LOOKING OFF THE BALL:

CONSTITUTIONAL LAW AND AMERICAN POLITICS

Casual spectators follow politics and law the same way they follow sports and entertainment. During sporting events, the camera and average fan obsessively follow the ball and scoreboard. Millions tune in each week to discover who gets voted off the island or remains in the American Idol competition. During political and legislative campaigns, the camera and average fan obsessively follow opinion polls and keep legislative scorecards. Litigants and court-watchers count judicial votes and determine the winning percentages of the leading litigants before the Supreme Court.

Afficionados of sports and politics recognize that the crucial events which determine outcomes often take place away from the camera's eye. Players on successful teams create scoring opportunities by moving without the ball. Producers and directors conduct extensive off-camera investigations that ensure viewers will be entranced by the televised product. Students of congressional elections are similarly aware that the private campaign for dollars frequently determines the public campaign for votes.[1] Power accrues to those who control the political agenda, not to those who win particular votes.[2] Public law scholars, by comparison, too rarely

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[1] See Paul S. Herrnson, Congressional Elections: Campaigning at Home in Washington (CQ Press: Washington, DC, 2004).

[2] See William H. Riker, The Art of Political Manipulation (Yale University Press: New Haven, 1986); Peter Bachrach and Morton S, Baratz, Power & Poverty: Theory & Practice (Oxford University Press: New York, 1970).

"look off the ball." "The scholarly focus," Keith Whittington observes, remains "on individual justices and how they cast their votes."[3]

Public law scholars who focus entirely on the public conflicts between constitutional authorities fail to appreciate how constitutional law influences American politics and judicial decision making. Legal norms better explain how constitutional controversies are structured than how they are resolved. Basic principles of constitutional law help secure legal agreement in the face of political disagreement. Political actors who reason constitutionally do not dispute numerous matters that they dispute vigorously when employing other justificatory logics. Citizens who disagree about the merits of a recent Supreme Court nomination nevertheless agree that the nominee will legitimately serve on the bench if confirmed by the Senate. When political disagreements are resolved into legal disagreements, basic principles of constitutional law alter the terrain on which those conflicts are fought. Political actors who reason constitutionally debate different matters than they do when they employ other justificatory logics. Elected officials and interest groups during the New Deal debated the merits of national legislation mandating collective bargaining. The justices on the Hughes Court debated whether various industries covered by the resulting laws were engaged in interstate commerce.

The following pages detail how and why constitutional law influences both judicial and public decision making. Part I discusses the allure of and problems with the common view that constitutional argument merely masks policy preferences. Treating justices as free to express

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[3] Keith E. Whittington, "Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics," 25 **Law & Social Inquiry** 601, 601 (2000).

their partisan commitments may seem to explain Bush v. Gore,[4] but not the judicial failure to intervene in the other numerous presidential elections in which the candidate favored by most members of the Supreme Court lost. Part II details the agreement function of constitutional law, how constitutional norms and standards generate legal agreements among persons who dispute the underlying merits of particular policies under constitutional attack. The norms and standards explain constitutional criticism, why only a small proportion of the political questions that occupy Americans are normally resolved into constitutional questions, and how legislatures by making constitutionally "safe" choices may immunize their decisions from judicial scrutiny. Part III describes how constitutional law structures those constitutional controversies that do take place. Constitutional debates are often quite different from other political debates because constitutional norms and standards require constitutional decision makers treat as important phenomena of less interest to policy makers and attach little significance to those phenomena crucial to the underlying policy decision. Part IV briefly comments on aspects of constitutional decision making obscured by too sharp a distinction between law and policy. Political scientists who neatly divide the justificatory world into legal norms and policy norms implicitly take sides in hotly contested interpretive debates and overlook the most important differences between elected officials and justices as constitutional decision makers.

The commentary below frequently makes points that are obvious. Who would bother conducting a quantitative study exploring whether pro-capital punishment judges in states and countries that have abolished the death penalty nevertheless insist that the relevant constitution mandates that murder be punished by death? If, however, justices exercise "virtually

[4] 531 U.S. 98 (2000).

untrammeled policy-making authority,"[5] as much political science folk wisdom repeatedly insists, no reason exists for ruling out this possibility. Clearly, when political scientists refer to justices as policymakers, they do not mean that justices are as free as elected officials to mandate the death penalty. The question is what do they mean. The argument below indicates that whatever they mean must take constitutional law into account.

I. The Allure of Attitudinalism

Reducing constitutional law to politics by other phrases is tempting and problematic. Contemporary constitutional disputes, both on and off the bench, are typically between liberals and conservatives. Quantitative studies consistently find that ideology best explains differences between judicial votes on constitutional issues. Nevertheless, far more agreement exists on constitutional norms that would be the case were constitutional argument a form of policy or partisan argument with a few more Latin words and blue book citations tossed in. Constitutional decision makers committed primarily to expressing their political preferences would vote differently and, more important, write opinions much differently than they do in actual practice.

Judicial divisions over contested constitutional issues throughout American history frequently reflect underlying political commitments. In Dred Scott v. Sandford,[6] all five justices from the slave states voted to prohibit bans on slavery in American territories. The four justices

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[5] Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (Cambridge University Press: New York, 2002), p. 86.

[6] 60 U.S. 393 (1856).

from the free states wrote opinions that reflected their progressively greater anti-slavery sentiment. Justice Robert Grier concurred with the southern justices, Justice Samuel Nelson decided that Dred Scott remained a slave without deciding on the constitutionality of the Missouri Compromise, Justice Benjamin Curtis insisted that Congress could ban slavery in the territories, and Justice John McLean implied that Congress was constitutionally required to ban slavery in the territories. The voting pattern in Grutter v. Bollinger[7] and Gratz v. Bollinger[8], decided almost 150 years later, exhibited a similar pattern. The three most liberal justices on the Rehnquist Court voted to sustain the use of race in the admissions process by both the law school and undergraduate program at the University of Michigan. Justices Stephen Breyer and Sandra Day O'Connor voted to sustain the law school's affirmative action program, but not the affirmative action program for undergraduates, with the more conservative O'Connor calling for stricter constitutional restrictions on affirmative action than the more liberal Breyer. Justice Anthony Kennedy and Chief Justice Rehnquist voted to strike down both programs without rejecting affirmative action entirely. The most conservative justices on the Rehnquist Court, Justices Clarence Thomas and Antonin Scalia, voted to strike down both programs and rejected affirmative action entirely. Judicial voting and opinions in other political charged cases exhibit the same ideological pattern, whether the issue be capital punishment, abortion, or limits on congressional power under the commerce clause.[9]

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[7] 539 U.S. 306 (2003).

