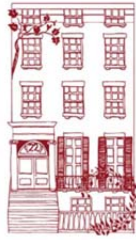

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Daryl Levinson

**Parchment and Politics: The Positive Puzzle of Constitutional Commitment**

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# PARCHMENT AND POLITICS: THE POSITIVE PUZZLE OF CONSTITUTIONAL COMMITMENT

By Daryl J. Levinson*

**Abstract**

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

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

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we expect institutional commitment devices to be any more stable than the first-order commitments they are supposed to facilitate?

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

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## INTRODUCTION

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

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

Constitutional lawyers and theorists have all but ignored such questions, focusing instead on normative issues surrounding the kinds of constitutional constraints that might be desirable or democratically legitimate.[2] Thus, the leading question in constitutional theory for generations has been how to justify constitutional limitations on the authority of democratic majorities given our background commitments to popular sovereignty and self-government—the infamous

[1] This skeptical question dates back at least to Hobbes, who doubted whether Leviathan could be bound by any kind of law. Hobbes's logic is simple and still compelling (though far from dispositive): "For [Leviathan] having power to make, and repeale Laws, he may, when he pleaseth, free himself from that subjection, by repealing those Lawes that trouble him, and making of new .... He that is bound to himselfe onley, is not bound." Leviathan at 184 (Richard Tuck ed.).

[2] *See* Richard H. Fallon, Jr., Constitutional Constraints 977 (noting the normative orientation of constitutional theorists and their lack of attention to the general topic of "constitutional constraints").

"countermajoritarian difficulty." No less important, however, is the positive (and perhaps conceptually prior) question of why politically empowered majorities would choose to comply with legal limitations on what they can accomplish politically. One might well wonder why democratic majorities and their representatives in government would tolerate, let alone embrace and support, such constraints.

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

What is left unexplained in all of these accounts is how popular majorities or other powerful political actors successfully commit themselves to constitutional constraints. No matter how legitimate or beneficial these constraints might be, they will not be effective unless they are accepted by the very actors who are making political decision in the present—acting in the heat of the moment, in the fallen state of ordinary politics, and through flawed political processes.

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[3] *See* Jon Elster, Ulysses Unbound 88-174 (2000); Stephen Holmes, Passions and Constraint 134-77 (1995).
[4] *See* Bruce Ackerman, We the People: Foundations (1991); Bruce Ackerman: We the People: Transformations (1998).
[5] *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

What will prevent these actors from ignoring the anachronistic dictates of the long deceased, making precisely the pathological or undeliberative decisions that their better sovereign selves had committed against or elevated above, or carrying on with the democratically degraded political processes through which they have risen to power? It is one thing to see the potential benefit of, for instance, precommitting to maintain civil liberties even in times of war or terror when there will be immense political pressure to prioritize national security. It is quite another to figure out how such precommitments can be made to stick when political push comes to shove. Ulysses needed ropes and a mast to resist the lure of the Sirens. Is there an equivalent device that might allow democratic political actors to limit their continuous capacity for self-government?[6]

The affirmative answer of first resort for many constitutional lawyers and theorists has been *courts*. Judicial review is commonly portrayed as the failsafe mechanism by which constitutional commitments become practically binding. If popular majorities and the political branches of government cannot muster the will to heed constitutional prohibitions, courts stand ready to enforce them. Only where courts might not be available to play this role do serious doubts about constitutional compliance begin to surface. Thus, a major challenge confronting proponents of "popular constitutionalism" is the apparent enforcement deficit that would result if the constitution were "taken away from the courts."[7] Having done away with judicial review as an external enforcement mechanism, popular constitutionalists are driven to look for ways in which constitutional constraints might be made somehow "self-enforcing." Yet this way of framing the problem obscures the more fundamental point that an effective system of constitutional law must be in some sense self-enforcing *regardless* of judicial review. Casting courts as constitutional enforcers merely pushes the question back to why powerful political actors are willing to pay attention to what judges say; why "people with money and guns ever

[6] *See* Scott J. Shapiro, Ulysses Rebound, 18 Econ. & Phil. 157 (2002) (framing the question this way).
[7] *See* Mark Tushnet, Taking the Constitution Away from the Courts ch. 5 (1999).

submit to people armed only with gavels."[8] Without some further explanation of how courts can stand in the way of a determined popular majority or a President intent on violating the constitution—and of why judges would want to do so in the first place—judicial review is merely a deus ex machina.

But of course the puzzle of constitutional commitment goes even deeper than this. The question of whether or how courts or constitutional law can constrain a popular President presupposes that we *have* a judiciary and a President, with their constitutionally-specified institutional forms and powers. Before constitutional law can aspire to constrain political actors it must *constitute* these actors. But the puzzle of constitutional commitment is no less profound. Without widespread and relatively stable agreement on the existence, composition, and basic authority of political institutions like the Presidency, the Supreme Court, and Congress, we would not recognize a functioning state, government, or constitutional order at all. Yet the ability of successful constitutions to accomplish this constitutive work is no more self-explanatory than the ability of an up-and-running system of constitutional law to regulate or constrain the constituted government. Why do powerful social groups who are disadvantaged by the basic structural arrangements of the federal government not simply ignore or reconstitute them—for example by replacing the constitutional structure of government with a military dictatorship? Why have large groups of Americans not more frequently followed the lead of the Confederate South in rejecting the U.S. constitutional order altogether?

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

Peripheral as it has become to subsequent constitutional theorists, this puzzle was of central concern to the original designers of the U.S. Constitution, particularly James Madison.

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[8] Matthew C. Stephenson, "When the Devil Turns . . .": The Political Foundations of Independent Judicial Review, 32 J. Legal Stud. 59 (2003); see also Keith E. Whittington, Political Foundations of Judicial Supremacy 26 (2007) (observing that 'the Court cannot stand outside of politics and exercise a unique role as guardian of constitutional verities" because "the Court's judgments will have no force unless other powerful political actors accept the ... priority of the judicial voice").

Madison famously feared that constitutional rights and other legalistic limitations on government would create merely "parchment barriers."[9] The problem, he explained, was that "[i]n our Governments the real power lies in the majority of the Community."[10] In the absence of any external constitutional enforcer capable of resisting the power of majorities, we should expect that rights "however strongly marked on paper will never be regarded when opposed to the decided sense of the public ... ."[11] At the same time, however, Madison recognized the possibility of converting parchment principles into meaningful constraints on government behavior. Madison hoped and hypothesized that the constitution could be made politically self-enforcing by selectively empowering political decisionmakers whose interests and incentives would remain in alignment with constitutional values.

This Article develops the Madisonian logic of constitutional commitment, exploring its possibilities as well as its limitations. After explicating Madison's theory of constitutional design along the lines described above in Part I, Part II abstracts from constitutionalism to the more general question of how intertemporal political commitments, of any sort, are possible. How, for example, can a government or political community credibly and successfully commit itself to repay its debts, make good on treaty obligations, or refuse to bail out banks that engage in reckless financial speculation? As modern social scientists have joined Madison in recognizing, the sustainability of such commitments depends upon keeping the interests of political decisionmakers pointed in the direction of supporting the relevant policy over time, or empowering as political decisionmakers those actors who will predictably have the right interests. Economists and political scientists have identified a wide variety of political decision-making institutions that appear to work in just this way. Part II surveys the social science literature and consolidates a generalizable set of mechanisms through which these institutional arrangements and the outcomes they are designed to secure can become entrenched against

[9] The Federalist No. 48.

[10] Madison, Letter to Jefferson, Oct. 17, 1788, in Jack N. Rakove, Declaring Rights: A Brief History with Documents 161 (1998).

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

change and thus effectively self-enforcing.

Part III carries over this general understanding of political commitment, entrenchment, and self-enforcement to constitutional law and theory. Constitutional law, often invoked as a mechanism of political commitment, must itself be the result of successful political commitment. The discussion in Part III elaborates this point by exploring the conceptual relationship between formal constitutional (and other legal) commitments and functional political commitments. It then turns to the question of how a commitment to constitutionalism could succeed in constituting and constraining a political community over time. Conceived as a political decision-making institution writ large, a constitution or a system of constitutional law might become politically entrenched through the mechanisms identified in Part II.

