

November 1987

Introduction: Does the Constitution Govern?

William F. Connelly Jr.

William Lasser

Follow this and additional works at: <https://digitalcommons.coastal.edu/jops>



Part of the [Political Science Commons](#)

Recommended Citation

Connelly, William F. Jr. and Lasser, William (1987) "Introduction: Does the Constitution Govern?," *Journal of Political Science*: Vol. 15 : No. 1 , Article 1.

Available at: <https://digitalcommons.coastal.edu/jops/vol15/iss1/1>

This Article is brought to you for free and open access by the Politics at CCU Digital Commons. It has been accepted for inclusion in Journal of Political Science by an authorized editor of CCU Digital Commons. For more information, please contact commons@coastal.edu.

INTRODUCTION: DOES THE CONSTITUTION GOVERN?

William F. Connelly, Jr. and William Lasser
Guest Editors

A hundred or even 50 years ago, the question "Does the Constitution Govern?" would have been regarded as a banality hardly worthy of consideration. To traditional political thinkers, the influence of the Constitution on American politics was a given; the Constitution, as the legal scholar Thomas Cooley wrote, was nothing less than "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."¹ To the question "Does the Constitution Govern?" traditional political scientists would have answered yes, and yawned, and wonder why the question was even asked.

The behavioralist revolution transformed the political scientist's view of the Constitution, just as it transformed political science itself. Behavioralism as applied to political science sought "to explain the phenomena of government in terms of the observed and observable behavior of people."² Such an approach tended to downplay the importance of institutions and ideas, and to reject abstraction and formalism. One casualty of the behavioralist revolution was the Constitution of the United States, at least as a major factor in political scientists' attempts to understand American government and politics. A few political scientists continued to study constitutional law, but even the public law subfield was replaced by an emphasis on judicial politics or judicial behavior. For much of the post-World War II era, American political science has neglected the Constitution, and many post-war thinkers would have dismissed our inquiry as a nostalgic but ultimately uninteresting enterprise. Their answer to the question "Does the Constitution Govern" would have been a simple and flat "No."

In recent years, however, the role of institutions in general and of the Constitution in particular has begun once again to attract the attention of students of American government. An increasing number of political scientists have found the behavioralist model too restrictive, and of incomplete explanatory value in assessing the larger questions of American politics. In their attempt to fill in the gaps, these modern thinkers have begun to take the Constitution seriously, so to speak, but not too seriously. They seek a comprehensive and integrated approach to the study of politics, seeing the Constitution (and institutions in general) as one factor governing our political system, but not as the only factor. The Constitution governs, in their view, but it does not govern alone or completely.

At the bicentennial of the United States Constitution, unlike at its centennial or sesquicentennial, the question "Does the Constitution Govern?" is both timely and relevant to the concerns of a growing number of American political scientists. This special issue of the *Journal of Political Science* presents a number of diverse answers to that question, from a variety of perspectives and across a range of American political science subfields.

The rejuvenated interest in institutions in general and in the Constitution in particular is reflected in all areas of American political science, as the essays in the following pages clearly demonstrate. Certainly one would expect such interest to be generated in fields like public law, and it is; one can, however, see the impact of this transformation in areas that traditionally neglected the Constitution altogether, such as in the study of interest group politics.

The study of public law, of course, has always been heavily committed to taking the Constitution seriously. Edward S. Corwin, perhaps the greatest of all public law scholars in this century, devoted an entire book to *The Constitution and What It Means Today*; and even in his other books emphasizes constitutional interpretation and formal constitutional principles. The field of public law at first focused almost exclusively on the constitutional decisions of the courts, and especially the Supreme Court; and on the philosophical and theoretical foundations of those decisions and of the American constitutional system in general. The titles of even of few of Corwin's essays present the flavor of this early approach to public law: among many others, he wrote "The 'Higher Law' Background of American Constitutional Law"; "Some Lessons from the Constitution of 1787"; "The Constitution as Instrument and Symbol"; and "The Impact of the Idea of Evolution on the American Political and Constitutional Tradition." Whatever else they did, Corwin and his contemporaries certainly took the Constitution seriously.

The behavioralist revolution, however, did not leave the field of public law untouched. For a while, in fact, especially in the 1960's, the Constitution threatened to disappear from the field of public law almost entirely. New approaches seemed more promising and less naive; judicial biography flourished, as did new initiatives like the analysis of "judicial strategy" and the quantitative assessment of judicial behavior. Courts and judges were now conceptualized as political actors creating policy outputs just like their counterparts in Congress and the presidency; and if congressional or presidential scholars did not find the Constitution of analytical value, why should public law scholars?

