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ARTICLES

PARCHMENT AND POLITICS: THE POSITIVE PUZZLE
OF CONSTITUTIONAL COMMITMENT

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TABLE OF CONTENTS

INTRODUCTION	659
I. MADISONIAN CONSTITUTIONAL DESIGN.....	665
II. POLITICAL COMMITMENT AND INSTITUTIONAL ENTRENCHMENT	672
<i>A. Commitment: Personal and Political</i>	672
<i>B. Entrenched Institutions</i>	681
<i>C. Institutions Versus Policies</i>	692
III. CONSTITUTIONALISM AS POLITICAL COMMITMENT	697
<i>A. Constitutional Commitment and Entrenchment</i>	697
<i>B. Constitutions as Institutions</i>	705
IV. THE INSTITUTIONAL CORE OF CONSTITUTIONALISM.....	716
<i>A. Constitutional Structure (Versus Rights)</i>	717
<i>B. Judicial Review</i>	733
CONCLUSION	745

PARCHMENT AND POLITICS: THE POSITIVE PUZZLE OF CONSTITUTIONAL COMMITMENT

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Constitutionalism is often analogized to Ulysses binding himself to the mast in order to resist the fatal call of the Sirens. But what is the equivalent of Ulysses's ropes that might enable a political community to bind itself to constitutional rules? The positive puzzle of constitutionalism lies in explaining the willingness and ability of powerful political actors to make sustainable commitments to abide by and uphold constitutional rules even when these rules stand in the way of their immediate interests. Why, for example, would a popular President choose to abide by constitutional limitations on conducting what he and the majority of the country believe to be a vitally necessary war to preserve the Union or to fight terrorism, or a critical intervention to save the country from the Great Depression or the collapse of the financial system? The puzzle generalizes to how intertemporal political commitments of any sort are possible. We might wonder, along similar lines, how a political community can credibly and durably commit itself to repaying its debts, refusing to bail out financially reckless banks, or refraining from war.

A standard approach to answering such questions in both legal and political contexts is to invoke stable "institutions" of various kinds as reliable commitment mechanisms. Courts can enforce constitutional norms. Structural arrangements such as federalism, separation of powers, democracy, and delegation can raise the cost of political change or stack the deck in favor of particular outcomes. And of course constitutions are commonly cast as somehow self-enforcing guarantors of political commitments. But this explanatory approach just pushes the puzzle back to how these institutions become impervious to socio-political revision or override. Why should we expect institutional commitment devices to be any more stable than the first-order commitments they are supposed to facilitate?

Understanding how constitutions and other institutions can effectively constrain politics remains a fundamentally important theoretical challenge in law and the social sciences. This Article demonstrates the generality of that challenge and explores its implications for constitutional law and theory. The Article also attempts to make progress in explaining how, and in what contexts, successful legal and political commitment may be possible by consolidating a set of mechanisms through which legal and political arrangements — prominently including systems of constitutional law, the constitutional structure of government, and judicial review — can become entrenched against opposition and change.

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INTRODUCTION

Constitutions are supposed to constitute and constrain a system of government, to create a stable set of rules for how the political game will be played. But as with any rulebook, constitutions can succeed only if the relevant players — government officials, popular majorities, interest groups, and other political actors — are committed to playing by and upholding the constitutional rules. If powerful political actors felt free to change the game at any time by ignoring or revising any rules that they found disadvantageous, there would be no such thing as constitutionalism.

How, then, can constitutionalism succeed? Why would the powerful ever defer to constitutional rules and arrangements that stand in the way of their interests (material or moral)?¹ Why, for example, would a popular President choose to abide by constitutional limitations on conducting what he and the majority of the country believe to be a vitally necessary war to preserve the Union or to prevent terrorism, or a vitally necessary intervention to save the country from the Great Depression or the collapse of the financial system? Why would he (or they) not simply override or reinterpret any constitutional rules that stand in the way? Recognizing that Presidents and popular majorities sometimes have broken or rewritten constitutional rules under dire circumstances such as these, we might wonder why they have not done so routinely, whenever constitutional limitations proved politically inconvenient.

Constitutional lawyers and theorists have all but ignored such questions, focusing instead on normative issues surrounding the kinds of constitutional constraints that might be desirable or democratically legitimate.² Thus, the leading question in constitutional theory for generations has been how to justify constitutional limitations on the authority of democratic majorities given our background commitments to popular sovereignty and self-government — the infamous “counter-majoritarian difficulty.” No less important, however, is the positive (and perhaps conceptually prior) question of why politically empowered majorities would choose to comply with legal limitations on what

¹ This skeptical question dates back at least to Thomas Hobbes, who doubted whether Leviathan could be bound by any kind of law. Hobbes’s logic is simple and still compelling (though far from dispositive): “For [Leviathan] having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new . . . [H]e that is bound to himselfe onely, is not bound.” THOMAS HOBBS, *LEVIATHAN* 184 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651).

² See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 977 (2009) (noting the normative orientation of constitutional theorists and their lack of attention to the general topic of “constitutional constraints”).

they can accomplish politically. We might well wonder why democratic majorities and their representatives in government would tolerate, let alone embrace and support, such constraints.

The most influential solutions to the normative version of the counter-majoritarian difficulty raise the same question. Originalists legitimate constitutional constraints by reference to the contractarian consent of We the People to the text and original understanding of the Constitution. Theorists of constitutional “precommitments” add that contractarian commitments and constraints that seem to frustrate present popular will might actually be sovereignty-enhancing, if they enable us to accomplish things that would otherwise be impossible.³ For example, constitutional law might enhance our capacity for self-government by allowing us to commit to respecting civil liberties even in times of war or crisis when we might be tempted — by panic, myopia, or some other decisionmaking pathology — to do things that we will later regret. Along broadly similar lines, theorists of “dualist democracy” maintain that true popular sovereignty manifests itself only occasionally and insist that decisions made during these “constitutional moments” should endure against the sub-sovereign vicissitudes of ordinary politics.⁴ Taking a different tack, political process theorists recast constitutional law not as contradicting but as facilitating or perfecting popular sovereignty by correcting or compensating for flaws in the democratic processes through which popular will is expressed.⁵

What is left unexplained in all of these accounts is how popular majorities or other powerful political actors successfully commit themselves to constitutional constraints. No matter how legitimate or beneficial these constraints might be, they will not be effective unless they are accepted by the very actors who are making political decisions in the present — acting in the heat of the moment, in the fallen state of ordinary politics, and through flawed political processes. What will prevent these actors from ignoring the anachronistic dictates of the long deceased, making precisely the pathological or undeliberative decisions that their better sovereign selves had committed against or elevated above, or carrying on with the democratically degraded political processes through which they have risen to power? It is one thing to see the potential benefit of, for instance, precommitting to maintain civil liberties even in times of war or terror when there will be im-

³ See JON ELSTER, *ULYSSES UNBOUND* 88–174 (2000); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 134–77 (1995).

⁴ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

⁵ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

mense political pressure to prioritize national security. It is quite another to figure out how such precommitments can be made to stick when political push comes to shove. Ulysses needed ropes and a mast to resist the lure of the Sirens. Is there an equivalent device that might allow democratic political actors to limit their continuous capacity for self-government?⁶

The affirmative answer of first resort for many constitutional lawyers and theorists has been *courts*. Judicial review is commonly portrayed as the fail-safe mechanism by which constitutional commitments become practically binding. If popular majorities and the political branches of government cannot muster the will to heed constitutional prohibitions, courts stand ready to enforce them. Only where courts might not be available to play this role do serious doubts about constitutional compliance begin to surface. Thus, a major challenge confronting proponents of “popular constitutionalism” is the apparent enforcement deficit that would result if judicial review were eliminated.⁷ Popular constitutionalists are thus driven to look for ways in which constitutional constraints might be made somehow “self-enforcing.” Yet this way of framing the problem obscures the more fundamental point that an effective system of constitutional law must be in some sense self-enforcing *regardless* of judicial review. Casting courts as constitutional enforcers merely pushes the question back to why powerful political actors are willing to pay attention to what judges say; why “people with money and guns ever submit to people armed only with gavels.”⁸ Without some further explanation of how courts can stand in the way of a determined popular majority or a President intent on violating the Constitution — and of why judges would want to do so in the first place — judicial review is merely a *deus ex machina*.

But of course the puzzle of constitutional commitment goes deeper than this. The question of whether or how courts or constitutional law can constrain a popular President presupposes that we *have* a judiciary and a President, with their constitutionally specified institutional forms and powers. Before constitutional law can aspire to constrain political actors, it must *constitute* these actors. Without widespread and relatively stable agreement on the existence, composition, and ba-

⁶ See Scott J. Shapiro, *Ulysses Rebound*, 18 *ECON. & PHIL.* 157, 161 (2002).

⁷ See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 95–128 (1999).

⁸ Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 *J. LEGAL STUD.* 59, 60 (2003); see also KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 26 (2007) (observing that “[t]he Court cannot stand outside of politics and exercise a unique role as guardian of constitutional verities” because “the Court’s judgments will have no force unless other powerful political actors accept the . . . priority of the judicial voice”).

sic authority of political institutions such as the presidency, the Supreme Court, and Congress, we would not recognize a functioning state, government, or constitutional order at all. Yet the ability of successful constitutions to accomplish this constitutive work is no more self-explanatory than the ability of an up-and-running system of constitutional law to regulate or constrain the constituted government. Why do powerful social groups who are disadvantaged by the basic structural arrangements of the federal government not simply ignore or reconstitute them — for example by replacing the constitutional structure of government with a military dictatorship? Why have large groups of Americans not more frequently followed the lead of the Confederate South in rejecting the U.S. constitutional order altogether?

In sum, the success of constitutional law, in both its constitutive and constraining roles, depends on the willingness and ability of powerful social and political actors to make sustainable commitments to abide by and uphold constitutional rules and institutions. The positive puzzle of constitutional commitment lies in explaining the sources of this willingness and ability.

Peripheral as it has become to subsequent constitutional theorists, this puzzle was of central concern to the original designers of the U.S. Constitution, particularly James Madison. Madison famously feared that constitutional rights and other legalistic limitations on government would create mere “parchment barriers.”⁹ The problem, he explained, was that “[i]n our Governments the real power lies in the majority of the Community.”¹⁰ In the absence of any external constitutional enforcer capable of resisting the power of majorities, we should expect that rights “however strongly marked on paper will never be regarded when opposed to the decided sense of the public”¹¹ At the same time, however, Madison recognized the possibility of converting parchment principles into meaningful constraints on government behavior. He hoped and hypothesized that the Constitution could be made politically self-enforcing by selectively empowering political decisionmakers whose interests and incentives would remain in alignment with constitutional values. Rather than attempting to protect substantive constitutional rights and values directly, the Madisonian constitutional design sought to protect them indirectly by creating political decisionmaking processes and institutions that would stack the deck in favor of these rights and values.

⁹ THE FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., 2003).

¹⁰ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JACK N. RAKOVE, DECLARING RIGHTS 160, 161 (1998).

¹¹ *Id.* at 163. Madison’s illustration was prescient: “Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the [writ of habeas corpus] be dictated by the alarm, no written prohibitions on earth would prevent the measure.” *Id.*

This Article develops the Madisonian logic of constitutional commitment, exploring its possibilities as well as its limitations. Part I explicates Madison's theory of constitutional design along the lines described above, emphasizing two conditions that are necessary for the Madisonian approach to succeed. First, the actors who are selectively empowered by constitutionally specified political decisionmaking arrangements must have interests or incentives that are in alignment with constitutional rules or values. Second, the institutional arrangements that place power in the hands of those decisionmakers must themselves be relatively stable, not subject to revision or subversion by the opponents of constitutionally desirable outcomes.

Unfortunately, Madison neglected to explain how either of these two conditions — *incentive compatibility* and *institutional stability* — would be satisfied in the workings of the U.S. constitutional order. Madison's assumptions about institutional stability are especially perplexing. He evidently believed that some constitutional rules — those specifying the institutional structure of political decisionmaking — would be more stable or resilient against political opposition than other (hypothetical) rules specifying the substantive outcomes that the institutional structures of political decisionmaking were supposed to secure. But Madison never explained why constitutional rules related to structure and process would be any stronger or more secure than rules forbidding particular substantive outcomes — the rules he dismissed as parchment barriers.

Part II abstracts from constitutionalism to the more general question of how intertemporal political commitments of any sort are possible. How, for example, can a government or political community credibly and successfully commit itself to repay its debts, make good on treaty obligations, or refuse to bail out banks that engage in reckless financial speculation? As section II.A describes, modern social scientists have joined Madison in recognizing that the sustainability of such commitments depends upon keeping the interests of powerful political decisionmakers pointed in the direction of supporting the relevant policy over time, or empowering as political decisionmakers those actors who will predictably have the right interests. Economists and political scientists have identified a wide variety of political decisionmaking institutions that appear to work in just this way, by selectively empowering proponents of the committed outcomes. The modern social sciences have followed Madison in viewing processes and structures of political decisionmaking as the key to successful political commitments.

Unfortunately, modern social scientists have also followed Madison in failing to explain how these processes and structures become more stable and enduring than the substantive outcomes they are supposed to secure. After identifying these parallels, Part II proceeds to explore how this rather significant gap in both Madisonian and modern social

science theories of political commitment might be filled. Section II.B surveys the social science literature and consolidates a generalizable set of mechanisms through which political arrangements can become entrenched against opposition and change — how they can become, in a sense, self-enforcing. Section II.C then ventures an explanation for why these mechanisms might operate more powerfully at the level of processes and structures of political decisionmaking than at the level of substantive outcomes. If this analysis is correct, then political decisionmaking institutions do, in fact, have the capacity to serve as the equivalent of Ulysses's ropes and mast.

Part III carries over this general understanding of political commitment, entrenchment, and self-enforcement to constitutional law and theory. Constitutional law, often invoked as a mechanism of political commitment, must itself be the result of successful political commitment. Notice the analogy to Madisonian and modern theories of political commitment by means of stable institutions. The system of constitutional law itself is cast in the role of a political institution, one that is capable of constraining and channeling the behavior of political actors. Left unexplained, however, is the source of constitutional law's institutional stability. The possibility of constitutional constraint depends on a sustained sociopolitical commitment to, or the enduring sociopolitical entrenchment of, constitutional law. Section III.A elaborates this point by exploring the conceptual relationship between formal constitutional (and other legal) commitments and functional political commitments and by emphasizing the continuity of legal and political commitment. This section also attempts to sort out some confusion in constitutional theory about the role that political entrenchment plays in identifying constitutional norms. Section III.B then turns to the question of how a commitment to constitutionalism could succeed in constituting and constraining a political community over time. What would motivate social and political actors to sustain a second-order commitment to the constitutional system, even when that system prevents them from achieving their first-order political interests? This section sketches out an answer: conceived as a political decisionmaking institution writ large, a constitution, or system of constitutional law, might become politically entrenched through the mechanisms identified in Part II.

Part IV refines this broad-brush explanation of how constitutionalism might be possible by attempting to explain why some aspects or levels of constitutional commitment are more likely to succeed than others. Constitutional lawyers and theorists have inherited Madison's belief that constitutional "structure" is somehow inherently more stable or self-enforcing than rights and other substantive constitutional rules. The category of structure includes the basic institutional features of the political decisionmaking process — a bicameral Congress, the President, federalism, and the like. In a new development since Madison's time, it also includes the institution of judicial review, now regarded as

a centrally important locus of constitutional commitment and a stable enforcement mechanism for constitutional rights. Here again, the operative distinction is between processes and structures of decision-making and substantive rights and rules. Drawing on the now-familiar set of mechanisms of political entrenchment and their bifurcated operation at the levels of decisionmaking processes and substantive outcomes, section IV.A proceeds to explore whether and how the structural parts of the Constitution have become more deeply entrenched against political opposition or override than other aspects of the constitutional order. Although the focus here, as throughout, is on the issue of institutional stability, this section also loops back to Madison's assumptions about incentive-compatibility in the context of separation of powers and federalism — assumptions that continue to hold sway over courts and constitutional theorists. Section IV.B investigates these same questions of entrenchment with respect to judicial review.

At the highest level of abstraction, the Article's ambition is to foreground, and make some progress in answering, a fundamental yet surprisingly underexplored set of questions about how intertemporal legal and political commitment is possible, and about how constitutional law — or any other legal or political institution that purports to establish the "rules of the game" — can place itself above ordinary political contestation. Somewhat more concretely, the Article is a first step toward explaining the patterns of stability and change that characterize constitutionalism in the United States and other countries. Why do some constitutions (or constitutional orders, or democracies) fail almost immediately, while others last hundreds of years? Why do some aspects of a given constitutional order prove resilient over long periods of time, while others seem to shift with the political winds? Why do we the People accept the anachronistic constraints of a constitution written and ratified generations ago by people very different from us? Under what circumstances will dominant political coalitions and their elected representatives be willing to comply with particular constitutional rules and arrangements that stand in the way of their interests? The Article attempts to provide some resources for answering these and similar questions about what constitutional commitment entails and how it is possible.

I. MADISONIAN CONSTITUTIONAL DESIGN

More than any constitutional theorist before or since, Madison recognized that the central challenge of constitutional design was to convert parchment barriers into politically meaningful constraints on government behavior. The premise of Madison's constitutional theory was that constitutional law could serve as a stable framework for governance only if compliance with constitutional rules and arrangements

could be made consistent with the political interests and incentives of officials and powerful groups in society. This imperative of political self-enforcement placed limits on what a constitutional designer could hope to accomplish.¹²

What might a constitutional designer hope to accomplish? The Framers of the U.S. Constitution were concerned about two broad classes of political pathology. First, they worried about the *agency* problem of representative government — how to prevent venal and corrupt federal officials from tyrannizing and plundering the citizens they were supposed to serve. Second, they worried that the principal-agent relationship between constituents and their representatives would be all too tight, allowing dominant factions of the electorate to capture government for their own selfish ends, including, especially, the oppression of minorities.¹³ As Madison emphasized in *The Federalist No. 51*, “[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”¹⁴

It was this latter problem, of *faction*, that Madison had come to believe was the most worrisome.¹⁵ “In our Governments,” Madison wrote:

[T]he real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.¹⁶

At the same time, Madison doubted that constitutional rights could do much to prevent political majorities or other powerful factions from having their way. Rights that protected the politically weak against the politically strong would be unenforceable; they would simply be

¹² Further limits were suggested by Madison’s skepticism about the capacity of political actors for moral self-restraint:

It was futile, he argued, to expect restraint from ordinary legislators who typically sought office for ambition and self-interest. . . . Even less faith could be placed in the people at large. Experience taught that neither “a prudent regard” for the general good nor “respect for character” nor even religion could deter an impassioned or interested majority from pursuing “unjust violations of the rights and interests of the minority, or of individuals.”

JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 55 (Oscar Handlin ed., 2d ed. 2002) (quoting Madison).

¹³ The classic statement of this general concern is Madison’s *The Federalist No. 10*. See *THE FEDERALIST NO. 10* (James Madison), *supra* note 9, at 75–76; see also AKHIL REED AMAR, *THE BILL OF RIGHTS* at xii–xiii (1998).

¹⁴ *THE FEDERALIST NO. 51* (James Madison), *supra* note 9, at 320.

¹⁵ Madison’s view was based in large part on the experience of state governments in the decade leading up to the Constitutional Convention. JACK N. RAKOVE, *ORIGINAL MEANINGS* 290, 313–16 (1996).

¹⁶ Letter from James Madison to Thomas Jefferson, *supra* note 10, at 161–62.

disregarded or overridden. Justifying to Jefferson his opposition to a bill of rights, Madison argued that “experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.”¹⁷ From this experience, Madison drew the general lesson that countermajoritarian rights would be an exercise in futility.¹⁸

Madison did believe that constitutional rights could do more good in guarding against the agency problem of tyrannical government officials acting contrary to the interests of their constituents. Under those circumstances, rights could serve “as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community.”¹⁹ The idea is that majorities might be alerted by constitutional transgressions to the bad behavior of their elected representatives, who would then be politically punished — or, in the extreme case, overthrown by force of arms — for ignoring or sacrificing the interests of their constituents. This was a large part of the logic underlying the Bill of Rights as it was originally conceived. Many of these rights were meant not to protect against majoritarian tyranny (as they have been retrospectively reinterpreted), but, quite the opposite, to bolster majoritarian governance by limiting the self-serving behavior of federal officials and safeguarding institutions of state and local self-government that would insulate citizens from these officials’ potentially despotic reach.²⁰ On the Madisonian assumption that “the political and physical power” in society were both lodged “in a majority of the people,”²¹ rights designed to protect against tyrannical governors are straightforwardly self-enforcing, backed by the ability and motivation of majorities to look out for their own interests.

¹⁷ *Id.* at 161.

¹⁸ See *infra* p. 668. Other Federalists shared Madison’s view. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 376–82 (1969) (recounting Noah Webster’s rollicking argument to the same effect). As Roger Sherman put the basic point: “No bill of rights ever yet bound the supreme power longer than the honeymoon of a new married couple, unless the rulers were interested in preserving the rights . . .” Roger Sherman, *A Countryman, II*, *NEW HAVEN GAZETTE* (Nov. 22, 1787), reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 218, 219 (Paul Leicester Ford ed., Brooklyn, Historical Printing Club 1892) (emphases omitted).

¹⁹ Letter from James Madison to Thomas Jefferson, *supra* note 10, at 162.

²⁰ See AMAR, *supra* note 13, at 3–133.

²¹ Letter from James Madison to Thomas Jefferson, *supra* note 10, at 162. This assumption might seem peculiar given that, throughout history, minority rule — by means of superior wealth, arms, or organization — has probably been the norm. Still, the assumption that the majority would ultimately win out, through force if not politics, has been a common and important premise of much political and legal theory. See Adrian Vermeule, *The Force of Majority Rule* (Harvard Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 08-48, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280201.

In contrast, the premise of majoritarian dominance also rendered countermajoritarian constitutional rights all but futile. After all, countermajoritarian rights could not be backed by the “dread of an appeal to any other force within the community” more powerful than the very majorities who posed the threat.²² Was there any hope, then, of constitutionalizing protection for individuals and minorities? Madison came around to the view that there was hope, but that it did not lie in attempting to enumerate rights and enforce them directly against the irresistible forces of politics. Instead, his idea was to create a structure of government that would harness and channel the forces of politics to prevent them from riding roughshod over individual liberty and minority interests. As Alexander Hamilton echoed Madison’s strategy of constitutional design, “all observations founded upon the danger of usurpation [would] be referred to the composition and structure of the government.”²³

This composition and structure had several important components. Perhaps most importantly, as Madison explained in *The Federalist No. 10*, shifting power to the national government of the extended republic would “take in a greater variety of parties and interests.”²⁴ The more factions in competition with one another for political power, he reasoned, the less likely that a stable, unified majority would capture the government and tyrannize minorities.²⁵ Madison thus made the case that “the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.”²⁶ At the same time, Madison hoped that large federal election districts and the indirect election of senators and the President would select for representatives who would “possess most wisdom to discern, and most virtue to pursue, the common good of the society.”²⁷ By insulating these “statesmen” from the heat of majoritarian political pressure, Madison hoped the constitutional structure of government would “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country

²² Letter from James Madison to Thomas Jefferson, *supra* note 10, at 162.

²³ THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 9, at 192.

²⁴ THE FEDERALIST NO. 10 (James Madison), *supra* note 9, at 78.

²⁵ *Id.* Madison explained:

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

Id.; see also THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 321 (“[T]he society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”).

²⁶ THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 321.

²⁷ THE FEDERALIST NO. 57 (James Madison), *supra* note 9, at 348.

and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”²⁸

In sum, Madison’s hope was that the political incentives generated by the Constitution’s basic electoral structure and upward delegation of power to the national government would render individual liberty and minority rights politically self-enforcing. Constitutional rights that could not be protected directly could be protected *indirectly* by creating a structure of government that would empower the beneficiaries, assisted by political allies, to protect themselves. Some decades after ratification, Madison continued to believe that “[t]he only effectual safeguard to the rights of the minority, must be laid in such a basis and structure of the Government itself, as may afford, in a certain degree, directly or indirectly, a defensive authority in behalf of a minority having right on its side.”²⁹

One drawback of Madison’s structural solution to the problem of faction is that it conspicuously exacerbated the problem of agency, stoking the fears of Antifederalists that powerful, democratically insulated federal officials would quickly set themselves up as tyrannical monarchs or oligarchs. Responding to this concern, Madison offered a further self-enforcing mechanism, this one focused on the branches of the federal government and on the relationship between the federal government and the states. Just as a multiplicity of factions would compete with and check one another in society and the electorate, Madison reasoned, competition among these institutional units of government might create a self-enforcing check on tyrannical self-aggrandizement. Thus, *The Federalist No. 51* famously describes how the constitutional separation of powers between the legislative and executive branches can be made self-enforcing by leveraging the “personal motives” of “those who administer each department” to preserve and expand their own power and inviting “[a]mbition . . . to counteract ambition.”³⁰ Along similar lines, Madison argued that state governments would be motivated and empowered through various channels of political influence to protect their turf against federal encroachment, effectively enforcing the federal power-sharing arrangement built into the constitutional design.³¹

²⁸ THE FEDERALIST NO. 10 (James Madison), *supra* note 9, at 76; *see also* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 41–42 (1985).

