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Symposium

The 2017 Maryland Constitutional Law Schmooze

THE COLLAPSE OF THE NEW DEAL CONCEPTUAL UNIVERSE: THE SCHMOOZE PROJECT

MARK A. GRABER*

For more than twenty years, the participants in the Georgetown Constitutional Law Schmooze, the Maryland/Georgetown Constitutional Law Schmooze, and now the Maryland Constitutional Law Schmooze, as well as participants in constitutional law schmoozes at Princeton and Wisconsin, have engaged in a common enterprise that we might call “the schmooze project.” The existence and nature of any “schmooze project” is my synthesis, not the publicly acknowledged consensus of the whole. Still, the papers submitted, conversations initiated, and scholarship published by schmooze participants indicate that Georgetown, Princeton, Wisconsin, and Maryland have been sites for developing a distinctive approach to constitutionalism. This distinctive approach provides important and better conceptual tools for understanding contemporary constitutional predicaments in the United States

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* Regents Professor, University of Maryland School of Law. Special thanks to President Jay Perman, Senior Vice President Bruce Jarrell, Dean Donald Tobin, and (happily in his mind) former Associate Dean Maxwell Stearns for their extraordinary efforts that made this talk possible. The list of schmoozers and colleagues to thank would be nearly endless. The great difficulty giving a talk and writing papers at a certain stage of your career is that by the time you reach that stage of your career when someone might ask you to talk about your ideas, you can no longer distinguish your ideas from those of your friends, colleagues and family. What seems today’s fresh insight, I fear, was first suggested by Sandy Levinson, Leslie Goldstein, Keith Whittington, Rogers Smith, Emily Zackin, Linda McClain or one of the hundreds of other schmoozers, in their contributions to a past Schmooze, or perhaps in a more offhand comment during the Schmooze’s traditional Friday night Indian buffet during a schmooze five years ago, or offered during a Maryland Law faculty workshop by Maxwell Stearns, Jana Singer, Donald Gifford, Danielle Citron, Taunya Banks, Richard Boldt or another of my wonderful colleagues. The thought may have even come from Dr. Julia Frank as an aside when we were watching the latest Murdoch Mystery. The best I can hope is you have forgotten your insight or that you forgive my more frequent lapses of memory.

and abroad, and for reforming contemporary constitutional institutions to meet unprecedented challenges to constitutional democracy.

Schmoozers in this symposium and elsewhere are replacing a New Deal conceptual universe structured by a sharp distinction between law and politics with a conceptual universe structured by constitutional politics. Constitutional politics consists of the struggles between proponents of different constitutional visions that take place throughout the political universe. Constitutional politics occurs, for example, when national political parties write platforms committing their coalition to repealing race based preferences in university admissions, when state governors veto legislation repealing such measures, and when courts declare that elected officials may use race to promote diversity, but not to compensate for general societal disadvantage.¹ People engage in constitutional politics when they protest voluntary prayers at town council meetings, ask their neighbor to sign petitions calling for an end to those prayers, and litigate the relevant establishment clause issues before high courts.² The constitutional law of the land at any particular time is a complex amalgam of all these practices, not simply a synthesis of opinions written by Supreme Court Justices.

This Essay begins by describing briefly how the New Deal conceptual universe we inherited as scholars was largely limited to delineating and often attempting to enforce different manifestations of the law/politics distinction. Part II details how schmoozers for a generation have undermined that law/politics distinction as a foundation for studying constitutional institutions, the allocation of constitutional authority, constitutional practice, and constitutional history. Part III introduces readers to the notion of constitutional politics and the tools constitutional politics provides for understanding constitutional practice in the United States and other constitutional democracies. Part IV elaborates how constitutional politics provides better conceptual tools for identifying the underlying causes of constitutional crises throughout the contemporary constitutional universe and for thinking about how political actors might maintain constitutional democracy in the United States during the age of Donald Trump and abroad in the face of contemporary challenges.

The pages below have three central purposes. The first is to identify a cohort of scholars that I believe to be united by a common project of collapsing a New Deal conceptual universe structured by an iron distinction between law and politics. The second is to suggest that rather than distinguish between law and politics—and insist that courts remain in the law lane—constitutional scholarship would be better off thinking about better and worse

1. *See* *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

2. *See* *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

ways in which law and politics are mutually constructive. The third is to continue the moves, particular in American constitution scholarship from constitutional law, the constitutional rules made by the Supreme Court of the United States and other judicial tribunals, to constitutional design, the institutional rules and practice that structure constitutional and political decisionmaking, to the nature of the entire constitutional regime. This Essay outlines the ways in which politics, law, economics, culture and other factors might interact to construct a healthy constitutional regime and, in present circumstances, how those factors are undermining the American constitutional regime and other constitutional democracies.

I. THE NEW DEAL CONCEPTUAL UNIVERSE

American constitutional and legal thought when older members of the schmooze generation came of age was structured by a sharp division between law and politics. Virtually every major piece of scholarship published in law and political science probed some aspect of this division. The distinction between law and politics provided the underlying structure to works exploring the institutional responsibilities of the different governing branches, elaborating the justificatory logics legitimately available to each governing institution, discussing the allocation of constitutional authority, detailing American constitutional development, and explaining judicial decisionmaking. Prominent titles included “Law or Politics,” “Is Law Politics,” or similar.³

A remarkable range of scholars shared this concern with elaborating the distinction between law and politics. The not-so-short list would include what the law professor Mark Tushnet describes as doing “grand [constitutional] theory”⁴ and what the political scientist Nancy Maveety describes as “pioneers of judicial behavior.”⁵ No brief composite can do justice to the richness of that scholarship, capture important nuances in how different scholars conceptualized the law/politics distinction, or acknowledge fully how prominent works sometimes deviated from the New Deal/Great Society orthodoxy. Henry Hart and Robert Bork differed in significant ways, as did

3. See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* (1994); Philip Bobbitt, *Is Law Politics?*, 41 *STAN. L. REV.* 1233 (1989); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 *HARV. L. REV.* 1202 (1988).

4. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW I* (2015). Grand constitutional theorists include Herbert Wechsler, Alexander Bickel, John Hart Ely, Ronald Dworkin, Michael Perry, Bruce Ackerman, Robert Bork, and Henry Hart.

5. *THE PIONEERS OF JUDICIAL BEHAVIOR* (Nancy L. Maveety ed., 2003). Pioneers of judicial behavior include C. Herman Pritchett, Glendon Schubert, Harold Spaeth, David Danelski, Edward Corwin, Alpheus Thomas Mason, and Robert McCloskey.

Robert McCloskey and Harold Spaeth. Nevertheless, with all the usual caveats about grand syntheses,⁶ the paragraphs below roughly capture the conceptual universe in which constitutional thought occurred during the New Deal and Great Society.

Robert McCloskey and Herbert Wechsler, whose works betray little or no awareness of the other despite their respective prominence in law and political science, each elaborated a common institutional division of labor that structured constitutional investigation in their disciplines. Politics was an arena for policymaking and interest group bargaining. Law was the site for working out fundamental regime principles or reasoned elaboration in the “forum of principle.”⁷ McCloskey, a distinguished professor of political science at Harvard, in his classic *The American Supreme Court* maintained that elected officials represented the democratic commitments of constitutional democracy, while Justices represented the constitutional commitments of constitutional democracy. “The legislature,” he wrote,

with its power to initiate programs and policies, to respond to the expressed interest of the public, embodied the doctrine of popular sovereignty. The courts, generally supposed to be without will as Hamilton said, generally revered as impartial and independent, fell heir almost by default to the guardianship of the fundamental law.⁸

Wechsler, in the most cited quotation in one of the top five cited law review articles of all time,⁹ proffered the same institutional functions when maintaining that elected officials appropriately pursued expedience while courts pursued principle. “[P]rinciples are largely instrumental as they are employed in politics,” he declared,

instrumental in relation to results that a controlling sentiment demands at any given time. Politicians recognize this fact of life and are obliged to trim and shape their speech and votes accordingly

. . . [But] are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching

6. TUSHNET, *supra* note 4, at 2–3.

7. RONALD DWORKIN, A MATTER OF PRINCIPLE 33 (1985).

8. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 7–8 (Sanford Levinson ed., 6th ed. rev. 2016).

9. See Fred Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

judgment on analysis and reasons quite transcending the immediate result that is achieved.¹⁰

This consensus that elected officials represented democratic commitments, while judges represented constitutional commitments, explains why constitutional thinkers during the New Deal and Great Society thought that only judicial decisionmaking required constitutional justification. The principle of majority rule or political accountability explained why elected officials who represented the popular sovereignty commitments of American constitutionalism could make whatever decisions they believed best facilitated their reelection. Supreme Court Justices who were not elected could not point to the same democratic commitments when declaring laws unconstitutional. When Supreme Court decisions overturned policies adopted by democratically elected officials, their rulings presented what Alexander Bickel labelled the countermajoritarian difficulty. “[W]hen the Supreme Court declares [a law] unconstitutional,” Bickel wrote, “it thwarts the will of representatives of the actual people of the here and now.”¹¹ This countermajoritarian difficulty, which was the central obsession of New Deal constitutional thought,¹² could be overcome, if overcome at all, only by demonstrations that the antidemocratic decisions of the federal judiciary were a faithful exercise of the judicial obligation to adhere to the constitutional commitments of American constitutionalism. Judicial supremacy followed from this institutional logic. Courts had the ultimate authority to determine what the Constitution means because courts were the only institution that had the obligation and might be expected to determine what the constitution means. Henry Hart insisted the Supreme Court:

is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law¹³

This demand that Justices make decisions on law rather than politics framed the central questions of both legal and public law scholarship during

10. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14–15 (1959).

11. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962).

12. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

13. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

the second half of the twentieth century. Academic lawyers asked how Justices could make decisions based on law rather than on politics. They devoted their energies to developing grand theories of constitutional interpretation that provided members of the Supreme Court with the algorithms necessary for grounding their rulings in constitutional logics sufficient to overcome the countermajoritarian difficulty.¹⁴ Social scientists meanwhile, claiming to “grind no ideological axes,”¹⁵ asked whether Justices were actually making decisions based on law rather than politics. They devoted their energies to plotting regression lines demonstrating that what law professors claimed were legal decisions were, in fact, grounded in the same factors as the decisions made by political actors in the rest of the constitutional system. Harold Spaeth and Jeffrey Segal, the two leading proponents of the attitudinal model, insisted:

the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.¹⁶

Wechsler and Spaeth disputed whether Justices based decisions on law or on politics, but they shared a common understanding of law as principled, of politics as policymaking and of the law/politics distinction.¹⁷

The study of American constitutional development was structured by the institutional division of labor underlying the distinction between law and politics. Constitutional history was the history of constitutional law, which included the processes by which constitutional texts were framed and ratified. Constitutional histories largely passed over the annexation of Texas because those constitutional debates occurred outside the courts.¹⁸ Conventional works led readers to believe that Americans began debating the constitutional status of bans on slavery in American territories during the run-up to *Dred*

14. TUSHNET, *supra* note 4, at 1.

15. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL xv (1993). Law professors, in turn, rarely referred to the empirical literature on courts. See Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 314–16 (2002).

16. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002).

17. Compare WECHSLER, *supra* note 10, at 14–15, with SEGAL & SPAETH, *supra* note 16, at 44–114.

18. For a discussion of the constitutional debates over the annexation of Texas, see Mark A. Graber, *Settling the West: the Annexation of Texas, the Louisiana Purchase, and Bush v. Gore*, in THE LOUISIANA PURCHASE AND AMERICAN EXPANSIONISM, 1803–1898, at 83 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

Scott v. Sandford,¹⁹ rather than in 1820 when Congress considered the Missouri Compromise.²⁰ Restricting constitutional history to the evolution of Supreme Court doctrine made sense because Justices were the only persons in the American constitutional order who made any pretense of justifying their decisions on constitutional grounds. Ignoring Charles Fairman's advice that "the historian of the Court should keep his watch in the halls of Congress, not linger within the chamber of the Court,"²¹ few students of American constitutional development tarried long in legislative halls, executive mansions or public streets. The political actors in those venues, conventional wisdom maintained, had no obligation to provide constitutional grounds for their behavior, did not provide constitutional grounds for their behavior, or, when they provided constitutional grounds for the behavior, did so insincerely.²²

Scholarship that reduced American constitutional development to the history of constitutional law took Supreme Court decisions as the authoritative statement of American constitutional practice at any given time. *Marbury v. Madison*²³ established the judicial power to declare laws unconstitutional because *Marbury* was the first judicial decision holding that the Supreme Court had the power to declare laws unconstitutional.²⁴ *Brown v. Board of Education*²⁵ desegregated public schools because that judicial decision declared Jim Crow education unconstitutional.²⁶ Implementation was a problem for public policy, not for constitutional law or theory.

The role of the constitutional historian and of constitutional history, when not purely descriptive, was to separate judicial decisions based on law from judicial decisions based on politics.²⁷ *McCulloch v. Maryland*,²⁸ which held that Congress had the power to incorporate a national bank, and the crucial Supreme Court decisions sustaining Roosevelt administration policies

19. 60 U.S. (19 How.) 393 (1857).

20. For the discussion of the constitutionality of banning slavery in the territories that took place during the debates over the Missouri Compromise, see MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 121–22 (2006).

21. CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–1888, at 118 (1971).

22. See Wechsler, *supra* note 10, at 14–15.

23. 5 U.S. (1 Cranch) 137 (1803).

24. See, e.g., MCCLOSKEY, *supra* note 8, at 25–28; WECHSLER, *supra* note 10, at 6–7.

25. 347 U.S. 483 (1954).

26. See, e.g., WECHSLER, *supra* note 10, at 31–32.

27. Gerald Gunther admitted that his influential casebook was structured to make certain decisions appear to be natural, while others to be exercises of judicial fiat. See GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed. 1975); see also David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1518–21 (2005) (describing changes to Gunther's presentation of *Lochner* over time).

28. 17 U.S. (4 Wheat) 316 (1819).

and practices during the New Deal²⁹ were good decisions because they were based on sound constitutional reasons.³⁰ *Dred Scott v. Sandford* and *Lochner v. New York*³¹ were bad decisions because when Justices declared Congress could not prohibit slavery in the territories or that states could not mandate maximum hour laws for bakers, they substituted their political preferences for the legal commands of the Constitution.³² Debate occurred over why *Brown* was a legal decision and whether the Supreme Court's decision in *Roe v. Wade*³³ finding a right to an abortion in the Fourteenth Amendment was based on law or politics.³⁴

Rebellions within law and political science usually consisted of taking the perspective of the other discipline. The critical legal studies movement gained notoriety by insisting, with political scientists, that all law was politics.³⁵ A few intrepid political scientists joined the legal quest for legitimate modes of constitutional interpretation³⁶ or for overcoming the countermajoritarian difficulty.³⁷ Wallace Mendelson, a former clerk for Justice Felix Frankfurter, a long time professor of political science at the University of Texas, Austin, and a remarkable gentleman, was as Frankfurterian in his calls for judicial restraint and insistence that judicial decisions be based on reasoned elaboration as any former Frankfurter clerk teaching in the legal academy.³⁸

29. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).

30. See WECHSLER, *supra* note 10, at 23 (“The phase of our modern constitutional development that I conceive we can most confidently deem successful inheres in the broad reading of the commerce, taxing, and related powers of the Congress . . .”).

31. 198 U.S. 45 (1905).

32. See WECHSLER, *supra* note 10, at 23–24; Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (noting the common view that “the anticanon constitutes those decisions in which the Court did an especially poor job of navigating and synthesizing the[] traditional (legal materials”).

33. 410 U.S. 113 (1973).

34. See John Hart Ely, *The Wages of Crying Wolf, A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (“[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”).

35. See, e.g., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982).

36. See LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY (1991); HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994).

37. See MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW (1966).

38. See WALLACE MENDELSON, SUPREME COURT STATECRAFT: THE RULE OF LAW AND MEN (1985).

The Princeton school of constitutional thought,³⁹ ably represented at schmoozes by Jim Fleming and Linda McClain,⁴⁰ provided the main alternative during the late twentieth century to this New Deal conception of the constitutional universe. The great Walter Murphy, among others, challenged common claims that the federal judiciary enjoyed a monopoly on constitutional authority.⁴¹ Princetonians insisted that the Constitution of the United States was more than the text ratified in 1789, as amended by the rules prescribed in Article V. They pushed constitutional thinkers in an Aristotelian direction, incorporating what they believed was the telos of constitutionalism and the American constitutional enterprise into constitutional theory. Richard Albert and Yaniv Roznai are working in this tradition, exploring the possibility of unconstitutional amendments, which are constitutional amendments ratified consistently with constitutional procedures that are nevertheless inconsistent with the basic principles underlying a constitution or constitutional democracy.⁴² Nevertheless, with the very important exception of Murphy's last work,⁴³ Princetonians largely accepted the legal emphasis of late twentieth century constitutional thinking. The very title of the standard text of that school, *American Constitutional Interpretation*, articulates the common view that American constitutional theory is about what the Constitution of the United States means⁴⁴ and whether Supreme Court decisions interpreting the Constitution bind all other political officials.

II. CRACKS IN THE NEW DEAL CONCEPTUAL UNIVERSE

Prominent schmoozers and fellow travelers by the turn of the twenty-first century were actively undermining the New Deal conceptual universe. Scholarship on the Constitution outside of the courts, the political construction of judicial review, and American constitutional development collapsed, in different ways, the distinction between law and politics. Schmoozers did so when exploring institutional divisions of labor, the nature of constitutional

39. See WALTER F. MURPHY, JAMES E. FLEMING & WILLIAM F. HARRIS, II, *AMERICAN CONSTITUTIONAL INTERPRETATION* (1986).

40. See, e.g., JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (2013). For an excellent anthology of work by members of the Princeton school, see *CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE* (Sotirios A. Barber & Robert P. George eds., 2001).

41. See Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 *REV. POL.* 401 (1986).

42. See YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* (2017); Richard Albert, *How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments*, 77 *MD. L. REV.* 181 (2017).

43. WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* (2007).

44. See, e.g., SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984).

decisionmaking, the justification of judicial review, constitutional authority, and constitutional history. Howard Gillman and Keith Whittington called on public law scholars to “avoid continued debate over whether judicial behavior is determined by “law” or “politics” and instead focus on the ‘interpenetration of law and politics and the difficulty of regarding them as either separate spheres or trying to collapse the one category into another.’”⁴⁵ Some scholar associated with the Critical Legal Studies movement, most notably Robert Gordon, began treating law as “relatively autonomous,” detailing how legal institutions were both influenced by and influenced other political institutions.⁴⁶ Rogers Smith in a series of important works on the “new institutionalism” or “historical institutionalism” called on scholars to recognize that “legal ideologies are relatively autonomous structures with their own peculiar internal character, so that they sometimes act as independent variables that transcend and actually help shape the content of the immediate self-interest of social groups.”⁴⁷

The battle against the law/politics distinction took place on three fronts. Works on American constitutionalism outside of courts, often inspired by the Princeton School, exploded the notion that constitutional decisionmaking was the unique province of the judiciary. Proponents of the political construction of judicial review detailed how Supreme Court decisions were the consequences of elected officials empowering courts, rather than judicial efforts to impose law on politics. Students of American constitutional development reconceived the path of American constitutionalism as a struggle between proponents of different constitutional visions, rather than as contests between law and politics.

The schmooze critique of the law/politics distinction often leans on what might be described as a comparative “veer” in constitutional scholarship. The scholars responsible for the New Deal conceptual universe wrote almost exclusively on the constitutional law of the United States, often identifying the particular elements of American constitutional democracy with the necessary elements of any constitutional democracy. Wechsler, for example,

45. Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the ‘Legal Model’ of Judicial Decision Making*, 26 *LAW & SOC. INQUIRY* 465, 494 (2001) (quoting Keith E. Whittington, *Once More Unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 *LAW & SOC. INQUIRY* 601, 629–31 (2000); see Howard Gillman, *From Fundamental Law to Constitutional Politics—and Back*, 23 *LAW & SOC. INQUIRY* 185, 185–86 (1998) (noting the contributions Judith Shklar and Stephen Griffin made to the collapse of the law/politics distinction”).

46. Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

47. Rogers M. Smith, *Political Jurisprudence, the ‘New Institutionalism,’ and the Future of Public Law*, 82 *AM. POL. SCI. REV.* 82, 98 (1988); see Rogers M. Smith, *If Politics Matters: Implications for a ‘New Institutionalism’*, 6 *STUD. AM. POL. DEV.* 1, 3–4 (1992).

spoke about the role of law and politics in general, never hinting that a constitutional democracy might organize institutional functions differently than the United States.⁴⁸ The Constitution of the United States still occupies the place of pride among students of the Constitution outside of the courts, the political construction of judicial review, and constitutional development. Nevertheless, some prominent schmoozers write primarily on comparative constitutionalism.⁴⁹ Others have published major works on comparative constitutionalism.⁵⁰ Most do little more than dabble on constitutional matters outside of the United States,⁵¹ but almost all schmoozers are far more aware of, and are more likely to take into account the work of, at least a few comparative constitutionalism scholars than were members of the previous generation of constitutional scholars in the United States.