Part IV refines this broad-brush explanation of how constitutionalism is possible by attempting to explain why some constitutional commitments work better than others. The conventional wisdom starting with Madison has been that constitutional "structure" is more stable than rights and other constitutional rules. Since Madison's time, moreover, the category of constitutional structure has come to include the institution of judicial review, now cast as the most important institutional locus of constitutional commitment. Part IV examines whether and how constitutional structure and judicial review have become more deeply entrenched against political opposition or override than other aspects of the constitutional order. The hope is that understanding how, and to what actual extent, constitutional commitment has worked in these contexts will shed light on the more general puzzle of constitutional stability and constraint.

## I. Madisonian Constitutional Design

More than any constitutional theorist before or since, Madison recognized that the central challenge of constitutional design was to convert parchment barriers into politically meaningful constraints on government behavior. The premise of Madison's constitutional theory was that constitutional law could serve as a stable framework for governance only if compliance with constitutional rules and arrangements could be made consistent with the political interests and incentives of officials and powerful groups in society. This imperative of political self-

enforcement placed limits on what a constitutional designer could hope to accomplish.[12]

What might a constitutional designer hope to accomplish? The Framers of the U.S. constitution were concerned about two broad classes of political pathology. First, they were worried about the *agency* problem of representative government—how to prevent venal and corrupt federal officials from tyrannizing and plundering the citizens they were supposed to serve. Alternatively, they were also worried that the principal-agent relationship between constituents and their representatives would be all too tight, allowing dominant factions of the electorate to capture government for their own selfish ends, including, especially, the oppression of minorities.[13] As Madison drew the distinction in *Federalist 51*, "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[14]

It was this latter problem, of *faction*, that Madison had come to believe was the most worrisome.[15] "In our Governments," Madison wrote, "the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."[16] At the same time, however, Madison doubted that constitutional rights could do much to prevent political majorities or other powerful factions from having their way. Rights that protected the politically weak against the politically strong would be unenforceable; they would simply be disregarded or overridden. Justifying to Jefferson his opposition to a Bill of Rights, Madison argued that "experience proves

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[12] Further limits were placed by Madison's skepticism about the capacity of political actors for moral self-restraint:

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

Jack N. Rakove, James Madison 55 (2d ed. 2002) (quoting Madison).

[13] The classic statement of this general concern is Madison's Federalist No. 10. *See* also Akhil Reed Amar, The Bill of Rights xii-xiii (1998).

[14] The Federalist No. 51.

[15] Madison's view was based in large part on the experience of state governments in the decade leading up to the Constitutional Convention. Jack N. Rakove, Original Meanings 290, 313–16 (1996).

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

the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State." [17] From this experience, Madison drew the general moral that countermajoritarian rights would be an exercise in futility.[18]

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

[17] *Id.* at 161.
[18] *See infra* p. 688 and accompanying text. Other Federalists shared Madison's view. *See* Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 376-82 (1969) (recounting Daniel Webster's rollicking argument to the same effect). As Roger Sherman put the basic point, "No bill of rights ever yet bound the supreme power longer than the honeymoon of a married couple, unless the rulers were interested in preserving the rights."
[19] Letter from James Madison to Thomas Jefferson, *supra* note 10, at 162.
[20] *See* Amar, *supra* note 13, at 3-133.
[21] Letter from James Madison to Thomas Jefferson, *supra* note 10, at 162. This assumption might seem peculiar given that, throughout history, minority rule — by means of superior wealth, arms, or organization — has probably been the norm. Still, the assumption that the majority would ultimately win out, through force if not politics, has been a common and important premise of much political and legal theory. *See* Adrian Vermeule, The Force of Majority Rule (Harvard Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 08-48, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280201.

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

This composition and structure had several important components. Perhaps most importantly, as Madison explained in *Federalist 10*, shifting power to the national government of the extended republic would "take in a greater variety of parties and interests."[24] The more factions in competition with one another for political power, he reasoned, the less likely that a stable, unified majority would capture the government and tyrannize minorities.[25] Madison thus made the case that "the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."[26] At the same time, Madison hoped that large federal election districts and the indirect election of Senators and the President would select for representatives who would "possess most wisdom to discern, and most virtue to pursue, the common good of society."[27] By insulating these "statesmen" from the heat of majoritarian political pressure, Madison hoped the constitutional structure of government would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it

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[22] Letter from James Madison to Thomas Jefferson, *supra* note 10, at 162.
[23] The Federalist No. 31. (Alexander Hamilton), *supra* note 9, at 192.
[24] The Federalist No. 10 (James Madison), *supra* note 9, at 78.
[25] *Id*. Madison explained:

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

[26] The Federalist No. 51 (James Madison), *supra* note 9, at 321.
[27] The Federalist No. 57 (James Madison), *supra* note 9, at 348.

to temporary or partial considerations."[28]

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

One drawback of Madison's structural solution to the problem of faction is that it conspicuously exacerbated the problem of agency, stoking the fears of Anti-Federalists that powerful, democratically insulated federal officials would quickly set themselves up as tyrannical monarchs or oligarchs. Responding to this concern, Madison offered a further self-enforcing mechanism, this one focused on the branches of the federal government and on the relationship between the federal government and the states. Just as a multiplicity of factions would compete with and check one another in society and the electorate, Madison reasoned, competition among these institutional units of government might create a self-enforcing check on tyrannical self-aggrandizement. Thus, Federalist 51 famously describes how the constitutional separation of powers between the legislative and executive branches can be made self-enforcing by leveraging the "personal motives" of "those who administer each department" to preserve and expand their own power and inviting "ambition ... to counteract ambition."[30] Along similar lines, Madison argued that state governments would be motivated and empowered through various channels of political influence to protect their turf against federal encroachment, effectively enforcing the federal power-sharing arrangement built into the constitutional design.[31]

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

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

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

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

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

Now, it is far from clear how Madison's own constitutional design was supposed to satisfy these two conditions. With respect to incentive compatibility, Madison never explained why the branches of government, or the state and federal governments, would reliably have political incentives at odds with one another; why they would tend to compete rather than cooperate or collude. Madison sometimes portrayed governmental units like the federal branches and the states as self-interested, self-aggrandizing political actors with wills and ambitions of their own.[35] In fact, however, the behavior of these entities will be driven by the interests and incentives of the real-life officials who staff them. Even granting that government officials seek to maximize their own power above all else, for Madison's theory to work, the

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[31] *See* The Federalist No. 45 (James Madison), *supra* note 9, at 285–90. Here too, courts and constitutional theorists continue to believe that competition for power between the states and the federal government will create a self-enforcing set of "political safeguards" for federalism. *See* Levinson, *supra* note 30, at 938–40.
[32] The Federalist No. 51.
[33] *See* Levinson, Empire-Building, *supra* note 30.
[34] *See* TUSHNET, *supra* note 7, at 95–96 (using "incentive compatibility" in this sense).

constitutional structure would somehow have to join the power-mongering ambitions of officials to the power of the institutional entities in which they work. Indeed, Madison at times recognized the need for such a linkage between "the interest of the man" and "the constitutional rights of the place."[36] Unfortunately, he did not offer any explanation of how this connection was supposed to take hold. And it is hard to see how it *could* take hold in a democratic system of government, in which representatives accumulate and exercise power not by aggrandizing the institutions in which they work but by getting things done—in particular, by advancing their (or their constituents') policy goals.[37] In fact, all indications are that political "ambition counteract[ing] ambition" has failed to serve as a self-enforcing safeguard for the constitutional structure of federalism and separation of powers in the way that Madison seems to have envisioned.[38]

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

Madison's theory of constitutional design was thus incomplete, and in some important

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[35] The Federalist No. 51 (James Madison), *supra* note 9, at 318.
[36] *Id*. at 319.
[37] *See* Levinson, *supra* note 30, at 926–32, 950–53.
[38] *See infra* notes 231–53 and accompanying text.
[39] *See* Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 361–66 (2007) (explicating the Framers' belief that structural protection for constitutional rights and values would be more secure than enumerating rights, though without explaining the basis for this belief).

respects mistaken. Nonetheless, there is much we can learn from the Madisonian approach to self-enforcing constitutionalism. Madison rightly recognized that constitutional commitments would be meaningless unless parchment barriers could somehow be converted into politically stable rules and arrangements. As the next Part describes, modern social scientists have (perhaps unwittingly) embraced and built upon Madison's strategy of committing to constitutional rights and rules by designing institutional structures that would stack the political deck in their favor.