[8] 539 U.S. 244 (2003).

[9] See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); United States v. Lopez, 514 U.S. 549

Partisan divisions outside the court are no different on constitutional issues. Liberals in Congress and in the law reviews support abortion rights while claiming that environmental regulations do not take property unconstitutionally. Conservatives in Congress and in the law reviews insist that bans on abortion are constitutional, but that many environmental regulations run afoul of the Fifth and Fourteenth Amendments. "A broad generalization, inaccurate only at the margins," Mark Tushnet writes, "is that nearly every constitutional theorist urges minimal judicial review and vigorous democratic dialogue on issues on which the theorist believes her preferred position is likely to prevail in the democratic dialogue and more-than-minimal review on issues on which the theorist believes her preferred position is unlikely to prevail there."[10]

Statistical analysis of judicial voting supports this common impression. Studies consistently find that ideology best explains differences in judicial voting. As the leading proponents of the attitudinal model of judicial behavior claim, "the Supreme Court decides disputes in light of the facts of the case vis-a-vis the ideological attitudes and values of the justices."[11] These attitudes and values are not complex. Jeffrey Segal and Harold Spaeth believe that most divisions among the justices can be mapped on a simple liberal/conservative axis. "Simply put," they famously conclude, "[William] Rehnquist vote[d] the way he [did] because

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(1995).

[10] Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty," 94 **Michigan Law Review** 245, 245 n.4 (1995).

[11] Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (Cambridge University Press: New York, 2002), p. 86.

he [was] extremely conservative; [Thurgood] Marshall voted the way he did because he was extremely liberal."[12]

The equally obvious phenomenon of judicial agreement on contested partisan issues should have cast doubt on this effort to reduce constitutional law to ideology. Consider Bush v. Gore, presently considered the prime exhibit for the case against treating constitutional law as having independent significance. The justices in that case are said to have voted in "a blatant politically partisan fashion,"[13] with the more conservative justices voting for Bush and the more liberal justices voting for Gore. Even ignoring some internal problems with this analysis,[14] partisanship alone does not explain Supreme Court decision making in the aftermath of the 2000 presidential election. A high probability exists that a majority of the justices on the Supreme Court favored the losing candidate in the 1800, 1804, 1828, 1832, 1840, 1848, 1860, 1868, 1884, 1892, 1912, 1916, 1932, 1936, 1992 and 1996 presidential elections.[15] Good reason exists for thinking a strong minority, possibly a bare majority, favored the losing candidate in the 1808,

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[12] Segal and Spaeth, Attitudinal Model, p. 86.

[13] Segal and Spaeth, Attitudinal Model, p. 171.

[14] Whether Justice Souter preferred Gore to Bush cannot be determined. Moreover, given that no one knew who the rules announced in Bush v. Gore would benefit in the future, the divisions among the majority and dissents are hard to fathom from a purely political perspective.

[15] During these years, a majority of the justices on the bench had been appointed by the party whose candidate lost the presidential election and no broad realignment had taken place which might suggest that the partisan preferences of the judicial majority might have changed over time.

1864, 1952, 1956, 1972 and 1976 presidential elections.[16] Nevertheless, the Supreme Court refrained from intervening, no matter how opposed the justices were to the putative president-elect. The "dyed-in-the-wool Federalist(s)"[17] who controlled the Supreme Court in 1800 did not issue an opinion in Adams v. Jefferson which had the practical effect of handing the second president a second term. Supreme Court justices who hated Andrew Jackson, Abraham Lincoln and Franklin Roosevelt held their pens when those "enemies of the constitution" were anointed by the electorate.

These failures to act in "a blatantly politically partisan fashion" cannot be explained by partisan failures to bring an appropriate case before the Supreme Court. An institution whose members exercise "virtually untrammeled policy-making authority"[18] would not have to passively wait for their preferred president candidate find constitutional grounds for reversing the apparently electoral result. Politically active Federalists in 1800 and Republicans in 1936 who thought justices decided cases solely on the basis of "ideological attitudes and values" and often acted in "a blatant politically partisan fashion" would certainly have manufactured some constitutional dispute as a vehicle for having the Ellsworth and Hughes Courts declare John Adams and Alf Landon, respectively, the winner of that year's presidential election. History suggests that such a judicial coup in a reasonably close election would not have done irreparable

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[16] For example, whether the judicial majority in 1972 and 1976 favored the winning candidate probably depends on how Lewis Powell, a Democrat appointed to the Court by a Republican, voted.

[17] Segal and Spaeth, Attitudinal Model, p. 23.

[18] Segal and Spaeth, Attitudinal Model, p. 12.

harm to either the nation or judiciary. An American public that has tolerated the election of a president who received fewer popular votes than a rival candidate and demurred when the justices decided Bush v. Gore probably would not have rioted in the streets had the Republican majority on the Waite Court found a constitutional excuse for declaring James Blaine the winner of the 1884 national election.