The Princeton School laid the foundation for challenging the New Deal conceptual universe by questioning the judicial monopoly on constitutional interpretation and authority, pointing to a long tradition in American politics of prominent presidents, most notably Thomas Jefferson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan, who raised questions about the judicial power to determine for the entire regime what constitutional provisions mean.⁵² Sanford Levinson's *Constitutional Faith* pushed the envelope further. Levinson identified a "Protestant" strand in American constitutionalism, one in which all Americans, from Supreme Court Justices to ordinary citizens, engaged in independent constitutional interpretation. Rather than

48. See Wechsler, *supra* note 10, at 14–20.

49. See, e.g., ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009); LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007); RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* (2014); GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* (2010); DIANA KAPISZEWSKI, *HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL* (2012); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012); Kim Lane Scheppelle, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296 (2003).

50. See, e.g., ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* (2003); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008); Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657 (2016).

51. See, e.g., Mark A. Graber, *Constitutional Politics in the Active Voice*, in *CONSEQUENTIAL COURTS: NEW JUDICIAL ROLES IN GLOBAL PERSPECTIVES* 363 (Diana Kapiszewski et al. eds., 2013); Gordon Silverstein, *Sequencing the DNA of Comparative Constitutionalism: A Thought Experiment*, 65 MD. L. REV. 49 (2006).

52. See *supra* text accompanying notes 41, 43. Louis Fisher and Neal Devins also wrote seminal works examining the constitution outside of the courts. See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988).

discuss how constitutional authorities should interpret the Constitution, Levinson's volume meditated on why and whether one should be faithful to the Constitution. By shifting the focus of American constitutional thought, Levinson highlighted important constitutional questions that only tangentially concerned Supreme Court Justices, such as what immigrants (or Presidents) affirmed when they promised to be faithful (or loyal) to the Constitution.⁵³ Keith Whittington's *Constitutional Construction* further elaborated on American constitutionalism outside of the courts by detailing numerous constitutional debates, such as the debates over protective tariffs and standards for impeaching presidents, that took place without substantial or any judicial input.⁵⁴ Whittington insisted that elected officials appropriately rely on different justificatory constitutional logics than elected officials. Elected officials construe the Constitution, relying on sources external to the text when resolving constitutional ambiguities and silences. Justices interpret the Constitution, limiting their inquiries to matters entirely within the text.⁵⁵

Other scholars recognized that participants in political movements are constitutional actors with constitutional agendas. Jack Balkin and Reva Siegel investigated the influence of social movements on First Amendment and equal protection law. They concluded that “[w]hen movements succeed in contesting the application of constitutional principles, they can help change the social meaning of constitutional principles and the practices they regulate.”⁵⁶ Bruce Ackerman detailed how Martin Luther King, Jr. and the civil rights movement, Thurgood Marshall and the Supreme Court, and Lyndon Johnson and the Congress of the United States were equal participants in the process that made *Brown v. Board of Education* the central pillar of contemporary American constitutionalism.⁵⁷ Mariah Zeisberg used Frederick Douglass as a case study when she examined the distinctive processes by which American citizens engage in constitutional exegesis. “The work of citizens,” she wrote, should “be not to represent the positions of others but rather to generate public conceptions of the document that are more praiseworthy, from a justice point of view, than the conceptions that they received.”⁵⁸ An important strain in the literature on the Constitution outside of

53. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (2011).

54. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 72–157 (1999).

55. See *id.*; see also KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

56. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006).

57. See BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

58. Mariah Zeisberg, Frederick Douglass, *Citizen Interpreter* 37 (April 2, 2010), <http://dx.doi.org/10.2139/ssrn.1583683>.

the courts developed new histories of twentieth century constitutional liberalism. Laura Weinrib, Risa Goluboff, and George Lovell detailed the different conceptions of free speech, racial equality, and civil liberties that lawyers and ordinary citizens articulated during the first half of the twentieth century, as well as the constitutional politics inside, but mostly outside, the courts that tamed more radical interpretations of the First and Fourteenth Amendments.⁵⁹ William Forbath is documenting a “social citizenship tradition,” which “centered on decent work and livelihoods, social provision, and a measure of economic independence and democracy.”⁶⁰ Proponents of social citizenship created a “majoritarian tradition, addressing [their] arguments to lawmakers and citizens, not to courts.”⁶¹

Contemporary works on the Constitution outside of the courts highlight how the Constitution on the ground looks far different from that proffered by the New Deal conceptual universe that saw only the Constitution inside the courts. Gerald Rosenberg famously concluded that the law in action on such matters as race and abortion often did not even bear a family resemblance to the official constitutional law of the land.⁶² Scholars who disagreed with Rosenberg’s conclusion that litigation was a poor means for seeking constitutional change nevertheless recognized that judicial decisions rarely, if ever, reconfigure the constitutional universe in their own image.⁶³ In many circumstances, constitutional development occurs when the Supreme Court is offstage. Steven Griffin’s *Long Wars and the Constitution* documents the fundamental changes in the constitutional balance of powers between the President and Congress over foreign policy that have taken place over the last seventy years, despite the absence of any Supreme Court decision on such matters as the constitutional authority of the President to order military action overseas without congressional approval.⁶⁴ Constitutional rules have a different structure when we evaluate the interactions between the elected branches of government. Mariah Zeisberg’s *War Powers* suggests that what matters in a separation of powers analysis is that each elected branch of government brings its distinctive virtues to bear on a national problem. She maintains that constitutional processes should not be strangled by the fixed

59. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); GEORGE I. LOVELL, *THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA* (2012); LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* (2016).

60. William E. Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999).

61. *Id.*

62. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

63. See, e.g., MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

64. See STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

legal rules better suited to regulating such matters as when Congress may regulate free speech than such matters as when Congress may delegate power to the president.⁶⁵

A related strand of analysis, best described as “American constitutionalism outside the federal courts,” by adding state constitutions and state courts into the mix, demonstrates far greater diversity in the American constitutional experience than that captured by a conceptual universe limited to studying the Supreme Court of the United States. Levinson, in *Framed: America’s 51 Constitutions and the Crisis of Government*, observes that many truisms of American constitutionalism are truisms only with respect to federal constitutions. State constitutions, he points out, change frequently, routinely require judicial elections, and often elect different members of the executive branch separately. None of these deviations have led to the untoward consequences predicted by an inherited constitutional theory that treats the Constitution of the United States as the sole expression of American constitutional thought and touchstone for best constitutional practices.⁶⁶ Emily Zackin points out how American state constitutions routinely include positive rights, such as rights to certain public services, that are absent from the Constitution of the United States. She argues that “Americans have a long tradition of enshrining positive rights in constitutions, but that we must look at state constitutional politics to find them.”⁶⁷ Zackin and Mila Versteeg highlight how state constitutions, like those of other democracies, are far more detailed and far more likely to be either replaced or amended.⁶⁸ John Dinan maintains that state officials are often more protective of constitutional rights than judges.⁶⁹ He describes the hundreds of state constitutional conventions held over the past two-hundred years that have served as vehicles for incorporating new visions of governance into fundamental law.⁷⁰

65. See MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* (2013); see also, SUSAN R. BURGESS, *CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES* (1998).

66. See SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

67. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 11 (2013).

68. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1666–68, 1679–81 (2014).

69. See JOHN J. DINAN, *KEEPING THE PEOPLE’S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS* (1998); see also JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* (forthcoming 2018) (discussing the role of state constitutional amendments in the process of constitutional governance). G. Alan Tarr deserves special mention as the father of contemporary studies on state constitutions. See, e.g., G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* (1998).

70. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006).

Scholarship documenting the political construction of judicial power integrated constitutional developments inside and outside the courts. Howard Gillman, Keith Whittington, Paul Frymer, George Lovell, and many others relate how constitutional actors outside of courts have consistently sought to empower the federal judiciary in order to secure their constitutional ambitions.⁷¹ Gillman describes how the Judiciary Acts of 1875 and 1891 helped fashion a Republican controlled judiciary that declared unconstitutional state interferences with national markets and sharply restricted the power of labor unions.⁷² Frymer discusses how the Democratic Party, during the 1960s, foisted on to courts disputes over the racial integration of unions that badly divided two crucial members of that coalition, both union members of color.⁷³ Lovell writes about how Congress during the early twentieth century empowered courts to make antitrust law and determine the legal status of labor unions through vague statutory language that invited judges to make public policy in the guise of statutory interpretation.⁷⁴ Whittington details how Presidents routinely endorse judicial supremacy when confronted with a hostile or paralyzed legislature.⁷⁵

Judicial review is as politically constructed in other constitutional democracies. Nadiv Mordechay and Yaniv Roznai observe that elected officials may facilitate judicial authority by inaction as well as action. They state, “[T]he anti-majoritarian judicial defense of rights and freedoms was established in Israel through a tacit political consent. For various reasons the Basic Laws on Human Rights have not been repealed, and the Knesset, in fact, accepted the idea that it has constitutional limits”⁷⁶

71. For reviews of this literature, see Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425 (2005); Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361 (2008); see also Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993).

72. See 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, 516–17 (2002).

73. See PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* (2008); Paul Frymer, *Acting when Federal Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions 1935–85*, 97 AM. POL. SCI. REV. 483 (2003).

74. See GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* (2003).

75. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

76. Nadiv Mordechay & Yaniv Roznai, *A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel*, 77 MD. L. REV. 244, 250–51 (2017) (citing Ori Aronson, *Why Hasn't the Knesset Repealed Basic Law: Human Dignity and Liberty? On the Status Quo as Counter Majoritarian Difficulty*, 37 TEL AVIV U. L. REV. 509 (2016)).

Courts in constitutional politics neither steal issues from election officials nor serve as mere agents for dominant majorities, but are one of many sites for political contests over what constitutional visions shall be the official law of the land. Ran Hirschl's hegemonic preservation thesis maintains that coalitions that fear losing their grip of electoral power, from the Federalists in 1800 to the Labor Party in Israel at the turn of the twenty-first century, often seek to empower judiciaries in order to maintain their influence over political and constitutional affairs. "[W]hen their policy preferences have been, or are likely to be, increasingly challenged in majoritarian decision-making arenas," Hirschl asserts, "elites that possess disproportionate access to, and influence over, the legal arena may initiate a constitutional entrenchment of rights and judicial review in order to transfer power to supreme courts."⁷⁷

Judicial empowerment may fail or be partly successful. Mordechai and Roznai note that the democratic project of the Israeli Supreme Court has not fully come to fruition because of an inadequate underlying constitutional politics. The justices and their allies have incompletely liberalized Israeli constitutional politics because "the supervisory capacity of the parliament" was not fully developed and "the constitutional ethos in the public sphere" was not "strengthen[ed]."⁷⁸ Powerful courts are relatively, but not completely autonomous institutions. Tom Keck points out that American Justices in a wide variety of cases cannot be classified as acting purely as umpires who put law over politics, purely as tyrants who impose their policy preferences on the body public, or purely as sideshows who blindly incorporate the dominant party's preferences into law.⁷⁹

Scholarship on the political construction of judicial review subverts the law/politics distinction that structured the New Deal conceptual universe. Judicial power to declare laws unconstitutional does not present a counter-majoritarian difficulty when that authority is established by legislative acts, such as the Judiciary Act of 1789, which explicitly authorized federal courts to strike down federal and state legislation,⁸⁰ rather than judicial decisions, such as *Marbury v. Madison*.⁸¹ The generation of scholars who worried about the democratic status of such decisions as *Brown v. Board of Education*, as Kevin McMahon details, wasted a good fuss. The foundations of that ruling were laid as much by decisions made by the Roosevelt, Truman, and Eisenhower

77. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 12 (2004).