## II. Political Commitment and Institutional Entrenchment

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

### A. Commitment: Personal and Political

The problem of personal commitment is a familiar one. We sometimes wish to restrict our own freedom of choice in order to guard against fleeting passions, fickle preferences, or some other source of time-inconsistent decision-making.[40] We can attempt to do so by purely "internal" means, simply resolving to ourselves that we will exercise more, wake up earlier, stop smoking, or save for retirement. The problem, of course, is that our internal commitments are not always psychologically strong enough to prevent us from acting upon our present desires. Recognizing ex ante that our future behavior will not conform to our current preferences by force

[40] *See* Jon Elster, Ulysees and the Sirens 65–77 (1979); Thomas C. Schelling, Choice and Consequence 83–87 (1984).

of will alone, therefore, we attempt to impose "external" constraints on our future selves. Homer's Ulysses is the oft-invoked the model for these efforts: Rather than relying solely on his internal commitment not to be seduced by the song of the Sirens, he famously bound himself to the mast with rope. Analogously, if less dramatically, we hire personal trainers, place our alarm clocks out of arm's reach, pledge our friends not to lend us cigarettes, and buy houses to force long-term savings.

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

Just as individuals can improve their welfare by entering into contracts or self-binding commitments, political actors—states, governments, officials, popular majorities, and interest groups—can make themselves better off over time by credibly committing themselves to plans or

[41] *See* Anthony T. Kronman, Contract Law and the State of Nature, 1 J. L. Econ. & Org. 5 (1985).

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

policies (ex ante) and sticking to them (ex post). States and governments that can credibly commit to protect property rights or repay debts will be able to benefit from economic investment and the availability of credit. Governments that can maintain a credible commitment not to negotiate with hostage-takers or other terrorists may be able to reduce the incidence of terrorism. States that can credibly commit to building up powerful militaries and fighting wars may enjoy the benefits of peace on favorable terms. States that successfully commit themselves to balanced budgets and environmental protection may do better in the long run than those that borrow and pollute profligately. Looking from the opposite perspective, the *inability* of states and governments to commit can be costly in obvious ways.[43] Financial bailouts and corporate rescues create moral hazard because governments cannot commit against providing future bailouts and rescues to mismanaged firms. Economically inefficient policies persist because Pareto-superior alternatives are blocked by current beneficiaries who cannot be bought-off because government commitments to future side-payments are not credible.[44] Civil wars and revolutions occur because governments cannot commit to an ongoing course of reform or redistribution, and wars between states occur because governments cannot commit to lasting terms of peace.[45]

In these and other settings, successful political commitments can bring two kinds of social benefits. If the political decision that is committed to at time 1 is procedurally or substantively *better* than the political decision that otherwise would have been made at time 2, then sticking to that decision is obviously beneficial. If protecting property rights is welfare-enhancing for society, for example, then committing to that policy against subsequent decisions

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[43] *See* Finn E. Kydland & Edward C. Prescott, Rules Rather Than Discretion: The Inconsistency of Optimal Plans, 85 J. Pol. Econ. 473, 477 (1977). Kydland & Prescott offer this widely cited example:

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

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

[45] *See* James D. Fearon, *Commitment Problems and the Spread of Ethnic Conflict*, in The International Spread of Ethnic Conflict 107-26 (David Lake & Donald Rothchild, eds., 1998); James D. Fearon, *Rationalist Explanations for War*, 49 Int'l Org. 379 (1995).

to expropriate will obviously be welfare-enhancing as well. But even if we are agnostic as between the merits of the time 1 and time 2 policies, it will be beneficial to commit when change or instability is inherently costly. Regardless of the relative merits of nationalizing versus privatizing industries, dramatic vacillations between the two policies (as might occur when conservative and socialist parties alternate in control of government) may be the worst of both worlds.

We might pause to notice that *constitutional* commitments can create both kinds of benefits. An oft-cited benefit of constitutionalism is that it enables us to commit to normatively preferred policies in order to stand firm during moments of pathological politics when these policies would otherwise be undermined. A commonly expressed concern, for example, is that panics over national security during times of war or crisis will lead us to sacrifice valuable civil rights and liberties.[46] Here the premise is that political decision-making at time 1 is better than political decision-making at time 2—where "better" might be cashed out in terms of the "procedural" decision-making context or the "substantive" content of the decisions made. Either way, if a constitution can help us hold ourselves to the time 1 decision, we will be made better off. Another strain of constitutional thought emphasizes advantages of intertemporal commitment that are independent of the relative merits decision-making at time 1 and 2. Constitutional construction and entrenchment of the basic institutional structure of government is said to be "enabling," inasmuch as the existence of a stable and broadly-acceptable framework for political decision-making allows us to get on with the profitable business of collective decision-making without perpetual conflict over the rules of the game.[47] Constitutional rules may also economize on the costs of political contestation by taking particularly contentious issues or subjects off the table.[48] In contexts where it is more important that things be settled than that they be settled in any particular way, committing to a stable set of arrangements will be beneficial in and of itself.

The discussion thus far has emphasized the social benefits of political commitment, but of course not all political commitments are broadly beneficial. Political commitments can also provide private benefits to some actors at the expense of others. Government officials, political parties, and interest groups will often have an interest in entrenching their preferred policies

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[46] *See*, e.g., Geoffrey R. Stone, Perilous Times (2004); Bruce Ackerman, Before the Next Attack 1-3 (2006).
[47] *See* Holmes, *supra* note 3, at 161-75.
[48] *Id*. at 202-35.

against shifts in political power or popular preferences, and present majorities may seek to impose their preferences on future generations. Constitutional commitments, too, can be recast in this self-serving mold. Rather than conceiving of "society" or "the people" as a unified decisionmaker engaging in self-restraint, we might see one group of political actors—a minority or a temporally fleeting majority—extending their political dominion over others.[49] Distinguishing the democratically legitimate commitments of a unitary political community from the illegitimate intertemporal power grabs of a subset of that community is tricky business, both conceptually and normatively.[50] For present purposes, however, we need only recognize that political and constitutional commitments are often desirable to a range of political decisionmakers acting on a range of motives.

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

Even accepting the Hobbesian analysis as far as it goes, however, the unenforceability of contracts still leaves a number of other political commitment mechanisms that do not depend on state coercion, analogous to those developed at the personal level. In relational contexts, no less than ordinary persons, states, governments, and other political actors can sometimes create the equivalent of contractual incentives through repeat-play, reciprocity, and reputation. These game-theoretical dynamics are commonly invoked, for example, to explain compliance by states

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[49] We might view personal identity in the same way, as comprising multiple selves; and we might it similarly problematic when an earlier self binds a future self, for example by becoming addicted to drugs. See generally Jon Elster, ed., The Multiple Self (1986); Derek Parfit, Reasons and Persons 199-347 (1984); Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 Legal Theory 23 (1997).
[50] See Elster, Ulysses Unbound, *supra* note 3, at 88-94.
[51] *See id*. at 88–174; HOLMES, *supra* note 3, at 134–77.

with treaties and other international law obligations in the absence of a super-state presiding over the "anarchical" international arena.[52] Similar mechanisms have been invoked to explain a number of political phenomena at the domestic level as well, ranging from the sustainability of the Senate filibuster[53] and legislative logrolling deals[54] to the stability of democracy.[55] In any context of political exchange, then, it is at least possible that reputation, repeat-play, and reciprocity will enable actors to make credible commitments.