²⁹ James Madison, Speech to the Virginia Constitutional Convention (1829), in *SELECTED WRITINGS OF JAMES MADISON* 354, 355 (Ralph Ketcham ed., 2006).

³⁰ THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 319. Courts and constitutional theorists continue to believe that the competition between the legislative and executive branches results in a self-enforcing balance of power. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950–51 (2005).

³¹ *See* THE FEDERALIST NO. 45 (James Madison), *supra* note 9, at 285–90. Here too, courts and constitutional theorists continue to believe that competition for power between the states and

Here again, the idea was that the structural design of government institutions would create politically self-sustaining limitations. Madison recognized that “a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”³² But in this context, parchment might be converted into political reality by the “policy of supplying, by opposite and rival interests, the defect of better motives.”³³

To summarize, Madison’s strategy of constitutional design was to create a set of structural arrangements that would selectively empower political decisionmakers whose interests and incentives would tend to be in alignment with constitutional rights and rules. Viewed in the abstract, the success of this strategy turns on two conditions. First, and most obviously, the relevant political actors must have the right interests or incentives; they must be motivated to behave in accordance with constitutional rules. Let us call this condition *incentive compatibility*.³⁴ Second, the institutional arrangements that place power in the hands of those decisionmakers must themselves be relatively stable. After all, if the political opponents of constitutionally desirable outcomes can capture decisionmaking authority by rearranging or ignoring the constitutionally specified decisionmaking processes, then the Constitution will be turned back into parchment. Let us call this condition *institutional stability*.

Now, it is far from clear how Madison’s own constitutional design was supposed to satisfy these two conditions. With respect to incentive compatibility, Madison never explained why the branches of government, or the state and federal governments, would reliably have political incentives at odds with one another — why they would tend to compete rather than cooperate or collude. Madison portrayed governmental units such as the federal branches and the states as self-interested, self-aggrandizing political actors with wills and ambitions of their own.³⁵ In fact, however, the behavior of these entities will be driven by the interests and incentives of the real-life officials who staff them. Even granting that government officials seek to maximize their own power above all else, there is no obvious relationship between the power-mongering ambitions of officials and the power of the institutional entities in which they work. Madison at times recognized the

the federal government will create a self-enforcing set of “political safeguards” for federalism. See Levinson, *supra* note 30, at 938–40.

³² THE FEDERALIST NO. 48 (James Madison), *supra* note 9, at 310.

³³ THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 319.

³⁴ See TUSHNET, *supra* note 7, at 95–96 (using “incentive compatibility” in this sense).

³⁵ THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 318.

need for such a linkage between “[t]he interest of the man” and “the constitutional rights of the place.”³⁶ Unfortunately, he did not offer any explanation of how this connection was supposed to take hold. And it is hard to see how it *could* take hold in a democratic system of government, in which representatives accumulate and exercise power not by aggrandizing their institutions, but by getting things done — in particular, by advancing their (or their constituents’) policy goals.³⁷ In fact, as elaborated below,³⁸ all indications are that political “ambition counteracting ambition” has failed to serve as a self-enforcing safeguard for the constitutional structures of federalism and separation of powers in the way that Madison seems to have envisioned.

Moving on to the institutional stability condition, Madison seemed to take for granted that the basic institutional structure of government outlined in the Constitution would remain stable. After all, a strategy of stacking the electoral deck in favor of public-spirited politicians presupposes that the electoral rules for choosing senators and the President will remain constant; creating a large playing field for factional competition presupposes that the power of the national government will not devolve to the states; and pitting ambitious branches of government against one another in a system of checks and balances presupposes that the separate institutional identities of the branches of the federal government will not dramatically change. So Madison must have believed that the basic institutional architecture of the constitutional design would somehow become entrenched against political contestation and revision in a way that enumerated constitutional rights would not. But, here again, he never explained how this would happen — how the institutional arrangements that were to serve as the mechanisms through which constitutional rights and values could be made self-enforcing would *themselves* become self-enforcing.³⁹

Madison’s theory of constitutional design was thus incomplete, and in some important respects mistaken. Nonetheless, there is much we can learn from the Madisonian approach to self-enforcing constitutionalism. Madison rightly recognized that constitutional commitments would be meaningless unless parchment barriers could somehow be converted into politically stable rules and arrangements. As the next Part describes, modern social scientists have (perhaps unwittingly) embraced and built upon Madison’s strategy of committing to constitu-

³⁶ *Id.* at 319.

³⁷ See Levinson, *supra* note 30, at 926–32, 950–53.

³⁸ See *infra* notes 231–53 and accompanying text.

³⁹ See Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 361–66 (2007) (explicating the Framers’ belief that structural protection for constitutional rights and values would be more secure than enumerating rights, though without explaining the basis for this belief).

tional rights and rules by designing institutional structures that would stack the political deck in their favor.

II. POLITICAL COMMITMENT AND INSTITUTIONAL ENTRENCHMENT

While Madison's ideas have been largely lost to constitutional scholars, economists and political scientists have explored the possibility of self-enforcing political arrangements along Madisonian lines in a number of different contexts. They have done so primarily in terms of political "commitment" and "entrenchment." Political commitments are self-conscious efforts to make policies or institutional arrangements difficult to change. Actors make political commitments in order to capture functional benefits from the consistency or durability of policies and institutions over time. Entrenched policies and institutions are those that are, in fact, difficult to change. Entrenchment need not come about intentionally and it need not be beneficial to anyone; policies and institutions may become entrenched quite accidentally and may persist for long periods even in the absence of any functional benefits. Setting aside these differences, the common denominator of commitment and entrenchment is the difficulty of revising or overriding political arrangements.

A. *Commitment: Personal and Political*

The problem of personal commitment is a familiar one. We sometimes wish to restrict our own freedom of choice in order to guard against fleeting passions, fickle preferences, or some other source of time-inconsistent decisionmaking.⁴⁰ We can attempt to do so by purely "internal" means, simply resolving to ourselves that we will exercise more, wake up earlier, stop smoking, or save for retirement. The problem, of course, is that our internal commitments are not always psychologically strong enough to prevent us from acting upon our immediate desires. Recognizing *ex ante* that our future behavior will not conform to our current preferences by force of will alone, we may attempt to impose "external" constraints on our future selves. Homer's Ulysses is the oft-invoked model for these efforts: rather than relying solely on his internal commitment not to be seduced by the song of the Sirens, he famously bound himself to the mast with rope. Analogously, if less dramatically, we hire personal trainers, place our alarm clocks out of arm's reach, pledge our friends not to lend us cigarettes, and buy houses to force long-term savings.

⁴⁰ See JON ELSTER, *ULYSSES AND THE SIRENS* 65–77 (1979); THOMAS C. SCHELLING, *CHOICE AND CONSEQUENCE* 83–87 (1984).

Personal commitment problems and their solutions may be entirely self-directed, as in the examples above, but they may also be “relational,” directed toward our dealings with others. The most common example of a relational commitment problem arises in the multifarious social and economic settings of nonsimultaneous exchange. Where simultaneous performance is costly or impossible, the party that performs first must somehow be assured that the second-performing party will carry through with its obligations. One way of making the second-performing party’s commitment credible is through contract law, which effectively enlists the state to coerce performance (or the payment of compensation for nonperformance). The state thus serves as an external commitment mechanism. Where contract law backed by state enforcement is unavailable, however, individuals must look to other mechanisms to make their relational commitments credible. In some contexts, promisors can offer hostages or collateral, or “tie their hands” in ways analogous to the self-directed precommitment strategies described above.⁴¹ In other contexts, repeat play, reciprocity, and reputation (discussed further, in the political context, below) can support exchange. The precise game-theoretical mechanisms differ, but the common denominator is that parties who fail to comply with their exchange obligations will lose the benefits of future exchange. An extensive literature in law and the social sciences documents the success of reciprocity and reputation in facilitating noncontractual exchange in a wide variety of settings.⁴²

Just as individuals can improve their welfare by entering into contracts or self-binding commitments, political actors — states, governments, officials, popular majorities, and interest groups — can make themselves better off over time by credibly committing themselves to plans or policies (ex ante) and sticking to them (ex post). States and governments that can credibly commit to protect property rights or repay debts will be able to benefit from economic investment and the availability of credit. Governments that can maintain a credible commitment not to negotiate with hostage takers or other terrorists may be able to reduce the incidence of terrorism. States that can credibly commit to building up powerful militaries and fighting wars may enjoy the benefits of peace on favorable terms. States that successfully

⁴¹ See Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5, 11–20 (1985).

⁴² See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders’ Coalition*, 83 AM. ECON. REV. 525 (1993); Avner Greif et al., *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990).

commit themselves to balanced budgets and environmental protection may do better in the long run than those that borrow and pollute profigately. From the opposite perspective, the *inability* of states and governments to commit can be costly in obvious ways.⁴³ Financial bailouts and corporate rescues create moral hazard because governments cannot commit not to provide future bailouts and rescues to mismanaged firms. Economically inefficient policies persist because Pareto-superior alternatives are blocked by current beneficiaries, who cannot be bought off because government commitments to future side payments are not credible.⁴⁴ Civil wars and revolutions occur because governments cannot commit to an ongoing course of reform or redistribution, and wars between states occur because governments cannot commit to lasting terms of peace.⁴⁵

In these and other settings, successful political commitments can bring two kinds of social benefits. If the political decision that is committed to at time 1 is procedurally or substantively *better* than the political decision that otherwise would have been made at time 2, then sticking to that decision is obviously beneficial. If protecting property rights is welfare enhancing for society, for example, then committing to that policy against subsequent decisions to expropriate will obviously be welfare enhancing as well. But even if we are agnostic as between the merits of the time 1 and time 2 policies, it will be beneficial to commit when change or instability is inherently costly. Regardless of the relative merits of nationalizing versus privatizing industries, dramatic vacillations between the two policies (as might occur when con-

⁴³ See Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473, 477 (1977). Kydland and Prescott offer this widely cited example:

[S]uppose the socially desirable outcome is not to have houses built in a particular flood plain but, given that they are there, to take certain costly flood-control measures. If the government's policy were not to build the dams and levees needed for flood protection and agents knew this was the case, even if houses were built there, rational agents would not live in the flood plains. But the rational agent knows that, if he and others build houses there, the government will take the necessary flood-control measures. Consequently, in the absence of a law prohibiting the construction of houses in the flood plain, houses are built there, and the army corps of engineers subsequently builds the dams and levees.

Id.

⁴⁴ See Daron Acemoglu, *Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics*, 31 J. COMP. ECON. 620, 633–38 (2003); Timothy Besley & Stephen Coate, *Sources of Inefficiency in a Representative Democracy: A Dynamic Analysis*, 88 AM. ECON. REV. 139 (1998); Joseph Stiglitz, *The Private Uses of Public Interests: Incentives and Institutions*, J. ECON. PERSP., Spring 1998, at 3, 8–11.

⁴⁵ See James D. Fearon, *Commitment Problems and the Spread of Ethnic Conflict*, in THE INTERNATIONAL SPREAD OF ETHNIC CONFLICT 107 (David A. Lake & Donald Rothchild eds., 1998); James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379, 401–09 (1995).

servative and socialist parties alternate in control of government) may be the worst of both worlds.

We might pause to notice that *constitutional* commitments can create both kinds of benefits. An oft-cited benefit of constitutionalism is that it enables us to commit to normatively preferred policies in order to stand firm during moments when pathological politics might undermine these policies. A commonly expressed concern, for example, is that panics over national security during times of war or crisis will lead us to sacrifice valuable civil rights and liberties.⁴⁶ Here the premise is that political decisionmaking at time 1 is better than political decisionmaking at time 2 — where “better” might be defined in terms of the “procedural” decisionmaking context or the “substantive” content of the decisions made. Either way, if a constitution can help us hold ourselves to the time 1 decision, we will be made better off.

Another strain of constitutional thought emphasizes advantages of intertemporal commitment that are independent of the relative merits of decisionmaking at times 1 and 2. Constitutional construction and entrenchment of the basic institutional structure of government are said to be “enabling,” inasmuch as the existence of a stable and broadly acceptable framework for political decisionmaking allows us to get on with the profitable business of collective decisionmaking without perpetual and costly conflict over the rules of the game.⁴⁷ Constitutional rules may also reduce the costs of political contestation by taking particularly contentious issues or subjects off the table.⁴⁸ In contexts where it is more important that things be settled than that they be settled in any particular way, committing to a stable set of arrangements will be beneficial in and of itself.

The discussion thus far has emphasized the social benefits of political commitment, but of course not all political commitments are broadly beneficial. Political commitments can also provide private benefits to some actors at the expense of others. Government officials, political parties, and interest groups will often have an interest in entrenching their preferred policies against shifts in political power or popular preferences, and present majorities may seek to impose their preferences on future generations. Constitutional commitments, too, can be recast in this self-serving mold. Rather than conceiving of “society” or “the people” as a unified decisionmaker engaging in self-restraint, we might see one group of political actors — a minority or a temporally fleeting majority — extending their political dominion over

⁴⁶ See, e.g., BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 1–3 (2006); GEOFFREY R. STONE, PERILOUS TIMES (2004).

⁴⁷ See HOLMES, *supra* note 3, at 161–75.

⁴⁸ See *id.* at 202–35.

others.⁴⁹ Distinguishing the democratically legitimate commitments of a unitary political community from the illegitimate intertemporal power grabs of a subset of that community is tricky business, both conceptually and normatively.⁵⁰ For present purposes, however, we need only recognize that political and constitutional commitments are often desirable to a range of political decisionmakers acting on a range of motives.

How, then, is political commitment *possible*? How can political decisionmakers at time 2 effectively be bound by political decisions made at time 1? One answer, prominent in political theory since Hobbes, is that they cannot be bound at all.⁵¹ The Hobbesian view emphasizes an important disanalogy between personal and political commitment: the absence of a super-state to enforce commitments on the model of individual-level contracts enforced by the state. States, governments, and political communities can, of course, codify commitments in treaties and constitutions, on the model of individual contracts (with respect to constitutions, between government and citizens, each conceived as a unitary actor; or among all the individual citizens in the form of a “social” contract). But because there is no external enforcer to firm up these formal promises, the Hobbesian worry goes, legal commitments will prove meaningless when political push comes to shove. They will be no more binding than Madison’s parchment barriers.

Even if we accept the Hobbesian analysis as far as it goes, however, the unenforceability of contracts still leaves a number of other political commitment mechanisms, analogous to those developed at the personal level, that do not depend on state coercion. In relational contexts, states, governments, and other political actors, no less than ordinary persons, can sometimes create the equivalent of contractual incentives through repeat play, reciprocity, and reputation. These game-theoretical dynamics are commonly invoked, for example, to explain state compliance with treaties and other international law obligations in the absence of a super-state presiding over the “anarchical” international arena.⁵² Similar mechanisms have been used to explain a number of political phenomena at the domestic level as well, ranging

⁴⁹ We might view personal identity in the same way, as comprising multiple selves, and we might find it similarly problematic when an earlier self binds a future self, for example by becoming addicted to drugs. See generally THE MULTIPLE SELF (Jon Elster ed., 1985); DEREK PARFIT, REASONS AND PERSONS 199–347 (1984); Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 LEGAL THEORY 23 (1997).

⁵⁰ See ELSTER, *supra* note 3, at 88–94.

⁵¹ See *id.* at 88–174; HOLMES, *supra* note 3, at 134–77.

⁵² See JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS (2008).

from the sustainability of the Senate filibuster⁵³ and legislative logrolling deals⁵⁴ to the stability of democracy.⁵⁵ In any context of political exchange, then, it is at least possible that reputation, repeat play, and reciprocity will enable actors to make credible commitments.

Not all political contexts involve exchange relationships of this sort. Where the relevant political actors have only themselves to deal with, we are left with the analogy to individuals' self-directed commitment strategies. Just as individuals can commit themselves by restructuring their downstream opportunities and incentives, political communities can successfully commit by pointing the incentives of influential constituencies in the right directions or by imposing structural barriers to change. Numerous such examples have been identified in the law, political science, and economics literatures.

Douglass North and Barry Weingast attribute economic growth in early modern England to institutional reforms growing out of the Glorious Revolution. These reforms — most importantly the assertion of parliamentary control over the fiscal powers of the monarch and the establishment of an independent judiciary — enabled the government to commit to respecting property rights and repaying debts in a way it could not have when the Crown had unlimited power to expropriate property and renege on loans. Whereas reputational and repeat-play constraints had proven inadequate to prevent opportunistic expropriation by the Crown, institutional reform created an effective, self-directed commitment mechanism. By restricting the ability of the Crown to interfere with property rights or repudiate debts, the new “constitutional” regime of separation of powers encouraged productivity, investment, and lending at lower interest rates. The net result was that the government was able to accumulate greater amounts of capital by limiting its own ability to expropriate.⁵⁶ Along similar lines, Weingast credits political federalism for the economic rise of England in the eighteenth century and the United States in the nineteenth and early twentieth centuries. Weingast's argument is that interjurisdictional competition in a system of federalism prevents redistributive and other inefficient forms of regulation and therefore serves as a credible government commitment to respect markets.⁵⁷

⁵³ See David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 70–71 (2006).

⁵⁴ See Peter Bernholz, *On the Stability of Logrolling Outcomes in Stochastic Games*, 33 PUB. CHOICE 65 (1978).

⁵⁵ See *infra* p. 685.

⁵⁶ Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989).

⁵⁷ Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995).

Daron Acemoglu and James Robinson explain Britain's nineteenth-century transformation from an elite oligarchy to a broadly enfranchised democracy as a means for elites to credibly commit to redistribute wealth and opportunity in order to stave off social unrest and the threat of revolution. In Acemoglu and Robinson's account, the masses were able to exercise political power through mobilization in the streets (or countryside), but the threat of revolution required collective action that could not be sustained indefinitely. Elite promises to enact and sustain pro-majority policies in the future were not credible because elites would have every incentive to retract these policies once they reconsolidated political control. Enfranchising the majority of citizens served as a credible commitment to enacting pro-majority policies going forward since the median voter, possessing decisive political power, would no longer be a member of the elite.⁵⁸

Many scholars have recognized that politicians can entrench policies by delegating to a politically independent judiciary. For instance, William Landes and Richard Posner emphasize the advantages to elected officials of delivering durable benefits to interest groups by way of a politically insulated judiciary.⁵⁹ Ran Hirschl explains the emergence of constitutional judicial review in a number of countries in recent decades as a "hegemonic preservation" strategy on the part of threatened elites. In Hirschl's account, political and economic elites whose power is threatened by majoritarian democratic movements seek to preserve their preferred policies by entrusting them to a politically independent judiciary that will share and protect their interests.⁶⁰ Similarly, in the U.S. context, Howard Gillman explains the increased power and conservative activism of the federal courts in the late nineteenth century as a successful effort by the Republican Party to entrench economically nationalistic policies as their electoral prospects were waning.⁶¹ Jack Balkin and Sanford Levinson emphasize the general importance to constitutional development of this kind of "partisan entrenchment," whereby temporarily dominant political parties lock in their policy gains by appointing ideologically sympathetic judges who continue to further the parties' agendas through constitutional law over the course of the judges' life-term appointments.⁶²

⁵⁸ DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY 23–30 (2006).

⁵⁹ William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

⁶⁰ See RAN HIRSCHL, TOWARDS JURISTOCRACY (2004).

⁶¹ Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002).

⁶² Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–67 (2001).

Along the same lines, a temporarily electorally dominant political party or governing coalition may entrench policy and make long-term commitments to interest groups and other constituencies by delegating decisionmaking authority to an administrative agency that is relatively insulated from political control. An important body of work by Mathew McCubbins, Roger Noll, and Barry Weingast (“McNollgast”) has shown how political officials, through control of administrative structure and process, can “stack the deck” in favor of their preferred policy outcomes in a bureaucratic decisionmaking environment that is more durable than the electoral coalition that created it.⁶³ McNollgast portray the 1946 enactment of the Administrative Procedure Act as a dramatic example of this phenomenon. Anticipating their imminent loss of the presidency to the Republicans, Democrats in Congress sought to entrench the policy gains of the New Deal by implementing a set of procedural restrictions that made it difficult for agencies to shift policy from the status quo.⁶⁴

Independent central banks are widely understood to serve as commitment mechanisms for politicians who would otherwise pursue economically destructive monetary policies in pursuit of short-term political gains.⁶⁵ International agreements, such as those creating the World Trade Organization and the International Criminal Court, have also been understood as public-regarding commitment mechanisms, serving to lock in free trade and human rights policies by placing them under the control of international organizations that are insulated by a “democratic deficit.”⁶⁶

In each of these cases, the political commitment strategy follows the same Madisonian logic. At time 1, the holders of political power shift some decisionmaking authority to another group of actors, who

⁶³ MCNOLLGAST, THE POLITICAL ECONOMY OF LAW: DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE AGENCIES (forthcoming 2010) (manuscript at 104) (on file with the Harvard Law School Library); see also Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, in ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 116 (Oliver E. Williamson ed., 1990); Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111 (1992).

⁶⁴ McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

⁶⁵ See ALLAN DRAZEN, POLITICAL ECONOMY IN MACROECONOMICS 144 (2000); Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q.J. ECON. 1169 (1985).

⁶⁶ See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 511–24 (2004); see also Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006); Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225 (2010). As Brewster, among others, emphasizes, international delegations can be used to entrench policies that benefit specific interest groups as well as further more public-regarding or widely shared goals. See Brewster, *supra*, at 542.

(1) are likely to continue to share the interests or policy preferences of the original holders of political power, and (2) are likely to hold onto this authority for a longer period of time. As we saw with respect to Madison's own theory, both of these conditions — incentive compatibility and institutional stability — must hold for any of these commitment strategies to succeed.

The basis for the incentive compatibility premise is better established in some of the cases than in others. It is easy to see how a democratic decisionmaking process that enfranchises the poor will generate redistributive policies, given that poor voters have a self-interested motivation to support wealth transfers. And it is certainly plausible that judges selected for their political or ideological preferences will tend to support the goals of their political patrons and that administrative agencies built to slant toward particular interests will indeed incline in those directions. In other cases, however, the motivations of the delegates of political power are less clear. It is not at all obvious what would lead the British Parliament to serve as a bastion of protection for property rights and creditors' interests,⁶⁷ or what would motivate an independent judiciary to enforce the interest group bargains made by past generations of legislators.⁶⁸ Absent some underlying theory of the interests and incentives of the relevant actors, these accounts of political commitment are incomplete.

A more pervasive and deeply problematic shortcoming of these accounts of political commitment is the absence of any explanation of how the arrangements that put decisionmaking authority into the hands of properly motivated decisionmakers are themselves sustainable — the premise of institutional stability. If political forces antithetical to the time 1 commitment become dominant, why will these forces be thwarted by decisionmaking arrangements that are themselves subject to political revision? What will prevent the current holders of political power from sweeping away these arrangements in just the same way they would otherwise sweep away the first-order policies that these arrangements are supposed to entrench? The challenge is to explain what makes the mechanisms of political commitment more durable than the bare commitments they are supposed to support.

⁶⁷ See DAVID STASAVAGE, *PUBLIC DEBT AND THE BIRTH OF THE DEMOCRATIC STATE* (2003) (complementing North and Weingast's theory by describing how the credibility of the British government's commitment to repay debt was contingent upon the political preferences of members of Parliament and patterns of coalition formation).

⁶⁸ See Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 496–98 (1988) (pointing out the omission in Landes and Posner's theory of any viable explanation of why judges would be inclined to uphold legislative bargains).

B. Entrenched Institutions

For many contemporary social scientists, the explanation of first resort invokes the concept of an *institution*. As the term is often used by economists and political scientists, an institution is, simply, any relatively durable political arrangement. Slightly more specifically, social scientists tend to have in mind the relatively durable structures and processes of political decisionmaking, in contrast to the particular policies and programs that emerge as outcomes from these decisionmaking processes. Thus, according to North's oft-cited definition: "Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction."⁶⁹ "Rules of the game" captures both the structural/processual nature and the durability of political institutions. In the examples of political commitment surveyed above, separation of powers, federalism, democratic voting rules, courts, agencies, central banks, and international regulatory bodies all are cast as institutions in this expansive sense — serving as relatively stable and durable organizational frameworks for political decisionmaking.

But of course building durability into the definition of an "institution" explains nothing about why these (candidate) institutions might in fact be politically stable. The Madisonian puzzle reasserts itself when we ask how certain political arrangements become "institutionalized" in this sense.⁷⁰ Unfortunately, most economists and political scientists have followed Madison in bracketing this underlying puzzle, simply treating stable institutions as exogenous or given.⁷¹ This rather fundamental methodological limitation of much work in the social sciences has been more widely acknowledged than rectified. For example, the positive political theory research program on "structure-induced equilibrium" invokes a variety of institutions as solutions to

⁶⁹ DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990); see also Stephen Skowronek, *Order and Change*, 28 POLITY 91, 93 (1995) (identifying the central characteristic of an "institution" as the persistence of its rules through time and the creation of "durable norms and dependable structures").