78. Mordechai & Roznai, *supra* note 76, at 268.

79. THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES (2014).

80. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 85–86.

81. See Mark A. Graber, *Establishing Judicial Review: Marbury and the Judiciary Act of 1789*, 38 TULSA L. REV. 609, 610 (2003).

administrations to staff the federal courts with racial liberals as by the series of judicial decisions that undermined *Plessy v. Ferguson*⁸² and Jim Crow in public education.⁸³ Barry Friedman's five-part history of the countermajoritarian difficulty insisted that public concern with the democratic credentials of judicial power throughout American history varies with the constitutional politics of particular eras and is not a constant feature of the American constitutional regime.⁸⁴ Friedman identified the following:

[F]our factors that explain from a historical perspective when countermajoritarian criticism of the courts is likely to emerge....
(a) the extent to which judicial decisions are unpopular with a group substantial enough to be able to claim to speak for "the people"; (b) whether such decisions are rendered at a time when public sentiment favors a relatively popular or direct form of democracy; (c) whether at the time such decisions are rendered there is relative faith in the determinacy of judicial interpretations of the Constitution; and (d) whether such decisions are rendered during a period of judicial supremacy.⁸⁵

Proponents of the political construction of judicial power explore why elected officials empower courts rather than the conditions under which courts may thwart the will of elected officials. Levinson and Balkin see courts as sites for partisan entrenchment. "Parties who control the presidency install jurists of their liking," they declare, who "in turn create decisions which are embodied in constitutional doctrine and continue to have influence long after those who nominated and confirmed the jurists have left office."⁸⁶ Ginsburg maintains that politicians drafting a constitutionally constructed judicial review is a form of political insurance.⁸⁷ Justin Crowe's history of the federal legislation that first created, and then expanded, the federal judiciary

82. 163 U.S. 537 (1896).

83. See KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* (2004). For decisions undermining Jim Crow in public education, see especially, *McLaurin v. Okla. St. Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

84. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) [hereinafter Friedman, *Road to Judicial Supremacy*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lessons of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

85. Friedman, *Road to Judicial Supremacy*, *supra* note 84, at 342.

86. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1076 (2001).

87. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18 (2003).

finds that elected officials throughout American history actively sought powerful courts partly to secure certain policy goals, partly to satisfy certain patronage needs, and partly because of commitments to a well-functioning and partly independent judicial system.⁸⁸

Politically constructed judicial power presents challenges to constitutional democracy that the countermajoritarian difficulty does not capture. George Lovell and Scott Lemieux worry that judicial review may enable elected officials to hide their responsibility for contested judicial decisions.⁸⁹ Gordon Silverstein worries that judicial review may result in incoherent policy, as for example, when the Justices in *Buckley v. Valeo*⁹⁰ declared unconstitutional parts, but not all, of a federal campaign spending law that Congress designed to be a coherent whole.⁹¹ Another strand of this scholarship treats judicial review as one of the many veto points that exist in American constitutional politics. Lemieux and David Watkins insist that politically constructed judicial review serves the democratic goal of preventing domination better than other veto points, such as the filibuster. Acknowledging the “complicated relationship between constitutional courts and other political actors,” they conclude, “judicial review is a relatively attractive veto point from a democracy-against-domination standpoint.”⁹²

Students of American constitutional development opened up another front in the war against the law/politics distinction by finding more fruitful ways of looking at constitutional history than distinguishing bad political decisions from good legal decisions.⁹³ Rogers Smith’s seminal *Liberalism and American Constitutional Law* explored how American constitutional law could be understood as contests over different ways of working out a liberal

88. See JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012).

89. See George I. Lovell & Scott E. Lemieux, *Assessing Juristocracy: Are Judges Rulers or Agents?*, 65 MD. L. REV. 100, 113 (2006).

90. 424 U.S. 1 (1976).

91. See GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* 152–74 (2009).

92. SCOTT E. LEMIEUX & DAVID J. WATKINS, *JUDICIAL REVIEW AND CONTEMPORARY DEMOCRATIC THEORY: POWER, DOMINATION AND THE COURTS* 2–4 (2017).

93. For other schmooze classics of American constitutional development not discussed here purely for space reasons, see STUART CHINN, *RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE* (2014); ELVIN T. LIM, *THE LOVERS’ QUARREL: THE TWO FOUNDINGS AND AMERICAN POLITICAL DEVELOPMENT* (2014); GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* (2007); ROBERT L. TSAI, *AMERICA’S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY* (2014). For my works in this tradition, see MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991); GRABER, *supra* note 20.

tradition.⁹⁴ Over time, Smith concluded that much of American constitutional development was a struggle between, as well as a complex amalgam of, liberal, republican, and ascriptive traditions, the latter of which regarded American identity as rooted in certain characteristics, such as race, that are established at birth.⁹⁵ Rather than classify judicial decisions by the extent to which they were rooted in political will or legal logic, Smith classified judicial decisions in light of their affinity with different strands of the American constitutional tradition. Howard Gillman documented how the Supreme Court's decision in *Lochner v. New York*, often regarded as the poster-child for political decisionmaking, was rooted in jurisprudential traditions that dated from the founding. All the Justices on the *Lochner* Court, he explained, engaged in making law because they were committed to elaborating the constitutional text in light of past precedents and longstanding traditions. All the Justices on the *Lochner* Court were also engaged in politics because how they interpreted the constitutional text in light of past precedents and longstanding traditions depended on their idiosyncratic values and policy preferences.⁹⁶

American constitutional development, as works in the schmooze tradition elaborate, is a consequence of complex dialogues between courts, elected officials, and non-governmental political actors, rather than the study of judicial solos. Eric Lomazoff's forthcoming book on the constitutional status of the national bank in the early republic details how *McCulloch* was partly the product of changing federal and state banking practices, partly the product of the changing constitutional understandings of the National Republican majority in Congress, and partly the product of longstanding Marshall Court interpretations of federal powers.⁹⁷ John Compton documents how nineteenth century evangelical movements, while seeking to ban lotteries and prohibit drinking, provided the constitutional foundations for the New Deal state.⁹⁸ Kenneth Kersch explores how the constitutional meaning of the Fourth Amendment changed as the conventional subject of a contested search evolved from businesspersons to bootleggers to persons of color.⁹⁹ In many

94. See ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* (2d ed. 1990).

95. See ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

96. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

97. ERIC LOMAZOFF, *A TALE OF TWO CLAUSES: RECONSTRUCTING THE CONSTITUTIONAL POLITICS OF NATIONAL BANKING, 1791–1832* (forthcoming 2018) (manuscript at 5) (on file with author).

98. See JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* (2014).

99. See KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 129–133 (2004).

instances, what Ronald Kahn describes as a “mutual construction process” exists, whereby political developments influence how federal justices interpret the constitutional universe, and those interpretations, in turn, reshape the rest of American politics.¹⁰⁰ Pamela Brandwein considers how Democratic/conservative Republican understandings of Reconstruction, inside and outside of the federal judiciary, influenced what materials later scholars thought relevant to determining the original meaning of the Fourteenth Amendment, which in turn influenced how the Supreme Court interpreted that text. Her work describes the “impact . . . on Warren Court arguments about legislative apportionment” of “history’s production—as built mostly by Northern Democratic congressmen in 1866, reconstituted by the Supreme Court in the 1870s, and validated by [the legal historian] Charles Fairman in the 1950s.”¹⁰¹

These new constitutional histories collapse the law/politics distinction underlying Herbert Wechsler’s call for judicial decisions based on neutral principles, as well as the attitudinal model’s claim that Justices make decisions on the basis of policy preferences rather than on the legal basis of the law. Smith’s analysis of the impact of liberalism, republicanism, and ascriptivism on American constitutional development highlights how political and legal variables are inevitably intertwined in legal decisions in ways that cannot be neatly disentangled. Inherited political science models, as I have pointed out, have difficulty classifying judicial decisions to follow past legal precedents, such as the judicial decision in *Ex parte McCordle*,¹⁰² when those precedents were initially based on strategic or policy considerations. “The legal roads” to most decisions, that work concludes, are “paved by a legal, strategic, and attitudinal mixture,” no element of which “can easily be isolated.”¹⁰³

Schmoozers, nevertheless, treat courts as distinctive political institutions, not distinct from the rest of a homogenized political universe, but distinctive in the sense that the Federal Elections Commission, Republican Party, and Des Moines School Board are also distinctive political institutions. As Carol Nackenoff notes in a contribution to a past schmooze, “The Court has its own norms, dynamics, and institutional history; it has doctrine, rules,

100. Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebelius*, 73 MD. L. REV. 133, 143 (2013).

101. PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 3 (2001).

102. 74 U.S. (7 Wall.) 506 (1869).