The behavioralist revolution in the field of public law, however, was an incomplete one. In the 1980's, the old approach coexists with the new, and the field, as Lawrence Baum put it, "has taken with a vengeance C. Herman Pritchett's advice to "Let a hundred flowers bloom."³ Public law scholars have rediscovered constitutional theory, constitutional interpretation, constitutional history, and constitutional law. This newly rediscovered emphasis on the Constitution does not assume that the formal study of the Constitution is enough, by itself, to understand the courts; far from it. But it does regard the Constitution as one of the central elements, and perhaps the central element, in understanding the role of courts and judges.

Nowhere is the new approach to public law more clearly reflected than in the spate of books being published in connection with the Constitution bi-

centennial. Consider only the three discussed by Sue Davis in her review essay in this volume; they approach the study of the Constitution from the diverse fields of legal philosophy, history, and traditional constitutional interpretation. When books like these can coexist with studies that utilize quantitative analysis, formal modeling, and a host of other approaches, the field of public law is surely a healthy and robust one.

In the area of interest groups, to take the second example, the influence of the new approach has been, if anything, even more dramatic. During the 1950s and 1960s the study of interest groups gained a great deal of attention precisely because this relatively new subfield seemed to liberate the political scientist from the confines of institutionalism and formalism. As Graham K. Wilson recently wrote,

Twenty-five years ago, the study of interest groups seemed likely to be one of the main branches of political science. The growing awareness of interest groups which scholars showed could be viewed as one of the most promising developments in the discipline. The study of interest groups would free political science from the straight jacket of the study of political institutions and constitutions; interest groups were part of the substance of real politics, not the arid principles of constitutional law. Above all, the study of interest groups would bridge the gap between the study of politics and the study of society.⁴

Robert Dahl, with his *Preface to Democratic Theory* and *Who Governs?* was at the center of this attempt to move the study and practice of politics beyond the constraints of the institutional and formalist approach that had characterized the study of American politics ever since James Madison. Dahl criticized Madison for fostering an excessive concern with constitutional principles such as the separation of powers, checks and balances, federalism, and bicameralism. "The Madisonian argument exaggerates the importance, in preventing tyranny, of specified governmental officials; it underestimates the importance of the inherent social checks and balances existing in every pluralist society." Dahl took this critique even a step further: "If constitutional factors are not entirely irrelevant," he concluded, "their significance is trivial as compared with the non-constitutional." Constitutional rules, Dahl wrote, "are not crucial, independent factors in maintaining democracy; rather, the rules themselves seem to be functions of underlying non-constitutional factors." Madison's concern with "the proper structure of the Union," according to Dahl, was excessive because constitutional structure is epiphenomenal. Constitutional limitations, he insisted, are merely a "Cheshire cat."⁵

Thirty years later the field of interest group politics appears to be coming around full circle, as seen for example in a study by Nelson Polsby, one of Dahl's foremost students. In *Political Innovation in America*, Polsby returns modern pluralist theory to the serious consideration of the influence of constitutional principles and structure on the behavior of individuals and groups. In response to those who argue that the American political system manifests

a bias against policy initiation, Polsby argues that the policy process is sufficiently decentralized and permeable so as to allow, and even encourage, policy innovation. Innovation in politics requires that the political system provide sufficient incentives to policy makers to search for innovations. These incentives, Polsby suggests, are "incorporated into the constitutional routines of the American political process as they affect the ambitions of politicians — routines associated with the electoral cycle and routines associated with the separation of powers." ⁶ The Constitution, in Polsby's view, establishes a multicentered, rather than hierarchical, decision-making structure, thus ensuring the institutionalized competition and conflict of a pluralism bounded by a decentralized political structure. In Polsby's view, quite clearly, one cannot simply separate social structure and political structure.

Critics of the pluralist literature over the past few decades also seemed to depreciate the importance of constitutional structure. In pointing to the biases of pluralism in theory and practice, elite theorists, for example, often argue that broad interests, such as consumer or environmental interests, are not adequately represented by organized interest groups. Indeed, the most general interest, namely the public interest, is, in their view, the most chronically underrepresented of all.