⁷⁰ See Stephen D. Krasner, *Sovereignty: An Institutional Perspective*, 21 COMP. POL. STUD. 66, 81 (1988) (noting that one "task of an institutionalist perspective involves explaining how institutions persist over time, even though their environments may change"); Bo Rothstein, *Political Institutions: An Overview*, in A NEW HANDBOOK OF POLITICAL SCIENCE 133, 152 (Robert E. Goodin & Hans-Dieter Klingemann eds., 1996) ("If institutions changed as the structure of power or other social forces surrounding them changed, then there would simply be no need for a separate analysis of institutions." (citation omitted)).

⁷¹ See Barry R. Weingast, *Political Institutions: Rational Choice Perspectives*, in A NEW HANDBOOK OF POLITICAL SCIENCE, *supra* note 70, at 167, 175 (noting that "[m]ost studies of institutions ignore" the question of "what makes institutions resistant to change" by "assuming that institutions are fixed and hence cannot be altered by individuals").

the instability of outcomes under majority rule.⁷² As William Riker long ago pointed out, however, there is no obvious reason why these supposedly equilibrium-inducing institutions would not inherit the instability of majority preferences over outcomes.⁷³ Without some explanation of what stabilizes the supposedly stabilizing institutional structures, structure-induced equilibrium is a *deus ex machina*. Similarly, while significant progress has been made by international relations scholars in explaining the political underpinnings of international “institutions” and “regimes,”⁷⁴ much work in the field continues to invoke international organizations, rules, and norms as unmoved movers of state behavior, with no explanation of how these decisionmaking structures could shape and constrain the behavior of states whose immediate interests they disserve.⁷⁵

The same problem afflicts a number of the theoretical accounts of political commitment surveyed above. All of these accounts are premised on the assumption that structures and processes of political decisionmaking — democratic voting rules, independent courts, federalism, and the like — tend to be relatively resistant to political revision or override by opponents of the policies these structures and processes generate. As Weingast recognizes in the context of market-preserving federalism, the “central problem” of institutional accounts of political commitment is explaining how the relevant institution “provides for its own survival” or is rendered politically “self-enforcing.”⁷⁶ To the extent theorists recognize this problem, they typically bracket it or brush it aside. For example, Acemoglu and Robinson’s theory of democratization as commitment rests on the assumption that elites would have a harder time doing away with democracy than they would have in retracting redistributive programs once the masses demobilize.⁷⁷ Yet the analytic structure of their theory suggests no reason for this asymmetry. If the masses cannot muster enough ongoing political power to se-

⁷² See, e.g., Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503 (1981).

⁷³ William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 443–44 (1980); see also KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 31–34 (1991).

⁷⁴ See ROBERT O. KEOHANE, AFTER HEGEMONY (1984); INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983).

⁷⁵ See John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5 (1994).

⁷⁶ Weingast, *supra* note 57, at 3. Weingast goes on to provide some context-specific reasons for why systems of federalism became stabilized in several different countries during specific time periods. *Id.* at 10–21; see also MIKHAIL FILIPPOV, PETER C. ORDESHOOK & OLGA SHVETSOVA, DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS (2004) (developing an account of the stability of federal arrangements based on the structure of political parties).

⁷⁷ See ACEMOGLU & ROBINSON, *supra* note 58, at 177–78.

cure a stream of redistribution, then how will they maintain sufficient power to defend democracy against an elite takeover?⁷⁸ Hirschl's hegemonic preservation theory of the rise of constitutionalization and judicial review begs the same sort of question: why will the democratic majorities who have taken control of the rest of government tolerate a hostile judiciary that continues to represent otherwise disempowered elites?⁷⁹

In sum, the notion of an "institution" is merely a placeholder for some account of how political arrangements become and remain durable, stable, and constraining. The social sciences have not yet generated anything like a comprehensive theory of how institutionalization in this sense is possible or under what conditions it is likely to materialize.⁸⁰

Nonetheless, social scientists working in a number of different areas have begun to converge upon a set of generalizable mechanisms through which certain political arrangements can be established and become (increasingly) impervious to change even when they disserve the immediate interests of the politically powerful.⁸¹ One such mechanism is based on the strategic logic of *coordination*. In many contexts, social groups with otherwise divergent interests can achieve common benefits from coordinating their actions or expectations. Just as we might all benefit from a norm specifying which side of the road to drive on or which language to speak, a broad range of political actors might all benefit from an institutionalized mechanism for resolving political disagreements. In the purest form of a coordination game, social groups care only about the fact of settlement, not about how, substantively, the issue is settled. But coordination can also be effec-

⁷⁸ See CARLES BOIX, *DEMOCRACY AND REDISTRIBUTION* 11 (2003) ("[I]t is not obvious why democracy rather than a commitment to more redistribution in the future is harder for the elite to reverse . . ."). Acemoglu and Robinson recognize the importance of this question in passing and gesture toward possible answers based on asset-specific investments and political feedback effects, along the lines discussed below. See ACEMOGLU & ROBINSON, *supra* note 58, at 179.

⁷⁹ Historians of the U.S. Constitution will immediately think of the failed attempt by the outgoing Federalist Party to entrench itself in the judiciary. Newly elected President Jefferson recognized the entrenchment strategy in terms similar to Hirschl's: "The Federalists have retired into the judiciary as a stronghold and from that battery all the works of republicanism are to be beaten down and erased." Gillman, *supra* note 61, at 521 (quoting Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801)). But of course Jefferson and his fellow Republicans had no intention of allowing this strategy to succeed. The Republican Congress promptly repealed the 1801 Judiciary Act, began impeaching Federalist judges, and successfully intimidated the Federalist-controlled Supreme Court into political docility. See *id.*

⁸⁰ For two exceptionally ambitious efforts in this regard, see AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY* (2006); and DOUGLASS C. NORTH ET AL., *VIOLENCE AND SOCIAL ORDERS* (2009).

⁸¹ See PAUL PIERSON, *POLITICS IN TIME* 133–66 (2004) (surveying and supplementing the relevant literature to identify a number of general sources of "institutional resilience," *id.* at 151).

tive when actors have divergent preferences about outcomes or about institutions for resolving these outcome-oriented disagreements. Each actor will obviously prefer the arrangement most likely to further its own interests. Nonetheless, in many contexts actors will be willing to sacrifice their first choices of outcomes or institutions in exchange for the benefits of avoiding conflict and agreeing on a common way forward.⁸² The higher the costs of unresolved disagreement — in the currency of political or violent conflict, or the inability to carry through on collective action and achieve collective goods — the greater the coordination benefits of *any* institutional settlement. Likewise, the greater the costs of reCOORDINATING on a different settlement, the more resilient we should expect current institutional arrangements to be. Institutional arrangements that are costly to set up and costly to do without will be protected by substantial coordination buffers.

Consider, for example, the coordination benefits of institutionalized democracy. What might lead electoral losers to respect democratic outcomes that disserve their interests, rather than to ignore unfavorable election results and attempt to wield power through other channels? The logic of coordination suggests one answer. Incumbent elites may resist the imposition of broad-based democracy in the first place, seeing greater gains from an aristocratic system of selecting leaders. Yet once democracy has been implemented, for whatever reason, elites may be willing to honor results that depart significantly from their first-best outcomes if the alternative might be revolution or civil war. Democracy may be reinforced by another type of coordination benefit, as well. Competitive elections provide common information to the public about the government's performance and create a focal point for coordinating rebellion if government officials do not comply with the results. The combination of these features makes democratic elections a useful — and self-enforcing — mechanism for holding government accountable to a coordinated public.⁸³

A second set of familiar mechanisms, introduced in the earlier discussion of personal and political commitment, follows the strategic logic of *reciprocity*, *repeat play*, and *reputation*. The simplest model is an iterated prisoners' dilemma game, in which political actors with conflicting interests can do better over time by cooperating, even though it

⁸² The precise game-theoretical logic could coincide with any of a number of games in the coordination family, including battle of the sexes, stag hunt, and hawk/dove. For a useful overview of coordination games and their application to law, see Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209 (2009).

⁸³ For examples of models along these lines, see Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997); and James D. Fearon, *Self-Enforcing Democracy 2* (Aug. 24, 2006) (unpublished manuscript) (on file with the Harvard Law School Library).

is always in their short-term interest to defect from cooperative arrangements. Where the longer-term gains from cooperation are high enough, discount rates are low enough, the terms of cooperation are clear, and the game continues indefinitely, a cooperative equilibrium may be sustained if each actor adopts a tit-for-tat or similar reciprocal strategy and thus conditions its own compliance on compliance by others. The same basic logic may be extended through the mechanism of reputation. Political actors may be willing to comply with institutional arrangements that disserve their immediate interests in order to build and preserve a good reputation of the sort that will induce the beneficial cooperation of other actors.⁸⁴ The possibility thus arises that institutions that constrain powerful political actors may be supported and sustained by these same actors, who derive broader and longer-term cooperative benefits from working through these institutions.⁸⁵

A number of the institutional commitment devices surveyed above might be explained in terms of repeat play, reciprocity, or reputation. For instance, the willingness of electoral losers to respect democratic decisionmaking can be understood in terms of an iterated prisoners' dilemma game between two parties or factions, where the prospect of future victories combined with a shared interest in avoiding violent conflicts over control of the government results in a mutual willingness to abide by democratic outcomes.⁸⁶ A system of market-preserving federalism might be maintained by repeat-play cooperation between states or regional coalitions that implicitly agree to defend one another against overreaching by the national government.⁸⁷ Along similar lines, political parties that expect to alternate in power over time may tacitly agree to maintain an independent judiciary,⁸⁸ a central bank, or administrative agencies. In all of these contexts, institutional stability can be explained by the cooperative surplus the relevant arrangements provide.

Coordination and reciprocity explain why actors may be willing to establish political arrangements that disserve or constrain their immediate interests.⁸⁹ These mechanisms also explain why actors may con-

⁸⁴ See GUZMAN, *supra* note 52, at 71–117.

⁸⁵ See KEOHANE, *supra* note 74.

⁸⁶ See ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET* 26 (1991).

⁸⁷ See Weingast, *supra* note 57; Rui J.P. de Figueiredo, Jr. & Barry R. Weingast, *Self-Enforcing Federalism*, 21 J.L. ECON. & ORG. 103 (2005).

⁸⁸ See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); Stephenson, *supra* note 8.

⁸⁹ Of course, the availability of coordination or cooperative benefits is not sufficient to create political agreement. Among other barriers to agreement is the need to settle distributive disagreements over how to divide the surplus (or over which of a number of coordinating or cooperative arrangements, each with different distributive consequences, will be implemented). See James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269, 274 (1998).

tinue to support such arrangements over time — and indeed why support may tend to increase. Political arrangements that have been in place for a while tend to become familiar and highly salient, crowding out alternative focal points for coordination. Reciprocal relationships, too, may become more stable over time, as actors build trust in one another's cooperative commitments, credibly signal long time horizons and low discount rates, and develop shared understandings about which behaviors count as cooperation or defection. Moreover, once political arrangements have been put in place, a further set of mechanisms contributes to their increasing stability over time.

The first of these entrenching mechanisms is driven by *asset-specific investments*. Political actors invest resources in inventing and building decisionmaking structures and processes. Setting up a new organizational structure or process usually requires high levels of investment in achieving agreement among the relevant actors.⁹⁰ Once such arrangements are up and running, moreover, political actors will invest in developing their own capabilities to work successfully within them. These investments might take the form of forming and mobilizing coalitions, building relationships, acquiring knowledge, or establishing reputations. To the extent these investments are specific and cannot easily be reallocated to alternative organizational structures or processes, political actors will want to avoid duplicating these investments and so will have a stake in maintaining existing arrangements and resisting reforms.⁹¹

Examples of asset-specific investments in structures and processes of political decisionmaking are legion. Political parties that grow up around and shape themselves specifically to systems of federalism or separation of powers, or to electoral arrangements such as proportional representation, will resist any change in these structural arrangements.⁹² Investment by advocacy groups in legal expertise and influence will give these groups a stake in defending the policymaking au-

⁹⁰ See NORTH, *supra* note 69, at 95; PIERSON, *supra* note 81, at 24–25.

⁹¹ See PIERSON, *supra* note 81, at 148–49; Paul Pierson & Shannon O'Neil Trowbridge, *Asset Specificity and Institutional Development* (2002) (prepared for delivery at the Annual Meeting of the American Political Science Association). As Karen Orren and Stephen Skowronek describe:

Social interests that thrive by filling a niche within established institutional forms or by discovering a channel for action made available by them have little interest in seeking major changes in the governing arrangements that favor them; on the contrary, they can be expected to hold politics to the present path, pressing only for those adaptations that promise to maintain the current relationship between institutional politics and public policy.

KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 105 (2004).

⁹² See ACEMOGLU & ROBINSON, *supra* note 58, at 179; ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 20 (2009); FILIPPOV ET AL., *supra* note 76, at 38–39.

thority of independent courts.⁹³ Similarly, interest groups that develop the capacity to be influential in international governance institutions or domestic administrative agencies will defend international and domestic delegations of power. In these and other contexts, the value of asset-specific investments and the extent of adaptation will tend to grow over time, so that the resistance of political stakeholders to change will be stronger the longer the relevant arrangements persist.⁹⁴

A further set of mechanisms through which political arrangements effectively build their own political support might be described as *positive political feedback*. Structures and processes of political decision-making, as well as particular policy outcomes, often reshape politics in ways that increase support for the institutions themselves.⁹⁵

Thus, some political arrangements *organize* or *empower* interest groups or other political constituencies with a stake in maintaining these arrangements, or *disempower* constituencies that oppose them. The home mortgage interest deduction, for example, creates a constituency of homeowners (joined by mortgage lenders and other beneficiaries) that is deeply committed to, and formidably capable of, preserving the entitlement.⁹⁶ Social Security and other social welfare programs similarly create vested interest groups that will resist retrenchment.⁹⁷ Rules of corporate law relating to ownership structure increase the wealth and power of corporate stakeholders who have an interest in maintaining or enhancing existing structures.⁹⁸ A widely recognized political advantage of a cap-and-trade system to reduce greenhouse gases, as compared with a more economically efficient car-

⁹³ Pierson & Trowbridge, *supra* note 91, at 22–23.

⁹⁴ Compare the difficulty of moving after living somewhere for a year with the difficulty of uprooting after several decades.

⁹⁵ The inverse effect is also possible: negative political feedback. See *infra* p. 744 and sources cited *infra* notes 335–37 (discussing public backlash against the Supreme Court); see also Mark J. Roe, Essay, *Backlash*, 98 COLUM. L. REV. 217 (1998) (describing the possibility that efficient economic arrangements will create self-defeating political backlashes); Adrian Vermeule, Essay, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 991–95 (2005) (noting the possibility that liberal democratic tolerance of intolerant groups will be politically self-defeating).

⁹⁶ See Hal R. Varian, *An Opportunity to Consider if Homeowners Get Too Many Breaks*, N.Y. TIMES, Nov. 17, 2005, at C3. Their commitment comes from some combination of material asset-specific investments and psychological endowment effects; their capability from both the greater resources and the enhanced collective action capacity that the entitlement itself provides. On political endowment effects, see Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 827–28 (1998); and Paul Pierson, *The New Politics of the Welfare State*, 48 WORLD POL. 143, 144–46 (1996).

⁹⁷ See PAUL PIERSON, *DISMANTLING THE WELFARE STATE?* (1994); Pierson, *supra* note 96; cf. Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243 (2004) (describing political strategies for welfare state retrenchment or subversion that have partially succeeded in the United States).

⁹⁸ See Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 157–60 (1999).

bon tax, is that the cap-and-trade approach will create, enrich, and empower commercial interest groups with a strong stake in preserving and expanding the system.⁹⁹ The inverse (but functionally equivalent) pattern of political arrangements becoming self-entrenching by weakening their opponents is also familiar. Airline deregulation reduced the economic and political cohesion of the industry and therefore reduced the prospects of re-cartelization.¹⁰⁰ Tort reform can gain momentum over time as trial lawyers make less money and wield commensurately less political power to resist further reforms.

Positive political feedback can also operate through *selection effects*, by increasing the sheer number of proponents relative to opponents.¹⁰¹ For example, municipal gun control or antismoking ordinances will gain political support over time as gun owners and smokers either give up their firearms and cigarettes or exit the jurisdiction, leaving behind an increasingly higher percentage of unarmed and nonsmoking supporters of the policy.¹⁰² Laws permitting more immigration or providing for better treatment of immigrants may be similarly self-reinforcing, as greater numbers of immigrants exercise more political power for the benefit of their successors.¹⁰³ Strategic politicians might even take advantage of selection effects by manipulating policy for the purpose of shaping their electorates.¹⁰⁴ As one account has it, James Michael Curley, who served four terms as the mayor of Boston during the first half of the twentieth century, and Robert Mugabe, the dictator of Zimbabwe, both used inflammatory political rhetoric and harsh redistributive policies to encourage the emigration of their political opponents (for Curley, the Brahmins who stood apart from his poor, Irish base; for Mugabe, white farmers).¹⁰⁵ Selecting a supportive constituency ensured these leaders' political survival and thus the continuation of their broader policy agendas.

If particular policies and programs can generate self-reinforcing positive political feedback through empowerment and selection effects,

⁹⁹ ERIC M. PATASHNIK, REFORMS AT RISK 179–80 (2008).

¹⁰⁰ See *id.* at 110–35.

¹⁰¹ See generally Vermeule, *supra* note 95.

¹⁰² See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1116–18 (2003). These examples can be generalized to many municipal-level decisions about policy and public goods provision, given Tiebout sorting dynamics.

¹⁰³ See *id.* at 1119.

¹⁰⁴ This phenomenon is transparent when it happens through the legislative redistricting process, which effectively allows legislators to choose their voters. For a contrasting example, see Shaila Dewan, *Gentrification Changing Face of New Atlanta*, N.Y. TIMES, Mar. 11, 2006, at A1, quoting a community leader as saying that African American mayors of Atlanta have “cut [their] own throat[s]” by encouraging gentrification that has decreased the percentage of black voters in the city. *Id.* at A12.

¹⁰⁵ Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1 (2005).

so too can structures and processes of political decisionmaking. Indeed, in contrast to the indirect political feedback effect of policies and programs, political decisionmaking structures allocate power *directly*. Furthermore, they allocate power not just to interest groups and other constituencies, but also to the government officials who hold offices within these structures. Officials and interest groups who are empowered by existing structural arrangements will often generate strong opposition to change. Consider the positive political feedback effects predictably generated within a system of electoral democracy. Expansions of the franchise have an obvious tendency toward durability, since enfranchised groups will not vote for their subsequent disenfranchisement, nor will the officials who benefit from their support.¹⁰⁶ The same is true of other features of the democratic process. Existing arrangements — with respect to campaign finance, political parties, districting, and the like — will be defended by the representatives who were empowered under these rules and by their supporters in the electorate.¹⁰⁷

Looking beyond electoral systems, positive political feedback effects stemming from political decisionmaking structures and processes arise at all levels of systemic generality. Thus, one account of the origins of modern capitalism attributes the dramatic economic growth of Europe in the sixteenth through nineteenth centuries to the selective enrichment and empowerment of pro-capitalist interests. On this account, a set of institutional constraints imposed on monarchs successfully protected property rights and thus facilitated Atlantic trade. The growth of trade in turn allowed commercial interests to become rich and politically influential — and, in a self-reinforcing dynamic, to use that influence to push forward the development of property rights and other capitalist institutions.¹⁰⁸ Contemporary capitalism doubtless displays a similar self-entrenching dynamic, as economic winners wield their disproportionate political power to preserve and entrench the capitalist system in a way that allows them to become ever more wealthy and politically influential.¹⁰⁹ Moving from the level of macro-institutional political economy to more localized arrangements, we might hypothesize that the authority of administrative agencies will

¹⁰⁶ See Vermeule, *supra* note 95, at 976. Of course, groups can be effectively disenfranchised *extrademocratically*. The entrenchment effect of enfranchisement operates within a system of democracy but does not entrench the system itself.

¹⁰⁷ See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509–28 (1997).

¹⁰⁸ Daron Acemoglu et al., *The Rise of Europe: Atlantic Trade, Institutional Change, and Economic Growth*, 95 AM. ECON. REV. 546 (2005).

¹⁰⁹ See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008) (describing how this political-economic dynamic has worked in the contemporary United States).

tend to become entrenched over time as the interest groups that benefit from agency regulation wield their (increased) power to protect their regulatory benefactors. Similarly, delegations of policymaking authority to international bodies such as the WTO will predictably be defended against reversal by the domestic export interest groups that benefit from free trade and therefore have a political leg up over import-competing interest groups that favor protectionism.¹¹⁰

To collect what has been said so far, we can identify a set of political dynamics that operate to entrench political arrangements, and in particular structures and processes of political decisionmaking of the sort commonly supposed to be “institutionalized.” These dynamics operate much like the economic phenomenon of increasing returns.¹¹¹ Patterns of technology adoption, industrial location, and international trade have been explained as emerging from a path-dependent process of increasing returns through which slight initial advantages snowball into irreversible market dominance. Increasing returns are commonly created by several features of the economic context: (1) large set-up or fixed costs, which lead to lower marginal costs of producing additional units and create an incentive to stick with an initial design; (2) learning effects, which increase the value of a product over time; and (3) coordination effects, including network externalities, which increase the value of a product as more people use it and expect others to use it in the future.¹¹² Each of these features has political analogs.¹¹³ Political decisionmaking structures typically require high initial set-up costs and then inspire specific, nontransferable investments by various actors. Moreover, these structures tend to shape the power and composition of political actors in ways that make institutions increasingly difficult to change. The benefits of coordination around and cooperation through structural arrangements also tend to stabilize these arrangements by creating equilibria in which no group can do better by withdrawing or contesting the status quo.

The focus thus far has been on rationalistic, interest-based mechanisms of political behavior. A methodologically broader account of political entrenchment and institutional stability might include a number of additional mechanisms and social processes. Many of these mechanisms and processes operate at the level of social psychology. In politics, as in many other social contexts, people become acculturated or

¹¹⁰ See ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 53–54 (2009).

¹¹¹ See NORTH, *supra* note 69, at 95–96.

¹¹² PIERSON, *supra* note 81, at 24. See generally W. BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (1994). The classic example is the “QWERTY” typewriter keyboard. See Paul A. David, *Clio and the Economics of QWERTY*, 75 *AM. ECON. REV.* 332 (1985).

¹¹³ See generally PIERSON, *supra* note 81, at 17–53.

habituated to status quo arrangements in ways that make change seem undesirable or unthinkable. Explanations along these lines range from essentially rationalistic accounts of adaptive or endogenous preference formation;¹¹⁴ to behavioral psychology predictions related to endowment effects, status quo bias, and loss aversion;¹¹⁵ to critical theories of ideological formation or “false necessity.”¹¹⁶ The common denominator is that political arrangements — whether at the level of routine decisionmaking procedures or post-industrial capitalism — can become psychologically and sociologically embedded in such a way that they are no longer experienced by actors as constraints or even as matters of choice.¹¹⁷

Further reducing the vast and heterogeneous array of theories along these lines to a set of predictable mechanisms of political entrenchment and disentanglement is a project that lies beyond the current reach of the social sciences, and certainly beyond the ambition of this Article. We should, however, recognize and bear in mind that political arrangements will tend to display a significant measure of inertia for reasons running well beyond the interest-based calculations of rational and well-informed political actors. The interests, beliefs, values, group identifications, and sheer imaginations of political actors will invariably be to some extent shaped and constrained by existing social and political structures and political thought. In politics as in society more broadly, the status quo exerts a powerful (though not unbreakable) hold on human behavior that often far exceeds the intrinsic merits of status quo arrangements. Change becomes psychologically and socially costly, hard to understand or envision, and normatively dubious. In sum, we should recognize a “fundamental asymmetry”¹¹⁸ between inherited institutional arrangements and theoretically feasible alternatives.¹¹⁹ For social-psychological as well as rational and material reasons, the range of viable choices actually experienced by political actors is typically much more constrained than the full set of options that might seem possible from the perspective of the external analyst.

¹¹⁴ See, e.g., JON ELSTER, *SOUR GRAPES* (1983); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

¹¹⁵ See, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

¹¹⁶ See, e.g., ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY* (1987).

¹¹⁷ Relevant in this regard is Madison’s response in *The Federalist No. 49* to Jefferson’s call for frequent constitutional conventions: “[F]requent appeals [to the people] would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.” THE FEDERALIST NO. 49 (James Madison), *supra* note 9, at 311.

¹¹⁸ See GREIF, *supra* note 80, at 189.

¹¹⁹ See *id.* at 189–94.

C. Institutions Versus Policies

The previous section developed a set of mechanisms by which political arrangements might become established and entrenched against change, despite conflicts between these arrangements and the interests of actors possessing the power to override or revise the arrangements. What remains to be explained is why the kinds of political decision-making processes and structures that are cast as “institutions” are *more* likely to become entrenched (or likely to become more strongly entrenched) than are the substantive policy outcomes that these institutions are supposed to generate.