103. Mark A. Graber, *Legal, Strategic or Legal Strategy: Deciding to Decide during the Civil War and Reconstruction*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 33, 60 (Ronald Kahn & Ken I. Kersch eds., 2006).

precedents, metaphors, and language peculiar to it.”¹⁰⁴ Some studies in American constitutional development highlight how law slows the implementation of policy preferences. Elizabeth Bussiere details how Warren Court Justices, committed to greater economic equality, did not have the legal time necessary to establish the precedents that might have eventually led to decisions declaring constitutional rights to basic necessities.¹⁰⁵ Julie Novkov explains how Supreme Court decisions in the 1930s that freed legislatures to regulate the bargaining process between employers and employees¹⁰⁶ provided doctrinal foundations for judicial decisions restricting women in the economic marketplace¹⁰⁷ long after the progressive justifications for those restrictions had vanished. “Protection was won at the expense of the recognition of women’s full citizenship,” she asserts, and was maintained “long after it was a valuable tool for women.”¹⁰⁸

Legal institutions influence how policy preferences are formed and implemented. Life tenure and legality matter. Tom Keck demonstrates that Republican and Democratic judicial appointees on the federal bench vote differently than their political sponsors in the White House and Congress.¹⁰⁹ Leslie Goldstein’s exhaustive study of American racial politics concludes that Justices are more likely than elected officials to protect the rights of racial minorities. She writes, “[T]he Court has, within the strictures created by the Constitution, acted to protect rights of one or another racial minority group to a greater degree than the elected branches have been willing to do.”¹¹⁰

III. TOWARDS CONSTITUTIONAL POLITICS

These schmooze projects are united by a commitment to constitutional politics rather than the separation between law and politics. Constitutionalism, in a conceptual universe developed by schmoozers, is a system of gov-

104. Carol Nackenoff, *Is There a Political Tilt to ‘Juristocracy’?*, 65 MD. L. REV. 139, 149 (2006).

105. See ELIZABETH BUSSIÈRE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997).

106. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

107. See *Goesaert v. Cleary*, 335 U.S. 464 (1948).

108. JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 271, 272 (2001).

109. See KECK, *supra* note 79; Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321 (2007).

110. LESLIE F. GOLDSTEIN, THE U.S. SUPREME COURT AND RACIAL MINORITIES: TWO CENTURIES OF JUDICIAL REVIEW ON TRIAL 399 (2017). Professor Goldstein has graciously published some of her work on race in this symposium. See Leslie Goldstein, *An Unacknowledged Constitutional Crisis: United States v. Shipp II (1909)*, 77 MD. L. REV. 200 (2017).

ernance that integrates law and politics. Matters conventionally deemed politics influence the course of American constitutionalism. Likewise, matters conventionally deemed legal influence the course of partisan politics. Good constitutional orders foster appropriate interactions between law and politics and do not construct impenetrable barriers between the two.

The path of constitutional law frequently intersects with the path of partisan politics, even though the two roads do not run fully parallel to each other. Both the Taney and Chase Courts reflected the Jacksonian proclivities of the Supreme Court Justices appointed between 1828 and 1860.¹¹¹ During the first two-thirds of the twentieth century, when competition between two non-ideological parties structured American politics, Supreme Court decision making was generally consistent with the views of a bipartisan elite.¹¹² Howard Gillman, Susan Lawrence, and Charles Epp point out how the liberalism of the Warren Court was partly rooted in congressional decisions that expanded the jurisdiction of the federal court system and provided substantial support for liberal litigation campaigns.¹¹³ Eliminate congressional funding for the Legal Services Corporation, and such cases as *Goldberg v. Kelly*,¹¹⁴ which provided a hearing for welfare recipients before government officials could terminate their benefits, probably would not come before the Supreme Court.

Basic features of American politics reflect underlying constitutional structures and decisions. Candidates for the presidency camp out in a few swing states, ignoring large metropolitan areas, such as New York City, Chicago, Los Angeles, and Washington, D.C., because the Electoral College awards victories based on gaining the most votes in individual states rather than gaining the most votes throughout the United States.¹¹⁵ Change the constitutional rules for electing the president, and how candidates conduct electoral campaigns will change. Lisa Miller's recent *The Myth of Mob Rule: Violent Crime & Democratic Politics* details how the policies that explain

111. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 77–93 (5th ed. rev. 2008); Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17 (2000).

112. See Mark A. Graber, *Judicial Supremacy and the Structure of Partisan Conflict*, 50 IND. L. REV. 141, 160–67 (2016).

113. See CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING (1990); HOWARD GILLMAN, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT, *supra* note 103, at 138.

114. 397 U.S. 254 (1970).

115. See *Two-Thirds of Presidential Campaign Is in Just 6 States*, NAT'L POPULAR VOTE (last visited Nov. 14, 2017), <http://www.nationalpopularvote.com/campaign-events-2016>.

different imprisonment rates among countries are highly sensitive to the structure of constitutional institutions. Parliamentary systems, she details, tend to be more concerned with prevention. In contrast, the American presidential system generates more concern with punishment.¹¹⁶ The Supreme Court's decisions in *Regents of the University of California v. Bakke*¹¹⁷ and *United Steelworkers of America v. Weber*¹¹⁸ help explain why Fortune 500 companies became more committed to diversity during the last decades of the twentieth century, which, in turn, helps explain why the Supreme Court in *Grutter v. Bollinger*¹¹⁹ reaffirmed *Bakke*'s support for using race in university admissions processes.¹²⁰

Constitutional politics are dynamic. Struggles take place across the political universe over the language for discussing fundamental regime commitments, the places where such commitments may be discussed, the institutions with the authority to at least temporarily settle constitutional controversies, and persons who occupy privileged positions in those institutions. Chief Justice John Marshall captured an important truth when he asserted that the Constitution of the United States was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."¹²¹ He nevertheless failed to acknowledge or foresee the deeply partisan processes by which those formal, semi-formal, and informal constitutional changes occur.¹²²

Constitutions in the schmooze world view are devices that constitute politics rather than means for regulating politics from above. Constitutions create languages for talking about fundamental regime commitments.¹²³ Americans debate whether the death penalty is "cruel and unusual punishment[]"¹²⁴ and whether requiring persons to buy health insurance "regulate[s] Commerce . . . among the several States."¹²⁵ Constitutions create places for discussing and settling fundamental political commitments. The First

116. See LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME AND DEMOCRATIC POLITICS* (2016).

117. 438 U.S. 265 (1978).

118. 443 U.S. 193 (1979).

119. 539 U.S. 306 (2003).

120. See MARK A. GRABER, *A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM* 238–39 (2013).

121. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 415 (1819).

122. For a discussion of the processes of formal, semi-formal and informal constitutional change, see GRABER, *supra* note 120, at 140–73.

123. See HOWARD SCHWEBER, *THE LANGUAGE OF LIBERAL CONSTITUTIONALISM* (2007); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 237 (Jon Elster & Rune Slagstad eds., 1988).

124. U.S. CONST. amend VIII.

125. *Id.* art. I, § 8, cl. 3.

Amendment gives all citizens the right to petition the national government on constitutional and other matters.¹²⁶ Article III creates a judiciary with jurisdiction over “all Cases . . . arising under this Constitution.”¹²⁷ Constitutions grant some people privileged positions in constitutional controversies: Federal Justices adjudicate cases raising constitutional matters. Presidents have the power to veto laws they believe unconstitutional.

Constitutional politics consistently alters the language for discussing fundamental regime commitments. Political movements have not struggled to change the literal constitutional text. Republicans in 1868 successfully added a textual commitment to equality that changed how Americans discussed the rights of persons of color and the rights of business corporations.¹²⁸ The women’s suffrage movement successfully added a textual right to vote that changed how Americans debated whether women could serve on juries.¹²⁹ And political movements influence constitutional conversations even when they do not change the constitutional text. When Americans in the twenty-first century debate the constitutional meaning of racial equality, they often spend more energy discussing the meaning of *Brown v. Board of Education* than the meaning of the post-Civil War Amendments.¹³⁰ Jamal Greene details the exceptional influence of the marketing campaign devoted to selling originalism as the primary means for constitutional interpretation.¹³¹

Similar struggles between political actors and political movements take place over what places shall have a privileged position in the constitutional order and who shall occupy those places. Much of constitutional politics consists of partisan efforts to empower those institutions that particular political movements believe they are most likely to control or influence for the foreseeable future. Antebellum southerners fought for state rights on matters they believed that states would make pro-slavery policies and for national power on matters they believed the national government more likely to make pro-slavery policies.¹³² “A broad generalization, inaccurate only at the margins,” Mark Tushnet maintains,

126. U.S. CONST. amend. I.

127. *Id.* art III, § 2, cl. 1.

128. *See Santa Clara Cty. v. So. Pac. R.R. Co.*, 118 U.S. 394 (1886).

129. *See People ex rel. Fyfe v. Barnett*, 150 N.E. 290 (Ill. 1925); *People v. Bartlz*, 180 N.W. 423 (Mich. 1920).

130. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746–48 (2007); *id.* at 772–80 (Thomas, J., concurring); *id.* at 799–803 (Stevens, J., dissenting); *id.* at 864–68 (Breyer, J., dissenting); *see also* Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 OHIO ST. L.J. 939, 1004–06 (2008)

131. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

132. *See* Arthur Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitution Doctrine, 1846–1860*, 54 J. ILL. ST. HIST. SOC’Y 117 (1961).

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.¹³³

Whittington details how presidents promote judicial supremacy when they believe that the federal judiciary is more sympathetic to their constitutional vision than Congress.¹³⁴ Political actors and movements as aggressively seek to change the persons who occupy the privileged positions in the American constitutional universe. Presidential candidates routinely tout their pro-life or pro-choice credentials. When elected, they appoint Justices and other government officials who broadly share their commitment to making a particular constitutional vision the official law of the land.

Participants in constitutional politics have multiple identities. The New Deal conceptual universe divided political actors into judges and elected officials.¹³⁵ This obsession with institutional affiliation discounted how partisan commitments, policy preferences, and personal identities exercise independent influence on constitutional behavior. That Ruth Bader Ginsburg is a Supreme Court Justice, a proponent of gender equality, a Democrat, and a white, Jewish woman all help explain why she favors judicial supremacy,¹³⁶ insists on a high degree of scrutiny for gender classifications,¹³⁷ opposes Christian prayers to open public meetings,¹³⁸ and is unlikely to retire while Donald Trump is President. A complete explanation of Donald Trump's constitutional actions, in turn, requires taking into account that he was the successful Republican candidate for the presidency, that he is a businessperson with an affinity for the alt-Right, and that Trump is a white male with limited religious convictions.¹³⁹

133. Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 245–46 n.4 (1995).

134. WHITTINGTON, *supra* note 75; *see also* MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* viii (1981) (describing courts as institutions “by which central political regimes consolidate their control over the countryside”).

135. Or, more accurately, judges and everyone else.

136. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

137. *See United States v. Virginia*, 518 U.S. 515 (1996).

138. *See Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

139. *See, e.g.,* Eli Stokols, *Trump Fires up the Alt-Right*, POLITICO (Oct. 13, 2015), <https://www.politico.com/story/2016/10/donald-trump-full-breitbart-229767>; Daniel Burke, *The Guilt-Free Gospel of Donald Trump*, CNN (Oct. 24, 2016) <http://www.cnn.com/2016/10/21/politics/trump-religion-gospel/index.html>.