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

- Douglass North and Barry Weingast attribute economic growth in early modern England to institutional reforms growing out of the Glorious Revolution. These reforms—most importantly the assertion of Parliamentary control over the fiscal powers of the monarch and the establishment of an independent judiciary—enabled the government to commit to respecting property rights and repaying debts in a way it could not when the Crown had unlimited power to expropriate property and renege on loans. Whereas reputational and repeat-play constraints had proven inadequate to prevent opportunistic expropriation by the Crown, institutional reform created an effective, self-directed commitment mechanism. By restricting the ability of the Crown to interfere with property rights or repudiate debts, the new "constitutional" regime of separation of powers encouraged productivity, investment, and lending at lower interest rates. The net result was that government was able to accumulate greater amounts of capital by limiting its own ability

[52] *See* Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005); Andrew T. Guzman, How International Law Works (2008).
[53] *See* David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. Contemp. Leg. Issues 51, 70-71 (2006).
[54] See Peter Bernholz, *On the Stability of Logrolling Outcomes in Stochastic Games*, 33 Pub. Choice 65 (1978).
[55] See *infra* p. 685.

to expropriate.[56] Along similar lines, Weingast credits political federalism for the economic rise of England in the 18th century and the United States in the 19th and early 20th centuries. Weingast's argument is that interjurisdictional competition in a system of federalism prevents redistributive and other inefficient forms of regulation and therefore serves as a credible commitment by government to preserve markets.[57]

- Daron Acemoglu and James Robinson explain Britain's 19th century transformation from an elite oligarchy to a broadly-enfranchised democracy as a means for elites to credibly commit to redistribute wealth and opportunity in order to stave off social unrest and the threat of revolution. In Acemoglu's and Robinson's account, the masses were able to exercise political power through mobilization in the streets (or countryside), but the threat of revolution required collective action that could not be sustained indefinitely. Elite promises to enact and sustain pro-majority policies in the future were not credible, because elites would have every incentive to retract these policies once they re-consolidated political control. Enfranchising the majority of citizens served as a credible commitment to enacting pro-majority policies going forward since the median voter, possessing decisive political power, would no longer be a member of the elite.[58]

- Many have recognized the possibility that politicians can entrench policies by delegating to a politically independent judiciary. William Landes and Richard Posner emphasize the benefits to elected officials of delivering durable benefits to interest groups by way of a politically insulated judiciary.[59] Ran Hirschl explains the emergence of constitutional judicial review in a number of countries in recent decades as a "hegemonic preservation" strategy on the part of threatened elites. In Hirschl's account, political and economic elites whose power is threatened by majoritarian democratic movements seek to preserve their preferred policies by entrusting them to a politically independent judiciary that will

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[56] Douglas C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. Econ. Hist. 803 (1989).
[57] Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. Econ. & Org. 1 (1995).
[58] Daron Acemoglu & James A. Robinson, Economic Origins of Dictatorship and Democracy 23-30 (2006).
[59] William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875 (1975).

share and protect their interests.[60] Similarly, in the U.S. context, Howard Gillman explains the increased power and conservative activism of the federal courts in the late-19th century as a successful effort by the Republican Party to entrench economically nationalistic policies as their electoral prospects were waning.[61] Jack Balkin and Sanford Levinson emphasize the general importance to constitutional development of this kind of "partisan entrenchment," whereby temporarily dominant political parties lock-in their policy gains by appointing ideologically sympathetic judges who continue to further the party's agenda through constitutional law over the course of their life-term appointments.[62]

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

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[60] Ran Hirschl, Towards Juristocracy (2004).

[61] Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States*, 1875-1891, 96 Am. Pol. Sci. Rev. 511 (2002).

[62] Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045, 1066 (2001).

[63] McNollgast, The Political Economy of Law: Decision-Making by Judicial, Legislative, Executive, and Administrative Agencies (forthcoming 2010) (manuscript at 104) (on file with the Harvard Law School Library); see also Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, in Organization Theory: From Chester Barnard to the Present and Beyond 116 (Oliver E. Williamson ed., 1990); Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111 (1992).

[64] McNollgast, The Political Origins of the Administrative Procedure Act, 15 J.L. Econ. & Org. 180 (1999).

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

In each of these cases, the political commitment strategy follows the same logic. At time 1, the holders of political power shift some decision-making authority to another group of actors, who (1) are likely to continue to share the interests or policy preferences of the original holders of political power, and (2) are likely to hold onto this authority for a longer period of time. Both of these conditions must be satisfied for political commitments to succeed. The empowered decisionmakers must have interests, incentives, or motivations that lead them to support the commitment. And the institutional arrangements that place power in the hands of those decisionmakers must themselves be relatively stable.

The basis for the first premise is better established in some of the cases than in others. It is easy to see how a democratic decision-making process that enfranchises the poor will generate redistributive policies, given that poor voters have a self-interested motivation to support wealth transfers. And it is certainly plausible that judges selected for their political or ideological preferences will tend to support the goals of their political patrons and why administrative agencies that have been built to slant toward particular interests will indeed incline in those directions. In other cases, however, the motivations of the delagees of political power are less clear. It is not at all transparent what would lead the British Parliament to serve as a bastion of protection for property rights and creditors' interests,[67] or what would motivate an independent

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[65] See Allan Drazen, Political Economy in Macroeconomics 144 (2000); Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q.J. Econ. 1169 (1985).

[66] See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 Va. J. Int'l L. 501, 511-24; Tom Ginsburg, Locking in Democracy: Constitutions, Commitment, and International Law, 38 N.Y.U. J. Int'l L. & Pol. 707 (2006); Beth Simmons, *Credible Commitments and the International Criminal Court* (forthcoming). As Brewster among others emphasizes, international delegations can be used to entrench policies that benefit specific interest groups as well as more public-regarding or widely-shared goals. See Brewster, *supra*, at 512.

[67] *See* David Stasavage, Public Debt and the Birth of the Democratic State: France and Great Britain, 1688-1789 (2003) (complementing Weingast's and North's theory by describing how the credibility of the British government's

judiciary to enforce the interest group bargains made by past generations of legislators.[68] Absent some underlying theory of the interests and incentives of the relevant actors, these accounts of political commitment are incomplete.

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

## B. Entrenched Institutions

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

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commitment to repay debt was contingent upon the political preferences of members of Parliament and patterns of coalition formation).

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

[69] Douglass C. North, Institutions, Institutional Change, and Economic Performance 3 (1990); *see also* Stephen Skowroneck, *Order and Change*, 28 Politics 91, 93 (1995) (identifying the central characteristic of an "institution" as the persistence of its rules through time and the creation of "durable norms and dependable structures").

this expansive sense—serving as relatively stable and durable organizational frameworks for political decision-making.

But of course building durability into the definition of an "institution" explains nothing about why these (candidate) institutions might in fact be politically stable. The Madisonian puzzle reasserts itself when we ask how political arrangements become certain political arrangements become "institutionalized" in this sense.[70] Unfortunately, most economists and political scientists have followed Madison in bracketed this underlying puzzle, simply treating stable institutions as exogenous or given.[71] This is a rather fundamental methodological limitation of much work in the social sciences—one that has been more widely acknowledged than rectified. For example, the positive political theory research program on "structure induced equilibrium" invokes a variety of institutions as solutions to the instability of outcomes under majority rule.[72] As William Riker long-ago pointed out, however, there is no obvious reason why these supposedly equilibrium-inducing institutions would not "inherit" the instability of majority preferences over outcomes.[73] Without some explanation of what stabilizes the supposedly stabilizing institutional structures, structure-induced equilibrium is a deus ex machina. Similarly, while significant progress has been made by international relations scholars in explaining the political underpinnings of international "institutions" and "regimes,"[74] much work in the field continues to invoke international organizations, rules, and norms as unmoved movers of state behavior, with no explanation of how these decision-making structures could shape and constrain the behavior of states whose immediate interests are disserved by them.[75]

The same problem afflicts a number of the theoretical accounts of political commitment surveyed above. All of these accounts are premised on the assumption that structures and processes of political decision-making—democratic voting rules, independent courts, federalism,

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

[71] See Barry R. Weingast, *Political Institutions: Rational Choice Perspectives*, in Goodin & Klingemann, *supra* note 70, at 175.

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

[73] William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 Am. Pol. Sci. Rev. 432, 443–44 (1980); *see also* Keith Krehbiel, Information and Legislative Organization 31–34 (1991).

[74] See Robert Keohane, After Hegemony (1984); Stephen Krasner, ed., International Regimes (1983).

[75] See John J. Mearsheimer, *The False Promise of International Institutions*, 19 Int. Security 5 (1994).

and the like—tend to be relatively resistant to political revision or override by opponents of the policies they generate. As Weingast recognizes in the context of market-preserving federalism, the "central problem" of institutional accounts of political commitment is to explain how the relevant institution "provides for its own survival" or is rendered politically "self-enforcing."[76] To the extent this problem is recognized, however, it is typically bracketed or brushed aside. For example, Acemoglu & Robinson's theory of democratization-as-commitment rests on the assumption that elites would have a harder time doing away with democracy than they would have in retracting redistributive programs once the masses demobilize.[77] Yet the analytic structure of their theory suggests no reason why this would be so: If the masses cannot muster enough ongoing political power to secure a stream of redistribution, then how will they maintain sufficient power to defend democracy against an elite takeover?[78] Ran Hirschl's hegemonic preservation theory of the rise of constitutionalization and judicial review begs the same sort of question: Why will the democratic majorities who have taken control of the rest of government tolerate a hostile judiciary that continues to represent otherwise disempowered elites?[79]

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

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[76] Weingast, *supra* note 570, at 3. Weingast goes on to provide some context-specific reasons for why systems of federalism became stabilized in several different countries during specific time periods. Id. at 10-21. *See also* Mikhail Filippov, Peter C. Ordeshook & Olga Shvetsova, Designing Federalism: A Theory of Self-Sustainable Federal Institutions (2004) (developing an account of the stability of federal arrangements based on the structure of political parties).