When Segal and Spaeth claim that Adams v. Jefferson, Blaine v. Cleveland, Landon v. Roosevelt and other similar lawsuits would be based on "meritless" legal claims that "no self-respecting judge would decide solely on the basis of his or her policy preferences,"[19] they undermine the entire foundations of their model of judicial behavior. Such legal materials as precedent, text, and history must matter, otherwise no grounds would exist for distinguishing meritless from worthy legal claims. If some constitutional arguments have no legal merits, then justices do not act as "untrammeled" policy makers. Rather, Segal and Spaeth apparently concede that justices act on notions of good policy only when competent constitutional arguments support their policy preferences. "Plausible legal arguments" must exist "on both sides."[20] Unfortunately, at no point do Segal and Spaeth make any effort to compare the universe of plausible policy preferences to the universe of policy preferences supported by competent constitutional arguments.[21] Absent such an analysis, fifty years of research on judicial behavior seems to have proven little more than the unsurprising proposition that law

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[19] Segal and Spaeth, Attitudinal Model, p. 93.

[20] Segal and Spaeth, Attitudinal Model, p. 93.

[21] The Supreme Court and the Attitudinal Model does engage in a great deal of sneering, not usually taught as a scientific method in most political science departments.

cannot entirely explain the outcome of those cases in which all parties made plausible legal arguments.

The attitudinal model further overlooks how justices control to some degree what constitutes a "plausible legal argument." Judges write legal opinions that both justify a particular decision and structure future constitutional litigation. By framing issues in particular ways, judicial opinions make more plausible some future legal claims while placing increased obstacles in the way of others. Were constitutional law a mask for policy and partisan preferences, one would expect by now that the justices would have constructed a set of precedents that provide the legal foundations necessary for guaranteeing that the Supreme Court chose all elected officials and determined all vital national policies. This is far from the case. Indeed, as will become clear shortly, constitutional precedents enable the justices to intervene only on a small fraction of the issues that excite the American public.

Constitutional law does a better job explaining agreement than disagreement. Conventional claims that constitutional law masks ideological preferences miss this function of constitutional law when they analyze only differences in judicial voting. Segal and Spaeth correctly note that when Rehnquist and Marshall voted differently, Marshall almost always took a more liberal position than Rehnquist. Marshall and Rehnquist did not, however, almost always vote differently. They voted together more than two-fifths of the time and presumable not always in cases brought by either really extreme conservatives or liberals. Marshall and Rehnquist frequently agreed on the constitutional status of hotly contested policy choices. Both justices voted to sustain President Carter's policies during the Iran hostage crisis[22] and insisted

[22] Dames & Moore v. Regan, 453 U.S. 654 (1981).

that the Supreme Court not scrutinize very strictly conditions on federal spending.[23] Neither justice wrote an opinion suggesting that President Reagan's tax cuts were unconstitutional or that Robert Bork had a constitutional right to Senate confirmation. Public law scholarship must explain these agreements as well as their more public disagreements.

II. Creating Agreement

The strength of practices such as law is best measured by determining the extent to which practitioners agree on the appropriate norms and application of those norms. Bridge bidding conventions matter even though experts dispute whether a bidder should say "one no-trump" when holding five cards in the spade or heart suit, because agreement exists on whether "one no-trump" is the correct bid in the Standard American System for approximately 99.9% of all possible hands. Constitutional criticism, the remarkable limited agenda of constitutional courts, and the existence of safe harbors on almost every constitutional question all indicate that constitutional law similarly constrains legal practitioners and decision-makers. Constitutions and constitutional law consistently secure agreements where agreements would otherwise not exist. People who reason constitutionally agree on numerous legal standards, even when they dispute the merits of the contested policy. Some constitutional agreements help forge normative agreements. Americans may favor the electoral college because they revere a constitution which mandates the electoral college.

The practice of constitutional criticism in the United States illustrates the agreement function of constitutional law. Anti-Federalists, abolitionists, populists, progressives, and

[23] South Carolina v. Dole, 483 U.S. 203 (1987).

contemporary citizens have alleged numerous flaws in the constitutional order. Sanford Levinson has recently penned a polemic describing the constitution as "both insufficiently democratic, in a country that professes to believe in democracy, and significantly dysfunctional, in terms of the quality of the government we received."[24] The subjects of his scorn include equal state representation in the Senate, the electoral college, a life tenured judiciary, the presidential veto, the limited grounds for impeachment, and the supermajoritarian requirements for constitutional amendment.[25] Yet, as is the case with previous constitutional critics, Levinson agrees that these pernicious constitutional provisions are presently the law of the land. He does not insist, the text of Article I to the contrary, that the Patriot Act is illegal because the Senate which approved that measure is undemocratically constructed.

The rules Levinson challenges have consequences that would almost certainly guarantee intense constitutional debate were constitutional debate was little more than a stylized version of policy or political debate. Presidential campaigns would be quite different had the constitution mandated that the winner gain a majority of the popular votes rather than a majority of the electoral college votes. Constitutional structures explain why the Kerry and Bush campaigns in 2004 spent almost half their funds on Florida and Ohio, ignoring such states as New York and California.[26] The practice of electing all members of the national legislature from states or

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[24] Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) (Oxford University Press: New York, 2006), p. 9.

[25] Levinson, Our Undemocratic Constitution, pp. 6-7.

[26] Sanford Levinson, "Debating the Electoral College"

districts located entirely within states contributed significantly to political polarization during the 1850s and to polarization at present.[27] Presidential parties do notoriously poorly during the second midterm election, but no president has ever received a vote of no confidence after such an adverse result. The constitutional rule limited impeachments to "high crimes and misdemeanors" restricts the capacity of partisan majorities in Congress to remove an unpopular president whose party was decisively rejected during the most recent national election. Federal spending on matters as different as highways and terror prevention grossly favor low population western states. Equal state representation in the Senate guarantees that Wyoming will garner (almost) as much transportation funding as New York.[28] Numerous popular constitutional amendments, ranging from prohibitions on child labor to permissions for school prayer, have failed to meet the supermajoritarian requirements for ratification.[29] Nevertheless, although the "hard wired" provisions of the constitution create political winners and losers, their meaning is rarely controversial. Californians and Rhode Islanders agree that each state is to be represented by two senators and that this arrangement significantly benefits Rhode Island.

These agreements on constitutional law may better explain important preferences or beliefs about best political practices than those preferences or beliefs explain agreements on

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[27] See Mark A. Graber, Dred Scott and the Problem of Constitutional Evil (Cambridge University Press: New York, 2006), p. ___.