IV. FROM CONSTITUTIONAL INTERPRETATION TO THE WORKING CONSTITUTION

Constitutional politics studies how constitutions work rather than what constitutional provisions mean. Schmoozers explore what people are doing or trying to do when they alter constitutional language, make constitutional arguments, and engage in numerous other forms of constitutional politics. Constitutional interpretation is central to these enterprises. Constitutional designers declare that “Congress shall make no law respecting an establishment of religion,”¹⁴⁰ or “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises,”¹⁴¹ because they believe those texts have particular meanings. How constitutional authorities interpret the words “nor cruel and unusual punishments inflicted”¹⁴² determines whether certain criminals are executed for their crimes. Nevertheless, constitutional framers recognize that parchment barriers are insufficient to fashion a constitutional order.¹⁴³ The persons responsible for creating, maintaining and modifying constitutions are constructing entire regimes, not merely limiting government.

Constitutional framers when creating regimes perform various tasks. Framers design institutions that foster constitutional fidelity. What the framers were doing when they mandated life tenure for members of the federal judiciary, *Federalist 78* claims, was facilitating the appointment of persons with “sufficient skill in the laws to qualify them for the station of judges.”¹⁴⁴ Many constitutional purposes cannot be achieved solely by words. A clause that forbade the president from appointing major generals whose “military knowledge, though plucky and adventury, has only been brought down to the beginning of the century”¹⁴⁵ is likely to be ineffective unless the President has the capacity and will to appoint competent military commanders. What the framers were doing when designing the system for electing the President, *Federalist 68* points out, was increasing the “probability of seeing the station filled by characters pre-eminent for ability and virtue.”¹⁴⁶ Rather than provide fixed limits on government, constitutional framers may be more concerned to guarantee, to the extent humanly possible, that persons with certain

140. U.S. CONST. amend. I.

141. *Id.* art. I, § 8, cl. 1.

142. *Id.* amend. VIII.

143. THE FEDERALIST NO. 48 (James Madison) (Garry Wills ed., 1982).

144. THE FEDERALIST NO. 78, at 479 (Alexander Hamilton) (Garry Wills ed., 1982).

145. This is, of course, the patter song from *Pirates of Penzance*. WILLIAM S. GILBERT & ARTHUR SULLIVAN, *PIRATES OF THE PENZANCE: I AM THE VERY MODEL OF A MODERN MAJOR-GENERAL* (1879), https://www.youtube.com/watch?v=X—ngR15_JM.

146. THE FEDERALIST NO. 68, *supra* note 144, at 416 (Alexander Hamilton).

capacities, values, and interests are responsible for implementing particular constitutional provisions. What Thaddeus Stevens was doing when he fought for the Fourteenth Amendment was “secur[ing] [the] perpetual ascendancy [of] the party of the Union [i.e., the Republican Party]” as the coalition that would be responsible for protecting the rights and exercising the powers enumerated by the Thirteenth Amendment.¹⁴⁷

The successors to constitutional framers perform similar tasks. They must ensure that institutions under changing circumstances continue to foster constitutional fidelity, generate leaders with the capacity to make intelligent policy, and privilege government by persons who represent the right combination of capacities, values and interests to achieve vital constitutional commitments. What Democrats in the Jacksonian Era were doing when they adopted supermajority rules for selecting the party’s nominee for the presidency was ensuring the selection of persons sensitive to slaveholding interests.¹⁴⁸ What Congress was doing during the Great Society by attaching various legislative vetoes to legislation delegating power was trying to retain some control over executive and administrative policymaking.¹⁴⁹

Constitutions work by constraining politics, constructing politics, and constituting politics.¹⁵⁰ Constitutions *constrain* politics when citizens, elected officials and Justices do not champion what they would otherwise believe are desirable policies because they believe those policies are unconstitutional or because the Supreme Court has declared those policies unconstitutional. James Madison vetoed a roads and canals bill he thought efficacious because he thought the federal government was not constitutionally authorized to sponsor internal improvements.¹⁵¹ Justice Felix Frankfurter refused to declare unconstitutional policies that violated his core commitments to free speech.¹⁵²

Constitutions *construct* politics by aggregating interests, values, and policy preferences in ways that privilege certain outcomes. State equality in the Senate helps explain why Wyoming gets a higher share of transit funds

147. See CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

148. See GRABER, *supra* note 20, at 148.

149. See *INS v. Chadha*, 462 U.S. 919, 967–74 (1983) (White, J., dissenting).

150. This paragraph largely summarizes GRABER, *supra* note 120, at 212–49.

151. 30 ANNALS OF CONG. 211–12 (1817).

152. See, e.g., *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 646–47 (1943) (Frankfurter, J., dissenting) (“Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime.”).

(and anti-terrorist funds) per capita than New York.¹⁵³ The American political system polarized during the 1850s and is polarized at present in part because the Constitution mandates an electoral system in which all members of the national legislature are chosen in local elections.¹⁵⁴ Americans who believe that abortion should be legal, but heavily regulated, may occupy the political center nationally, but they are in the minority in both Utah and Massachusetts, and states are where Americans hold elections for national office.

Constitutions *constitute* politics by shaping values. Madison thought that constitutional rights functioned by educating public opinion as well as by constraining political action. He told the first Congress that the parchment declarations in a bill of rights would have “a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community.”¹⁵⁵ Americans favor presidential systems primarily because they are socialized to appreciate the merits of presidential systems. When white supremacists seek permits to hold rallies, Americans have been conditioned to ask whether the First Amendment protects hate speech. Persons raised in a different constitutional order think some other question better frames the relevant issues.¹⁵⁶

Students of constitutional politics are especially concerned with the conditions under which constitutional democracy works and the conditions under which constitutional democracy might work better. By looking at how an entire regime generates and realizes particular constitutional visions, schmoozers go beyond the New Deal obsession with an independent judiciary that declares laws unconstitutional as the necessary and sufficient condition for a good constitutional order. Stephen Griffin’s essay in this symposium examines such elements of a constitutional order as “the structure of state institutions, political parties trying to run the Constitution in a polarized environment, the technological elites who staff the state, and the political trust required to keep the rickety train of government on track.”¹⁵⁷ Stephen Elkin provides a better framework for both empirical and normative work when observing that a constitutional order consists of commitments to certain

153. See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999).

154. See GRABER, *supra* note 20, at 161–63.

155. 1 ANNALS OF CONG. 455 (1789).

156. For comparative perspectives on free speech, see RONALD J. KROTOSZYNSKI, *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* (2006).

157. Stephen M. Griffin, *Trump, Trust and the Future of the Constitutional Order*, 77 MD. L. REV. 161, 162 (2017). For a discussion of constitutional orders, see STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 68–87 (1996). See also MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003).

values, institutions designed to achieve those values, and a people who share a commitment to those values and are capable of operating the relevant institutions.¹⁵⁸ Constitutions work when the relevant values, institutions and people align. Constitutional crises, “constitutional retrogression,”¹⁵⁹ or what Jack Balkin calls “constitutional rot” occur when the constitutional order becomes “disharmonic.”¹⁶⁰ One dimension of the constitutional order conflicts with or undermines other dimensions. During the years before the Civil War, governing institutions designed to facilitate compromises among sections increasingly privileged the election of sectional extremists.¹⁶¹ Immediately after the Civil War, constitutional commitments to racial equality conflicted with increased elite commitments to federalism and scientific racism.¹⁶²

The Federalist Papers outlines at length some broader constitutional phenomena necessary for maintaining a constitutional republic. James Madison and Alexander Hamilton were particularly concerned with the character of the political leadership class. They celebrated the institutions established by the Constitution of the United States for their capacity to generate governing officials who were committed to constitutional values, had the capacity to pursue such constitutional goals as the general welfare and common defense, and were sufficiently diverse to represent the entire country. *Federalist 57* declares that every political constitution should strive above all “to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”¹⁶³ *Federalist 10*, as opposed to *Federalist 2*,¹⁶⁴ emphasizes that constitutional democracy can thrive only in a diverse society. Madison wrote, “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.”¹⁶⁵

158. See Stephen L. Elkin, *The Constitutional Theory of the Commercial Republic*, 69 *FORDHAM L. REV.* 1933, 1948 (2001).

159. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* (forthcoming 2018) (manuscript at 6), <https://dx.doi.org/10.2139/ssrn.2901776>.

160. GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 1 (2010); see Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 *MD. L. REV.* 147 (2017).

161. See GRABER, *supra* note 20, at 162–63.

162. See PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 72–105 (1999).

163. THE FEDERALIST NO. 57, *supra* note 144, at 347 (James Madison).

164. See THE FEDERALIST NO. 2, *supra* note 144, at 9 (John Jay) (“Providence has been pleased to give this one connected country, to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs . . .”).

165. THE FEDERALIST NO. 10, *supra* note 144, at 57 (James Madison).

The great democratic theorist Robert Dahl, updating Publius, concluded that stable polyarchies, of which constitutional democracies are an important subset, require “modern[,] dynamic pluralist societ[ies].”¹⁶⁶ These societies are characterized by

a relatively high level of income and wealth per capita, long-run growth in per capita income and wealth, a high level of urbanization, a rapidly declining or relatively small agricultural population, great occupational diversity, extensive literacy, a comparatively large number of persons who have attended institutions of higher education, an economic order in which production is mainly carried on by relatively autonomous firms whose decisions are strongly oriented toward national and international markets, and relatively high levels of conventional indicators of well-being, such as physicians and hospital beds per thousand persons, life expectancy, infant mortality, percentage of families with various consumer durables, and so on.¹⁶⁷

Modernity, dynamism, and pluralism each play distinctive roles fostering polyarchy and constitutional democracy. Modern societies are governed by highly educated officials whose decisions are consistently evaluated by a literate public. Dynamic societies are characterized by a strong and confident middle-class whose members, during most economic times, enjoy secure jobs and livelihoods.¹⁶⁸ Pluralist societies are populated by citizens who have a wide variety of economic, religious, ethnic and other identities, and these identities are considered consistent with their full citizenship in the regime.¹⁶⁹ Dahl concludes that this combination of modernity, dynamism and pluralism creates political environments in which political actors “can resist unilateral domination, compete with each other for advantages, engage in conflict and bargaining, and pursue independent actions on their own.”¹⁷⁰ Though regimes commonly considered to be constitutional democracies are often characterized by substantial inequalities and political exclusions.¹⁷¹

An admittedly creative synthesis of Publius, Dahl and various schmoozers suggest four conditions under which democratic constitutions are likely to work.

- An intelligent and experienced leadership class that is committed to the basic norms of constitutional democracy and engages in politics

166. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 251 (1989) (emphasis omitted).

167. *Id.*

168. *Id.* at 252.

169. *Id.* at 259.

170. *Id.* at 252.

171. Thanks to Julie Novkov for reminding me of this point.

for the purpose of serving the public rather than for celebrity or enrichment.