As we have seen, theories of political commitment presume that institutional commitment mechanisms will be more resilient in the face of political opposition than the first-order policy commitments they are supposed to generate would have been on their own. For example, Weingast’s theory of federalism as a market-preserving commitment against excessive redistribution or expropriation of property presupposes that federalism is a more effective commitment device than simply specifying property rights. Likewise, Acemoglu and Robinson’s argument that enfranchising the poor has served as a credible commitment by elites to future redistribution of wealth seems to be premised on the assumption that simply creating constitutional welfare rights for the poor would work less well as a commitment mechanism. The same is true of theories that cast the independent judiciary as an enforcer of commitments: there would be no need for the judiciary to play this role if threatened elites or temporarily dominant political parties could more directly entrench their preferred policies in the form of rights. All of these accounts of political commitment turn on the assumption that the relevant institutional commitment mechanisms are more stable or more susceptible to entrenchment than the desired policy outcomes would have been standing alone. This assumption reflects the broader assumption, seemingly pervasive in the social sciences, that political decisionmaking institutions are less vulnerable to revision or override than substantive policy outcomes. Yet one searches the scholarly literature in vain for any explanation of why in general, or under what specific circumstances, we should expect this assumption to hold true.

Understanding the mechanisms through which institutions might become politically entrenched (per the previous section) just highlights the unanswered question of why we should expect these mechanisms to operate differently — and more powerfully — at the level of structures and processes of political decisionmaking than at the level of substantive policy outcomes. In fact, the previous discussion moved fluidly back and forth between decisionmaking processes and substantive policies, suggesting that entrenchment works much the same way with respect to both types of political arrangement. Driving on the

right side of the road is stabilized by coordination in just the same way as the procedural institution of electoral democracy. Political actors make specific investments in provisions of the tax code in just the same way as political parties invest in the decisionmaking institution of the presidency. And policies such as Social Security and smoking bans, no less than political decisionmaking institutions, “create a new politics”¹²⁰ by triggering positive political feedback. As a first cut, then, we might conclude that there is no good reason, in general, to expect decisionmaking institutions to become more deeply entrenched than policy outcomes. Political entrenchment can take hold of both types of political arrangements, working through the same causal pathways.

Is there any further reason, then, for believing the conventional wisdom about the relative stability of political institutions as compared to policies? An affirmative answer might proceed along the following lines. Institutions are typically conceived as the “procedural” rules and organizational structures through which “substantive” political decisions about policy are made. The distinction between procedure and substance in this context can be operationalized by defining as “substantive” those political arrangements over which actors have strong intrinsic, as opposed to merely instrumental, preferences. Thus, we might posit that political arrangements such as democratic elections, separation of powers, federalism, administrative agencies, courts, and international bodies are assessed by political actors not (primarily) in terms of their intrinsic merits but instead by reference to the outcomes these decisionmaking structures are likely to produce.¹²¹ We can then distinguish these “procedural” decisionmaking institutions from the “substantive” decisions, or policy outcomes, that they will generate. What political actors care most about, by hypothesis, are the substantive laws, regulations, and adjudicatory decisions that emerge from the institutional structures and processes of political decisionmaking. Political actors’ preferences about how these institutional structures and processes are arranged will depend primarily on their predictions about how various arrangements will affect policy outcomes.¹²²

On these assumptions, political actors might view and assess decisionmaking institutions largely as bundles of probabilistic policy out-

¹²⁰ E.E. SCHATTSCHEIDER, *POLITICS, PRESSURES AND THE TARIFF* 288 (1935) (“New policies create a new politics.”); *see also* THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* 57–60 (1992) (describing how “[p]olicies [t]ransform [p]olitics,” *id.* at 57).

¹²¹ Here again, this analysis is agnostic toward the criteria that might be used to assess these outcomes. Such criteria could be self-interested and materialist or other-regarding and moralistic.

¹²² In some contexts, of course, political actors will in fact have intrinsic preferences about political decisionmaking processes. Where this is the case, such “processes” should be treated as substantive outcomes for purposes of this analysis.

comes. Decisionmaking institutions effectively “bundle” policies in the sense that a given institution will generate — or, in conjunction with a number of other such institutions, causally contribute to generating — many different policy outcomes. These outcomes will usually be at least somewhat uncertain, or probabilistic, from the ex ante perspective of the political actors who are assessing proposed and ongoing institutional arrangements. This uncertainty arises because decisionmaking structures tend not to determine outcomes completely and predictably but only to increase the probability of some outcomes relative to others. As a result, the distribution of political costs and benefits stemming from institutions will usually be less certain than the distribution of costs and benefits of enacted policies — for the simple reason that which policies will be enacted through a given institution (or complex of institutions) will be less than perfectly predictable.¹²³

These distinctive features of political decisionmaking institutions — prospectivity, uncertainty, and bundling — may be conducive to higher likelihoods or levels of stability in the face of political pushback. Consider first the effects of prospectivity and uncertainty. It is a common observation about institutional — and constitutional — design that actors might take a less self-interested, more impartial view of political decisionmaking structures that they expect to be in place for relatively long periods of time simply because they cannot predict how these institutions will affect their own interests.¹²⁴ To the extent that institutionally produced policy outcomes and their distributive consequences are uncertain ex ante, institutions will be insulated against interest-based opposition. Of course, the ex post perspective is different. Once institutions are set up and begin to generate streams of policy outcomes, the institutional veil of ignorance will be lifted — but only partially. If future decisions remain uncertain, and political losers cannot

¹²³ In a brief discussion, Kenneth Shepsle emphasizes the relative uncertainty and riskiness of institutional change compared to policy change, though he does not spell out precisely why institutional uncertainty is greater or how uncertainty bears on the incentives of political actors. See Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in *POLITICAL SCIENCE: THE SCIENCE OF POLITICS* 51 (Herbert F. Weisberg ed., 1986) (recognizing the need to “drive a wedge between choice of policy and choice of institutional arrangements,” *id.* at 69).

Of course, policies also may have uncertain or unpredictable distributional consequences at the time of enactment. The comparison in the text is relative and on average.

¹²⁴ See GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* 33–36 (Liberty Fund 2000) (1985); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 77–80 (1962); RUSSELL HARDIN, *INDETERMINACY AND SOCIETY* 125 (2003); see also JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999). Note that Rawls’s famous “veil of ignorance” shields decisionmakers not from knowledge of the distributive consequences of the basic structure they agree upon but from knowledge of their position in society and thus the distributional outcomes that they themselves will experience. See Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 *YALE L.J.* 399, 399 (2001).

predict an ongoing pattern of defeats, then their incentives to resist institutional authority will be blunted. Given uncertainty, they may have no reason to expect that any feasible replacement decisionmaking institution would better serve their interests.

The other key feature of decisionmaking institutions is the multiplicity of policy outcomes that each institution (or complex of institutions) will generate. The coordination advantages of bundling multiple (probabilistic) policy decisions into a single institutional decisionmaking process are obvious. Rather than having to start from scratch in resolving each new disagreement, political actors can agree once on an authoritative decisionmaking process that will resolve a broad and temporally extended set of disagreements. The coordination benefits of such a decisionmaking institution will be some multiple of the coordination benefits of resolving any particular disagreement. Moreover, by effectively bundling multiple policy outcomes into a single package, institutions facilitate compromise, or implicit logrolling. Losers on any particular policy outcome will stay invested in decisionmaking institutions that will predictably provide them with victories on other outcomes that they value more highly. Further, institutions that will determine multiple policy outcomes will typically induce political actors to make large specific investments, both in negotiating the shape of the institution in its origination and in working effectively within or through the institution once it is up and running. While the higher upfront costs of creating institutions will make institutional-level agreement more difficult than policy-level agreement (all else equal), those institutions that do get created will be heavily insulated by the high costs of negotiating an alternative decisionmaking process or equivalent set of outcomes. And finally, as noted in the previous section, bundling should dial up the positive political feedback effects of decisionmaking institutions, making them more strongly self-reinforcing on average than discrete policy outcomes.

Consider, for example, the institution of an academic appointments committee operating in the context of a faculty that is sharply divided along ideological or methodological lines. Even if such a faculty could not agree on any appointment considered in isolation, it is not hard to imagine the emergence of a political equilibrium in which faculty members are willing to defer to the appointments committee, even in cases where a decisive coalition disagrees with the particular outcome. If the cost of nondeference to the committee is perpetual fighting or gridlock over appointments to the detriment of all, then the coordination benefits of mutual deference to the committee will be large. At the same time, competing factions may achieve a cooperative, reciprocal equilibrium by tacitly agreeing to defer to the committee in the expectation that each faction will get its most-preferred appointments. The appointments committee effectively ensures repeat play and facilitates reciprocity (or logrolling) among political factions of a sort that

would be more difficult to accomplish without any comparable institutional structure.¹²⁵ Over time, faculty factions will make specific investments in influencing the committee's decisionmaking process, for instance, by placing representatives on the committee rather than by mobilizing outside the committee-centered process. Moreover, as the committee makes appointments, these new faculty members will themselves tend to have appointment preferences that align with the committee's — thus bolstering support through the mechanism of positive political feedback. Because the committee will generate multiple faculty appointments, this feedback effect will be stronger than the feedback effect of appointing a single faculty member who increases the strength of some faction by one. In sum, political resistance that would be sufficient to overturn a series of outcomes, each considered in isolation, might effectively be overcome by a higher-order willingness to support the institutional decisionmaking process that generates the same set of outcomes.

This analysis should not be taken as conclusive of the stability advantages of institutions over policies in all cases. One countervailing consideration is that the stability-enhancing effects of institutional bundling might be achieved by bundling policy outcomes in other ways.¹²⁶ Rather than agreeing to a decisionmaking institution, for example, political actors might agree to the full slate of substantive policies that would likely have emerged from that institution. (The faculty in the illustration above might forego an appointments committee and simply vote on a full slate of appointments.¹²⁷) If such an agreement could be achieved, it would be functionally equivalent to its institutional substitute with respect to the stability and entrenchment advantages of bundling (though not with respect to the advantages of uncertainty). But of course in many contexts it will be impossible to achieve that kind of broad substantive agreement up front. After all, the main reason societies are driven to create ongoing political decisionmaking institutions is that they cannot anticipate or adequately inform themselves about all of the decisions that will arise in the future.

Without attempting a more definitive analysis, we might conclude that conventional assumptions about the relative stability of political decisionmaking institutions have at least some plausibility. If deci-

¹²⁵ For direct analogies, see KEOHANE, *supra* note 74, at 85–109 (viewing international regimes in this light); and Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988) (viewing the congressional committee system in this light).

¹²⁶ See Roderick M. Hills, Jr., *Federalism and Self-Restraint* 140–45 (unpublished manuscript) (on file with the Harvard Law School Library) (suggestively conceptualizing constitutional principles as bundles of outcome commitments backed by coalitions of supporters of these outcomes).

¹²⁷ To carry over the example, we should assume away tenure and imagine each appointment as reversible.

sionmaking institutions do indeed possess greater stability than substantive outcomes, then they should be capable of facilitating political — and as we shall soon see, constitutional — commitments. In politics, law, and life more broadly, it is commonly supposed that people who disagree about substance can nonetheless come together on decisionmaking processes that will serve to settle these disagreements. Such intuitions are more often invoked and acted upon than explained. This section has suggested a potential explanation grounded in a broader account of political commitment and entrenchment. Both the broader account and this important corollary are immediately relevant to the theory and practice of constitutionalism, to which the Article now turns.

III. CONSTITUTIONALISM AS POLITICAL COMMITMENT

A. *Constitutional Commitment and Entrenchment*

Constitutional law is both a *mechanism* of political commitment and *itself* a political commitment. At a formal level, constitutionalizing legal rules and institutional arrangements entrenches them against legal change.¹²⁸ But formal constitutional commitment is neither necessary nor sufficient to create functional political entrenchment — meaning, a relatively high degree of political difficulty in revising or reversing a law or policy.¹²⁹ It is not necessary because, as described

¹²⁸ Entrenchment in this formal, legal sense is clearly a matter of degree — specifically, the degree of difficulty of legal change imposed by a given set of procedural requirements. One extreme of legal entrenchment is marked by the explicitly unamendable provisions of a constitution (for instance, Article V's requirement of equal state suffrage in the Senate). The other extreme in the U.S. legal system might be occupied by an executive decision or order issued and unilaterally revocable by the President. Somewhere in the middle, protected by various levels of procedural barriers to change, are amendable constitutional rules (subject to the Article V procedures), judicial decisions (subject to norms of *stare decisis*), and ordinary federal statutes (which can be changed through the Article I, Section 7 procedural gamut, supplemented by internal congressional rules and other intrabranch procedural hurdles). Legal theory invites confusion, therefore, when it describes some rule or arrangement as "entrenched" (full stop). This description must reflect an implicit comparison with some other, less cumbersome set of procedural requirements for effecting legal change. Sometimes the baseline is set by the procedural difficulty of enacting the same policy in the first place. See Eric A. Posner & Adrian Vermeule, Essay, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002). When constitutional law is described as "entrenched," however, the implicit baseline must be the set of procedural requirements for creating or changing some *other* type of law. Constitutional law might be considered entrenched in this sense relative to federal statutes, just as U.S. statutes are entrenched relative to statutes in parliamentary systems such as Britain's (which do not present the obstacles of bicameralism or presentment) or to executive orders.

¹²⁹ Like formal entrenchment, functional entrenchment is obviously a matter of degree. Also like formal entrenchment, the baseline for defining and measuring functional entrenchment might be set by the political difficulty of enacting the law or policy in the first place, or — more com-

above, there are many ways of increasing the costs of policy revision or reversal without erecting formal legal barriers to change. Political commitments that are sustainable by way of enfranchisement of the poor, structured delegations to administrative agencies, or statutory grants of judicial or central bank independence, for example, do not depend on constitutional law.¹³⁰ Formal constitutional entrenchment is not sufficient to create functional entrenchment because formal, legal barriers may be ignored, opportunistically revised, or overridden.¹³¹ An effective system of constitutional law — one that can serve as a mechanism of political commitment — thus depends on the success of an underlying sociopolitical commitment to play by the constitutional rules.

This deeper dependence of formal, legal commitments on functional, sociopolitical ones reflects the foundational insight of Hartian jurisprudence.¹³² For Hartian positivists, legal validity ultimately rests on a social practice among officials (if not citizens more broadly) of recognizing and accepting certain rules or practices as obligatory.¹³³ It follows from this understanding that formal constitutional commitments will be binding only to the extent that political actors are committed to

monly, but also more ambiguously — by implicit reference to some “ordinary” level of difficulty of changing political course.

¹³⁰ Recognizing the possibility of functional entrenchment makes longstanding normative debates about the constitutionality and democratic legitimacy of formal legislative entrenchments seem rather academic. Many constitutional theorists have argued that it would be unconstitutional and democratically illegitimate for a legislature to limit the legislative authority of its successors by passing a statute that declared itself to be unamendable or that required a special supermajority to override it. See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2-3, at 125 n.1 (3d ed. 2000); Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 *AM. B. FOUND. RES. J.* 379, 384-427. But given that functional entrenchment strategies are freely available to legislatures, it becomes difficult to explain why formal strategies that accomplish the same thing must be condemned. If Congress is free, for example, to structure farm subsidies in a way that strengthens powerful interest groups certain to resist any retrenchment, then what is so different about embedding these subsidies in a statute that requires a supermajority to be revoked? See Posner & Vermeule, *supra* note 128, at 1705.

¹³¹ See David S. Law, *Constitutions*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* (Peter Cane & Herbert M. Kritzer eds., forthcoming 2010) (surveying empirical studies that collectively fail to demonstrate a strong correlation, let alone a causal relationship, between formal constitutional rules and actual government behavior).

¹³² See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

¹³³ H.L.A. Hart and subsequent legal positivists have had surprisingly little to say about what might motivate official and public acceptance of the ultimate rule(s) or practices of recognition. See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 93 (2001) (recognizing in passing a wide and open-ended set of reasons for why people might benefit from committing to a legal system, but bracketing this question as beside the point of positivist analysis).

adhering to stable constitutional rules or enforcing them against one another.¹³⁴

Indeed, on the Hartian view, if a critical mass of political actors does not remain committed to adhering to or upholding a constitutional rule or system, then that rule or system ceases to exist as law. It follows from this view that legal change can happen either within the boundaries of a legal system, in compliance with the secondary rules of recognition and change that determine intrasystemic legal validity, or outside of the system, when social and political practices shift to recognize different primary or secondary rules. Changes to constitutional law can be effected through the Article V amendment process, but they might also be effected through the formation of a new political consensus that some constitutional rule or right (possibly including Article V or, for that matter, the entire Constitution) has become outdated and is now best ignored.¹³⁵ Imagine that in the wake of a series of terrorist attacks, the President, acting without constitutional or congressional authorization, orders emergency detentions or quarantines. And suppose that most political and judicial officials, as well as supermajorities of the public, support these measures and accept their legitimacy. Under these circumstances, we might initially say that constitutional law was violated; or we might say that constitutional law was effectively amended to eliminate previously recognized constraints on presidential power, or to reconstitute the presidency in a somewhat different form. Regardless of how constitutional changes like this are conceptualized, the practical bottom line is that formal constitutional rules can constrain (or enduringly constitute) political actors only to the extent that political and social support for these rules is sustained.

These theoretical observations are borne out by constitutional practice. The formal Constitution is more than two centuries old, and its most important amendments date to the Reconstruction era. The decisions it embodies were made by people who had little in common with modern-day Americans — technologically, economically, politically, socially, or even morally. Not surprisingly, subsequent generations of Americans have been unwilling to live with these decisions and have found ways of revising them, usually without resorting to formal constitutional amendments.¹³⁶ These revisions have been accomplished

¹³⁴ See generally THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (bringing a Hartian perspective to bear on U.S. constitutional law and theory).

¹³⁵ See Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145 (Sanford Levinson ed., 1995).

¹³⁶ Moreover, many of the formal amendments that have been enacted appear to have accomplished little more than memorializing changes in constitutional norms that occurred independently of the text. For example, the Thirteenth Amendment recognized the abolition of slavery that

primarily by interpreting or supplementing the fixed provisions of the constitutional text to make them conform to contemporary political preferences. Thus, fundamental constitutional changes — such as the massive expansion of federal power, the rise of the administrative state, the increasing dominance of the President in foreign affairs, the development of extensive protections for free speech and “privacy,” and the emergence of the constitutional law of gender equality — have taken place without any change in the text of the Constitution.

In recognition of the divide between formal and functional constitutionalism, it has become conventional among constitutional theorists to distinguish the formal, big-C Constitution from the functional, small-c constitution — or, as it is sometimes called, the “constitution in practice.”¹³⁷ Unfortunately, there is no consensus on the precise definition or content of the small-c constitution; theorists offer different conceptions depending on their various understandings of what it means for a norm to be functionally “constitutional.” Most capaciously, some would view virtually any norm or practice relating to the structure, organization, or powers of government, or the workings of the political process more broadly, as constitutional — in the sense of “constituting the government.”¹³⁸ What seems distinctive about the laws and practices we take to be constitutional, however, is not just their relation to the workings of government, but their capacity to serve as rules of the political game. This capacity entails some combination of commitment and entrenchment. Political actors — officials or “We the People” more broadly — must commit themselves to rules and arrangements that stand above ordinary politics in the sense that they cannot be changed through ordinary political channels and are likely to prove relatively stable against ordinary political disagreement.¹³⁹

had been effected for all practical purposes by the Civil War. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459, 1478–81 (2001).

¹³⁷ See ELKINS ET AL., *supra* note 92, at 38–47.

¹³⁸ See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 417–20 (2007) (showing how a “constitutive” criterion for functional constitutionality might encompass any number of formally ordinary legal instruments and political practices, such as those creating and regulating the administrative state, the electoral system, the internal organization of Congress, political parties, and the like); see also KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 9 (1999) (defining “constitutional subject matter” to include “organic structures [of government], the distribution of political powers, individual and collective rights, structures of political participation/citizenship, jurisdiction, the role of domestic government, and international posture”).

¹³⁹ Thus, Mark Tushnet defines a “constitutional order” or “regime” as “a *reasonably stable* set of institutions through which a nation’s fundamental decisions are made over a *sustained period*, and the principles that guide those decisions. These institutions and principles provide the structure within which ordinary political contention occurs, which is why I call them *constitutional* rather than merely political.” MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 1 (2003) (first and second emphases added) (footnote omitted).

Accordingly, the most well-developed approaches to identifying the small-c constitution emphasize sociopolitical commitment and entrenchment. In Bruce Ackerman's view, for example, constitutional norms may be created or changed when the American public is roused to transcend ordinary politics and engage in a higher-order form of deliberation about the public good.¹⁴⁰ These norms may float free of any particular legal document or text, or they may be codified in formally nonconstitutional statutes such as the 1964 Civil Rights Act and the 1965 Voting Rights Act.¹⁴¹ They may also be reflected in "superprecedents" like *Brown v. Board of Education*.¹⁴² What is important about these norms is not just their special democratic pedigree, but their invulnerability to ordinary political revision or revocation. Likewise, *Brown's* status as a superprecedent is confirmed by the fact that "any lawyer or judge who questions *Brown's* legitimacy places himself outside the jurisprudential mainstream."¹⁴³ Taking a similar theoretical perspective, William Eskridge and John Ferejohn identify a class of quasi-constitutional "super-statutes," including the 1964 Civil Rights Act and the Endangered Species Act of 1973.¹⁴⁴ According to Eskridge and Ferejohn, these statutes take on properties of higher law in part because of their hyperdemocratic pedigree: super-statutes "acquire their normative force through a series of public confrontations and debates over time."¹⁴⁵ A further necessary criterion of super-statutedom is entrenchment: a super-statute is one that succeeds in "establish[ing] a new normative or institutional framework for state policy," "stick[ing] in the public culture," and exerting "a broad effect on the law."¹⁴⁶

Other theorists focus more single-mindedly on entrenchment as the primary distinguishing criterion of the small-c constitution. Writing in the 1930s, Karl Llewellyn defined our "working [c]onstitution" as the set of norms and institutional arrangements that political actors treat as "not subject to abrogation or material alteration."¹⁴⁷ Following in Llewellyn's footsteps, Ernest Young sets out to define constitutional law functionally instead of formally, and he concludes that the only interesting and distinctive sense in which some legal norms are "constitutional" is that they are "entrenched" against change.¹⁴⁸ Young points,

¹⁴⁰ See ACKERMAN, FOUNDATIONS, *supra* note 4; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

¹⁴¹ See Ackerman, *The Living Constitution*, *supra* note 140, at 1757–93.

¹⁴² 347 U.S. 483 (1954); see Ackerman, *The Living Constitution*, *supra* note 140, at 1752.

¹⁴³ Ackerman, *The Living Constitution*, *supra* note 140, at 1789.

¹⁴⁴ William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

¹⁴⁵ *Id.* at 1270.

¹⁴⁶ *Id.* at 1216.

¹⁴⁷ K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 28–29 (1934).

¹⁴⁸ Young, *supra* note 138, at 426.

for example, to the Social Security Act's promise of government financial support in old age, which he plausibly predicts is less likely to be "fundamentally altered or abolished over the next ten years" than canonical constitutional norms such as the rights to burn an American flag or to get an abortion.¹⁴⁹

These accounts helpfully emphasize the dependence of functional constitutionalism on political commitment and entrenchment, but they suffer from incompleteness or confusion at two levels. First, there is some misleading slippage in what it means to say that a norm is politically or constitutionally "entrenched." Young's prediction that Social Security entitlements will outlast abortion rights seems plausible, but predictions of sheer political or legal lifespan do not really speak to entrenchment. Legal and political rules and arrangements may last a long time not because they are unusually difficult to change, but simply because no one wants to change them. Criminal laws prohibiting murder, for example, have been part of our legal system since its inception, and it is hard to imagine they will ever disappear — not because they are politically or constitutionally entrenched, but simply because they have remained consistent with the first-order political preferences of a supermajority of citizens. Likewise, it is hard to see how the major shifts in public opinion that Ackerman identifies as legitimate constitutional amendments have anything to do with political or constitutional entrenchment. The revolutionary changes in constitutional understandings that occurred during Reconstruction and the New Deal have endured through the present, but not because they have been somehow entrenched against political opposition. They have endured because there has been no political opposition. Most people today share the views of Reconstruction Republicans and New Deal Democrats with respect to the wrongness of race discrimination and the desirability of expansive exercises of federal and executive power. If popular majorities ever change their minds about these issues, then Ackerman's "constitutional" commitments will dissolve.¹⁵⁰ There has been no obvious process of political entrenchment that would make these commitments more stable than the first-order political preferences they reflect.

The second problem with these accounts relates to the relationship, or lack thereof, between entrenchment and other markers of constitutional status. Young is right to point to Social Security as an example of a politically entrenched norm, inasmuch as the program has become insulated against opposition by positive political feedback of the sort

¹⁴⁹ *Id.* at 427.