[28] See Frances E. Lee and Bruce I. Oppenheimer, Sizing Up the Senate: The Unequal Consequences of Equal Representation (University of Chicago Press: Chicago, 1999).

[29] David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1985 (University Press of Kansas: Lawrence, Kansas, 1996).

constitutional law. Persons socialized in a particular constitutional order may develop relatively unthinking commitments to the constitutional procedures of their native polity. Whether persons favor a parliamentary or presidential regime may largely be a function of whether they live and have been educated in a parliamentary or presidential regime. Some Americans wax poetic over constitutional institutions with very clouded historical pasts. The framers adopted the electoral college largely to provide additional political protections for slavery. Madison and others observed that selecting the president by popular vote would leave southern states with "no influence in the election on the score of the Negroes"[30] No democracy nation subsequently constitutionalize a practice even resembling the electoral college for electing the national executive. Given these dubious origins and the utter lack of imitation, good reason exists for thinking that continued American support for the electoral college[31] is rooted in reverence for the constitution rather than in claimed virtues of that practice that did not occur to the framers and have not occurred to constitutionalists in any other regime. Had constitutional law mandated different rules for electing the national executive, those rules would almost certainly enjoy the same degree of public acclaim.

Constitutional law generates agreements on the legality of controversial public policies as well as on the legality of potentially controversial political procedures. Tocqueville grossly

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[30] Max Farrand, ed., The Records of the Federal Convention of 1787 (Vol. II) (Yale University Press: New Haven, 1966), p. 57. See Paul Finkelman, "The Proslavery Origins of the Electoral College," 23 **Cardozo Law Review** 1145 (2002).

[31] See, i.e., John McGinnis, "Two Cheers for the Electoral College (and Two Cheers is All that Can Be Expected),

distorted both the plasticity of constitutional law and the influence of courts on public policy when he asserted, "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[32] Two recent studies, the first on contemporary politics,[33] the second on politics in the Jacksonian age,[34] detail how the majority of political questions that arise in the United States remain, in whole or in large part, political questions. Intense political debates are no more likely to be constitutionalized than issues less salient to most voters. The political questions that have historically divided the two major political parties in the United States are rarely resolved into constitutional questions and even more rarely settled by judicial decree. This would not be case were constitutional law a mere mask for policy preferences and Supreme Court justices unalloyed policymakers.

Professor Frederick Schauer's comparison of judicial and political agendas cast doubt on common impressions "that the Constitution, constitutional law, and the Supreme Court not only occupy a major role in American policymaking, but also in fact make a great deal of American policy."[35] He found that the justices tend to resolve only political questions of relatively low interest to the general public. Schauer's analysis of newspapers and public opinion surveys revealed that such "hot button issues for the court" as "race, sexual orientation, and abortion . . .

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[32] 1 Alexis De Tocqueville, Democracy In America 280 (Phillips Bradley ed., 1945)

[33] Frederick Schauer, "Foreword: The Court's Agenda–And the Nation's," 120 **Harvard Law Review** 4 (2006).

[34] Mark A. Graber, "Resolving Political Questions into Constitutional Questions: Tocqueville's Thesis Revisited," 21 **Constitutional Commentary** 485 (2004).

[35] Schauer, "The Court's Agenda." p. 11.

turn out to generate an unexpectedly low amount of attention."[36] Judicial rulings on the constitutionality of Bush Administration anti-terrorism policies influence the concerns of the general public only at the margins. Hamdan v. Rumsfeld, Schauer observes, is not "much more than a footnote to the war on terrorism" and has "little to do with Iraq–the topic the public and their representatives now care most about."[37] The issues off the judicial agenda are far more important to the general public than the issues on the judicial agenda. Schauer points out that the justices have not ruled on

> fuel prices, the minimum wage, income taxes, the estate tax, Social Security, inflation, interest rates, avian flu, or the nuclear capabilities of Iran and North Korea, while taking on issues related to healthcare, employment, and education that could not seriously be described as in any way connected with current or past policy debates on these topics.[38]

This tendency for the Court to operate at the periphery of American politics has been true for the past half-century. "[T]he Court's noninvolvement, with few exceptions," Schauer details,

> encompassed almost all of World War II, European postwar recovery, the occupation of Japan, the Berlin Airlift, the Cold War, the Korean War, nuclear disarmament, Cuba, farm policy and agricultural subsidies, recession, the creation of the interstate highway system, the establishment of Medicare, the war in Vietnam, double-digit inflation, severe gas shortages, and military operations in the Dominican Republic, Panama, Somalia, Lebanon, Kosovo, and Iraq, among others.[39]
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> Justices who have no legal capacity to intervene on these matters are not the

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[36] Schauer, "The Court's Agenda," p.16.

[37] Schauer, "The Court's Agenda," p. 27.

[38] Schauer, "The Court's Agenda," p. 31-32.

[39] Schauer, "The Court's Agenda," p. 44.

"untrammeled policy makers" described by too much political science and legal literature. Comparisons of the judicial and political agendas consistently find that "the people and their elected representatives can nevertheless be understood as still making the vast bulk of decisions that are most important to the people themselves."[40] Many of these political questions were not resolved into judicial questions because they were not first resolved into constitutional questions. Elected officials on issues as diverse as the annexation of Cuba and the privatization of Social Security have agreed that government may constitutionally make the controversial political choice. Disagreement was limited to policy considerations. Supreme Court justices apparently support this consensus. Although each justice writes approximately thirty to forty opinions a year, no contemporary justice has sought to lay the precedential foundations for making their policy views the law of the land on tax cuts or troop strength in Iraq.

Constitutional law matters even when political questions are resolved into constitutional questions. The constitution, in most cases, establishes legal floors or ceilings on government policy, but not both.[41] The Eighth Amendment forbids "cruel and unusual punishment." No constitutional provision bans "unusually compassionate punishment." Elected officials may have constitutional obligations to punish crime adequately, but most commentators who

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[40] Schauer, "The Court's Agenda," p. 53.

