced by its ambitions to overcome or

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[83] Madison, 5:273.
[84] Thomas Jefferson, *The Papers of Thomas Jefferson*, ed. Julian Boyd, vol. 14 (Princeton: Princeton University Press, 1958), 660.
[85] The political effect of judicial constitutional discourse can still be understood in this way – as a means of legitimating judicial actions to a political audience. Snowiss, 13-89; Martin Shapiro, *Courts* (Chicago: University of Chicago Press, 1981), 1-64.
[86] For recent efforts to shift the focus of constitutional theory away from the courts, see, e.g., Louis Fisher, *Constitutional Dialogues* (Princeton: Princeton University Press, 1988); Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1991); Griffin, *American Constitutionalism*; Tushnet, *Taking the Constitution Away from the Courts*; Keith E. Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999). In doing so, however, not all these works break from the higher law framework.

mitigate the countermajoritarian difficulty. As would-be advice to the Court, academic theory has adopted the Court's perspective of the constitutional world and focused on the judiciary's particular problems. Such problems are real and worthy of consideration, but constitutional theory needs to move beyond them. It needs to supplement the Court's Constitution with the political constitution. Like the behavioral political science that emerged in the postwar period, constitutional theory has been largely concerned with only the most explicit displays of constitutional power to counter government action. It has neglected the more routine mechanisms by which government power might be effectively restrained and constitutional ends secured.

The Court is not the only constitutional actor. To the extent that constitutional theory is to be a largely prescriptive enterprise designed to provide generally accepted theory to guide government officials as they make constitutional decisions, then an exclusive concern with the judiciary is problematic. The wave of constitution making in the aftermath of the collapse of the Communist regimes in Eastern Europe has brought new attention to the problem of constitutional design. In the United States, constitutional design has understandably been of secondary concern. Far greater attention has been paid to the domestically more salient problem of interpreting an enduring constitution than of creating a new one. The fall of the Berlin Wall, however, served as a reminder that constitutional design is very much a contemporary problem for much of the world. More recently, domestic events have also emphasized that nonjudicial political actors may have distinctive constitutional concerns even within the context of an established constitutional system. American constitutional theory has provided little systematic foundation for offering advice to those active in creating new constitutional systems or confronting problems outside the judicial context.

To the extent that constitutional theory is concerned with understanding, and not just prescribing, an excessive concern with the legalized Constitution is hampering. Efforts to understand the Constitution outside the courts will not progress very far unless they shed the analytical perspectives adopted for understanding the Constitution inside the courts. The true significance of the Constitution outside the

[87] Richard A. Posner, "Against Constitutional Theory," *New York University Law Review* 73 (1998): 1.

courts may not lie in those moments and activities when nonjudicial actors behave most like judges or are mostly closely engaged with constitutional law. Understanding the Constitution outside the courts may be best advanced by focusing less on "the Constitution" of traditional constitutional theory than on constitutionalism. The most interesting questions in this area may relate to how the scope of government action is effectively delimited rather than on how well elected officials understand constitutional law. Such explorations will raise their own normative and prescriptive questions, focusing on such matters as the need for constitutional reform and on the appropriateness of various alternative mechanisms for limiting government.

Finally, looking beyond the first face of constitutionalism may be necessary to adequately contextualize judicial review itself. Some have begun to question the ultimate value of judicial review and have posited that judicial review is of little consequence.[88] More commonly, a variety of constitutional theories offer essentially functional defenses of judicial review that depend on assumptions about the operation of the constitutional system as a whole and of other political branches. These theories not only provide answers to the countermajoritarian difficulty and justify the power of judicial review, but they also advance particular understandings of how active the Court should be in exercising that power, what sorts of constitutional claims the Court should be most aggressive in advancing, and in what directions constitutional law ought to be developed. In other words, even a constitutional theory primarily concerned about judicial review and the higher law constitution depends on a broader sense of constitutionalism and how it operates. Yet that critical background has been little explored.

The Supreme Court has been a prominent part of twentieth century American constitutional history. Contemporary constitutional theory was born through the effort to come to grips with that development and continues to reflect those origins. Judicial review and constitutional law represent only one facet of the constitutional experience, however. Supplementing our understanding of the judiciary's Constitution

[88] See, e.g., Tushnet, *Taking the Constitution Away from the Courts*, 129-176; Waldron, *Law and Disagreement*, 285-289.

will require not only looking beyond the courts but also a willingness to explore other, distinctive faces of constitutionalism.