¹⁵⁰ In fact, during periods when these commitments were not embraced by politically empowered majorities, such as the post-Reconstruction era with respect to race, they ceased to be part of the operational constitution.

described above.¹⁵¹ But it seems doubtful that entrenchment in this sense should count as a *sufficient* criterion of constitutional status. After all, as the discussion in section II.B highlights, the home mortgage interest deduction, antismoking regulations, tort reform, and any number of other seemingly prosaic laws and policies are politically self-entrenching in much the same way Social Security is.¹⁵² Political entrenchment alone seems inadequate to capture what theorists intuitively see as special about those statutes and precedents they are inclined to regard as constitutional.

What Ackerman and other theorists emphasize instead is the special democratic pedigree of those political changes and enactments that might count as constitutional. There is certainly a case to be made that the heightened public attention and democratic deliberation that accompany certain political changes and enactments should invest them with normative priority over the products of ordinary politics. But the hyperdemocratic process through which Ackerman's extracanonical constitutional amendments are enacted does not tell us anything about their entrenchment against ordinary political change. Ackerman seems to think that enactment pedigree and entrenchment will somehow go hand in hand:

To be sure, the leading principles of the Civil Rights Act of 1964 could be repealed by a simple majority of Congress, if supported by the President. But this is also true of *Marbury v. Madison*: a sufficiently determined national majority could decisively undermine the current practice of judicial review. Yet this formal point does not deprive *Marbury* of a canonical place in our tradition. As with *Marbury*, we all recognize that an all-out assault on the Civil Rights Act, or the Voting Rights Act, could not occur without a massive effort comparable to the political exertions that created these landmarks in the first place.¹⁵³

Yet it is hard to see what effort would be required beyond that of ordinary, majoritarian politics. Absent some mechanism of political entrenchment that is nowhere visible in Ackerman's account, the most democratically and constitutionally sacrosanct decisions of the big-P

¹⁵¹ See *supra* p. 687. Here again, we should recognize the possibility that Social Security is hard to change simply because political support for the goal of providing financial security to people in old age has not diminished since the program's inception in 1935. Admittedly, the conceptual difference between persistent popularity of this kind and genuine political entrenchment can be slippery. Suppose Social Security persists in part because it has *become* more popular, as Americans have learned from their experience under the program about the solidaristic and other benefits of universally framed welfare programs. That dynamic would be an instance of political entrenchment through adaptation and endogenous preference change, as opposed to the kind of popularity that might persist or even grow for reasons exogenous to the enactment of the law itself — though disentangling causation along these lines is obviously difficult.

¹⁵² See *supra* pp. 687–90.

¹⁵³ Ackerman, *supra* note 140, at 1788.

People will be perpetually at the mercy of the debased politics of the small-p people.¹⁵⁴

In sum, it is hard to see any connection between the political norms that might be deemed constitutional based on their enactment process or democratic pedigree and the norms that are most deeply entrenched. If constitutional theorists have not been clear on the disconnect, it is painfully familiar to politicians and political reformers working closer to the ground. Periodically in American politics it happens that broad-based, ideologically committed political mobilization leads to significant general-interest policy reform. But activist engagement is invariably transitory: even, or perhaps especially, the most committed and ideologically high-minded social movements cannot stay mobilized for very long. Concentrated groups that oppose reform, in contrast, tend to have greater staying power. Consequently, in many cases interest groups succeed in retrenching reforms that were enacted by broad, bipartisan coalitions after the social movements that got the reforms enacted have left the stage.¹⁵⁵

Here again, nothing about the process or pedigree of enactment guarantees the sustainability of general-interest reforms. What matters, instead, is that the downstream political process is structured in a way that gives residual as well as newly created supporters of these reforms sufficient political power to fend off attacks from opponents. To repeat an example,¹⁵⁶ the success of climate change regulation will depend as much on its longer-term political viability as on the success of the social movement that pushes the regulation through. No doubt the environmental movement itself will sustain some measure of ongoing support through the lasting changes in behavior, attitudes, and expectations it has generated. But unless climate change regulation also cultivates an environmentally indifferent but economically invested mar-

¹⁵⁴ In his earlier work, Ackerman cast courts in the “preservationist” role of “block[ing] efforts to repeal established constitutional principles by the simple expedient of passing a normal statute,” thus forcing constitutional reformers “to move onto the higher lawmaking track if they wish to question the judgments previously made by We the People.” ACKERMAN, FOUNDATIONS, *supra* note 4, at 10. Unfortunately, Ackerman never explained what institutional incentives judges would have to play this role, or how they would be able to resist ordinary majoritarian political pressures for change. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1083 (2001) (criticizing Ackerman for ignoring the possibility of “constitutional retrenchment” when the “dominant party starts losing Presidential elections,” and thus “its grip on control of the judiciary”); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1288 (2004) (“[Ackerman’s] judges would have to be superhuman to enforce a past set of commitments against a government set on its immediate policy.”); see also *infra* section IV.B, pp. 733–44.

¹⁵⁵ This recurring dynamic is the focus of PATASHNIK, *supra* note 99. The book presents a number of case studies, including the Tax Reform Act of 1986, *id.* at 35–54, and the 1996 “Freedom to Farm” law, *id.* at 55–71. It is not difficult to envision a similar dynamic operating with respect to, for instance, the 2010 financial reform legislation.

¹⁵⁶ See *supra* p. 688.

ket clientele (like the economic beneficiaries of a cap-and-trade system), its prospects of outlasting the warm glow of initial public approval seem dim. Political sustainability may be a prerequisite for environmental sustainability.

Constitutional stability, too, depends on the political sustainability of constitutional commitments. Precisely which political commitments should be regarded as truly “constitutional” remains a matter of theoretical (or perhaps just definitional) debate. For present purposes, the important point is that any type of rule or arrangement — nominally constitutional or not — that aspires to constitute a relatively stable system of politics or constrain actors within that system will succeed only by virtue of sustained social and political support.

B. Constitutions as Institutions

In successful constitutional systems such as the United States’s, social and political support for constitutional rules — of both the big-C and little-c varieties — has in fact been sustained. To the extent that constitutional law does, in fact, enduringly constitute and constrain political actors, we should wonder how this state of affairs becomes possible. The answer is by no means obvious. *Within* our constitutional system, political disagreement, conflict, and competition are routine facts of life. Every important issue generates winners and losers. Constitutional stability depends on the willingness of the losers to limit their competitive efforts to the ordinary processes of political decisionmaking. We should wonder, however, why intensely committed groups do not carry the battle beyond the bounds of ordinary politics to the constitutional level. Why would political losers docilely accept constitutionally prescribed political decisionmaking processes and limitations on outcomes that will predictably lead to their defeat? We can understand the reasons why losing teams in games such as baseball or chess remain committed to the “constitutional” rules of the game. Politics is different, however: the stakes are higher, and the players are much less interested in the intrinsic enjoyment of playing the game than they are in achieving outcomes that are largely independent of existing rule structures. Under these conditions, we might expect any two-level structure that separates the constitutional rules of the political game from ordinary moves within that game to collapse into undifferentiated sociopolitical conflict.¹⁵⁷

Notice the analogy to Madisonian and modern theories of political commitment by means of stable institutions. The system of constitutional law itself is cast in the role of a political institution, one that is

¹⁵⁷ For an influential conceptualization of constitutional law as the second-level rules of a first-level political game, see BRENNAN & BUCHANAN, *supra* note 124, at 8–9, 19.

capable of constraining and channeling the behavior of political actors. Left unexplained, however, is the source of constitutional law's institutional stability. The possibility of constitutional constraint rests on a sustained sociopolitical commitment to, or the enduring sociopolitical entrenchment of, constitutional law. So how does constitutional law become sufficiently entrenched that it can underwrite political commitments more broadly? What would motivate social and political actors to sustain a second-order commitment to the constitutional system, even when that system prevents them from achieving their first-order political interests (noble or ignoble)?

One approach to answering these questions follows a long tradition in jurisprudence and political philosophy of positing an intrinsic moral obligation to obey the law. In particular, for many constitutional lawyers and theorists, the consent of "We the People" to the original Constitution and its amendments creates ongoing moral obligations to comply with constitutional law. This contractarian view of constitutional commitment has been central to Americans' constitutional self-understanding since the Founding.¹⁵⁸ Of course, the difficulties of attempting to derive present obligations from the consent of some fraction of our long-deceased ancestors have also been well known since the Founding.¹⁵⁹ Other attempts to derive a moral obligation to comply with constitutional (or other types of) law — based on hypothetical consent, the nature of political association,¹⁶⁰ a "duty of fair play,"¹⁶¹ or the like — are problematic in their own ways.¹⁶²

What is important for present purposes, however, is not whether a moral obligation of constitutional compliance exists, but the extent to which real-life officials and citizens are motivated by the moral pull of legal obedience. The design of most *nonconstitutional* legal regimes

¹⁵⁸ See Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 655–60 (2008) (surveying the contractarian account of U.S. constitutionalism).

¹⁵⁹ Thomas Jefferson famously argued to Madison that "no society can make a perpetual constitution The earth belongs always to the living generation." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 6 THE WORKS OF THOMAS JEFFERSON 3, 8–9 (Paul Leicester Ford ed., 1904).

¹⁶⁰ See RONALD DWORKIN, *LAW'S EMPIRE* 206–08 (1986).

¹⁶¹ See John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (Sidney Hook ed., 1964).

¹⁶² For a skeptical survey of possible justifications for the moral legitimacy of the Constitution and a corresponding duty to comply with it, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1796–1813 (2005). For a skeptical survey of approaches to legal obligation more broadly, see Leslie Green, *Legal Obligation and Authority*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2003), <http://plato.stanford.edu/entries/legal-obligation>. Some political philosophers conclude that there is no general moral obligation to obey the law. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 233–49 (2d ed. 2009). See generally A. JOHN SIMMONS, *JUSTIFICATION AND LEGITIMACY* (2001); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (1970).

seems to reflect the view that moral obligation is not enough to secure sufficient legal compliance and must be supplemented by the threat of coercive sanctions (a threat that constitutional law lacks). This view undoubtedly reflects some measure of empirical skepticism about the strength, consistency, or distribution of moral motivations generally.¹⁶³ But it must also reflect the recognition that those who are inclined to do the right thing will not necessarily prioritize the rightness of legal compliance over the rightness (real or perceived) of their first-order political and policy goals when the two conflict. President Lincoln famously prioritized saving the Union over complying with constitutional rules relating to the power of the presidency — a choice that many officials and citizens would continue to endorse as obviously right, both prudentially and morally.

For all of these reasons, we might doubt whether moral obligation alone could be a sufficient explanation of real-world constitutional compliance.¹⁶⁴ Madison was famously dismissive of the possibility: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”¹⁶⁵ But even those who are more sanguine about the intrinsic motivational force of legal obligation might do well to explore other, perhaps complementary, approaches to understanding the efficacy of constitutional law.

The general logic of political commitment and entrenchment suggests one such approach. If the benefits of cooperating through or coordinating on constitutional rules and arrangements exceed the costs of constitutional constraints, then social and political actors will have an incentive to commit themselves to upholding and working within the system of constitutional law. And once these actors invest resources and structure their activities (and even identities) around a constitutional system of government, they will have a self-reinforcing set of incentives to sustain that system.

Constitutional and political theorists have taken only the most preliminary steps toward developing such an account of politically self-enforcing constitutionalism. Most significantly, some theorists have recognized that the efficacy and stability of constitutions must rest

¹⁶³ Oliver Wendell Holmes famously argued that law was designed for the amoral “bad man.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹⁶⁴ See Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action? (The Sibley Lecture)*, 45 GA. L. REV. (forthcoming 2010).

¹⁶⁵ THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 319; see also *supra* note 12. Kant’s similar but stronger aspiration was to design a constitution that could make even “a nation of devils . . . inhibit one another in such a way that the public conduct of the citizens will be the same as if they did not have such evil attitudes.” IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT’S POLITICAL WRITINGS 93, 112–13 (Hans Reiss ed., H.B. Nisbet trans., 1970).

heavily on the political logic of coordination.¹⁶⁶ Compliance with constitutional law might follow from the self-interested calculation of most political actors that working within a common set of constitutional rules and institutions creates greater benefits than costs. Constitutional arrangements that successfully establish a functioning government — one that can make and enforce laws, maintain order, foster economic prosperity, and provide public goods — are enormously beneficial. Given these benefits, even if some (or all) groups would prefer a different arrangement, the inevitable risks and transition costs of upending a workable constitutional order will provide considerable stability to the status quo. Moreover, just by virtue of its status quo position, the existing constitutional order will enjoy a special salience that conceivably preferable alternatives will lack. Maintaining coordination around the existing, and therefore focal, order will always be much easier than attempting to recoordinate around some alternative constitutional regime.

Coordination offers an especially perspicacious explanation of the ongoing relevance of the big-C Constitution. As noted in the previous section, much of what has been understood to be small-c constitutional in law and politics has floated free from the big-C constitutional text — or is tethered only by a tenuous interpretive relationship.¹⁶⁷ Still, it is an indisputable feature of constitutional practice that the text is taken to be authoritative within its domain. That domain is limited, but significant. A number of reasonably clear and relatively specific provisions of the text of the 1787 Constitution and its formal amendments are universally understood to “mean what they say” and are accepted as inviolable.¹⁶⁸ Nobody disagrees about the age requirements or term lengths for Presidents and members of Congress, the number of sena-

¹⁶⁶ The most sustained work on constitutionalism as coordination is RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 82–140 (1999). See also Eric A. Posner, *Constitutional Evolution* (unpublished manuscript) (on file with the Harvard Law School Library) (modeling constitutional rules as coordination equilibria).

¹⁶⁷ What counts as an interpretation of the constitutional text as opposed to a nontextual norm or convention depends on the operative theory of interpretation. Constitutional lawyers, judges, and theorists perpetually disagree about what that theory should be — whether interpreters should look to original understandings or expectations, subsequent historical understandings, traditional practices, moral philosophical analyses, functional inferences from our basic structure of government, or other sources of constitutional meaning — and therefore about which norms count as valid interpretations of the text and which should be understood as extratextual. Fortunately, nothing in the present discussion turns on the existence or location of the line between interpretation and extratextualism. For an introduction to the conceptual debate, see generally Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975).

¹⁶⁸ Here again, which provisions are understood to be “reasonably clear and specific” and what these provisions “mean” or “say” depend on the operative approach to interpretation. Despite deep disagreements over how constitutional interpretation should proceed, however, there does appear to be overlapping consensus on the “plain meaning” of a fair number of constitutional provisions. See Frederick Schauer, *Easy Cases*, 58 *S. CAL. L. REV.* 399 (1985).

tors per state, or the existence of a Supreme Court. More broadly, our commitment to the text creates a discursive requirement that all constitutional norms and arguments be couched as “interpretations” of the big-C Constitution. Given some level of background agreement on what counts as a plausible interpretation, even the more abstract, interpretively debatable provisions of the text can serve to narrow the range of political disagreement on some issues and to rule some options off the table.¹⁶⁹

One straightforward explanation for the ongoing authority of the constitutional text follows from the logic of coordination. As we have seen, writing down constitutional rules is neither necessary nor sufficient to establish an efficacious system of constitutional law. Some countries have a constitutional system that is based largely on unwritten conventions and not on a single, sanctified text.¹⁷⁰ Other countries have official, parchment constitutions that are mostly or entirely ignored. A written constitution can, however, help to coordinate social and political actors on a common plan of government, allowing political decisionmaking to proceed without continual fighting about the ground rules.¹⁷¹

A number of features of the U.S. Constitution have made it particularly well suited to playing this role. The Constitution’s self-conscious design as a comprehensive plan of government, the protracted public deliberation surrounding its enactment, and the claim (if not the reality) of supermajoritarian popular support all must have contributed to making the document highly salient to broad swaths of the American public. And the Constitution has remained highly salient, owing to its symbolic connection to the birth of the nation, its subsequent cultural canonization as the embodiment of our most deeply held values, and its track record of successfully asserted authority. Whatever the historical and cultural sources, it seems clear enough that the Constitution has achieved the kind of sociological focality that facilitates political coordination.

What is more, the U.S. Constitution and its amendments seem to have been drafted, or interpreted, in a way that makes them especially well suited to serving as a focal point for coordination. The constitutional text is quite specific on many low-stakes issues, where agreement is more important to most political actors than achieving any particular outcome. Constitutional rules setting age requirements for

¹⁶⁹ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 906–08 (1996).

¹⁷⁰ The constitutional system of the United Kingdom fits this description. See COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION* 3–6 (6th ed. 2007).

¹⁷¹ See John M. Carey, *Parchment, Equilibria, and Institutions*, 33 COMP. POL. STUD. 735 (2000); Strauss, *supra* note 169, at 907–11.

Presidents, the end dates of their terms in office, and the order of presidential succession in case they do not make it to that date are all readily analogized to rules of the road, for which coordination takes priority over content. On the other hand, the constitutional text retreats to generality and abstraction on many high-stakes issues, where political actors will be less willing to compromise on outcomes for the sake of agreement.¹⁷² Or, perhaps more accurately, the constitutional text is *interpreted* specifically and literally when it comes to lower-stakes issues but read as open-ended when the stakes get higher. Under either description, it is a striking feature of American constitutional practice that “the text matters most for the least important questions.”¹⁷³ For example, courts and political actors turn to the text to “formalistically” resolve separation of powers disputes that have low or uncertain stakes but abandon the text for “functional” analyses of disputes with predictably serious political consequences.¹⁷⁴ This pattern is consistent with a coordination-based account according to which the text is valued by political actors because — but just to the extent that — it reduces decision costs more than it increases the costs of undesirable substantive outcomes.

This account helps explain both the ongoing authority of the constitutional text and the limits of that authority. The utility of the Constitution in providing focal points for coordination insulates the constitutional text from political disagreement. Intuitively,

[e]very time the text is ignored or obviously defied, its ability to serve . . . as a focal point[] is weakened. . . . [I]f one person cheats, by failing to follow the text, others are more likely to cheat too, and soon the ability of the text to coordinate behavior will be lost, to everyone’s detriment.¹⁷⁵

But the benefits of coordinating around the constitutional text will take us only so far. Where the substantive stakes of disagreements are high, political actors will not accept text-based settlements just because they are easily available. Even seemingly clear and specific textual provisions can be interpreted away or around when powerful political actors see a significant advantage in doing so and are willing to sacrifice the benefits of text-based coordination.¹⁷⁶ The constitutional text

¹⁷² See David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1741–44 (2003).

¹⁷³ Strauss, *supra* note 169, at 916; see also *id.* at 916–19.

¹⁷⁴ See Strauss, *supra* note 172, at 1741–43.

¹⁷⁵ *Id.* at 1734–35.

¹⁷⁶ Departing from the text will not necessarily sacrifice the benefits of constitutional coordination more generally, since there are other potential focal points besides the constitutional text: judicial precedents, well-established practices, and the status quo, among others.

operates as more than a parchment barrier, but only in certain contexts is it sufficiently concrete to withstand political assault.¹⁷⁷

Beyond coordination, political scientists and constitutional theorists have also recognized that game-theoretical logics of repeat play, reciprocity, and reputation can provide further support for constitutional commitment. Here the core idea is that politically powerful groups may be willing to trade their short-term interests for the longer-term benefits of cooperating with other groups in accordance with stable rules. Such accounts have been offered to explain compliance with particular rules or rights. For example, Democrats in control of the national government may refrain from suppressing Republican political speech on the tacit understanding that Republicans will similarly respect free speech when they are in control; or states may refrain from protectionism (or submit to congressional or judicial policing of trade regulation) in order to avoid the noncooperative equilibrium of trade warfare.¹⁷⁸ More broadly, commentators have invoked reciprocity to explain the “self-enforcing” stability of constitutional “pacts,” ranging from the sectional balance rule in the antebellum Senate to the Constitution in its entirety.¹⁷⁹ Adherence to such pacts can be modeled as an iterated game in which two or more social groups tacitly cooperate by resisting transgressions by government against any of the groups.¹⁸⁰ But the basic model can be extended beyond the agency context to encompass cooperative relationships between and among factions, where the cooperative equilibrium is either set by or definitive of constitutional rules.

Both of these game-theoretical explanations of constitutional compliance and commitment — coordination and reciprocal cooperation — stem from the powerful insight that legal regimes are capable of constraining powerful political actors because they are also, and even more so, *enabling* for these actors.¹⁸¹ Constitutional rules and ar-

¹⁷⁷ Of course, political actors will often have further reasons for accepting constitutional rules and arrangements that correspond to the text of the Constitution: these rules and arrangements may be coincident with their substantive political interests or may have become politically entrenched through any of the mechanisms described above and elaborated below. But the same may be true of those rules and arrangements that cannot be plausibly derived from the text but are widely accepted as part of little-c constitutional law. We should be careful to distinguish the political entrenchment and stability of the big-C constitutional text from that of the rules and arrangements that correspond to textual provisions.

¹⁷⁸ See Edmund W. Kitch, *Regulation and the American Common Market*, in REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 9, 9–19 (A. Dan Tarlock ed., 1981).

¹⁷⁹ See Weingast, *supra* note 83; Barry R. Weingast, Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century (Nov. 2005) (unpublished manuscript) (on file with the Harvard Law School Library), *available at* <http://ssrn.com/abstract=1153527>.

¹⁸⁰ See Weingast, *supra* note 83, at 246–51.

¹⁸¹ See HOLMES, *supra* note 3, at 6–8.

rangements that create self-constraints on the powerful or mutual constraints on contending groups can be enabling, or beneficial, in numerous ways. The benefits of constraint help explain why, throughout history, groups with the preconstitutional capacity to dominate through force alone have often found it in their interest to submit to self-imposed constitutional restraints on their power.¹⁸² Constitutional restraints may serve to fend off revolutions or to provide “insurance” to current holders of power by offering them reciprocal protection if they find themselves on the receiving end of domination. Constitutionally predictable and limited government intervention makes possible economic growth and prosperity, military organization and mobilization, and the accumulation of the massive amounts of knowledge necessary to manage a large society. And again, most fundamentally, the very possibility of collective self-rule for large populations depends on a relatively stable constitutional plan of government. The absence of constitutional stability — leaving nothing but chaos, economic stagnation, civil war, and vulnerability to external conquest — will be enormously costly to most if not all.¹⁸³

To the extent that constitutionalism is beneficial to political actors for any of these reasons, they will have an incentive to adhere to the constitutional bargain rather than risk the loss of these benefits by defecting. So long as the benefits to a critical mass of officials and citizens of cooperating or coordinating on constitutional terms are greater than the costs of the concomitant constraints, constitutional arrangements will remain in equilibrium. Even the relative losers in a constitutional bargain will prefer to stick with the current arrangement if the expected costs of attempting to renegotiate or to go their own way are higher than the expected costs of ongoing compliance.¹⁸⁴ In the early years of the United States, for example, the Antifederalists rather quickly came to accept a constitution they had vehemently opposed, in large part because of the calculation that even a bad law was better than lawlessness.¹⁸⁵

¹⁸² See generally Stephen Holmes, Parables of Self-Restraint (unpublished manuscript) (on file with the Harvard Law School Library), available at http://www.law.nyu.edu/ecm_dlvi1/groups/public/@nyu_law_website__academics__colloquia__constitutional_theory/documents/documents/ecm_pro_o63857.pdf.

¹⁸³ See *id.*

¹⁸⁴ The prospects of success for groups that defect from constitutional bargains will depend on factors such as the size, power (economic or military), and capacity for independence of the relevant group, all of which will affect their bargaining power in renegotiations.

¹⁸⁵ See DAVID J. SIEMERS, RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME, at xiv–xvii (2002) (describing how “[f]ear induced stability” in the early Republic, *id.* at xvii). Of course, there are limits to how bad the bargain can be; at some point even violent secession becomes preferable. After the election of 1860, for example, Southerners determined that the costs of breaking from the Union, including both the short-term

Once a constitutional plan of government has been put in place, moreover, we should expect its political stability to be enhanced over time through the other mechanisms of political entrenchment. Asset-specific investments will give political actors a stake in constitutional arrangements, and positive political feedback will increase the relative power of those actors who benefit from those arrangements. Thus, another reason the Antifederalists came to accept the Constitution is that they were able to exercise considerable power under the constitutional scheme of government — culminating in the triumph of their coalition with disaffected Federalists (including Madison) under the auspices of the Republican Party in 1800.¹⁸⁶ And, at the same time, the victorious Federalists suppressed residual resistance to the Constitution and the potentially powerful federal government it created by wielding the quickly expanding powers of that very government.¹⁸⁷ Self-reinforcing political dynamics like these will be pervasive in any constitutional system and will become increasingly significant over time, as political actors organize themselves around, and are selectively empowered by, constitutional rules. Political parties, for instance, will shape themselves to features of the constitutional structure such as federalism, presidentialism, and the electoral system.¹⁸⁸ Parties that have been successful within a particular structure of government will become deeply invested in preserving that structure and, by virtue of their early success, will be well situated to do so. The same will be true of interest groups, government officials, and other political and social actors who have adapted themselves to and thrived within an existing constitutional framework. Constitutional frameworks thus have a tendency to build their own political constituencies.¹⁸⁹

In passing, this discussion may seem to suggest that constitutional systems will tend to become more politically stable with age. It is important to understand why that prediction does not necessarily follow.¹⁹⁰ Constitutions will indeed garner greater political support over

costs of war and the longer-term costs of foregone cooperation (particularly free trade) with the North, were still less than the anticipated costs of being forced to give up slavery.