[41] The potential conflicts between the free exercise and establishment clauses of the First Amendment, and between the press clause of the First Amendment and due process clause of the Fifth Amedment are the two most important exceptions to the discussion in the text.

champion such duties treat them as not legally enforceable.[42] This feature of constitutional law typically provides elected officials making binary policy choices with a constitutional safe harbor. While one policy choice is constitutionally controversial, the alternative is not. Constitutional lawyers debate whether government may outlaw flag-burning, impose capital punishment, and condemn land for private development. General agreement exists that government may constitutionally permit flag-burning, refrain from imposing capital punishment, and outlaw condemnations for private development.

Constitutional safe harbors sharply constrain judicial capacity to influence public policy and shape constitutional development. Persons deciding exclusively on policy logics are free to choose whether to outlaw flag burning, impose capital punishment or condemn land for private development. Persons deciding exclusively on constitutional logics may intervene only when policy makers select the constitutionally controversial alternative. Justices who believe the death penalty morally evil and unconstitutional strike down legislative efforts to mandate capital punishment. Justices who believe the death penalty a moral necessity and constitutionally permitted have no constitutional grounds for intervention when policy makers refuse to punish murder by death. The Marshall Court found this limit on constitutional adjudication particularly frustrating. Shortly after handing down McCulloch v. Maryland,[43] the justices wrote a letter to President Monroe declaring that their opinion upholding the national bank provided the

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[42] See, i.e., Lawrence G. Sager, "Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law," 88 **Northwestern Law Review** 410 (1993).

[43] 17 U.S. 316 (1819).

necessary legal precedent for sustaining the internal improvements bill under presidential consideration.[44] Nevertheless, when Monroe vetoed that bill on constitutional grounds,[45] constitutional law did not provide the Marshall Court with the authority to reverse that constitutional mistake.[46] A constitutional disagreement could not be fully translated into a legal disagreement because the President Monroe had made the constitutionally uncontroversial, controversial policy choice.

The Marshall Court was one of many constitutional decision makers whose influence on public policy was sharply limited by their obligation to justify decisions legally. Decision makers limited to constitutional logics do not participate in debates over the merits of the constitution. They do not participate in the numerous policy debates, ranging from the proper strategy in Iraq to the structure of national education testing, that are not resolved into constitutional debates. Justices do not participate in constitutional debates whenever elected officials choose the constitutionally uncontroversial policy. These limits on constitutional decision making hardly leave constitutional authorities with a dull agenda. Abortion, affirmative action, environmental regulations, and the status of detainees during the war on terrorism are examples of the hot political questions that constitutional logics permit to be resolved into judicial questions. Still, we should not make "the fallacious leap from the accurate premise that

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[44] See 1 Charles Warren The Supreme Court In United States History 596-97 (1947).

[45] James Monroe, Veto Message in 2 Messages and Papers at 142-43

[46] See Mark A. Graber, The Jacksonian Origins of the Chase Court, 25 J. Sup. Ct. Hist.17, 34 (2000).

much of what the Supreme Court does is important to the erroneous conclusion that much of what is important is done by the Supreme Court."[47] When keeping one eye on the judicial agenda, students of constitutional politics should keep their other eye firmly on the rest of the political agenda. As the Bible remains us, understanding that David has slain "his ten thousands" puts in better perspective claims that "Saul has slain his thousands."

III. Structuring Disagreement

Law structures constitutional conflicts when constitutional conflicts break out. Persons who reason from constitutional norms have different disagreements than persons who reason from other norms. Ideology often explains the differences between persons engaged in a constitutional debate, but law usually explains the debate they are having. Policy disputes over whether the president's economic policies are wise are quite different from constitutional disputes over whether national economic policies regulate interstate commerce, even if both pit liberals against conservatives.

Thinking about "jurisprudential regimes" provides a helpful way of understanding how constitutional law influences constitutional disputes. As detailed by Mark Richards and Herbert Kritzer, "jurisprudential regimes structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing

[47] Schauer, "The Court's Agenda," p. 8.

the justices are to employ in assessing case factors."[48] The presence of a jurisprudential regime does not guarantee that all justices will reach the same conclusions. Rather, jurisprudential regimes encourage justices to ask the same questions. Justices making decisions in the jurisprudential regime instituted by Plessy v. Ferguson[49] focused on the extent to which the separate facilities offered to white persons and persons of color could be said to be equal. When constitutional decision makers disagreed, their dispute was over whether the law was a race distinction or a race discrimination.[50] Justices making decisions in the jurisprudential regime instituted by Brown v. Board of Education[51] focused on the extent to which laws made justifiable race distinctions. When constitutional decision makers disagreed, their dispute was over whether government had a sufficiently compelling reason to make a conceded race distinction/discrimination.[52]

Preliminary studies indicate that the establishment of a jurisprudential regime influences judicial voting. Richards and Kritzer found that the same justice was likely to be influenced by

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[48] Mark J. Richards and Herbert M. Kritzer, "Jurisprudential Regimes in Supreme Court Decision Making," 96 **American Political Science Association** 305 (2002).

[49] 163 U.S. 537 (1896).

[50] See Gilbert Thomas Stephenson, Race Distinctions in American Law (D. Appleton: New York, 1910); Plessy v. Ferguson.

[51] 347 U.S. 483 (1954).

[52] See Johnson v. California, 543 U.S. 499 (2005); Korematsu v. United States, 323 U.S. 214 (1944);

different factors after an important precedent established clear case law. Judicial voting patterns changed when the Supreme Court in Chicago Police Department v. Mosley[53] and Grayned v. Rockford[54] ruled that time, place and manner regulations had to be content neutral. Justices of all political persuasions were more likely to protect "racial minorities, alleged communists, and businesses" after Mosley and Grayned were decided.[55] While the existence of a content neutral regulation had no statistical impact on judicial voting before 1972, that factor was statistically significant afterwards. "[A]fter the adoption of the speech-protective part of the regime that applies to content-based regulations," Richards and Kritzer detail, "the justices were likely to be more supportive of speakers who were regulated based on the content of their speech relative to speakers whose expression fell within the less protected categories."[56]

Lemon v. Kurtzman[57] had a similar impact on judicial voting in religion cases. That decision held that laws passed constitutional muster only if the law had a secular purpose, was neutral between different religions and avoided excessive government entanglement with religion. Before that decision, secular purpose and religious neutrality were not statistically associated with judicial voting, while government monitoring statistically increased the probability that a justice would vote to sustain the law under constitutional attack. After Lemon

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[53] 408 U.S. 92 (1972).