Madison, were he alive to defend himself, might insist that constitutional government is itself the organization and articulation of the public interest, as seen for example, in the principle of representation. An argument can be made that the constitutional principle of representation, as embodied in the deliberations within Congress and between the President and Congress, provides the most immediate and tangible expression of the common good. And yet, pluralist and anti-pluralist theorists alike have labeled such an argument naive, and have called into question the very nature of representation. Implacable foes on most everything else, on this pluralists and their critics often agree: an elected representative is more readily the agent or advocate of his particular group or class interest, and infrequently, not to say never, is he sincerely the trustee of the public interest. Much of the literature on Congress reflects this somewhat cynical view. But today we are seeing a reconsideration of the argument that constitutional government and the principle of representation actually mean something.

Arthur Maass, in his new book, *Congress and the Common Good*, criticizes the pluralist view of the legislative process and attempts to revive the argument that deliberation in Congress leads to the public interest. How is it, Maass asks, that according to many pluralist theorists, all interests except the public interest are knowable and definable? Maass sees the legislative process as a continuous process of deliberation and discussion about the common good which refines and enlarges our "breadth of view." The key to this, according to Maass, is the institutional environment or context.⁷

II

The contributors to this special issue of the *Journal of Political Science* offer a variety of answers to the question "Does the Constitution Govern?" The first essay, by Louis Fisher, explores extrajudicial influences, including social, ideological, and political factors, on the development of constitutional law. Fisher concludes that such considerations have a significant effect on the evolution of constitutional law, a conclusion he documents with a range of historical and modern examples. James W. Ceaser adopts the opposite tack, and looks at the effect of constitutional principles of political culture. Ceaser examines the connection between our Constitution and our constitution, and argues that our written Constitution, and the ongoing debate over the principles of that Constitution, continue to inform the development of our political culture. He concludes that the American constitutional order remains viable because it represents a healthy synthesis of the two traditions in American politics, namely, the federalist and the antifederalist, or the urban and the rural.

The article by Randall W. Strahan moves out of the realm of high theory to a more practical and particular focus on the Constitution's "originating clause" and the role of the constitution in the politics of federal taxation. Strahan asks, in effect, does the originating clause govern? He concludes that, while the originating clause has not consistently dictated the formation of tax policy, it generally has been followed throughout our history, and it may provide a standard worth adhering to in the future in order to maintain a measure of stability in tax decisionmaking.

Danny Adkison's article and the essay by Marcia Whicker, Ruth Ann Strickland, and Raymond Moore both raise the question: why has the Constitution survived for two hundred years? Adkison maintains that the Constitution remains viable because the Founders, as students of political philosophy, based the Constitution on a profound understanding of the connection between human nature and politics. The Constitution survives, according to Adkison, because it is compatible with human nature. Whicker, Strickland, and Moore present an interesting exploratory study which seeks to explain the constitutional amendment process in terms of two broad causal models. The constitution governs, they conclude, because it is adaptable.

Finally, Tinsley E. Yarbrough raises the enduring question of the nature of constitutional interpretation within the context of his focus on the interpretivist jurisprudence of Justice Hugo Black. Yarbrough defends Justice Black's interpretivism as holding the Constitution up as "higher law," thus enabling the constitution to govern. The Yarbrough essay, with its examination of the "constitutional faith of Justice Black," provides an appropriate close to the six essays in this special edition of the *Journal of Political Science*. All six essays provide different, yet consistently challenging, answers to the questions: does the Constitution govern? In this bicentennial year it is fitting and proper that we study the Constitution and wonder at its ability to endure.

NOTES

¹Thomas Cooley, "Constitutional Limitations," 30 *American Political Science Review* 1071-85 (1936).

²Raymond Seidelman and Edward J. Harpham, *Disenchanted Realists*, (Albany, NY: State University of New York Press, 1985), p. 149.

³Ada W. Finifter, *Political Science: The State of the Discipline* (Washington: The American Political Science Association, 1983), p. 191.

⁴Graham K. Wilson, *Interest Group Politics in the United States* (Oxford: Clarendon Press, 1981), p. vii.

⁵Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), pp. 22, 135, 137, 20.

⁶Nelson W. Polsby, *Political Innovation in America* (New Haven: Yale University Press, 1984), p. 165.

⁷Arthur Maass, *Congress and the Common Good* (New York: Basic Books, 1983), pp. 18, 24, 29.