¹⁸⁶ See *id.* at 193–215.

¹⁸⁷ Examples include the Washington Administration's suppression of the Whiskey Rebellion and the Adams Administration's use of the 1798 Sedition Act to suppress Jeffersonian opposition. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 461–88, 694–706 (1993). Another Federalist strategy was to use the appointment power of the federal government to generate political support through patronage. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 107–08 (2009).

¹⁸⁸ See sources cited *supra* note 92 and accompanying text. For a description of how political parties in the United States emerged and developed around the constitutional structure of government, see Larry D. Kramer, *After the Founding: Political Parties and the Constitution* (unpublished manuscript) (on file with the Harvard Law School Library).

¹⁸⁹ See ELKINS ET AL., *supra* note 92, at 19–20.

¹⁹⁰ See *id.* at 90–91.

time as a result of self-stabilizing coordination, cooperation, specific investments, and political feedback effects. Consequently, all else equal, older constitutions will be more difficult to revise or reject than younger ones. But all else will not be equal. As constitutions age, we should also expect them to lose their connection to the functional and political interests that brought them into existence. Constitutional arrangements that, at the time of their inception, benefited some or all groups in society or successfully compromised political disagreements will increasingly become politically arbitrary and functionally obsolete as politics and society change around them. Political pressure will grow for constitutional reform or replacement to better match constitutional rules and arrangements with prevailing patterns of political power and social demands. As constitutions age, then, the stabilizing effects of entrenchment compete with the destabilizing effects of obsolescence. Without knowing the magnitude of these competing effects, we have no basis for predicting whether constitutions will tend to become more or less politically stable over time.

We can, however, predict a general paradox of constitutionalism: enduring constitutional rules and arrangements will tend to become both increasingly dysfunctional and increasingly difficult to change over time. This paradox arises because the political dynamics that entrench institutional arrangements operate independently of both the initial motives for establishing these arrangements and the arrangements' ongoing functional justifications.¹⁹¹ As a result, constitutional rules and arrangements that were initially created to serve the interests of the politically powerful or of society more broadly may persist long after, and notwithstanding the fact that, they have ceased to serve any of these originating interests. For example, the U.S. Framers' reasons for designing the Senate as they did — providing representation for states as equal sovereigns, providing an elite check on democratic lawmaking, and appeasing the small states whose delegates were threatening to walk out of the Philadelphia Convention¹⁹² — have little contemporary relevance, and many believe the institution has become a functional impediment to good government.¹⁹³ Yet the political odds of substantially reforming or scrapping such a deeply entrenched institution, one that has become historically focal and defended by powerful groups of beneficiaries, seem vanishingly small.

¹⁹¹ Recall the definitional distinction between political commitment, which entails intentionality (and therefore, at least from someone's perspective, functional efficacy), and entrenchment, which does not necessarily imply either intentionality or functional efficacy. *See supra* p. 672. The obsolescence of the political commitments embodied in constitutions does not disentrench them.

¹⁹² SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 62 (2006).

¹⁹³ *See id.* at 25–38, 49–62.

The same combination of arguable obsolescence and entrenchment might characterize the American system of separation of powers more broadly, the Electoral College, federalism, and many of the other basic structural features of the U.S. constitutional design.¹⁹⁴ Much of the constitutional system we have inherited has long outlived its original purposes and political motivations; it would not be recreated today if we were writing on a blank political slate.¹⁹⁵ Many constitutional rules and arrangements continue to exist only because of a functionally indifferent, path-dependent process of political entrenchment.

To summarize, we now possess the resources to sketch out an explanation of the institutional stability of a system of constitutional law. Conceived as an institution in its own right, constitutional law creates an elaborate political decisionmaking process that prospectively bundles a very large number of outcomes behind a thick veil of uncertainty. We should expect the entrenchment dynamics operating on this institutionalized system of government to be quite powerful. The high fixed costs and huge benefits of coordinating or cooperating under a constitutional plan of government will give political actors a strong incentive to work within a constitutional system and a reason to incur significant costs to avoid systemic collapse. Not only will political actors invest in the constitutional system in myriad ways, but their very identities will in many cases be created by the constitutional system itself. The constitutional system will also have large and pervasive effects on the formation, composition, and political power and influence of various groups and will therefore generate a great deal of positive political feedback. Through all of these mechanisms, systems of constitutional law will tend to be self-entrenching, accumulating greater political support over time.

* * * *

The challenge is to make this abstract understanding of constitutional commitment and entrenchment more concrete: to better understand not just the general mechanisms of political constraint, commitment, and entrenchment, but also how they have worked, more or less effectively, in real-world systems of constitutional law such as that of the United States. A good starting point is to recognize, with Madison,

¹⁹⁴ For general criticisms of the constitutional structure of government, see ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2d ed. 2003); and LEVINSON, *supra* note 192.

¹⁹⁵ The same is true of nonconstitutional law. More than one-tenth of laws in effect in Britain at the beginning of the 1980s had been enacted before the reign of Queen Victoria in 1837. See Richard Rose, *Inheritance Before Choice in Public Policy*, 2 J. THEORETICAL POL. 263, 266 (1990).

that constitutional law does not stand or fall, endure or fail, as a single package. Some parts of the constitutional system are more securely constraining and deeply entrenched against change than others.

Thus, there are many contexts in which the viability of certain constitutional rules and arrangements is called into question even while others remain beyond controversy. The question, for instance, of whether or how constitutional rights can constrain a President in times of emergency has real-world resonance. But the question presupposes a deeper constitutional consensus on the *existence* of a President, and perhaps also of a Supreme Court and a Congress, possessing widely agreed-upon institutional structures and powers and operating within a widely agreed-upon system of political organization and decision-making. We would do well to understand why the threat of a President refusing to comply with (or interpreting away) the constitutional prohibition on suspending habeas corpus has been a real one, even while the threat that a President will suspend elections or shut down Congress has remained off the table.

The next Part takes some preliminary steps in that direction, focusing on two important aspects of the U.S. constitutional system that have seemed to achieve a higher order of political stability. As the examples above suggest, and as Madison predicted, many of the institutional arrangements that make up the constitutional structure of government appear to be less susceptible to political revision or override than rights and other constitutional rules. And one particular structural feature, originally peripheral to the Madisonian design, has emerged as a central focus of constitutionalism in the United States and other countries: judicial review. The next Part attempts to assess and explain the apparently greater stability of our constitutional (sub)commitments to these institutions.

IV. THE INSTITUTIONAL CORE OF CONSTITUTIONALISM

As we have seen, it is a foundational premise of Madisonian theory that not all of constitutional law is created equal — or is equally sustainable. Recall that Madison's strategy of constitutional commitment was to leverage the relative stability of structural arrangements to stack the deck in favor of preferred political values and outcomes. Constitutional theory and practice since the Founding suggest that Madison was on to something. It has become an article of conventional wisdom that constitutional structure — the set of institutions and political decisionmaking processes that create our basic framework of government — is durable and constraining in a way that other constitutional rules, particularly those specifying rights, are not. Moreover, the institution of judicial review has developed into a relatively stable and centrally important “structural” commitment device, seemingly capable of creating binding constitutional rights and rules.

Thus, John Ferejohn and Larry Sager speak for many constitutional lawyers and theorists when they conceptualize structural constitutional provisions relating to “procedures or mechanisms of governance” — including judicial review — as “external” commitment devices that prevent majorities from reneging on their “internal” commitments to constitutional rights.¹⁹⁶ Of course, this constitutional bootstrapping strategy can work only if structural commitments are more stable than the rights they are supposed to protect. Ferejohn and Sager (among others) embrace this Madisonian premise. They view structural rules and arrangements, in contrast to politically precarious rights, as “substantially self-executing” because structural dictates somehow “inspire reflexive conformity with their stipulations.”¹⁹⁷

While these assumptions have been central to constitutional thought since Madison, the reasoning behind them has never been clear. What makes structural provisions of the Constitution more durable, stable, or self-enforcing than rights provisions? What gives the institution of judicial review, in particular, more political traction than the constitutional rules and rights it is supposed to enforce? Do these claims even have any empirical veracity? This Part attempts to make some progress in answering these questions, bringing to bear the advantages of both a better understanding of political commitment and entrenchment and a contemporary perspective on constitutional history.

A. *Constitutional Structure (Versus Rights)*

A conventional way of viewing the architecture of the Constitution distinguishes “structure” from “rights.” The structural parts of the Constitution create the institutional infrastructure of government and prescribe political decisionmaking processes. Rights are conceived as substantive constraints on the exercise of governmental power through these structurally prescribed processes. It is also conventional to recognize, with Madison, that structure and rights can be functional substitutes, since at least some forms of bad behavior by government that rights forbid can also be prevented by structural arrangements that make it politically difficult or undesirable for officials to act in these ways.¹⁹⁸

More interesting is Madison’s stronger claim that indirect, structural protections of rights will work *better* than attempts at direct protection, because structural arrangements will be more politically sustain-

¹⁹⁶ John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1945 (2003).

¹⁹⁷ *Id.* at 1948–49.

¹⁹⁸ See Graber, *supra* note 39.

able than “parchment” rights.¹⁹⁹ This claim, too, has been embraced by contemporary constitutional theorists, who have seen its apparent confirmation over the course of U.S. constitutional history. Thus, John Hart Ely celebrates the Madisonian architecture of the U.S. Constitution, which is “overwhelmingly concerned” with the processes of political decisionmaking, leaving “the selection and accommodation of substantive values . . . almost entirely to the political process.”²⁰⁰ In Ely’s view, “the few attempts the various framers *have* made to freeze substantive values by designating them for special protection in the document have been ill-fated, normally resulting in repeal, either officially or by interpretative pretense,”²⁰¹ and he concludes that “preserving fundamental values is not an appropriate constitutional task.”²⁰² Ely is joined by many others who share the Madisonian perspective that the truly essential, and lasting, part of the Constitution “is a design of government with powers to act and a structure arranged to make it act wisely and responsibly. It is in that design, not in its preamble or its epilogue, that the security of American civil and political liberty lies.”²⁰³

It must be noted that for all their confidence in the relative durability of structure, constitutional scholars have never provided a thoroughgoing demonstration that structure *has*, in fact, proved more stable than rights over the course of constitutional history. Certainly that historical judgment is not as straightforward as Ely and others suggest.²⁰⁴ Some rights appear to have maintained their core content over

¹⁹⁹ See *supra* notes 15–28 and accompanying text. A further argument made by Federalists against rights and in favor of structure was that the scope of rights could not be clearly specified in advance. See THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 9, at 513 (“Who can give [a right] any definition which would not leave the utmost latitude for evasion?”).

²⁰⁰ ELY, *supra* note 5, at 87.

²⁰¹ *Id.* at 88.

²⁰² *Id.*

²⁰³ HERBERT J. STORING, *The Constitution and the Bill of Rights*, in TOWARD A MORE PERFECT UNION 108, 128 (Joseph M. Bessette ed., 1995); see also *supra* p. 717. For another example, consider Sanford Levinson’s argument that a number of structural features of the Constitution (including bicameralism, equal state representation in the Senate, and the Electoral College system) are dysfunctional, yet also fixed in place by the Constitution and very difficult to change. See LEVINSON, *supra* note 192, at 29–38, 49–62, 81–97. Levinson views constitutional rights, in contrast, as relatively unproblematic because “[i]t is always the case that courts are perpetually open to new arguments about rights — whether those of gays and lesbians or of property owners — that reflect the dominant public opinion of the day.” *Id.* at 5.

²⁰⁴ A prerequisite to a full assessment of the relative stability of structure and rights would be to sort out some tricky definitional issues. Which parts of the Constitution count as “structural” and which count as “rights” is not self-evident. An immediate ambiguity arises in how to classify the constitutional *powers* of Congress and the President. Do these changes code as transformations of the structure of Congress and the presidency? Or should we follow the Federalists and view powers as more closely related to rights? (Federalist constitutional theory held that rights and powers were two sides of the same coin; rights began where powers ended. See THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 9, at 513.) Also complicating the classifica-

long periods of time: congressional appropriations of tangible property without compensation, establishments of an official national religion, and prior restraints on speech have been unconstitutional since the Bill of Rights was ratified. And while it is easy to point to dramatic constitutional change with respect to other rights, such as the development of modern free speech and equal protection law, it is also easy to point to dramatic structural changes, such as the rise of the administrative state, the decline of federalism, the replacement of the constitutionally prescribed treaty-making process with congressional-executive agreements, and the erosion of Congress's constitutional power to declare war by unilateral presidential action.

Still, the overall comparative judgment seems credible. Many of the most important structural features of the U.S. government have remained mostly noncontroversial and more or less intact since the Founding: for example, the bicameral structure of Congress and its primary legislative authority; the procedural outlines of the Article I, Section 7 lawmaking process; and the electoral cycles and terms of office for representatives, senators, and Presidents.²⁰⁵ These and other institutional arrangements have displayed formidable staying power, even while they have arguably lost much of their original claims to functional and political efficacy.²⁰⁶ To be sure, the structural constitution is far from politically impermeable or immutable. The original constitutional structure could not withstand the tectonic economic and political changes that occurred in the late nineteenth and early twentieth centuries related to industrialization, the integration of the national economy, and the country's expanding international role. These changes created broad-based political demands for the major structural reformations of the New Deal period and beyond (and also for the concomitant and equally dramatic changes in rights²⁰⁷). Nonetheless,

tion, some nominal rights, particularly those that operate in the context of voting and elections, seem inseparable from what is conventionally understood to be part of the structural constitution. Ely's overlapping distinction between constitutional provisions governing "substance" versus "process" further muddies the water, as many nominal rights, such as procedural due process, criminal procedure protections, and voting rights, address political decisionmaking procedures and thus might be classified as structural.

²⁰⁵ Cf. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 767–68 (2006) (noticing that groups that disagree about many other aspects of constitutional law share convergent understandings of authoritative government institutions, such as the President and Congress).

²⁰⁶ See *supra* pp. 713–15.

²⁰⁷ The central dynamic with respect to rights, of course, was the post–New Deal demise of antiregulatory, economic liberty rights, giving way to modern civil rights focused on racial equality, free speech, criminal procedure, religious liberty, and the like. For a richly textured historical account of how the political forces surrounding the state-building project of the Progressive and New Deal eras affected the development of modern civil rights, see KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* (2004).

constitutional structure may be less susceptible to the continuous political recalibration that has characterized the development of constitutional rights in many areas: the close correspondence between the constitutional law of race and changes in racial attitudes, practices, and politics between *Plessy* and *Brown*;²⁰⁸ the extension of equal protection to gender and sexual orientation following the social and political success of the modern feminist and gay rights movements;²⁰⁹ the construction and subsequent dismantling of the wall separating church and state in accordance with the changing political interests of Protestant groups and diminishing anti-Catholicism;²¹⁰ the strong correlation between constitutional protection of free speech and “the perceived severity of the threat that radical dissenters posed to the economic and political status quo”;²¹¹ and the demise of economic liberty rights as a constraint on government regulatory power during the New Deal.²¹² It is at least a plausible hypothesis that changes to constitutional structure require a higher threshold of political dissatisfaction or broader consensus on the need for reform than comparable changes to rights.

This belief, at any rate, has been widely shared and politically efficacious throughout U.S. history. The politics of slavery, from the Constitutional Convention through the antebellum period, provides a vivid illustration. While it was generally accepted at the Founding that some sort of constitutional protection for slavery was a necessary condition for Southern states to join the Union, there was little inclination at the Philadelphia Convention to write explicit, substantive protections for slaveholders into the constitutional text.²¹³ Some of the Framers were squeamish about their peculiar institution. Madison, for one, thought it would be “wrong to admit in the Constitution the idea that there could be property in men.”²¹⁴ But the absence of substantive protections for slavery also reflected the views of Southern Feder-

²⁰⁸ See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004).

²⁰⁹ See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 443–45 (2005) (sexual orientation); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 9 (1996) [hereinafter Klarman, *Rethinking*] (gender).

²¹⁰ See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); Klarman, *Rethinking*, *supra* note 209, at 15–16.

²¹¹ Klarman, *Rethinking*, *supra* note 209, at 35; see also *id.* at 34–35.

²¹² See, e.g., ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 161–79 (1960) (offering a now-standard political account of the Supreme Court’s repudiation of economic liberty rights). But see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998) (arguing against the primacy of political forces in explaining the Court’s post–New Deal turn).

²¹³ On the debates over slavery during the Convention, see generally Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188 (Richard Beeman et al. eds., 1987).

²¹⁴ James Madison, Power of Congress to Prohibit the Slave Trade, Speech of James Madison at the Constitutional Convention (Aug. 25, 1787), in 10 THE PAPERS OF JAMES MADISON 157, 157 (Robert A. Rutland et al. eds., 1977).

alists, who shared Madison's broader philosophy that "parchment guarantees for human bondage would not restrain a Northern majority committed to abolishing slavery."²¹⁵ White Southerners preferred to stake their fortunes on the structural design of the federal government. Proportional representation in the lower house of Congress and the Electoral College, bolstered by the Three-Fifths Clause, promised to ensure Southern control of the House of Representatives and the presidency. Even if the North were seized by abolitionist sentiment, Southern control over the federal government would block any national movement to do away with slavery — or so slaveholders were assured at the Founding.²¹⁶

As it happens, the Founding bargain over slavery reflected a major miscalculation about the demographic future of the Republic. Northerners and Southerners alike had expected faster population growth in the South than in the North, and therefore increasing Southern representation in the House and consolidated Southern control over the presidency.²¹⁷ In fact, the opposite turned out to be true: the relative population and political power of the North increased dramatically through the early decades of the nineteenth century. By the late 1850s, the Northern white population was more than twice as large as the Southern white population, and Northern representatives had come to dominate the House of Representatives.²¹⁸ Although a Southerner occupied the presidency for all but twenty of the seventy years of the antebellum period, the longer-term prospects of Northern dominance loomed there too.²¹⁹

The best remaining hope for structural constitutional protection of slavery was the Senate — and the sectional balance rule that came to govern its composition. The rule required that the North and the South have equal representation in the Senate so that they would hold a mutual veto over any attempt to turn the nation for or against slavery. Instituted as part of the Missouri Compromise, the sectional balance rule became a quasi-constitutional substitute for the original constitutional bargain over slavery.²²⁰ For the next thirty years, a

²¹⁵ MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 114 (2006).

²¹⁶ See *id.* at 101–06.

²¹⁷ *Id.* at 102.

²¹⁸ *Id.* at 126–27.

²¹⁹ See JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY, 1789–1861*, at 89–92 (Univ. of S.C. Press 1990) (1930).

²²⁰ See GRABER, *supra* note 215, at 140–44; Barry R. Weingast, *Political Stability and Civil War: Institutions, Commitment, and American Democracy*, in ROBERT H. BATES ET AL., *ANALYTIC NARRATIVES* 148, 153–55 (1998). Notice that the balance rule was motivated by a rather obvious political feedback effect: every free territory created the potential for a free state that could enter the Union and shift the balance of power in the Senate, allowing the North to dominate national politics and threaten slavery, or vice versa.

relatively stable equilibrium was maintained as new states entered the Union in pairs and sectional balance was preserved. Only in the 1850s, when economically and politically viable opportunities for the expansion of slavery ran out, and it became impossible to rebalance the Senate after the admission of California as a free state had tipped the balance in favor of the North, did this political settlement unravel.²²¹

In any case, throughout the antebellum period, Southern political thought was wedded to the idea that structural protections for slavery would provide more security than substantive constitutional rights. Although Southern politicians such as John C. Calhoun advocated for recognition of the rights of slaveholding states, slaveholders were dubious about how effective such substantive constitutional guarantees would be when push came to shove.²²² Like the Federalist Framers, antebellum white Southerners doubted that a national majority united against slavery would be long detained by constitutional limitations. Echoing Madison, John Randolph declared, "I have no faith in parchment."²²³ Elaborating on this common wisdom during the debates of the Virginia Constitutional Convention, Abel Upshur confidently proclaimed that no "paper guarantee was ever yet worth any thing, unless the whole, or at least a majority of the community, were interested in maintaining it."²²⁴

At the same time, however, white Southerners continued to see structural protections as relatively secure. Whatever his feelings about rights, Calhoun's lasting contribution to both political theory and antebellum political practice was his defense of the principle of the "concurrent voice":

[T]he adoption of some restriction or limitation which shall so effectually prevent any one interest or combination of interests from obtaining the exclusive control of the government . . . can be accomplished only in one way: . . . by dividing and distributing the powers of government [to] give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws or a veto on their execution.²²⁵

Calhoun and his fellow Southern politicians advocated a number of institutional instantiations of this principle, on the model of sectional balance in the Senate. These included Calhoun's proposal of a dual

²²¹ See Weingast, *supra* note 220, at 156–59.

²²² See GRABER, *supra* note 215, at 137–40.

²²³ 42 ANNALS OF CONG. 2361 (1824), quoted in GRABER, *supra* note 215, at 139–40.

²²⁴ CARPENTER, *supra* note 219, at 141.

²²⁵ JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND SELECTIONS FROM THE DISCOURSE 20 (C. Gordon Post ed., 1953). See generally CARPENTER, *supra* note 219, at 77–126; DAVID M. POTTER, THE SOUTH AND THE CONCURRENT MAJORITY (Don E. Fehrenbacher & Carl N. Degler eds., 1972).

executive (comprising a Northern and a Southern President, each with veto power over national legislation)²²⁶ and like-minded suggestions for balancing the Supreme Court between Justices from slaveholding and nonslaveholding states.²²⁷ The Madisonian premise of these proposals, and of Southern political thought more generally during the antebellum period, was that institutional arrangements allocating political decisionmaking power would prove more reliable than prohibitions on particular political outcomes.

As we have now seen, this premise has been widely shared by politicians, lawyers, and theorists since Madison. Yet no one has ever provided a convincing explanation of why we should expect constitutional structure to be more stable or constraining than rights or other constitutional rules.

A straightforward explanation would be that the constitutional text simply happens to be more specific about structure than rights.²²⁸ Certainly it is true that constitutional provisions such as those specifying the bicameral structure of Congress, the minimum age of the President, and the requirement of two senators per state seem more concrete and less susceptible to politically expeditious reinterpretation than abstractly stated rights such as free speech and equal protection. As discussed above, the greater utility of these structural provisions as focal points for coordination may stabilize their meaning.²²⁹ But it seems doubtful that differences in textual expression alone can fully account for the longstanding conventional wisdom about the relative durability of structure. After all, that conventional wisdom traces back to Madison and the other Federalist Framers, for whom textual specificity was not a given but a choice.²³⁰ Antebellum slaveholders, too, doubted that even the most clearly stated rights could provide the security they saw in structural arrangements.

Another possible explanation is Madison's theory of structural self-enforcement. Following Madison's analysis in *The Federalist No. 51*, courts and constitutional theorists continue to profess that the structural constitution — the system of federalism and separation of powers — will be self-stabilizing through the mechanism of “ambition counteracting ambition.” It is an article of faith among contemporary courts and constitutional theorists that the legislative and executive branches will police and prevent one another's attempts at aggrandizement,

²²⁶ See CARPENTER, *supra* note 219, at 94–95.

²²⁷ See *id.* at 98–99.

²²⁸ See, e.g., Adler, *supra* note 205, at 767; Strauss, *supra* note 172, at 1741.

²²⁹ See *supra* pp. 709–11.

²³⁰ To the extent that the Framers chose to be more specific about structure than rights in the constitutional text, this decision might have been a reflection rather than a cause of their predictions about the relative stability of the two types.

making judicial supervision of separation of powers necessary only to maintain a level playing field between the competitive branches.²³¹ Similarly, along the “vertical” dimension of constitutional structure, lawyers and theorists continue to believe that federalism will be preserved through a self-enforcing competitive equilibrium between states and the national government.²³² No comparable mechanism has been identified for the self-stabilization of rights.

Unfortunately, neo-Madisonian theorists have seldom paused to question how the political incentives of government officials and their constituents would lead to the kind of self-regulating competition for power that is supposed to sustain structure — or indeed, whether or when such a dynamic actually exists. Recall that Madison’s own constitutional theory offered no explanation of how the incentive compatibility condition for successful commitment could be satisfied.²³³ Madison’s contemporary followers have failed to fill this explanatory gap.

In fact, casual empiricism suggests that structure-preserving competition among units of government is largely a product of constitutional law’s Madisonian imagination. In the real world, we often observe government units choosing to surrender power to, or cooperate with, their supposed competitors. And it is easy to see how this non-competitive institutional behavior serves the interests of the officials and their constituents who animate the relevant institutions. In a system of democratic politics, representatives accumulate and exercise power not by aggrandizing the institutions in which they work but by getting things done — in particular, by advancing their (or their constituents’) policy goals.²³⁴ If representatives can better achieve their pol-

²³¹ See, e.g., MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 106 (1995) (emphasizing the importance of separating powers to give each of the branches the “tools necessary to limit the excesses of its rivals”); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 156 (1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

²³² This idea was originally advanced by Madison and other Federalists. See *THE FEDERALIST NOS. 45–46* (James Madison). Herbert Wechsler’s theory of “the political safeguards of federalism” reinvigorated the idea, which has served as perhaps the primary justification for the demise of serious judicial attempts to enforce constitutional federalism limitations after the New Deal. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 217 (2000) (describing the political safeguards argument as “the dominant post–New Deal theory of judicial review and federalism”).