[54] 408 U.S. 104 (1972).

[55] Richards and Kritzer, "Jurisprudential Regimes," p. 314.

[56] Richards and Kritzer, "Jurisprudential Regimes," p. 314.

[57] 403 U.S. 602 (1971).

was handed down, lack of a secular purpose, lack of religious neutrality and government monitoring statistically increased the probability that a justice would strike down the law under constitutional attack. Ideology mattered before and after Lemon. Conservative justices were more likely than liberal justices to reject establishment clause claims. Nevertheless, Lemon shifted the terrain of judicial debate. Before Lemon, conservative and liberal justices disputed whether a law was supported by historical practice. After Lemon, conservative and liberal justices disputed whether the law had a secular purpose, was religiously neutral, and required excessive government entanglement with religion. Laws that were sustained in one regime were struck down in the other, even though no significant change in judicial membership had taken place.[58]

Jurisprudential regimes include all legal materials that constitutional decision makers consider when resolving controversies. The language of constitutional provisions structures constitutional disagreements as do shared understandings about constitutional history. Understood this broadly, the impact of jurisprudential regimes on constitutional decision making is obvious. Consider the post-Civil War Amendments. Americans disputed the constitutional status of persons of color before and after the Civil War. Before the Civil War, whether persons of color were citizens was a central constitutional issue.[59] After the Civil War, disputes were

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[58] Herbert M. Kritzer and Mark J. Richards, "Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases," 37 **Law and Society Review** 827, 835-37 (2003).

[59] See Dred Scott v. Sandford, 60 U.S. 393 (1956).

over what rights persons of color enjoyed as citizens.[60] Before joining the bench in 1859, Nathan Clifford was on record as supporting the result in Dred Scott.[61] While on the bench, Clifford interpreted narrowly Fourteenth Amendment protections for persons of color,[62] but he nevertheless recognized that the "one pervading purpose" of the post-Civil War constitution was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[63]

Howard Gillman's acclaimed The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence provides another important case study on how law influences the terrain of constitutional debate. Gillman demonstrates that two distinctive debates over business regulation took place during the late nineteenth and early twentieth centuries. The political debate was over the merits of laissez-faire, over whether government intervention promoted liberty and efficiency. The legal debate was over the application of the constitutional animus to class legislation. Participants in these distinctive controversies employed distinctive justificatory logics. Constitutional decision makers consistently employed legal logics and those legal logics explain why justices consistently made legal distinctions between cases when there

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[60] See Civil Rights Cases, 109 U.S. 3 (1883).

[61] See Philip Greely Clifford, Nathan Clifford: Democrat (G.P. Putnam's Sons: New York, 1922), pp. 271-73.

[62] See especially, Strauder v. West Virginia, 100 U.S. 303 (1880).

[63] Slaughter-House Cases, 83 U.S. 36, 71 (1873).

was no corresponding policy distinction. As Gillman concludes:

> that the justices were by and large motivated by a principled commitment to the application of a constitutional ideology of state neutrality, as manifested in the requirement that legislation advance a discernible public purpose . . . explains a good deal more of the dependent variable (judicial behavior) than do hypothesis that suggest the justices were basing decisions on a blind adherence to laissez-faire or on a desire to see members of their class win specific lawsuits or on an interest in imposing their ideiosyncratic policy preferences on the country.[64]

Policy commitments influenced how different justices applied the constitutional commitment to state neutrality. Justices who were more sympathetic to state regulation in general were more likely to find a discernible public purpose than those who were not.[65] For this reason, analyses limited to explaining differences between justices would find ideology the most significant variable. Such analyses ignore how judicial battles over class legislation were structured differently than political struggles over the administrative state. The justices sustained hundreds of laws that political conservatives insisted were economically unwise.[66] No policymaker in the legislature or the White House came close to mirroring any judicial preference. Persons who based decisions on the "constitutional ideology of state neutrality" behaved differently than those who based decisions on the night watchman state.

Several lesser known decisions handed down during the "Constitutional Revolution of

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[64] Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (Duke University Press: Durham, 1993), p. 199.

[65] See Lochner v. New York, 198 U.S. 45 (1905); Holden v. Hardy, 169 U.S. 366 (1898)

[66] See Robert G. McCloskey, The American Supreme Court (fourth edition) (revised by Sanford Levinson) (University of Chicago Press: Chicago, 2005), pp. 100-05.

1937" provide another window into the way in which constitutional struggles are often fought over different terrains than other policy struggles. On the same day the Supreme Court by 5-4 votes ruled that the Wagner Act could be constitutionally applied to business manufacturing steel and clothing,[67] the justices unanimously held that Congress could regulate the hours and wages of persons employed by a bus company that operated a line that ran between Maryland, the District of Columbia and Virginia.[68] Two weeks earlier, conservatives and liberals on the Hughes Court unanimously held that Congress could regulate labor relationships in the railroad business.[69] No one in the non-legal world suggested employees who worked on trains and buses should be treated differently than persons employed by steel and clothing magnates. The relevant policy debates were over the merits of minimum wages and collective bargaining. Conservative justices making decision on the basis of constitutional law, by comparison, could consider only whether the affected business was engaged in interstate commerce. The constitutional distinction between steel workers and bus drivers reflected a conservative constitutional commitment to the distinction between production and commerce that had no conservative policy analogue.

Constitutional law constrained the liberals on the New Deal Court as well as conservatives, even making the historically false assumption that Justices Stone, Cardozo, and

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[67] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937).