[77] See Acemoglu & Robinson, *supra* note 58, at 177–78.

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

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

[80] For two exceptionally ambitious efforts in this regard, see Douglass C. North et al., Violence and Social Orders (2009); Avner Greif, Institutions and the Path to the Modern Economy (2006).

generalizable mechanisms through which certain political arrangements can be established and become (increasingly) impervious to change even when they disserve the immediate interests of the politically powerful.[81]

One such mechanism is based on the strategic logic of *coordination*. In many contexts, social groups with otherwise divergent interests can achieve common benefits from coordinating their actions or expectations. Just as we might all benefit from a norm specifying which side on the road to drive on or which language will be spoken, a broad range of political actors might all benefit from an institutionalized mechanism for resolving political disagreements. In the purest form of a coordination game, social groups care only about the fact of settlement, not about how, substantively, the issue is settled. But coordination can also be effective when actors have divergent preferences about outcomes, or about institutions for resolving these outcome-oriented disagreements. Each actor will obviously prefer the arrangement most likely to further her own interests. Nonetheless, in many contexts actors will be willing to sacrifice their first choices of outcomes or institutions in exchange for the benefits of avoiding conflict and agreeing on a common way forward.[82] The higher the costs of unresolved disagreement—in the currency of political or violent conflict, or the inability to carry through on collective action and achieve collective goods—the greater the coordination benefits of *any* institutional settlement. Likewise, the greater the costs of re-coordinating on a different settlement, the more resilient we should expect current institutional arrangements to be. Institutional arrangements that are costly to set up and costly to do without will be protected by substantial coordination buffers.

Consider, for example, the coordination benefits of institutionalized democracy. What might lead electoral losers to respect democratic outcomes that disserve their interests, rather than ignoring unfavorable election results and attempting to wield power through other channels? The logic of coordination suggests one answer. Incumbent elites may resist the imposition of broad-based democracy in the first place, seeing greater gains from an aristocratic system of selecting leaders. Yet once democracy has been implemented (for whatever reason), elites may be willing to honor results that depart significantly from their first-best outcomes if the

[81] *See* Paul Peirson, Politics in Time 133-66 (2004) (surveying and supplementing the relevant literature to identify a number of general sources of "institutional resilience").

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

alternative might be revolution or civil war. Democracy may be reinforced by another type of coordination benefit, as well. Competitive elections provide common information to the public about government's performance and also create a focal point for coordinating rebellion if government officials suspend elections or do not comply with the results. The combination of these features makes democratic elections a useful, and self-enforcing, mechanism of holding government accountable to a coordinated public.[83]

A second set of familiar mechanisms, introduced in the earlier discussion of personal and political commitment, follows the strategic logic of *reciprocity, repeat-play,* and *reputation*. The simplest model is an iterated prisoners' dilemma game, in which political actors with conflicting interests can do better over time by cooperating, even though it is always in their short-term interest to defect from cooperative arrangements. Where the longer-term gains from cooperation are high enough, discount rates are low enough, the terms of cooperation are clear, and the game continues indefinitely, a cooperative equilibrium may be sustained if each actor adopts a tit-for-tat or similar reciprocal strategy, conditioning its own compliance on compliance by others. The same basic logic may be extended through the mechanism of reputation. Political actors may be willing to comply with institutional arrangements that disserve their immediate interests in order to build and preserve a good reputation of the sort that will induce the beneficial cooperation of other actors.[84] The possibility thus arises that institutions that constrain powerful political actors may be supported and sustained by these same actors, who derive broader and longer-term cooperative benefits from working through these institutions.[85]

A number of the institutional commitment devices surveyed above might be explained in terms of repeat-play, reciprocity, or reputation. For instance, the willingness of electoral losers to respect democratic decision-making can be understood in terms of an iterated prisoners' dilemma game between two parties or factions, where the prospect of future victories combined with a shared interest in avoiding violent conflicts over control of the government results in a mutual willingness to abide by democratic outcomes.[86] A system of market-preserving federalism might be maintained by repeat-play cooperation between states or regional coalitions

[83] For models along these lines, see James D. Fearon, Self-Enforcing Democracy (unpublished manuscript); Barry R. Weingast, The Political Foundations of Democracy and the Rule of Law, 91 Am. Pol. Sci. Rev. 245 (1997).
[84] *See* Guzman, *supra* note 52, at 71–117.
[85] See Keohane, *supra* note 74.
[86] *See* Adam Przeworski, Democracy and the Market (1991).

that implicitly agree to defend one another against over-reaching by the national government.[87] Along similar lines, political parties who expect to alternate in power over time may tacitly agree to maintain an independent judiciary, central bank, or administrative agency.[88] In all of these contexts, institutional stability can be explained by the cooperative surplus the relevant arrangements provide.

Coordination and reciprocity explain why actors may be willing to establish political arrangements that disserve or constrain their immediate interests.[89] These mechanisms also explain why actors may continue to support such arrangements over time—and indeed why support may tend to increase. Political arrangements that have been in place for a while tend to become familiar and highly salient, crowding out alternative focal points for coordination. Reciprocal relationships, too, may become more stable over time, as actors build trust in one another's cooperative commitments, credibly signal long time horizons and low discount rates, and develop shared understandings about which behaviors count as cooperation or defection. Moreover, once political arrangements have been put in place, a further set of mechanisms contributes to their increasing stability over time.

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

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[87] *See* Weingast, Market-Preserving Federalism, *supra* note 57; Rui J. P. de Figueiredo, Jr. & Barry R. Weingast, Self-Enforcing Federalism, 21 J. L. Econ. & Org. 103 (2005).

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

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

[90] *See* North, *supra* note 69, at 95; Pierson, *supra* note 81, at 24–25.

arrangements and resisting reforms.[91]

Examples of asset-specific investments in structures and processes of political decision-making are legion. Political parties that grow up around, and shape themselves specifically to, systems of federalism or separation of powers, or to electoral systems like proportional representation, will resist any change in these structural arrangements.[92] Investment in legal expertise and influence by advocacy groups will give these groups a stake in defending the policymaking authority of independent courts.[93] Similarly, interest groups that develop the capacity to be influential in international governance institutions or domestic administrative agencies will defend international and domestic delegations. In these and other contexts, the value of asset-specific investments and the extent of adaptation will tend to grow over time, so that the resistance of political stakeholders to change will increase the longer the relevant arrangements persist.[94] (Compare the difficulty of moving after living somewhere for a year to the difficulty of uprooting after several decades.)

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

Thus, some political arrangements *organize or empower* interest groups or other political constituencies with a stake in maintaining these arrangements, or *disempower* constituencies who are opposed. The home mortgage interest deduction, for example, creates a constituency of

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[91] *See* Pierson, Politics in Time, supra note 81, at 148-49; Paul Pierson & Shannon O'Neil Trowbridge, Asset Specificity and Institutional Development (unpublished manuscript). As Orren & Skowroneck describe:

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

The Search for American Political Development at 105.

[92] *See* Acemoglu & Robinson, *supra* note 58, at 179; Zachary Elkins et al., The Endurance of National Constitutions 19-20 (2009); Filippov et al., Designing Federalism, *supra* note 76.

[93] Pierson & Trowbridge, *supra* note 91, at 22-23.