- A population that takes what the eighteenth century thought of as a scientific outlook on public policy, rather than making political choices on ideological or religious dogma. Politics is experienced rather than faith based. The ways in which citizens acquire information exposes them to various perspectives and facilitates intelligent political decisions.
- A commitment to social pluralism. Political actors recognize that multiple ways exist of leading the good life, being a good citizen, and constructing a good society.¹⁷² People are encouraged to have a wide variety of identities consistent with condition 2 and persons with those identities are fairly represented in the political elite. Politicians committed to pluralism are able to reach the broadly accepted compromises necessary to maintain a stable political order.
- A commitment to a fair degree of economic and social equality. Substantial class mobility exists. No social or economic class, the political class in particular, is walled off from good or bad times. No underclass exists that is disproportionately composed of members of identifiable groups in the population.

Variations on these themes are certainly possible. Nevertheless, the turns from the law/politics distinction to constitutional politics and from constitutional interpretation to the working constitution focus constitutional theory far more on the composition of the political class, the nature of decisionmaking, the acceptance of social and cultural pluralism, and the roles of social and economic class in a particular regime than on whether constitutional courts are correctly interpreting the constitutional text.¹⁷³

V. THE CRISIS OF (AMERICAN) CONSTITUTIONAL DEMOCRACY

The present governing crisis in the United States and throughout the world, the schmooze project suggests, is a consequence of a weakening in these conditions for constitutional democracy. Griffin notes that “constitutional crises [are] generated internally rather than externally,”¹⁷⁴ by failures of constitutional institutions operating normally to achieve desirable results rather than by unexpected outside shocks to the political system. Independent

172. Or fashioning a good university.

173. Scholars who remain focused on the federal judiciary should nevertheless consider the composition of the political class, the ways in which the general public makes political decisions, the extent of social pluralism and the roles of economic and social class when explaining why they believe courts make particular mistakes interpreting the Constitution.

174. Griffin, *supra* note 157, at 174.

judiciaries remain in place, but their foundations and the foundations for more vital conditions of constitutional democracy are crumbling. Elections are held regularly and laws passed according to the constitutional rules, but the “policy disasters that have occurred in recent years, including the Iraq War and the 2008 financial crisis, suggest that something is deeply wrong with the way the American state is organized.”¹⁷⁵ Some prominent schmoozers look for solutions outside of constitutional politics, calling for a constitutional convention that will somehow happen without the intervention of Congress, political parties or existing political interests.¹⁷⁶ The schmooze project provides reasons for thinking this project both intellectually stimulating and an escapist fantasy. While citizens in a healthy constitutional democracy consistently ask whether constitutional institutions might be improved, problems within existing constitutional politics can be cured only by effective use of resources within existing constitutional politics.¹⁷⁷

The institutions and practices of constitutional democracy are weakening throughout the world, as well as in the United States. Yasmin Dawood’s contribution to this symposium asserts that “democracy [is] in retreat across nearly the entire globe.”¹⁷⁸ Aziz Huq and Tom Ginsburg observe an “incremental (but ultimately substantial) decay in three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the adjudicative and administrative rule of law necessary for democratic choice to thrive.”¹⁷⁹ Both fragile and previously stable constitutional democracies are under siege. Huq and Ginsburg observe “constitutional backsliding” in Venezuela, Thailand, Turkey, Sri Lanka, Hungary and Poland.¹⁸⁰ Mordechai and Roznai document the decline of democratic commitments in Benjamin Netanyahu’s Israel, noting “an erosion of [Israel’s] democratic institutions” leading “to an incremental democratic backslide.”¹⁸¹

Citizens of constitutional democracies are increasingly likely to be governed by officials who fail to satisfy Publian, Dahlian or related standards for

175. *Id.* at 179.

176. See STEPHEN M. GRIFFIN, *BROKEN TRUST: DYSFUNCTIONAL GOVERNMENT AND CONSTITUTIONAL REFORM* (2015); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

177. See Griffin, *supra* note 157, at 171. (“Trump himself may in time be ‘solved’ by some constitutional process (such as impeachment), but that would not change the reality that he was produced by the constitutional order itself.”).

178. Yasmin Dawood, *The Fragility of Constitutional Democracy: Theory and Practice*, 77 MD. L. REV. 192, 194 (2017) (quoting JOSHUA KURLANTZICK, *DEMOCRACY IN RETREAT: THE REVOLT OF THE MIDDLE CLASS AND THE WORLDWIDE DECLINE OF REPRESENTATIVE GOVERNMENT* 10 (2014)).

179. Huq & Ginsburg, *supra* note 159, at 6.

180. *Id.* at 54 tbl. 3.

181. Mordechai & Roznai, *supra* note 76, at 246.

constitutional leadership. The President of the United States is a bigot¹⁸² who lacks every qualification for the presidency set out in the *Federalist Papers*, save for being elected according to the rules set out in Article II.¹⁸³ Many Republicans and Democrats treat electoral politics as a path for enrichment and celebrity rather than as a means for facilitating human flourishing.¹⁸⁴ President Trump's response to political protest, state legislation aimed at political protest, and legislation designed to reduce voting by less fortunate Americans highlights weakening support for the practices of constitutional democracy across the American constitutional universe.¹⁸⁵ Leaders with a similar absence of qualifications and democratic commitments are gaining traction in electoral politics in other constitutional democracies.¹⁸⁶

At a time when knowledge about matters as diverse as global warming, globalization, and nuclear proliferation is particularly vital,¹⁸⁷ substantial percentages of the voting population in the United States do not know basic facts about the environment, the economy, and foreign policy.¹⁸⁸ An influential minority of Americans, often inspired by political or business entrepreneurs, are particularly prone to engage in magical thinking when discounting the scientific consensus on global warming.¹⁸⁹ Chinn notes that “the polity is bereft of the basic tools needed for . . . engagement” on vital political questions, such as “agreement upon basic terminology or something approaching baseline ‘facts.’”¹⁹⁰ The fundamental problem is the tendency to base voting and political decisions on ideological or religious dogma rather than a dearth of information. When ideological and religious zealots are presented with facts inconsistent with their opinions, they cling to those opinions more

182. See Stuart Chinn, *Threats to Democratic Stability: Comparing the Elections of 2016 and 1860*, 77 MD. L. REV. 291 (2017); see also Griffin, *supra* note 157, at 161–64.

183. See Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. (forthcoming 2018) (manuscript at 7–12).

184. See Brian Cowan, *Celebrity and Politics Before Trump*, OUPBLOG (Dec. 8, 2016), <https://blog.oup.com/2016/12/celebrity-politics-before-trump/>.

185. See Dawood, *supra* note 178, at 198–99.

186. See Huq & Ginsburg, *supra* note 179, at 5 (noting a trend in Eastern Europe toward populists).

187. See Nancy L. Rosenblum, *Governing Beyond Imagination: The ‘World Historical’ Sources of Democratic Dysfunction*, 94 B.U. L. REV. 649, 655–60 (2014).

188. See ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 17–46 (2d ed. 2016).

189. See Stephanie Pappas, *Why So Many Americans Don't ‘Believe’ in Evolution, Climate Change and Vaccines*, HUFF POST (Jan. 25, 2017, 11:55 AM), https://www.huffingtonpost.com/entry/why-americans-deny-evolution-climate-and-vaccine-science_us_5888cd7ce4b098c0bba7db84; CARY FUNK & BRIAN KENNEDY, PEW RESEARCH CTR., *THE POLITICS OF CLIMATE* 19–29 (2016), <http://www.pewinternet.org/2016/10/04/the-politics-of-climate/>.

190. Chinn, *supra* note 182, at 302.

fiercely.¹⁹¹ More and more Americans obtain most of their information about politics from sources that do little more than confirm their world views. Maxwell Stearns speaks of “information silos” and “the confirmation-biasing tendencies of the breakdown of traditional media.”¹⁹² American and global commitments to cultural pluralism are weakening. The United States is experiencing what has been described as “the Great Disinhibition,” as prejudices formerly kept in the closet now find increasing avenues for expression.¹⁹³ Chinn’s paper in this symposium discusses “the weakening or disappearance of structures of commonality in American society” that allow for pluralism while containing the more tribal elements of pluralism.¹⁹⁴ New methods of communication enable bigots to threaten, with near impunity, members of historically disadvantaged groups who seek to participate in public discourse and disrupt intelligent conversations on matters of public importance.¹⁹⁵ Millions of Americans who would never march in a white supremacist rally nevertheless blame persons of color and immigrants for all the ills of their lives¹⁹⁶ and see racial minorities, African-Americans in particular, as “special favorite[s] of the law.”¹⁹⁷ The left as well as the right is wracked by problems of pluralism. Much evidence indicates that persons who voted for Hillary Clinton and persons who voted for Bernie Sanders in the Democratic primary had difficulty holding civil political conversations with each other.¹⁹⁸

191. See Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 323 (2010).

192. Maxwell L. Stearns, *Reflections on the Aftermath of Election 2016*, 77 MD. L. REV. 271, 277 (2017).

193. Josh Marshall, *The Great Disinhibition*, TALKING POINTS MEMO: EDITOR’S BLOG (Nov. 18, 2016, 10:57 PM), <http://talkingpointsmemo.com/edblogger/the-great-disinhibition>.

194. Chinn, *supra* note 182, at 292.

195. See DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 35–95 (2014).

196. See Stanley Greenberg, *The Democrats’ ‘Working Class Problem,’* AM. PROSPECT (June 1, 2017), <http://prospect.org/article/democrats%E2%80%99-%E2%80%98working-class-problem%E2%80%99>. See generally STANLEY B. GREENBERG, MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY (rev. ed. 1996) (reviewing the “middle class revolt against politics” in the 1990s).

197. Civil Rights Cases, 109 U.S. 3, 25 (1883); see also Chinn, *supra* note 182, at 292–95 (noting the consequences of Trump for a variety of vulnerable groups); Terry Smith, *White Backlash in a Brown County*, 50 VAL. U. L. REV. 89, 109 (2015) (discussing the racial backlash leading to the Tea Party).

198. See, e.g., MARK LILLA, THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS (2017); Beverly Cage, *An Intellectual Historian Argues His Case Against Identity Politics*, N.Y. TIMES (Aug. 15, 2017) (book review), <https://www.nytimes.com/2017/08/15/books/review/mark-lilla-the-once-and-future-liberal.html>. Better yet, see my Facebook page whenever Sanders or Clinton is in the news.