[68] Washington, Virginia & Maryland Coach Co. v. NLRB, 301 U.S. 142 (1937).

[69] Virginia R. Co. v. System Federation, 300 U.S. 515 (1937).

Brandeis were enthusiastic proponents of the second New Deal. Unions generally won legislative struggles during the 1930s, but Congress after World War II increasingly favored management. Liberals particularly abhorred the Taft-Hartley Act, which placed sharp limits on strikes. Nevertheless, although President Harry Truman's veto message described Taft-Hartley as "a dangerous stride in the direction of a totally managed economy,"[70] he and his political allies regarded the bill as within the enumerated powers of Congress. Having committed themselves to a substantial effects test which permitted the national government to regulate labor relations, New Deal constitutionalists lacked the tools to distinguish between pro-union and anti-union legislation. When the Supreme Court debated the constitutionality of Taft-Hartley, their focus was entirely on the Communist registration provisions,[71] a matter that did not occupy much legislative attention.

Much political science scholarship on American constitutional development explicitly or implicitly highlights sharp differences between political and constitutional controversies. Prominent examples include Pamela Brandwein's analysis of how inherited understandings about the nature of rights influenced the origins of the state action doctrine,[72] Julie Novkov's

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[70] 93 **Congressional Record** 7500 (1947).

[71] American Communication Ass'n v. Douds, 339 U.S. 382 (1950).

[72] See Pamela Brandwein, "The *Civil Rights Cases* and the Lost language of State Neglect," The Supreme Court & American Political Development (edited by Ronald Kahn and Ken I. Kersch) (University Press of Kansas: Lawrence, Kansas, 2006).

history of how categories taken from gender influenced New Deal constitutional law,[73] and Ken Kersch's work on the evolution of privacy law.[74] None of these scholars insist that justices shed their policy preferences once they joined the bench. The argument is simply that these preferences had to be expressed in legal language and were subtly altered by the "requirement of translation."[75] Sometimes justices found that commitments made in one area of the law constrained other constitutional decisions. New Deal protections for speech were truncated in large part because of previous commitments progressives had made when opposing the freedom of contract.[76] Some justices concluding pressing policy commitments could not be translated into legally enforceable norms. Elizabeth Bussiere details the difficulty Great Society liberals had finding welfare rights in the constitution.[77] Judicial liberals were more inclined to support

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[73] Julie Novkov, Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years (University of Michigan Press: Ann Arbor, Michigan 2001).

[74] Ken I. Kersch, Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law (Cambridge University Press: New York, 2004).

[75] Howard Schweber, The Language of Liberal Constitutionalism (Cambridge University Press: New York, 2007), p. 14.

[76] See Mark A. Graber, Transforming Free Speech: The Ambiguously Legacy of Civil Libertarianism (University of California Press: Berkeley, 1991).

[77] Elizabeth Bussiere, Dientitling the Poor: The Warren Court, Welfare Rights, and the American Political Tradition (Pennsylvania State University Press: University Park,

welfare rights than judicial conservatives, but they provided far less support for welfare rights than liberals with the same policy commitments in the legislative and executive branches of the national government.

IV. Beyond the Law/Politics Distinction

Too sharp distinctions between policy and legal obscure how constitutional decision making may incorporate both in ways that cannot be fully separated. Prominent constitutional thinkers maintain that constitutional decision makers are sometimes obligated to engage in value voting. Ronald Dworkin, Sotirios Barber, James Fleming and others maintain that justices and others have an obligation "to interpret the Constitution to make it the best it can be."[78] Justices who refuse to make value judgments, they believe, act **illegality**, violating their obligation to be faithful to the law.[79] Remarkably, Justice Antonin Scalia agrees, approving how "the inevitable tendency of justices to think the law is what they would like it to be . . . cause(s) most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current,

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Pennsylvania, 1997).

[78] See Sotirios Barber and James E. Fleming, Constitutional Interpretation: The Basic Questions (Oxford University Press: New York: New York, 2007), p. xiii; Ronald Dworkin, Law's Empire (Harvard University Press: Cambridge, 1986), p. 379.

[79] See Dworkin, Law's Empire, p. 215.

modern values."[80] This brief excursion into constitutional theory suggests the crucial issue is when constitutional decision makers are legally entitled to engage in value voting, and not whether value voting is legitimate legally. Investigation is likely to reveal broad agreements that value voting is permissible in some circumstances, impermissible in other instances, and controversial on those matters on which constitutional decision makers disagree.[81]

Distinctions between law and policy do not capture distinctions between how elected officials and justices make decisions. Constitutional decision making takes place in all governing institutions. "Immortal principles fly their standards in judicial opinions," Thomas Reed Powell observed in 1918, "(b)ut so they do in the common every-day talk of the butcher and the banker, of the suffragists and the anti-suffragist, the pacifist and the militarist, the Socialist and the individualist."[82] Much recent political science literature details how Presidents and members of Congress, in particular, have made principled constitutional arguments when

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[80] Antonin Scalia, "Originalism: The Lesser Evil," 57 **University of Cincinnati Law Review** 849, 864 (1987).

[81] The same is true of strategic decision making. Some instances of strategic decision making are legal, some are illegal, and some are controversial. See Mark A. Graber, "Legal, Strategic, or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction," The U.S. Supreme Court and American Political Development (edited by Ronald Kahn and Ken Kersch) (University Press of Kansas: Lawrence, Kansas, 2006).

[82] Thomas Reed Powell, "The Logic and Rhetoric of Constitutional Law, 15 *Journal of Philosophy, Psychology, and Scientific Methods* 645,647-48 (1918).

engaged in heated constitutional debates.[83] Nevertheless, elected officials making constitutional decisions may have different constitutional commitments than justices.

Professor Tom Keck's research demonstrates how institutional affiliations influence constitutional decision making. His essay in the 2007 **American Political Science Review** compared the judicial coalitions responsible for declaring fifty-three federal laws unconstitutional between 1980 and 2004 with the legislative and executive coalitions responsible for passing those measures. Judicial voting patterns proved distinctive. Justices neither voted as liberals or conservatives did in the national legislature, nor as Republicans or Democrats. On a tribunal that

"never included more than two Democratic appointees," Keck observes.