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

[95] The inverse effect is also possible: negative political feedback. *See infra* notes 335-37 and accompanying text (on Supreme Court backlash). See also Mark J. Roe, Backlash, 98 Colum. L. Rev. 217 (1998) (describing the possibility that efficient economic arrangements will create self-defeating political backlashes); Adrian Vermeule, Selection Effects in Constitutional Law, 91 Va. L. Rev. 953, 991-95 (2005) (noting the possibility that liberal democratic tolerance of intolerant groups may be politically self-defeating).

homeowners (joined by mortgage lenders and other beneficiaries) that is deeply committed to, and formidably capable of, preserving the entitlement.[96] Social security and other social welfare programs similarly create vested interest groups who will resist retrenchment.[97] Corporate law rules relating to ownership structure increase the wealth and power of corporate stakeholders who have an interest in maintaining or enhancing existing structures.[98] A widely recognized political advantage of a cap-and-trade system to reduce greenhouse gases, as compared to a more economically efficient carbon tax, is that the cap-and-trade approach will create, enrich, and empower commercial interest groups with a strong stake in preserving and expanding the system.[99] The inverse (but functionally equivalent) pattern of political arrangements becoming self-entrenching by weakening their opponents is also familiar. Tort reform can gain momentum over time as trial lawyers make less money and wield commensurately less political power to resist further reforms. Airline deregulation reduced the economic and political cohesion of the industry and therefore the prospects of re-cartelization.[100]

Positive political feedback can also operate through *selection* effects, by increasing the sheer number of proponents relative to opponents.[101] For example, municipal gun control or antismoking ordinances will gain political support over time as gun owners and smokers either give up their firearms and cigarettes or exit the jurisdiction, leaving behind an increasingly higher percentage of unarmed and nonsmoking supporters of the policy.[102] Laws permitting more immigration or providing for better treatment of immigrants may be similarly self-reinforcing, as greater numbers of immigrants exercise more political power for the benefit of

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[96] *See* Hal R. Varian, An Opportunity to Consider if Homeowners Get Too Many Breaks, N.Y. Times, Nov. 17, 2005. Their commitment comes from some combination of material asset-specific investments and psychological endowment effects; their capability from both the enhanced collective action capacity and the greater resources the entitlement itself provides. On political endowment effects, see Clayton P. Gillette, Lock-In Effects in Law and Norms, 78 B.U. L. Rev. 813827-28 (1998); Paul Pierson, The New Politics of the Welfare State, 48 World Pol. 143, 144-45 (1996).

[97] *See* Paul Pierson, Dismantling the Welfare State (1994); Pierson, Welfare State, *supra* note 96. Cf. Jacob S. Hacker, *Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 Am. Pol. Sci. Rev. 243 (2004) (describing political strategies for welfare state retrenchment or subversion that have partially succeeded in the U.S.).

[98] *See* Lucian Ayre Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 Stan. L. Rev. 127, 157-59 (1999).

[99] *See* Eric M. Patashnik, Reforms at Risk 179 (2008).

[100] *See id.* at 110-35.

[101] *See* generally Vermeule, Selection Effects, *supra* note 95.

[102] *See* Eugene Volokh, *The Mechanisms of the Slippery-Slope*, 116 Harv. L. Rev. 1026, 1116-17 (2003). These examples should generalize to many municipal level decisions about policy and public goods provision, given Tiebout sorting dynamics.

their successors.[103] Strategic politicians might even take advantage of selection effects by manipulating policy for the purpose of shaping their electorates.[104] As one account has it, James Michael Curley, the mayor of Boston for much of the first half of the twentieth century, and Robert Mugabe, the dictator of Zimbabwe, both made use of inflammatory political rhetoric and harsh redistributive policies to encourage the emigration of their political opponents (for Curley, the Brahmins who stood apart from his poor, Irish base; for Mugabe, white farmers).[105] Selecting for a supportive constituency ensured these leaders' political survival and thus the continuation of their broader policy agendas.

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

Looking beyond electoral systems, positive political feedback effects stemming from political decision-making structures and processes arise at all levels of systemic generality.

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[103] *See id.* at 1119.
[104] This is a transparent phenomenon when it happens through the legislative redistricting process, which effectively allows legislators to choose their voters. For a contrasting example, see Shaila Dewan, Gentrification Changing Face of New Atlanta, N.Y. Times, March 11, 2006, describing how African-American mayors of Atlanta have "cut their own throats" by presiding over gentrification that has decreased the percentage of black voters in the city.
[105] *See* Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J. L. Econ. & Org. 1 (2005).
[106] *See* Vermeule, Selection Effects, *supra* note 95, at 976. Of course groups can be effectively disenfranchised extrademocratically. The entrenchment effect of enfranchisement operates within a system of democracy but does not entrench the system itself.
[107] *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491 (1997).

Thus, one account of the origins of modern capitalism attributes the dramatic economic growth of Europe in the 16th through 19th centuries to the selective enrichment and empowerment of pro-capitalist interests. On this account, a set of institutional constraints imposed on monarchs successfully protected property rights and thus facilitated Atlantic trade. This in turn allowed commercial interests to become rich and politically influential—and, in a self-reinforcing dynamic, to use that influence to push forward the development of property rights and other capitalist institutions.[108] Contemporary capitalism doubtless displays a similar self-entrenching dynamic, as economic winners wield their disproportionate political power to preserve and entrench the capitalist system in a way that allows them to become ever more wealthy and politically influential, and so on.[109] Moving from the level of macro-institutional political economy to more localized arrangements, we might hypothesize that the authority of administrative agencies will tend to become entrenched over time as the interest groups that benefit from agency regulation wield their (increased) power to protect their regulatory benefactors. Similarly, delegations of policymaking authority to international bodies like the WTO will predictably be defended against reversal by the domestic export interest groups that benefit from free trade—and therefore have a political leg up over import-competing interest groups that favor protectionism.[110]

To collect what has been said so far, we can identify a set of political dynamics that operate to entrench political arrangements, and in particular structures and processes of political decision-making of the sort commonly supposed to be "institutionalized." These dynamics operate much like the economic phenomenon of increasing returns.[111] Patterns of technology adoption, industrial location, and international trade have been explained as emerging from a path-dependent process of increasing returns through which slight initial advantages snowball into irreversible market dominance. Increasing returns are commonly created by several features of the economic context: (1) large set-up or fixed costs, which lead to lower marginal costs of producing additional units and create an incentive to stick with an initial design; (2) learning effects, which increase the value of a product over time; and (3) coordination effects, including

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[108] Daron Acemoglu et al., *The Rise of Europe: Atlantic Trade, Institutional Change, and Economic Growth*, 95 Am. Econ. Rev. 546 (2005).
[109] *See* Larry M. Bartels, Unequal Democracy: The Political Economy of the New Gilded Age (2008) (describing how this political-economic dynamic has worked in the contemporary U.S.).
[110] *See* Eric A. Posner, The Perils of Global Legalism 53-54 (2009).
[111] *See* North, *supra* note 69, at 95.

network externalities, which increase the value of a product as more people use it and expect others to use it in the future.[112] Each of these features has political analogs.[113] Political decision-making structures typically require high initial set-up costs and then inspire specific, non-transferable investments by various actors. Moreover, the power and composition of political actors tends to be shaped by these structures in ways that make institutions increasingly difficult to change. The benefits of coordination around and cooperation through structural arrangements also tend to stabilize these arrangements by creating equilibria in which no group can do better by withdrawing or contesting the status quo.

The focus thus far has been on rationalistic, interest-based mechanisms of political behavior. A methodologically broader account of political entrenchment and institutional stability might include a number of additional mechanisms and social processes. Many of these operate at the level of (social-) psychology. In politics as in many other social contexts people become acculturated or habituated to status quo arrangements in ways that make change seem undesirable or unthinkable. Explanations along these lines range from essentially rationalistic accounts of adaptive or endogenous preference formation;[114] to behavioral psychology predictions related to endowment effects, status quo bias, and loss aversion;[115] to critical theories of ideological formation or "false necessity."[116] The common denominator is that political arrangements—whether at the level of routine decision-making procedures or post-industrial capitalism—can become psychologically and sociologically embedded in such a way that they are no longer experienced by actors as constraints or even as matters of choice.[117]

Further reducing the vast and heterogeneous array of theories along these lines into a set of predictable mechanisms of political entrenchment and disentrenchment is a project that lies beyond the current reach of the social sciences, and certainly beyond the ambition of this Article.

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[112] Pierson, *supra* note 81, at 24. *See generally* W. Brian Arthur, Increasing Returns and Path Dependence in the Economy (1994). The classic example is the "QWERTY" typewriter keyboard. *See* Paul A. David, *Clio and the Economics of QWERTY*, 75 Am. Econ. Rev. 332 (1985).