²³³ See *supra* pp. 670–71.

²³⁴ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2314 (2001) (“The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power — or, what is almost the same thing, to deny authority to the other branches of government.”); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 144 (1999) (explaining that mem-

icy goals by deferring to another institution, there is no obvious reason why they would want to do the job themselves. A hawkish senator eager to effectuate her foreign policy goals may be happy to grant the President open-ended authority to pursue a global war on terrorism, even though this amounts to a shift in power to the executive branch. Likewise, a senator committed to libertarian economics may be eager to deregulate markets that are currently subject to federal oversight or to devolve regulatory authority to state governments that will be less inclined to meddle.²³⁵ The simple point is that representatives and other officials can often exercise power and advance their interests more effectively by encouraging the institution in which they work to *refrain* from acting or to defer to a “competing” institution.²³⁶

In the context of federalism, for example, federal regulation and spending can, and often do, benefit state-level constituencies. Where this is the case, state representatives interested in maximizing political support will have powerful incentives not to resist federal power but to invite it. Farm states, for example, will elect state representatives who will lobby for federal farm subsidies and protectionist trade policies. Representatives from states that derive economic benefits from military bases, defense contracts, or homeland security subsidies will support greater federal spending in these areas. Representatives of states whose citizens value the environment will do what they can to encourage stringent federal environmental regulation. The essential misconception of the neo-Madisonian, political safeguards view of federalism is that no matter how empowered state officials might be to push back against the federal government, this power will not lead to less federal regulation unless state officials *want* less federal regulation. Often they want more.

By the same token, there is no reason to expect that the political incentives of federal officials will reliably point toward maximizing the power of the federal government at the expense of the states. In many circumstances, federal representatives will maximize their political support by deferring to state regulators.²³⁷ If corporate shareholders, managers, or lawyers constitute powerful interest groups that benefit from Delaware corporate law, then Congress and the President will have political incentives not to enact a preemptive national corporate

bers of Congress will object to executive orders only if those orders are detrimental to their constituencies, and noting that the “fact that [the] order might well be seen as usurping Congress’s lawmaking powers, or that it has the effect of expanding presidential power, will for most legislators be quite beside the point”).

²³⁵ See Levinson, *supra* note 30, at 928.

²³⁶ For an extended version of the argument that follows, see Levinson, *supra* note 30.

²³⁷ See generally Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990).

law.²³⁸ If state-level constituencies have conflicting views about contentious issues such as the morality of same-sex marriage or the death penalty, federal legislators may reap greater political rewards by deferring to state legislatures than by resolving these issues with a uniform national rule.²³⁹ The neo-Madisonian dynamic of competing imperialists is no more reliably true on the federal side than it is on the state side.

What drives the political dynamics of American federalism is not competition between the federal and state governments but the vagaries of political demand for federal and state action. As patterns of political demand have changed, so too has the shape of federalism. Crudely, states were relatively strong and the national government relatively weak during the antebellum period not because states (*qua* states) had any interest in resisting national power but because sectional disagreements over economic policy and slavery thwarted national-level political consensus.²⁴⁰ The enormous growth of the federal government and its policy reach over the course of the twentieth century, likewise, was not a product of federal hegemony overwhelming state resistance but of broad-based political demand for federal regulation in response to industrialization, the integration of the national economy, and the country's expanding international role.²⁴¹ For present purposes, the important point is not just that the distribution of power between the national and state governments has changed dramatically over time — though it certainly has — but that even relatively stable periods of federalism are a product of political forces entirely different from the ones that neo-Madisonians imagine. Federalism is not a self-enforcing equilibrium of political competition among government divisions but a contingent byproduct of division-indifferent policy demands.

The same is true of separation of powers. Consider, for example, the enormous expansion of the power of the executive branch during and after the New Deal. The post-New Deal administrative state probably represents the greatest shift in the balance of powers between the legislative and executive branches since the Founding.²⁴² Confounding all neo-Madisonian logic, it was, of course, *Congress* that decided to delegate away so much authority to its supposedly rival

²³⁸ See *id.* at 276–80.

²³⁹ See *id.* at 281–82.

²⁴⁰ See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 107–09 (2008).

²⁴¹ See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 365–78 (1997).

²⁴² See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 534–40 (1992); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1819–21 (1996); cf. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994).

branch. Far from jealously guarding their institutional power against rivalrous encroachments, members of Congress have been all too eager to allow the executive branch to take over much of what had formerly been conceived as legislative power. The political incentives motivating legislators to delegate are hardly mysterious. Some of these incentives are created by constituent demand. Since the beginning of the twentieth century, increasing national and international economic integration, among other factors, has created greater political demand for more federal regulation, exhausting the legislative capacity of Congress and driving legislators to delegate policymaking responsibility to administrative agencies. The increasing complexity of the modern regulatory state has also made it difficult for legislators to generate valuable policy outputs in many areas without harnessing the expertise of bureaucrats. Further incentives to delegate stem from the self-serving political strategies of professional politicians. For example, members of Congress have discovered that delegations can improve their reelection prospects by allowing them to take credit for regulatory benefits while shifting the blame for regulatory costs.²⁴³ Not surprisingly, these and other political incentives pushing toward delegation have proven far more important to legislators than aggrandizing the power of Congress at the expense of the Executive.

A similar separation of powers dynamic has prevailed with respect to authority over war and foreign affairs. Since World War II, Congress has largely abdicated to the President the authority to decide when to lead the country into war²⁴⁴: “Legislative action during emergencies consists predominantly of ratifications of what the executive has done, authorizations of whatever it says needs to be done, and appropriations so that it may continue to do what it thinks is right.”²⁴⁵ From a neo-Madisonian perspective, it is hard to understand how Congress could have “ceded [this] ground without a fight.”²⁴⁶ But a more realistic assessment of the political incentives of members of Congress makes clear that they were, as we would expect, acting entirely in their political self-interest.²⁴⁷ The expanding international

²⁴³ See generally DAVID EPSTEIN & SHARYN O’HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 29–33 (1999) (surveying theories of delegation, benign and malign).

²⁴⁴ See HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 123–33 (1990) (discussing the failure of the War Powers Resolution of 1973 to constrain the Executive). See generally JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

²⁴⁵ ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 47 (2007).

²⁴⁶ ELY, *supra* note 244, at ix.

²⁴⁷ *Id.* (“[T]he legislative surrender was a self-interested one . . .”).

role of the United States and its post–World War II stature as a global hegemon has raised the stakes of foreign affairs and created greater political demand for the distinctive capabilities of the presidency — speed, secrecy, and univocality, among others. In wartime, in particular, legislators and their constituents may well understand that Congress, encumbered by collective action problems, is institutionally ill-equipped to act quickly or decisively in emergencies.²⁴⁸ At the same time, the lack of intense interest in foreign affairs on the part of congressional constituencies, combined with the risk aversion of incumbent legislators, makes it strategically advantageous for most members of Congress to let the President take the lead, second-guessing only in retrospect, if things turn out badly.²⁴⁹ When their constituents are favorably inclined toward a presidential foreign policy initiative — as they generally are when it comes to wars, at least at first — members of Congress will seldom have any incentive to oppose it on principled separation of powers grounds.²⁵⁰

The political incentives confronting modern Presidents are different. Here, the neo-Madisonian premise of executive aggrandizement has some traction, though for reasons more complicated than a hard-wired drive toward empire-building. It is true that because individual Presidents enjoy a much greater share of the power of their institution than individual members of Congress, they will be willing to invest more effort in securing power for the executive branch.²⁵¹ But probably more important is the set of constituency-driven political incentives that push toward presidential activism. Observers of the modern presidency emphasize its “plebiscitary” responsiveness to the national electorate and to prevailing public opinion. The public’s opinion of the President, in turn, is closely tied to the perceived successes and failures of government generally — especially given congressional passivity.²⁵² Presidents are thus driven to take aggressive action in response to pressing problems (even when they can do little to solve them).²⁵³

²⁴⁸ See POSNER & VERMEULE, *supra* note 245, at 47.

²⁴⁹ See ELY, *supra* note 244, at 52–54.

²⁵⁰ See KOH, *supra* note 244, at 133 (describing how, when President Reagan took military action in Grenada and Libya “without complying with the terms of the War Powers Resolution, . . . advocates of his policy decision remained quiet rather than contest his procedural violation”); see also ELY, *supra* note 244, at 175 n.34 (“Separation of powers issues are not the sort voters get exercised about.”).

²⁵¹ Even so, many of the benefits of enhancing the power of the presidency will be externalized onto future occupants and spread among other policymaking officials in the executive branch.

²⁵² See Kagan, *supra* note 234, at 2310 (pointing to the fact that “Congress repeatedly has failed to demonstrate sustained capacity for political leadership” as one explanation for the public pressure on modern Presidents to assert control over political decisionmaking).

²⁵³ See *id.* at 2310–11, 2335–36; Moe & Howell, *supra* note 234.

This picture of reluctantly imperial Presidents and stubbornly passive Congresses bears little resemblance to the neo-Madisonian vision of rivalrous branches competing with one another for power. It does, however, correspond to what has happened in the real world. The balance of power between the legislative and executive branches has not been a stable, equilibrational outcome of rivalrous competition. Instead, it has shifted considerably throughout U.S. constitutional and political history; and specifically, over the course of the twentieth century, it has shifted dramatically toward the Executive.

In sum, neither federalism nor separation of powers has proven self-enforcing in the way that constitutional lawyers and theorists since the Founding have hoped or imagined. The system of democratic politics that exists in the United States simply does not generate the kind of government official who cares more about the intrinsic interests of his department than about his personal political ambitions or the interests of the citizens he represents. It is this rather glaring problem of incentive incompatibility that accounts for the failure of the Madisonian mechanisms of political competition that were supposed to preserve the constitutional structure of federalism and separation of powers.

Nonetheless, the constitutional structure has to some extent — and perhaps to a greater extent than constitutional rights — been preserved. Perhaps a better explanation can be found in a different part of Madisonian theory. As explicated in Parts I and II, there is reason to believe, with Madison and modern social scientists, that political decisionmaking processes and structures tend to be more stable than the substantive outcomes of these processes and structures.²⁵⁴ Carrying over the earlier discussion, we are now in a position not only to recognize this intuition in the conventional constitutional wisdom about rights versus structure but also to provide a tentative explana-

²⁵⁴ It is telling that legal theorists in areas far removed from constitutional law (and the constitutional text) seem to share this intuition. For instance, Bernard Black and Reinier Kraakman offer a “self-enforcing” approach to corporate law for emerging capitalist economies in which judicial enforcement is unreliable. See Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996). Their basic strategy is to focus on “structural” rules creating corporate decisionmaking processes that empower minority shareholders and other vulnerable stakeholders to protect themselves through voting and other mechanisms. *Id.* at 1932–37. Black and Kraakman contrast this approach with a “prohibitive model,” which effectively grants these vulnerable stakeholders rights against particular corporate behaviors that create the potential for abuse. *Id.* at 1929–31. The premise of the article is that rules about structure and process (for example, shareholder voting requirements) will constrain corporate insiders more effectively and command greater compliance than rights against specific corporate abuses. Whatever is supposed to account for the greater efficacy of rules related to structure and process in this setting, it cannot be the specificity of textual expression. Black and Kraakman are clear in their belief that rights are likely to be evaded or ignored even when they are specified in “considerable detail.” *Id.* at 1929.

tion for it. If constitutional structure means roughly the same thing as a set of political decisionmaking institutions, and constitutional rights are understood to specify a type of (prohibited) policy outcome, there might indeed be good reasons to expect structure to be more durable and constraining than rights.

To review, the basic set of mechanisms through which political arrangements become entrenched — including coordination, reciprocity, asset-specific investment, and political feedback — should operate similarly at the levels of policies/rights and institutions/structure. Indeed, some rights seem susceptible to significant political entrenchment. It is easy to see, for example, how constitutional protection for political speech and dissent might be stabilized by way of a cooperative equilibrium between political factions that compete for control of the government, or how media and telecommunications interests that benefit financially and politically from freedom of speech might come to constitute an effective constituency in favor of extensive First Amendment protections. Similarly, religious pluralism may create reciprocity-based political incentives in support of religious liberty and nondiscrimination; and religious liberty in turn may sustain pluralism, creating a self-reinforcing feedback loop.²⁵⁵ Antidiscrimination protection for women and racial minorities will enable more members of these groups to attain positions of wealth and power in society — which they may then use to defend or expand constitutional protection. The constitutional protection of property rights, too, may be strengthened by a self-reinforcing “rich get richer” dynamic, as property owners leverage their initial advantages into more expansive protection over time.²⁵⁶

All else equal, however, we might expect these kinds of dynamics to create more powerful entrenchment effects at the institutional/structural level. Political decisionmaking institutions, such as separation of powers, the Senate, and electoral democracy, effectively bundle numerous prospective policy outcomes. By doing so, these institutional arrangements both facilitate compromise and blunt the incentives of political losers to defect. Decisionmaking institutions that will generate a large number of policy outcomes in future periods will blunt the resistance of political losers to any single outcome by offering them the prospect of more favorable policies along other policy dimensions and in future periods. Bundling outcomes in this way also increases the

²⁵⁵ See ANTHONY GILL, *THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY* (2008).

²⁵⁶ A particularly striking example is the successful lobbying by copyright holders such as Disney for greater protection for their intellectual property. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 23–24 (2001); Lawrence Lessig, *Copyright's First Amendment*, 48 *UCLA L. REV.* 1057, 1065 (2001) (terming the Sonny Bono Copyright Term Extension Act of 1998 the “Mickey Mouse Protection Act”).

benefits of coordination and cooperation and therefore the costs of noncoordination or defection. Finally, because political decisionmaking institutions tend to have a larger cumulative effect than isolated policy decisions on the distribution of power and resources among groups in society, they should generate stronger self-reinforcing political feedback. For all of these reasons, we expect the kinds of institutional arrangements that qualify as constitutional structure to display greater political stability than the particularistic policy prohibitions represented by rights.²⁵⁷

Thus, returning to the example of slavery in the antebellum South, one might reconstruct the reasoning of white Southerners as follows. In the abstract, the structural security of a Senate veto over national legislation and direct protection of the property rights of slaveholders might seem equally precarious. Rights could be ignored or interpreted away. At the same time, as Calhoun and others recognized, the executive branch could unilaterally bypass the South's senatorial vetogate once the North took control of the presidency.²⁵⁸ Which of these imperfect alternatives was a better bet? White Southerners may well have believed that the political costs to the North of subverting the separation of powers would be higher than the costs of ignoring the property rights of slaveholders. In part this was because the Senate, and the balance rule in particular, provided *mutual* security — for the South against abolition; for the North against the spread of “slave power” throughout the country. This reciprocity of benefit, behind a partial veil of ignorance concerning which section might ultimately control the rest of the government, helped support an equilibrium in which both North and South remained committed to the authority of the Senate and the balance rule.²⁵⁹ Ceding power to a monarchical President with no guarantee of his regional sympathies might be less desirable for both sides, not just because of the slavery issue, but also because of the broader risks and disadvantages of protodictatorship and the elimination of an effective legislative role. Congress was an institution that benefitted many constituencies, in both the North and the South, not least its own members and their political parties. Moreover, one of these parties, the Democrats, was built upon Southern representation and veto power, both within the party and in government. This asset-specific investment gave the Democrats strong incentives to maintain sectional balance.²⁶⁰

²⁵⁷ See *supra* notes 121–25 and accompanying text.

²⁵⁸ See CARPENTER, *supra* note 219, at 89–97.

²⁵⁹ See Weingast, *supra* note 220, at 154–55.

²⁶⁰ See GRABER, *supra* note 215, at 144–48; *id.* at 155–56 (examining the demise of national parties' ability to maintain bisectionalism during the 1850s).

Of course, balance in the Senate eventually broke down, the Democratic Party divided, and the country went to war. Still, the structure of the Senate had held — and held together the Union — for more than three decades. Would rights-based protection for slavery have worked as well?²⁶¹ White Southerners may have had good reason for doubt. In contrast to the bundled and reciprocal structure of the Senate, a right to own slaves would be freestanding and unilateral. The costs to Northerners of violating such a right might be considerably lower than the costs of a complete breakdown of the system of separation of powers. It is also hard to see how such a right could attract the asset-specific investments or generate the kinds of political feedback that would give some constituency other than slaveholders a stake in preserving it. Minus these sources of political stability, property rights for slaveholders might indeed have proven more fragile than the structural Senate veto.

Needless to say, much more work would be needed to substantiate these sketchy speculations — and more still to generalize beyond these specific examples. The most that can be done here is to suggest that this work would be well worth undertaking. The relative durability and inviolability of constitutional structure has been an article of faith since Madison, exerting a powerful hold over our thinking about the possibilities of constitutionalism and the pathways of constitutional change. Constitutional designers, courts, and social movements in the real world are regularly confronted with consequential choices about whether to pursue structural or rights-based strategies for protecting vulnerable groups. Present sympathies for Southern slaveholders run thin, but consider the choice confronting the NAACP in the Jim Crow South of whether to allocate resources in order to achieve greater access to the political process and representation for black citizens (a functionally structural strategy, even if cast in the vocabulary of voting “rights”) or to secure substantive rights, such as the desegregation of

²⁶¹ In 1861, in a last-ditch attempt to prevent more Southern states from seceding, Congress proposed, President Lincoln endorsed, and three states ratified a constitutional amendment (known as the Corwin Amendment) that made explicit Congress’s lack of power to interfere with or abolish slavery in any state, and that prohibited any subsequent constitutional amendment to the contrary. Southerners were dismissive of this proposed thirteenth amendment, and it did nothing to prevent secession and war. See generally A. Christopher Bryant, *Stopping Time: The Pro-Slavery and “Irrevocable” Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL’Y 501 (2003). Interestingly, Southerners had been much more receptive to the Crittenden Compromise, an earlier package of proposed “unamendable” amendments highlighted by a reinstatement and extension of the Missouri Compromise line that would have protected slavery in the Southern territories. The Crittenden Compromise was rejected by Republicans. See DAVID M. POTTER, *THE IMPENDING CRISIS, 1848–1861*, at 531–35, 549–54 (Don E. Fehrenbacher ed., 1976).

public schools.²⁶² Or consider the perspective of a constitutional designer who must determine whether the stability of property entitlements would be better assured through structural arrangements such as federalism — as the political science literature on market-preserving federalism implies²⁶³ — or instead through the direct protection of constitutional property rights. In these and other contexts, constitutional lawyers and theorists would do well to build upon their intuitions and investigate the conditions under which structural protections do, in fact, outperform or outlast the protection of rights.

B. Judicial Review

In the view of many constitutional lawyers and theorists, the efficacy of constitutional commitment depends largely if not entirely on judicial enforcement of constitutional rights and rules. But if the Supreme Court²⁶⁴ is to serve as the primary institutional solution to the problem of constitutional commitment, then the institutional stability of the Court itself must be explained.²⁶⁵ Courts can enforce the Constitution effectively only if political actors have incentives to comply with judicial commands and precedents and to preserve judicial independence.²⁶⁶

In fact, powerful political actors — Presidents, members of Congress, state officials, and social movements — have not always deferred to the Court. Presidents Jefferson, Jackson, Lincoln, and Roosevelt all famously declared, and in some cases acted upon, their willingness to defy the Court.²⁶⁷ Congress, too, has often pushed back against judicial authority — by routinely considering and occasionally enacting statutes stripping the Court of jurisdiction to hear politically

²⁶² Having been stripped of both the franchise and the rights they had briefly enjoyed during Reconstruction, Southern blacks must have been acutely aware of durability and political resilience as important variables in thinking about how to advance civil rights.

²⁶³ See Weingast, *supra* note 57; *supra* p. 677.

²⁶⁴ The discussion in this section will refer to the Supreme Court as shorthand for the entire judiciary. Much of what is said will be equally applicable to the highest or constitutional courts of other countries.

²⁶⁵ Judicial review as a constitutional commitment mechanism also depends on *incentive compatibility*: judges must be motivated to enforce constitutional rights instead of doing something else entirely. While the focus of this section is on institutional stability, some of what follows is also relevant to the question of judicial motivation.

²⁶⁶ See WHITTINGTON, *supra* note 8, at 26 (“[P]olitical actors must have reasons for allowing the Court to ‘win.’ [They] . . . must see some political value in deferring to the Court and helping to construct a space for judicial autonomy.”); Bernd Hayo & Stefan Voigt, *Explaining De Facto Judicial Independence*, 27 INT’L REV. L. & ECON. 269, 269–74 (2007) (emphasizing that the judiciary can serve as a constitutional commitment mechanism only if political actors maintain a higher-order commitment to judicial independence).

²⁶⁷ See Fallon, *supra* note 2, at 1016 (collecting examples); see also WHITTINGTON, *supra* note 8, at 27 (“We can easily imagine presidents dismissing the authority of the Court and ignoring its opinions . . .”).

important cases that the Justices might decide the wrong way,²⁶⁸ and also by manipulating the size of the Court to shift its political balance.²⁶⁹ In response to deeply controversial decisions such as *Dred Scott v. Sandford*²⁷⁰ and *Brown v. Board of Education*, large segments of the public, joined by national and state officials, have resisted the Court's authority.²⁷¹

Still, open defiance of the Court has been the exception rather than the rule. The extent to which political actors have been willing to challenge judicial authority and supremacy in constitutional interpretation has varied somewhat over the course of U.S. history,²⁷² but in the broad run of cases, judicial decisions about constitutional law have not been seriously contested. The puzzle thus arises: "Given the evident power of elected government officials to intimidate, co-opt, ignore, or dismantle the judiciary, we need to understand why they have generally chosen not to use that power and instead to defer to judicial authority."²⁷³ What accounts, in other words, for the apparent institutional stability of judicial review?

A simple answer is that the institutional stability and independence of judicial review are *merely* apparent, an illusion created by the observational equivalence of constraint and nonconstraint. Judicially created constitutional rules and rights do not function as constraints on political actors if these rules and rights simply align with those actors' interests or correspond to what they would have done in any case. Political scientists and constitutional historians have long observed that judicial interpretations of constitutional law generally track the preferences of politically powerful domestic constituencies, particularly national-level majorities.²⁷⁴ The reasons for this correspondence are well understood. Federal judges and Supreme Court Justices are selected by ruling political coalitions based largely (albeit not entirely) on their political and ideological views.²⁷⁵ And after appointment, these judges

²⁶⁸ See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 986–89 (2002).

²⁶⁹ *Id.* at 981–82.

²⁷⁰ 60 U.S. (19 How.) 393 (1857).

²⁷¹ See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 110–21 (2009) (discussing *Dred Scott*); KLARMAN, *supra* note 208, at 385–421 (discussing *Brown*).

²⁷² For a historical overview, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004).

²⁷³ WHITTINGTON, *supra* note 8, at 11.

²⁷⁴ See MCCLOSKEY, *supra* note 212, at 224 ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.")

²⁷⁵ See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 26–27, 47–66 (2005). Of course, federal judges serve for long periods of time, and their political preferences may fall out of line as different coalitions become domi-

and Justices are subject to ongoing political control by the political branches and the public, which possess the power to coerce or marginalize a judiciary that seriously interferes with the agenda of a dominant national coalition.²⁷⁶

For whatever combination of these reasons,²⁷⁷ over the course of American history the Supreme Court has usually — and since the New Deal quite consistently — remained safely within the bounds of political tolerance.²⁷⁸ The Justices have steered clear of, or have attempted to tread very lightly in, policy areas where elected officials and their constituents have intense political preferences, such as economic regulation, war, and foreign affairs.²⁷⁹ It is nearly inconceivable, for example, that the current Court would play a major role in the war on terrorism or the financial crisis — by, for instance, ordering the release of detainees or denying the Secretary of the Treasury authority to administer the bank bailout — and even less conceivable that the Court would set (or even set a limit on) tax rates, order the redistribution of wealth, or end the war in Afghanistan. A Court that tried to do any of these things would almost certainly be defied or disciplined; and the Justices are probably not inclined to do them in the first place.²⁸⁰

Moreover, even in the relatively low-stakes areas where the Court has focused its attention, seldom has it attempted to stand in the way of the strongly held preferences of national political majorities. Quite

nant. Thus, Dahl predicted that the Court would come into serious conflict with the political branches only during rare periods of electoral instability, when a newly dominant electoral coalition confronted Justices appointed by their defeated ideological rivals. The New Deal was Dahl's paradigm case. Dahl, *supra* note 274, at 285. This pattern seems to have held true less than Dahl expected, however. See WHITTINGTON, *supra* note 8, at 12.

²⁷⁶ See Ferejohn & Kramer, *supra* note 268, at 994 ("Taken as a whole, the miscellaneous devices available to the political branches to obstruct the courts afford ample means to cow or even cripple the federal judiciary."); see also RICHARD A. POSNER, HOW JUDGES THINK 375 (2008) (observing that Justices are constrained by "an awareness, conscious or unconscious, that they cannot go 'too far' without inviting reprisals by the other branches of government spurred on by an indignant public").