> more than 70% of its judicial review decisions were issued by bipartisan coalitions and more than 80% invalidated statutes that had been enacted with substantial Republican legislative support. Similarly, more than sixty percent of the decisions are inconsistent with a model of policy-motivated judging, either because they were joined by both liberal and conservative justices or because they reached results that are difficult to place in ideological space.[84]

Scholars aware of these findings would attend more carefully "to the possibility of institutionally

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[83] See especially, Louis Fisher, Constitutional Dialogues: Interpretation as Political Process (Princeton University Press: Princeton, New Jersey, 1988); Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (Harvard University Press: Cambridge, Massachusetts, 1999).

[84] Thomas M. Keck, "Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?" 101 **American Political Science Review** 321, 336 (2007).

motivated action," in particular, the influence of law on judicial decisions.[85] Keck concludes, "(s)o long as the justices think the purpose of an independent judiciary is to defend certain fundamental principles against majoritarian interference, that normative commitment is likely to shape at least some of their decisions."[86]

One should not confuse "institutional motivations" with a commitment "to defend settled law against majoritarian override," as Keck sometimes does.[87] The elected officials who voted for the Religious Freedom Restoration Act and for the Americans with Disabilities Act thought they were protecting fundamental constitutional principles from (local) majoritarian interference. Many prominent constitutional scholars side with Congress, insisting that the Supreme Court decisions declaring those measures unconstitutional were inconsistent with both the original meaning of the Fourteenth Amendment and settled precedents.[88] Institutional affiliation may matter, such cases as City of Boerne v. Flores[89] and Board of Trustees of University of Alabama v. Garrett[90] indicate, because justices have different beliefs about constitutional authority and constitutional interpretation than elected officials, and not because the former are more prone to

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[85] Keck, "Party," p. 337.

[86] Keck, "Party," p. 337.

[87] Keck, "Party," p. 337.

[88] Robert Post and Reva Siegel, "Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power," 78 **Indiana Law Journal** 1 (2003).

[89] 512 U.S. 507 (1997).

[90] 531 U.S. 536 (2001).

be motivated by law. Keck's evidence suggests that justices are more likely than elected officials to be committed to libertarian understandings of constitutional rights, formalist interpretations of the separation of powers, and judicial supremacy.[91] These findings cast important light on the consequences of giving justices the power to declare laws unconstitutional, even if they do not reflect the traditional law/politics distinction.

V. Toward a Better Research Agenda

Judge, later Justice, Benjamin Cardozo's famous Storrs lectures still provide the best starting place for scholars interested in understanding the influence of law on judging and constitutional decision making. When considering how to "decide a case," Cardozo first noted that "[t]here are times when the [decision] is obvious" because either the text or precedent plainly resolved a legal dispute.[92] These pure legal logics were insufficient when there were "gaps in the law." In such instances, "justice and general utility" were "the two objectives" Cardozo though should influence judicial votes.[93] Significantly, Cardozo added, on most matters the law was fairly clear. Quoting Justice Oliver Wendell Holmes, he insisted,

> I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A

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[91] Keck, "Party," p. ___.

[92] Benjamin N. Cardozo, The Nature of the Judicial Process (Yale University Press: New Haven, 1921), pp. 10, 14.

[93] Cardozo, Judicial Process, p. 75.

> common-law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.[94]

Cardozo's observations highlight how law often settles matters before substantial controversies arise. Controversies take place only in legal gaps and the nature of these gaps are largely determined by legal texts, legal precedents, and legal history. Behavioral analysis that focuses entirely on disagreements among legal authorities over the precise application of "the doctrine of consideration" cannot appreciate the central role consideration plays in contract law. A similar obsession with explaining controversies over the meaning of the First Amendment overlooks all the controversies Americans do not have because of the First Amendment.

Much good empirical work will be done once public law scholars acknowledge the relative autonomy of constitutional law. We need more extensive research on the nature of constitutional reasoning. On some accounts, constitutional decision makers make self-conscious decisions to follow the constitution rather than their policy preferences.[95] Other accounts suggest constitutionalism is constitutive, that persons occupying certain roles are simply socialized to think constitutionally.[96] Whether a constitution is "a machine that would go of itself"[97] may

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[94] Cardozo, Judicial Process, p. 69 (quoting Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917)).

[95] See Howard Gillman, "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," Supreme Court Decision-Making: New Institutionalist Approaches (edited by Cornell W. Clayton and Howard Gillman) (University of Chicago Press: Chicago, 1999), pp. 78-86.

[96] See John Brigham, The Constitution of Interests: Beyond the Politics of Rights (New

depend partly on which account of constitutional reasoning is correct. We need more extensive research on how constitutional questions arise and are settled. Americans in the nineteenth century thought protective tariffs raised constitutional questions. Free trade, at present, is considered entirely a policy choice. No existing approach to constitutional decision making explains this transformation. Most important, we need more extensive research into the different ways in which persons in different institutional settings make constitutional decisions. A good deal of contemporary scholarship indicates that judicial review is unnecessary as a means for ensuring decisions are made on the basis of constitutional principle.[98] All governing coalitions act on the basis of constitutional visions that structure their policy choices. Nevertheless, much contemporary scholarship also suggests that justices act on different constitutional principles than other governing officials.[99] What those principles are and whether their articulation is desirable should be central to the next generation of constitutional law scholarship.

York University Press: New York, 1996).

[97] See Michael Kammen, A Machine That Would Go of Itself: The Constitution in American Culture (Knopf: New York, 1986).

[98] See, i.e., Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press: New York, 2004).

[99] Ran Hirschl, Toward Juristocracy: The Origins and Consequences of the New Constitutionalism (Havard University Press: Cambridge, Massachusetts, 2004); Mark A. Graber, "Constructing Judicial Review," 8 **Annual Review of Political Science** 425, 447-48 (2005).