The resulting polarization inhibits compromise between and within political parties and political movements.¹⁹⁹ David Law points out how “the inherent reliance of social media on preexisting social ties and membership in self-selecting networks of affinity implies the tribalization of information flows: as reliance on social media for news continues to grow, both content and distribution will increasingly track preexisting tribal divisions.”²⁰⁰ Israel is one of many countries facing particularly virulent forms of these challenges. Mordechay and Roznai note the increased political appeal in Israeli politics of anti-Arab racism and the Netanyahu administration’s efforts to enforce cultural loyalty.²⁰¹

Economic equality, long thought to be a vital prerequisite to a functioning constitutional democracy, is decreasing sharply throughout the universe of constitutional democracy. Ganesh Sitaraman declares, “The number one threat to American constitutional government today is the collapse of the middle class.”²⁰² “The problem of economic insecurity,” Law observes, “is the Achilles heel of liberal democracy.”²⁰³ The top one percent in the United States and elsewhere has gained an increased share of the national wealth with substantial consequences for both electoral politics and economic mobility.²⁰⁴ The upper-middle class and above is becoming increasingly immune to downturns in the economy. Poor citizens, a disproportionate number of which are persons of color, women, and children, gain the least during good economic times.²⁰⁵

The combination of policy disasters by incompetent governing officials, prejudices inflamed by new media, information silos, and economic inequality is weakening commitments to constitutional democracy in the United States and throughout the world. Law notes the increasing attractiveness of an Asian model in which democratic freedoms are few, but consumer goods are often plentiful. His contribution suggests that ordinary citizens accept a

199. See Dawood, *supra* note 178, at 198–99; AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT* (2012).

200. David S. Law, *Alternatives to Liberal Constitutional Democracy*, 77 MD. L. REV. 223, 229 (2017) (footnote omitted).

201. Mordechay & Roznai, *supra* note 76, at 251–65.

202. GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 3* (2017).

203. Law, *supra* note 200, at 230.

204. See MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012).

205. See Thomas Piketty, Emmanuel Saez & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States*, ___ Q.J. ECON. ___ (forthcoming 2018) (manuscript at 3–4), <https://doi.org/10.1093/qje/qjx043>; Jana Kasperkevic, *The 1% Are Recovering from the 2008 Recession While 99% Are Still Waiting*, *GUARDIAN* (July 6, 2016, 12:15 PM), <https://www.theguardian.com/business/2016/jul/06/one-percent-2008-recession-recovery-income>.

bureaucratic authoritarianism that makes trains (if not buses) run on time.²⁰⁶ Constitutional arrangements, by comparison, may be producing the wrong goods. “How compelling is the response that we constitutional lawyers have,” he asks, “as keepers of the faith in liberal constitutional democracy, to the argument that democracy is inherently vulnerable to some combination of ignorance, tribalism, and fear?”²⁰⁷

The path of constitutional law influences constitutional retrogression at the margins,²⁰⁸ but no serious scholar claims that judicial decisions bear the brunt of the blame for poorly qualified political leaders, a badly informed public, weakened commitments to pluralism, and increasing economic inequality. Rather, the Constitution of the United States and the constitutions of other constitutional democracies are constructing and constituting politics in ways that privilege the election of celebrities more interested in exploiting than understanding the political world, that privilege spokespersons for narrow interests and cultural fears at the expense of persons who speak for broader public interests, and that privilege global elites at the expense of the citizens needed to form a strong middle class. The fault in the United States may lie in trying to operate an undemocratic and inefficient eighteenth-century constitution in a twenty-first century world,²⁰⁹ in failing to acknowledge that “our constitutional democracy rests on premises that no longer hold,”²¹⁰ in a “thickening” of political time that prevents any substantive reform,²¹¹ or perhaps in a constitutional culture that is no longer capable of sustaining a constitutional democracy, but not in politics and law being too intertwined. Part II of this Essay details how law is no more or less integrated with politics at present than in the past.²¹² The problems with contemporary constitutional democracy lie in how law and politics are integrated. We can obtain better constitutional law only by obtaining a better constitutional politics. Dawood properly recognizes that “it is the interaction between constitutional and po-

206. See Law, *supra* note 200, at 231–43.

207. *Id.* at 242.

208. See, e.g., *Shelby Cty. v. Holder*, 570 U.S. 2 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

209. See LEVINSON, *supra* note 176.

210. Stearns, *supra* note 192, at 274; see CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017).

211. Eric Lomazoff, *Why Donald Trump Is Not Andrew Jackson (and Why that Matters for American Constitutional Democracy)*, 77 MD. L. REV. 280, 284–85 (2017) (quoting STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 31 (1997) (discussing the results of an “institutional thickening on the politics of leadership”).

212. See *supra* Part II.

litical factors that will be determinative of” the survival of American constitutional democracy, “rather than the strengths and deficiencies of the Constitution on its own.”²¹³

Constitutional politics challenges the means offered by the New Deal conceptual universe for achieving constitutional reform. That conceptual universe provides one place for constitutional change, points to the nine persons who must be persuaded, and offers one language for persuasion. Constitutional politics provides multiple places for constitutional change, points to the different people who hold privileged positions in these different places who must be persuaded, and offers different persuasive languages for convincing different persons in different places to make constitutional changes. Localities are alternatives to federal courts. Some states granted same-sex couples the right to marry before the Supreme Court decided *Obergefell v. Hodges*.²¹⁴ Elected officials are alternatives to judges. Gubernatorial commutations, as well as judicial stays, halt executions. Popular constitutional rhetoric is an alternative to legality. Courts routinely reject legal claims based on the Declaration of Independence,²¹⁵ but such constitutional rhetoric is often powerful when employed by political movements in electoral and legislative settings.²¹⁶

This constitutional politics is more dynamic than the static world view presented by the law/politics distinction. Americans throughout history have altered the places for constitutional change, the persons who must be persuaded, and the language of persuasion. The constitutional powers of all branches of the national government have waxed and waned throughout American history.²¹⁷ Political movements and elected officials constantly contest the partisan composition of the federal judiciary.²¹⁸ Legal entrepreneurs transform the dominant methods of constitutional discourse.²¹⁹ Reformers may nevertheless change these elements of constitutional politics

213. Dawood, *supra* note 178, at 196.

214. See, e.g., EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION (3d ed. 2017); DANIEL R. PINELLO, AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE (2006).

215. Mark A. Graber, *The Declaration of Independence and Constitutional Pedagogy*, 89 S. CAL. L. REV. 509, 515–16 (2016)

216. See ALEXANDER TESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE (2012).

217. See, e.g., JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS (1981).

218. See, e.g., ABRAHAM, *supra* note 111.

219. See, e.g., PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2014); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the ‘Living Constitution’ in the Course of American State-Building*, 11 STUD. IN AM. POL. DEV. 191 (1997).

only by making creative use of the existing places where people may be persuaded, the people who must be persuaded, and the languages by which they might be persuaded.

Constitutional politics can be improved only by politics. Work that demonstrates the political foundations of judicial power undermines the inherited belief that law can protect us from politics, *i.e.*, that if politics is the problem, then law is the solution. The foundations for constitutional democracy, which contemporary constitutional politics are undermining, can be buttressed only by materials found within contemporary constitutional orders. Quentin Skinner's aphorism, "all revolutionaries . . . march backwards into battle,"²²⁰ captures how persons modifying or replacing a failing regime justify their reforms by using the language of the old constitutional order that their audience understands and accepts. Julie Novkov's work on the New Deal Constitutional Revolution details how Hughes Court Justices were able to provide constitutional foundations for minimum wage and maximum hours laws by ascribing longstanding characteristics of women workers to workers of all sexes.²²¹ Stephen Skowronek observes how all new institutions bear the imprint of the old institutions that gave birth to them. The politics of the pre-administrative state in the United States, he details, structured the institutions of the administrative state.²²² The Supreme Court has played a major role in American constitutional development because new coalitions coming to power consistently conclude that they will best promote their constitutional visions by modifying existing activist practices rather than by building a new federal judiciary.²²³

The relationship between constitutional stability and constitutional change has important consequences for efforts to restore the preconditions of constitutional democracy in the United States and throughout the world. No Archimedean point exists outside of politics that provides foundations for creating or imagining better constitutional regimes. Successful reformers must acquire power either through existing channels of power or by using the tools that contemporary constitutional politics provides for modifying existing channels of power. The means used by reformers to change the existing constitutional order will, in turn, structure the new constitutional order. Replacing Donald Trump by impeachment has different constitutional consequences than replacing Trump's Republican Party by election.

220. QUENTIN SKINNER, *VISIONS OF POLITICS: REGARDING METHOD* 149–50 (2002).

221. See NOVKOV, *supra* note 108, at 183–240.

222. See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982).

223. See WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* (1989).

The conceptual order schmoozers are fashioning celebrates good politics, abandoning the world view that demeaned all politics as a lower form of constitutional behavior. This good politics consists of the persuasion, mobilization, and policies necessary to sustain the conditions for constitutional democracy and to improve a regime's capacity to realize constitutional ideals or, in the case of the United States, the American constitutional ideals. This constitutional politics is a politics of better and worse rather than one of legal truth and error. Chief Justice Earl Warren spoke the language of the New Deal conceptual universe when he rejoiced in the judicial capacity to provide litigants with "a whole loaf."²²⁴ Constitutional politics offers no similar hope for redemption. The half a loaf reformers we might gain, should their constitutional efforts successfully persuade our fellow citizens of the virtues of intelligence, science, pluralism, and economic equality, seems meager from the Olympian heights of law. Nevertheless, the bread obtained through constitutional politics serves those throughout the world who are metaphorically starving for some justice and less metaphorically starving for any nourishment.

Abraham Lincoln concluded his second annual message to Congress by declaring,

Fellow-citizens, *we* cannot escape history. We of this Congress and this administration, will be remembered in spite of ourselves. No personal significance, or insignificance, can spare one or another of us. The fiery trial through which we pass, will light us down, in honor or dishonor, to the latest generation.²²⁵

We can no more escape politics than we can escape history. Constitutional democracy will survive the fiery trial through which those governing practices are passing only if constitutional democrats persuade our fellow citizens of the virtues and preconditions of constitutional democracy through existing channels of communication and mobilization, or through the new channels of communication and mobilization they devise using the materials provided by contemporary constitutionalism. A constitutional theory rooted in a constitutional politics committed to constitutional democracy must provide persuasive reasons for thinking that elected officials and political actors need experience and intelligence, that public policy must be based on sound science rather than religious or ideological dogma, that modern pluralist societies are here to stay and offer the best possibility for human flourishing, and that a constitutional democracy without a vibrant and diverse middle

224. See EARL WARREN, *THE MEMOIRS OF EARL WARREN* 6 (1977) (noting that the Supreme Court is not where one "take[s] a half a loaf where a whole loaf could not be obtained").

225. Abraham Lincoln, Second Annual Message to Congress, (Dec. 1, 1862), in *COLLECTED WORKS OF ABRAHAM LINCOLN* 537 (Roy P. Basler ed., 1953).

class is a practical political contradiction. If we as a collective, as a society and as a species fail in this constitutional endeavor, we may not be remembered in spite of ourselves only because the high probability exists that our failure will leave no institutions capable of preserving memory or worse, no selves to do the remembering.