²⁷⁷ A growing empirical literature attempts to sort out the contributions of indirect selection and direct political control on judicial behavior. For recent surveys of (and contributions to) this debate, see Micheal W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293 (2008); and Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court* (unpublished manuscript) (on file with the Harvard Law School Library).

²⁷⁸ See generally FRIEDMAN, *supra* note 271.

²⁷⁹ See Frederick Schauer, *The Supreme Court, 2005 Term — Foreword: The Court's Agenda — and the Nation's*, 120 HARV. L. REV. 4 (2006).

²⁸⁰ Conceivably, the Justices might lack the inclination because the Constitution simply does not speak to these salient and high-stakes political issues. As a purely legal matter, however, the constitutional case against executive power to detain enemy combatants in Guantánamo or the open-ended delegation of authority to the Secretary of the Treasury to manage the financial crisis seems at least as strong as the constitutional case against voluntary school integration, gender-segregated public colleges, or sodomy laws.

the opposite, most of the Court's major interventions have been to impose an emerging or consolidated national consensus on local outliers.²⁸¹ As Madison recognized, compliance with judicial authority is not a problem when it is backed by the political, financial, and military supremacy of the national government over states or regions. Less commonly, the Court has intervened in a contentious political debate that has split the country approximately in half. Landmark decisions such as *Brown v. Board of Education*, *Roe v. Wade*,²⁸² *Regents of the University of California v. Bakke*,²⁸³ and *Bush v. Gore*²⁸⁴ fit this description.²⁸⁵ While these decisions have been predictably controversial, the support of half the country is usually enough to protect the Court against political retribution. Most of the approximately fifty percent of voters who cast their ballots for George W. Bush were presumably pleased with the Court's intervention in *Bush v. Gore*, and the newly elected President Bush and the Republican-controlled Congress certainly had no inclination to second-guess the decision.

In sum, if the Court typically operates not against but as "part of the dominant national alliance,"²⁸⁶ then the political stability of judicial review is easy to understand. Real questions about the viability of judicial power arise only when courts act counter to the interests of the national political branches or popular majorities. These cases do exist: Supreme Court decisions invalidating school prayer, striking down criminal bans on flag burning, and requiring procedural protections for criminal defendants have been unpopular with majorities of the public.²⁸⁷ And controversial decisions such as *Roe* have survived long stretches of Republican political ascendance without generating serious political reprisals against the Court.

The apparent ability of the Court to defy dominant political coalitions in these cases is corroborated by the political science literature on "diffuse support" for the Court.²⁸⁸ Surveys of public opinion find a

²⁸¹ See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 489-94 (2000); Klarman, *Rethinking*, *supra* note 209, at 16-17.

²⁸² 410 U.S. 113 (1973).

²⁸³ 438 U.S. 265 (1978).

²⁸⁴ 531 U.S. 98 (2000) (per curiam).

²⁸⁵ See Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1749-50 (2001).

²⁸⁶ Dahl, *supra* note 274, at 293.

²⁸⁷ See Klarman, *supra* note 285, at 1750. While these decisions have been modestly counter-majoritarian, it is still the case that substantial minorities of the country have supported them. For more detailed information about public opinion in each of these contexts, see PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008).

²⁸⁸ Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636 (1992); see also Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 325-28 (2005) (surveying the political science literature on diffuse support).

“reservoir” of institutional support for the Court that outruns “specific support” for particular judicial decisions.²⁸⁹ The public — and therefore, we might suppose, its elected representatives — is apparently willing to go some distance in supporting the Court and defending its independence even when it generates particular outcomes with which the public disagrees. Historical episodes such as the New Deal Court-packing threat corroborate this view. Although an obstructionist Court was ultimately brought into line with the views of the dominant national political coalition, the political unpopularity of Roosevelt’s Court-packing plan seemed to reveal a significant measure of support for an independent judiciary.²⁹⁰

Unfortunately, the existing empirical evidence sheds little light on precisely how much political support exists for judicial independence.²⁹¹ The qualitative impressions of informed observers range broadly. At one extreme is the common but implausible portrayal of the Court as a (potentially) heroic protector of minorities and leader of progressive social change, or as a pervasively antidemocratic usurper of political authority from the people and their elected representatives. At the other extreme lies the possibility of political subservience²⁹²: a Court that follows the election returns — or, more precisely, the political preferences of democratic majorities, ruling elites,²⁹³ or dominant

²⁸⁹ Caldeira & Gibson, *supra* note 288, at 637.

²⁹⁰ On the political history of the New Deal Court-packing episode, see FRIEDMAN, *supra* note 271, at 195–236; and WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995). As Ely summarizes, “The message is mixed, but what now seems important about the episode is that an immensely popular President riding an immensely popular cause had his lance badly blunted by his assault on judicial independence.” ELY, *supra* note 5, at 46.

²⁹¹ See FRIEDMAN, *supra* note 271, at 373–74 (noting this empirical deficit). Existing quantitative measures of judicial independence are highly imperfect. For an example of the state of the art, see Hayo & Voigt, *supra* note 266, at 279–80.

²⁹² Even those who are inclined toward this extreme would grant that the frictions of the ordinary political process will generate at least some degree of slack. Justices serve for long periods, and redirecting the Court through appointments takes time. Political attacks on judicial independence require statutes, which can be blocked by a majority (or even a well-situated minority) in either chamber of Congress, or by the President’s veto. Only during periods of strongly unified government can a single political party wage a successful partisan war against the Court. As for the public, collective action in defiance of the Court is hard to mobilize, and it requires a population that is well informed and intensely opposed to what the Court is doing. All of these factors will inevitably create at least a modest political buffer around the Court.

²⁹³ The disproportionate political influence of elites is one straightforward explanation for the Court’s apparently countermajoritarian decisions with respect to free speech, gay rights, and school prayer. These decisions track public opinion among the affluent and well educated. See Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 190–91 (1998). More generally, the low salience of most judicial decisions allows diffuse support to persist until the public is informed and organized by political elites. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2617–20 (2003) (citing studies). Consequently, even strongly countermajoritarian decisions that serve the interests of elites may be insulated against public disapproval.

political parties or coalitions.²⁹⁴

Notwithstanding the empirical uncertainty about the extent of judicial independence, it may be instructive to consider how the Court could have — and probably has in fact, to some indeterminate extent — acquired and maintained the latitude to act against the interests of powerful political actors. The explanation most commonly advanced (or assumed) by constitutional lawyers and theorists, and by judges themselves, is that “[t]he Court’s power lies . . . in its legitimacy.”²⁹⁵ This assertion rests on the idea that political support for judicial review will depend on the public’s normative assessment of whether the Court as an institution is playing an appropriate role in American democracy,²⁹⁶ or (relatedly) on the extent to which the public believes that judicial decisionmaking is based on “law” or “principle” as opposed to “politics” or the “personal preferences” of the Justices.²⁹⁷ There must be some truth to these ideas. It certainly seems plausible that the public’s tolerance for substantively undesirable judicial rulings will depend to some degree on perceptions of whether the Court is acting within the scope of its rightful authority.²⁹⁸ And there is at least some empirical evidence that public support for the Court is influenced by perceptions of the procedural fairness of its decisionmaking, and particularly by the perceived “neutrality” of its judgments.²⁹⁹

At the same time, it also seems clear that much of the variance in public and political support for the Court depends not on normative assessments of the judiciary’s institutional role or decisionmaking processes but instead on the substantive outcomes judicial review produces. To give just one example, a great deal of the institutional prestige enjoyed by the modern Supreme Court stems from *Brown v. Board of Education* — a decision that is now widely applauded on its substantive merits but that was heavily criticized contemporaneously as illegitimately political, nonneutral, and beyond the bounds of the judicial role.³⁰⁰

²⁹⁴ See FRIEDMAN, *supra* note 271; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Klarman, *supra* note 285, at 1749–50.

²⁹⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

²⁹⁶ See KRAMER, *supra* note 272, at 230–31.

²⁹⁷ See, e.g., *Casey*, 505 U.S. at 865 (“The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures . . .”). For a discussion of the promiscuity of the term “legitimacy” in constitutional law and theory and a useful analytic parsing of its various meanings, see generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

²⁹⁸ See KRAMER, *supra* note 272, at 229–31.

²⁹⁹ See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

³⁰⁰ See Klarman, *supra* note 285, at 1722–23.

Insofar as political support for the Court is based on instrumental assessments of substantive outcomes rather than on intrinsic assessments of judicial legitimacy, the Court can be understood as an “institution,” and its political stability can be analyzed along now-familiar lines. As it happens, a number of the most plausible existing explanations for how an independent judiciary might be politically sustainable that have been developed in the legal, economics, and political science literatures closely track the mechanisms of political commitment and institutional entrenchment that have been generalized throughout this Article.

One well-rehearsed model of judicial independence dates back to Madison’s suggestion that constitutional rights might serve “as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community.”³⁰¹ To the extent constitutional law is supposed to help solve the agency problem of representative government by “guard[ing] the society against the oppression of its rulers,”³⁰² courts might play the valuable supplemental role of authoritatively identifying and publicizing constitutional violations and thus facilitating coordinated retaliation by the public at large.³⁰³ Since the public would benefit from judicial monitoring of government officials, it would have an incentive to resist any attempt by self-serving officials to interfere with the Court or undermine its authority.³⁰⁴ This “fire alarm”³⁰⁵ account of the judiciary’s role in protecting popular sovereignty against untrustworthy government agents resonates with modern empirical evidence that the Court’s decisions are no less — and possibly more — consistent with public opinion than are those of the political branches.³⁰⁶ But the fire alarm theory also has a major limitation. As Madison emphasized, constitutional law is addressed not just to problems of agency but also — and in modern constitutional law, predominantly — to problems of faction.³⁰⁷ In a system of constitutional law that is primarily geared toward protecting individuals and minorities against majorities, political support for

³⁰¹ Letter from James Madison to Thomas Jefferson, *supra* note 10, at 162.

³⁰² THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 320; *see also supra* p. 667.

³⁰³ *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009); Weingast, *supra* note 83.

³⁰⁴ *See* Law, *supra* note 303, at 786.

³⁰⁵ *Id.* at 731.

³⁰⁶ For a survey of this evidence, *see id.* at 729–30 nn.19–20. This account also resonates with anecdotal observations that the Court, during times of war and crisis, has been markedly more aggressive in standing up to unpopular and politically weak Presidents. *See* POSNER & VERMEULE, *supra* note 245, at 50–51.

³⁰⁷ *See* Levinson, *supra* note 30, at 971–72.

judicial review cannot be adequately explained by the model of the people versus their governors.³⁰⁸

Other sources of institutional stability and entrenchment offer greater explanatory potential. For one, the coordination benefits of authoritative judicial interpretations might be extended beyond the fire alarm model. As discussed above, the benefits of coordinating on a common plan of government provide a general source of constitutional compliance incentives for political actors.³⁰⁹ The constitutional text is one important focal point, but because the text is so often vague, irrelevant, or substantively unacceptable, judicial review has emerged as an alternative locus of constitutional coordination.³¹⁰ Judicial settlement of political controversies is valuable to political actors, giving them reason to respect and preserve judicial authority, irrespective of their substantive agreement or disagreement with the outcomes.³¹¹ To illustrate, the two sides of the election dispute that the Court resolved in *Bush v. Gore*, notwithstanding the intensity of their disagreement on the merits, shared an interest in coordinating on a peaceful settlement of the controversy and uniting the country under a single President.³¹² In this and many other contexts, everyone may be better off agreeing to accept judicial resolutions of political controversies (at least within some tolerable range of substantive outcomes) rather than continuing to fight.

Further reasons for supporting judicial authority follow from the logic of repeat play and reciprocity. Another standard model of judicial independence envisions competing political coalitions that tacitly agree to support an independent judiciary in order to hedge against the risk of all-or-nothing reversals of political fortune.³¹³ On this “insurance” model of independent judicial review, the coalition in power may do better to cede some authority to the courts in order to deprive its rivals of plenary power if they take over the government.³¹⁴ Thus, Democrats who are temporarily in control of the national government may tolerate a judicial check on their ability to suppress Republican

³⁰⁸ In the special context of voting and election law, where representatives have especially strong self-serving incentives, constitutional scholars have emphasized the strong normative case for judicial enforcement of agency-focused “anti-entrenchment” rules. See generally Klarman, *supra* note 107. The complementary descriptive observation is that public support for judicial enforcement of these rules will come naturally.

³⁰⁹ See *supra* notes 166–77 and accompanying text.

³¹⁰ See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997).

³¹¹ See ELKINS ET AL., *supra* note 92, at 106–08.

³¹² Cf. RICHARD A. POSNER, *BREAKING THE DEADLOCK* 150–89 (2001) (defending the Court’s intervention in *Bush v. Gore* as pragmatically necessary to avert a constitutional and political crisis).

³¹³ Ramseyer, *supra* note 88; Stephenson, *supra* note 8.

³¹⁴ See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 21–33 (2003).

political speech on the tacit understanding that Republicans will be similarly constrained when they take their turn in power.³¹⁵ Note that the emergence and stability of judicial independence in this model depend upon a competitive political marketplace. In the early years of the Republic, when competitive political parties were a new and possibly fleeting phenomenon, Federalists and Republicans alike engaged in blatantly partisan manipulation of the judiciary.³¹⁶ Likewise, during periods when a dominant party or coalition is securely in control and the prospects of being on the losing side are beyond political time horizons, the immediate benefits of unchecked power will outweigh the prospective benefits of judicial independence. Political attacks on the Court by the relatively secure Republican majority in Congress during Reconstruction, and by the relatively secure Democratic majority during the New Deal, may be examples of this point. In contrast, we might hypothesize that close political competition between the two parties and frequent rotation of control of the presidency and Congress in recent decades may have contributed to an increase in the political acceptability of judicial supremacy.³¹⁷

Political coalitions that do have a secure hold on power may benefit from judicial review in different ways. For one thing, courts can be useful in implementing their policy agendas.³¹⁸ Political scientists have documented the important role courts play in helping national officials and constituencies “overcome federalism,” by constitutionalizing dominant national policy preferences and enforcing them against oppositional political forces at the state and local levels. Prominent examples include the famous “nationalizing” decisions of the Marshall Court and the activism of the Warren Court in imposing prevailing national norms on the South.³¹⁹ The Court has also stood ready to advance the policy goals of governing national coalitions when other political pathways have been blocked by gridlock, minority vetogates, or other forms of political friction.³²⁰ For instance, *Brown* and other progressive civil rights decisions served the interests of the postwar liberals

³¹⁵ Here again, the value added by judicial review lies in coordinating actors’ understandings and expectations of what counts as a constitutional violation. See Stephenson, *supra* note 8, at 68–70.

³¹⁶ See Ramseyer, *supra* note 88, at 742–43.

³¹⁷ On the apparent rise of judicial supremacy in recent decades, see KRAMER, *supra* note 272, at 219–26.

³¹⁸ See WHITTINGTON, *supra* note 8, at 287–88; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 58–65 (1993); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 *INT’L REV. L. & ECON.* 349 (1993); Keith E. Whittington, “Interpose Your Friendly Hand”: *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 *AM. POL. SCI. REV.* 583, 584–86 (2005).

³¹⁹ See WHITTINGTON, *supra* note 8, at 105–20.

³²⁰ See Whittington, *supra* note 318, at 589–91.

who for many purposes dominated national politics during the Roosevelt and Truman Administrations but were repeatedly thwarted on race issues by Southern Democrats.³²¹ An independent judiciary can also serve the interests of political leaders by taking responsibility for contentious or divisive issues those leaders would prefer to avoid.³²² The Court's willingness to take on segregation in *Brown* probably benefited President Eisenhower by allowing him to "shift[] the burden of ending segregation outside areas of specific executive authority to the courts."³²³ The attempt by the antebellum Democrats to avoid the divisive issue of slavery in the territories by delegating it to the Court was less successful, but it reflected the calculated risk that the Court could defuse the major threat to their political dominance.³²⁴

For all of these reasons, maintaining an independent judiciary can be beneficial to powerful political actors — government officials, parties, and democratic majorities alike. And to the extent that these actors do benefit from an independent judiciary, they will be willing to tolerate and even support some constitutional decisions that cut against their immediate interests. Notice the importance of bundling and prospectivity to this analysis. If political actors assess judicial review as a package of probabilistic policy outcomes rather than one case at a time, then the expected policy value of the Court as an institution can be positive on net despite some negative-value decisions. Bundling and prospectivity thus create the possibility that institutional stability can exceed policy stability. Judicial decisions that would not be politically acceptable in isolation can be protected under the umbrella of institutional-level political support.

In fact, political actors do seem to assess judicial review as a package deal. To illustrate, some progressive Democrats were willing to support the New Deal Court against Roosevelt's political attack because they believed that an independent judiciary would protect not just economic liberty, but also the rights they valued, such as freedom of speech and religion.³²⁵ In the words of Senator Henry Ashurst, "[e]ven many people who believe in President Roosevelt . . . were haunted by the terrible fear that some future President might, by sud-

³²¹ See WHITTINGTON, *supra* note 8, at 130–34.

³²² See *id.* at 134–52; Graber, *supra* note 318; Whittington, *supra* note 318, at 591–93.

³²³ WHITTINGTON, *supra* note 8, at 147.

³²⁴ See Graber, *supra* note 318, at 46–50.

³²⁵ See FRIEDMAN, *supra* note 271, at 218–22; WHITTINGTON, *supra* note 8, at 269–70. For another example, Klarman hypothesizes that one reason the Rehnquist Court "survive[d] *Bush v. Gore* reasonably unscathed, [was] because the remainder of the Court's constitutional jurisprudence has been such a political grab bag of results," including liberal decisions on abortion, school prayer, gender discrimination, and free speech. Klarman, *supra* note 285, at 1763; see also THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY 199–253* (2004) (describing the Rehnquist Court's activism in enforcing both liberal and conservative rights).

denly enlarging the Supreme Court, suppress free speech, free assembly, and invade other Constitutional guarantees of citizens.”³²⁶ The empirical literature similarly suggests that diffuse support for the Court is based on a “running tally” of the Court’s performance as an institution.³²⁷ Evidently, the Court can build up a savings account of approval that it can then spend down by issuing unpopular decisions without losing public support. Thus, an increasingly conservative Court has maintained the support of a cohort of African Americans who continue to remember and value the outcomes generated by the liberal Warren Court some decades ago.³²⁸

Viewing the Court in this light, as a relatively stable political institution, suggests some additional explanations for judicial independence. For instance, we might trace the support of some groups for the Court to their asset-specific investments in judicial authority. Lawyers may be a good example. While the bar has always been divided along political and ideological lines, lawyers have displayed a guild interest in defending and expanding judicial authority.³²⁹ The political mobilizations of the bar in defense of judicial independence during the Progressive and New Deal eras are at least suggestive in this regard.³³⁰

The mechanism of positive political feedback must also be at work in sustaining judicial power. The Warren Court’s invalidation of malapportioned legislative districts pursuant to a constitutional requirement of one person, one vote provides a clear example of this dynamic. Not surprisingly, incumbent politicians whose jobs were threatened by reapportionment mounted a vehement attack on the decision and on

³²⁶ Adrian Vermeule, Essay, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1162 (2006) (alterations in original) (quoting Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 276 (1988)) (internal quotation marks omitted).

³²⁷ See James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 364 (2003).

³²⁸ See James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120 (1992). One interpretation is that this cohort has been slow to update its beliefs about the expected value of judicial review. Another is that the experience of the Warren Court reminds them of the potentially positive value of judicial review in the future. See *id.* An analogous anecdotal observation is commonly made about law professors. See, e.g., Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 90 (1997) (“Because of the nation’s experience with the Warren Court, legal liberalism has been linked to political liberalism since mid-century.”).

³²⁹ See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 98–99 (1996) (“Support, respect, and reverence for the Supreme Court remain strong today among American lawyers and constitute[] one of the main pillars of the Court’s power.” *Id.* at 99.); William G. Ross, *The Resilience of Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks*, 38 WAKE FOREST L. REV. 733, 763 (2003).

³³⁰ See WILLIAM G. ROSS, *A MUTED FURY* 242–43, 302 (1994).

the Court more generally.³³¹ Once reapportionment took hold, however, the one person, one vote rule effectively generated its own powerful political coalition, comprising officials who were elected from reapportioned districts that they now had a vested interest in preserving.³³² The political feedback effects of reapportionment operated at the level of a single decision (or short line of decisions), but it is easy to imagine broader effects with greater institutional-level consequences. The business interests that defended the Court through the early decades of the twentieth century were no doubt all the more influential on account of the economic and political clout that ongoing judicial protection had helped them to amass.³³³

At the same time, however, judicial decisions are distinctively likely to provoke *negative* political feedback.³³⁴ Prominent “progressive” decisions such as *Brown*, *Miranda*, *Furman*, *Roe*, and *Lawrence* have all incited an immediate political backlash against the causes these decisions were supposed to benefit — and to varying extents against the Court itself.³³⁵ To illustrate, *Roe* generated a politically powerful pro-life movement that catalyzed the Religious Right, helped the Republicans take over Washington, and put abortion rights under siege through the 1980s and 90s. Conservative Republicans waged war against the Court, attacking judicial activism, promoting originalism (as a jurisprudence of judicial restraint), and making abortion a litmus test for Supreme Court nominees.³³⁶ In short, “[h]aving tried to take abortion out of politics, the Court now found itself a victim of the politics of abortion.”³³⁷ The retrospective politics of *Roe* and the broader phenomenon of backlash suggest that political feedback — both positive and negative — is an important variable in understanding the political sustainability of judicial review.

For present purposes, it is enough to appreciate that the judiciary can impose constitutional constraints on powerful political actors only if these actors support the judiciary. Political support for judicial authority that outruns agreement with the substance of particular decisions is a phenomenon that must be both documented and, to the extent it exists, explained. The most promising lines of explanation, here

³³¹ See FRIEDMAN, *supra* note 271, at 268–69.

³³² See Klarman, *supra* note 285, at 1754–55.

³³³ See FRIEDMAN, *supra* note 271, at 171–87.

³³⁴ See *supra* note 95.

³³⁵ See Michael J. Klarman, *Why Backlash?* (Aug. 2010) (unpublished manuscript) (on file with the Harvard Law School Library).

³³⁶ See *id.*; see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (surveying the literature on the political history of reaction to *Roe* and assessing the backlash hypothesis).

³³⁷ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 358 (1994).

again, track a now-familiar set of mechanisms of political commitment and entrenchment.

CONCLUSION

Constitutional change is a constant. The average lifespan of written constitutions since 1789 has been nineteen years.³³⁸ In the United States, where a single constitution has been formally “alive” since 1789, the constitution in practice has been revised continually — occasionally through formal amendment but more often and more substantially through changes in judicial interpretation, political construction, and popular acceptance. Some of the most breathtaking theoretical contortions of contemporary constitutional scholarship have been provoked by the need to rationalize and legitimate constitutional transformations as somehow consistent with the rule of law and not merely concessions or outright surrenders to the unrelenting force of ordinary politics.³³⁹

The ubiquity of constitutional change should inspire more than a little skepticism about the extent of genuine constitutional commitment and entrenchment — certainly more than most constitutional lawyers and theorists display. That said, constitutionalism in the United States and other countries appears to be far more than an exercise in futility. Popular presidents refrain from ruling by decree or running for third terms; dominant political parties resist the temptation to suppress dissent or suspend democracy; and judicially created constitutional doctrine is normally accepted as authoritative and binding. At any given time, these and other constitutional rules and arrangements command reflexive, noncontroversial compliance, even from political actors who seem to suffer serious costs. And while constitutional change has been continual, it has not been continuous: even those constitutional rules and arrangements that are eventually eroded or reformed manage to hold their ground against persistent social and political mobilization for years or decades. All told, it seems hard to deny that the American people have succeeded in sustaining a broad and important set of constitutional commitments.

The minimal ambition of this Article is to remind us that these familiar features of constitutional law as it appears to operate in the United States and elsewhere are far from self-explanatory. In order for constitutions to serve as the rules of the political game, they must avoid *becoming* the political game. Yet, as Madison well understood,

³³⁸ ELKINS ET AL., *supra* note 92, at 1–2 (also noting the coincidence that nineteen years was Thomas Jefferson’s proposed expiration date for constitutions, on the principle that the “dead should not govern the living,” *id.* at 1 (quoting Letter from Thomas Jefferson to James Madison (Sept. 6, 1789)) (internal quotation marks omitted)).

³³⁹ See, e.g., sources cited *supra* note 4.

constitutions cannot succeed by standing outside of politics altogether; to the contrary, social and political support is all that makes a constitution more than parchment. Understanding how constitutions, systems of constitutional law, and other political institutions can constrain politics while remaining embedded in politics is a fundamentally important theoretical challenge in law and the social sciences — one with immediate practical implications for constitutional law and design. The more constructive ambition of this Article has been to develop a conceptual framework and marshal a set of resources that might help solve the puzzle of how political, and particularly constitutional, commitments can succeed.