[113] *See* Pierson, Politics in Time, *supra* note 81, at 17-53.

[114] *See*, e.g., Jon Elster, Sour Grapes (1983); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129 (1986).

[115] See, e.g., Daniel Kahneman et al., The Endowment Effect, Loss Aversion, and Status Quo Bias, 5 J. Econ. Persp. 193 (1991).

[116] *See* Roberto Mangabeira Unger, False Necessity (1987).

[117] Relevant in this regard is Madison's response to Jefferson's call for frequent constitutional conventions in Federalist 49: "[F]requent appeals [to the people] would, in great measure, deprive the government of that veneration that time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability."

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

## C. Institutions Versus Policies

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

This, after all, is the premise of theories of political commitment. These theories all presume that institutional commitment mechanisms will be more resilient in the face of political opposition than the first-order policy commitments they are supposed to generate would have been on their own. For example, Weingast's theory of federalism as market-preserving commitment against excessive redistribution or expropriation of property presupposes that federalism is a more effective commitment device than simply specifying property rights. Likewise, Acemoglu and Robinson's argument that enfranchising the poor has served as a

[118] *See* Greif, *supra* note 80, at 189.
[119] *See id.* at 189–94.

credible commitment by elites to future redistribution of wealth seems to be premised on the assumption that simply creating constitutional welfare rights for the poor would work less well as a commitment mechanism. The same is true of theories that cast the independent judiciary as an enforcer of commitments: There would be no need for the judiciary to play this role if threatened elites or temporarily dominant political parties could more directly entrench their preferred policies in the form of rights. All of these accounts of political commitment turn on the assumption that the relevant institutional commitment mechanisms are more stable or more susceptible to entrenchment than the desired policy outcomes would have been standing alone. This reflects the broader assumption, seemingly pervasive in the social sciences, that political decision-making institutions are less vulnerable to revision or override than substantive policy outcomes. Yet one searches the scholarly literature in vain for any explanation of why in general, or under what specific circumstances, we should expect this assumption to hold true.

Understanding the mechanisms through which institutions might become politically entrenched (per the previous section) just highlights the unanswered question of why we should expect these mechanisms to operate differently—and more powerfully—at the level of structures and processes of political decision-making than at the level of substantive policy outcomes. In fact, the previous discussion moved fluidly back and forth between decision-making processes and substantive policies, suggesting that entrenchment works much the same way with respect to both types of political arrangement. Thus, we saw that driving on the right side of the road is stabilized by coordination in just the same way as the procedural institution of electoral democracy. Political actors make specific investments in provisions of the tax code in just the same way as political parties invest in the decision-making institution of the Presidency. And policies like social security and smoking bans, no less than political decision-making institutions, "make new politics"[120] by triggering positive political feedback. As a first cut, then, we might conclude that there is no good reason, in general, to expect decision-making institutions to become more deeply entrenched than policy outcomes. Political entrenchment can take hold of both types of political arrangements, working through the same causal pathways.

Is there any further reason then, for believing the conventional wisdom about the relative stability of political institutions as compared to policies? An affirmative answer might proceed

[120] E. E. Schattschneider, Politics, Pressures, and the Tariff 289 (1935) ("new policies make new politics"); *see also* Theda Skocpol, Protecting Soldiers and Mothers 57 (1992) ("policies transform politics").

along the following lines. Institutions are typically conceived as the "procedural" rules and organizational structures through which "substantive" political decisions about policy get made. The distinction between procedure and substance in this context can be operationalized by defining as "substantive" those political arrangements over which actors have strong intrinsic, as opposed to merely instrumental preferences. Thus, we might posit that political arrangements like democratic elections, separation of powers, federalism, administrative agencies, courts, and international bodies are assessed by political actors not (primarily) in terms of their intrinsic merits but instead by reference to the outcomes these decisiommaking structures are likely to produce.[121] If this is indeed the case, then we can distinguish these "procedural" decisiommaking institutions from the "substantive" decisions, or policy outcomes, that they will generate. What political actors care most about, by hypothesis, is the substantive laws, regulations, and adjudicatory decisions that emerge from the institutional structures and processes of political decision-making. Political actors' preferences about how these institutional structures and processes are arranged will depend primarily on their predictions about how various arrangements will affect policy outcomes.[122]

On these assumptions, political actors might view and assess decision-making institutions largely as bundles of probabilistic policy outcomes. Decision-making institutions effectively "bundle" policies in the sense that a given institution will generate—or, in conjunction with a number of other such institutions, causally contribute to generating—many different policy outcomes. These outcomes will usually be at least somewhat uncertain, or probabilistic, from the ex ante perspective of the political actors who are assessing proposed and ongoing institutional arrangements. This is because decision-making structures tend not to determine outcomes completely and predictably but only to increase the probability of some outcomes relative to others. As a result, the distribution of political costs and benefits stemming from institutions will usually be less certain than the distribution of costs and benefits of enacted policies—for the simple reason that which policies will be enacted through a given institution (or

[121] Here again, this analysis is agnostic toward the criteria that might be used to assess these outcomes. These criteria could be self-interested and materialist or other-regarding and moralistic.
[122] In some contexts, of course, political actors will in fact have intrinsic preferences over political decision-making processes. Where this is the case, such "processes" should be treated as substantive outcomes for purposes of this analysis.

complex of institutions) will be less than perfectly predictable.[123]

These distinctive features of political decision-making institutions—prospectivity, uncertainty, and bundling—may be conducive to higher likelihoods or levels of stability against political push-back. Consider first the effects of prospectivity and uncertainty. It is a common observation about institutional—and constitutional—design actors might take a less self-interested, more impartial view of political decision-making structures that they expect to be in place for relatively long periods of time simply because they cannot predict how these institutions will affect their own interests.[124] To the extent that institutionally produced policy outcomes and their distributive consequences are uncertain ex ante, institutions will be insulated against interest-based opposition. Of course, the ex post perspective is different. Once institutions are set up and begin to generate streams of policy outcomes, the institutional veil of ignorance will lifted—but only partially. If future decisions remain uncertain, and political losers cannot predict an ongoing pattern of defeats, than their incentives to resist institutional authority will be blunted. Given uncertainty, they may have no reason to expect that any feasible replacement decision-making institution would better serve their interests.

The other key feature of decision-making institutions is the multiplicity of policy outcomes that each institution (or complex of institutions) will generate. The coordination advantages of bundling multiple (probabilistic) policy decisions into a single institutional decision-making process are obvious. Rather than having to start from scratch in resolving each new disagreement, political actors can agree once on an authoritative decision-making process that will resolve a broad and temporally extended set of disagreements. The coordination benefits of such a decision-making institution will be some multiple of the coordination benefits of resolving any particular disagreement. Moreover, by effectively bundling multiple policy

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[123] In a brief discussion, Shepsle emphasizes the relative uncertainty and riskiness of institutional change compared to policy change, though he does not spell out precisely why institutional uncertainty is greater or how uncertainty bears on the incentives of political actors. See Kenneth A. Shepsle, Institutional Equilibrium and Equilibrium Institutions, in Political Science: The Science of Politics (Herbert F. Weisberg, ed., 1986) (recognizing the need to drive a wedge between "choice of policy and choice of institutional arrangements"). Of course policies, too, may have uncertain or unpredictable distributional consequences at the time of enactment. The comparison in the text is relative and on average.

[124] *See* Geoffrey Brennan & James M. Buchanan, The Reason of Rules 33-36 (2000); James M. Buchanan & Gordon Tullock, The Calculus of Consent 77-80 (1962); Russell Hardin, Indeterminacy and Society 51, 125 (2003). See also John Rawls, A Theory of Justice 118-23 (rev. ed. 1999). Note that Rawls's famous "veil of ignorance" shields decisionmakers not from knowledge of the distributive consequences of the basic structure they agree upon but from knowledge of their position in society and thus the distributional outcomes that they themselves will experience. See Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399, 399 (2001) (drawing this distinction).

outcomes into a single package, institutions facilitate compromise, or implicit logrolling. Losers on any particular policy outcome will have reason to support and stay invested in decision-making institutions that will predictably provide them with victories on other outcomes that they care more about. Further, institutions that will determine multiple policy outcomes will typically induce political actors to make large specific investments, both in negotiating the shape of the institution in its origination and in working effectively within or through the institution once it is up and running. While the higher up front costs of institutions will make institutional level agreement more difficult than policy-level agreement (all else equal), those institutions that do get created will be heavily insulated by the high costs of negotiating an alternative decisiommaking process or equivalent set of outcomes. And finally, as noted in the previous section, bundling should dial up the positive political feedback effects of decision-making institutions, making them more strongly self-reinforcing on average than discrete policy outcomes.

Consider, for example, the institution of an academic appointments committee operating in the context of a faculty that is sharply divided along ideological or methodological lines. Even if such a faculty could not agree on any appointment considered in isolation, it is not hard to imagine the emergence of a political equilibrium in which faculty members are willing to defer to the appointments committee, even in cases where a decisive coalition disagrees with the particular outcome. If the cost of nondeference to the committee is perpetual fighting or gridlock over appointments to the detriment of all, then the coordination benefits of mutual deference to the committee will be large. At the same time, competing factions may achieve a cooperative, reciprocal equilibrium by tacitly agreeing to defer to the committee in the expectation that each faction will get its most-preferred appointments. The appointments committee effectively ensures repeat-play and facilitates reciprocity (or logrolling) among political factions of a sort that would be more difficult to accomplish outside of any comparable institutional structure.[125] Over time, faculty factions will make specific investments in influencing the committee's decision-making process, for instance by placing representatives on the committee rather than mobilizing outside of the committee-centered process. Moreover, as the committee makes

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

appointments, these new faculty members will themselves tend to have appointments preferences that align with the committee's—thus bolstering support through the mechanism of positive political feedback. Because the committee will generate multiple faculty appointments, this effect will be stronger than the identical (in kind) effect of appointing a single faculty member who increases the strength of some faction by one. In sum, political resistance that would be [1]sufficient to overturn a series of outcomes each considered in isolation might effectively be overcome by a higher-order willingness to support the institutional decision-making process that generates the same set of outcomes.

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

Without attempting a more definitive analysis, we might conclude that conventional assumptions about the relative stability of political decision-making institutions have at least some plausibility. If decision-making institutions do indeed display greater stability than substantive outcomes, then they should be capable of facilitating political—and as we shall soon see, constitutional—commitments. In politics, law, and life more broadly, it is commonly supposed that people who disagree about substance can nonetheless come together on decision-

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

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

making processes that will serve to settle these disagreements. Such intuitions more often invoked and acted upon than explained. This section has suggested a potential explanation grounded in a broader account of political commitment and entrenchment. Both the broader account and this important corollary are immediately relevant to the theory and practice of constitutionalism, to which the Article now turns.

## III. Constitutionalism as Political Commitment

### A. Constitutional Commitment and Entrenchment

Constitutional law is both a *mechanism* of political commitment and *itself* a political commitment. At a formal level, constitutionalizing legal rules and institutional arrangements entrenches them against legal change.[128] But formal constitutional commitment is neither necessary nor sufficient to create functional political entrenchment—meaning, a relatively high degree of political difficulty in revising or reversing a law or policy.[129] It is not necessary because, as described above, there are many ways of increasing the costs of policy revision or reversal without erecting formal legal barriers to change. Political commitments that are sustainable by way of enfranchisement of the poor, structured delegations to administrative agencies, or statutory grants of judicial or central bank independence, for example, do not

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

[129] Like formal entrenchment, functional entrenchment is obviously a matter of degree. Also like formal entrenchment, the baseline for defining and measuring functional entrenchment might be set at the political difficulty of enacting the law or policy in the first place, or—more commonly, but also more ambiguously—by (implicit) reference to some "ordinary" level of difficulty of changing political course.

depend on constitutional law.[130] Formally constitutional entrenchment is not sufficient to create functional entrenchment because formal, legal barriers may be ignored, opportunistically revised, or overridden.[131] An effective system of constitutional law—one that can serve as a mechanism of political commitment—thus depends on the success of an underlying socio-political commitment to play by the constitutional rules.

This deeper dependence of formal, legal commitments on functional, socio-political ones reflects the foundational insight of Hartian jurisprudence.[132] For Hartian positivists, legal validity ultimately rests on a social practice among officials (if not citizens more broadly) of recognizing and accepting certain rules or practices as obligatory.[133] It follows from this understanding that formally constitutional commitments will be binding only to the extent that political actors are committed to adhering to stable constitutional rules or enforcing them against one another.[134]

Indeed, on the Hartian view, if a critical mass of political actors does not remain committed to adhering to or upholding a constitutional rule or system, then that rule or system ceases to exist as law. It follows from this view is that legal change can happen either within the boundaries of a legal system, in compliance with the secondary rules of recognition and change that determine intra-systemic legal validity, or outside of the system, when social and political practices shift such that different primary or secondary rules become recognized as legally valid. Changes to constitutional law can be effected through the Article V amendment process, but they

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

[131] See David S. Law, Constitutions, in The Oxford Handbook of Empirical Legal Research (Peter Cane & Herbert M. Kritzer eds., forthcoming 2010) (surveying empirical studies that collectively fail to demonstrate a strong correlation, let alone a causal relationship, between formal constitutional rules and actual government behavior).

[132] *See* H. L. A. Hart, The Concept of Law (2d ed. 1994).

[133] Hart and subsequent legal positivists have had surprisingly little to say about what might motivate official and public acceptance of the ultimate rule(s) or practices of recognition. See Jules Coleman, The Practice of Principle 93 (recognizing in passing a wide and open-ended set of reasons for why people might benefit from committing to a legal system and then bracketing this question as beside the point of positivist analysis.)

[134] *See generally* The Rule of Recognition and the U.S. Constitution (Matthew D. Adler & Kenneth Einar Himma, eds., 2009) (bringing a Hartian perspective to bear on U.S. constitutional law and theory).

might also be effected through the formation of a new political consensus that some constitutional rule or right (including, possibly, Article V; or, for that matter, the entire constitution) has become outdated and is now best ignored.[135] Imagine that in the wake of a series of terrorist attacks, the President, acting without constitutional or congressional authorization, orders emergency detentions or quarantines. And suppose that most political and judicial officials, as well as supermajorities of the public, support these measures and accept their legitimacy. Under these circumstances, we might initially say that constitutional law was violated; or we might say that constitutional law was effectively amended to eliminate previously recognized constraints on presidential power, or to reconstitute the presidency in a somewhat different form. Regardless of how constitutional changes like this are conceptualized, the practical bottom line is that formal constitutional rules can constrain (or enduringly constitute) political actors only to the extent that political and social support for these rules is sustained.

These theoretical observations are borne out by constitutional practice. The formal Constitution is more than two centuries old and its most important amendments date to the end of the Civil War. The decisions it embodies were made by people who had little in common with contemporary Americans—technologically, economically, politically, socially, or even morally. Not surprisingly, subsequent generations of Americans have been unwilling to live with these decisions and have found ways of revising them, usually without resorting to formal constitutional amendments.[136] Mostly this has been accomplished by interpreting or supplementing the fixed provisions of the constitutional text to make them conform to contemporary political preferences. Thus, fundamental constitutional changes like the massive expansion of federal power, the rise of the administrative state, the increasing dominance of the President in foreign affairs, the development of extensive protections for free speech and "privacy," and the emergence of the constitutional law of gender equality, have taken place without any change in the text of the Constitution.

In recognition of the divide between formal and functional constitutionalism, it has become conventional among constitutional theorists to distinguish the formal, or big-C

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[135] *See* Frederick Schauer, *Amending the Presuppositions of the Constitution*, in Responding to Imperfection 145-61 (Sanford Levinson, ed., 1995).

[136] Many of the formal amendments have been enacted, moreover, appear to have accomplished little more than memorializing changes in constitutional norms that occurred independently of the text. For example, the 13th Amendment recognized the abolition of slavery that had been effected by the Civil War. *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457, 1459, 1478-82 (2001).

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

Accordingly, the most well-developed approaches to identifying the small-c constitution emphasize socio-political commitment and entrenchment. In Bruce Ackerman's view, for example, constitutional norms may be created or changed when the American public is roused to transcend ordinary politics and engage in a higher-order form of deliberation about the public good.[140] These norms may float free of any particular legal document or text, or they may be codified in formally non-constitutional statutes like the 1964 Civil Rights Act and the 1965 Voting Rights Act.[141] They may also be reflected in "super-precedents" like *Brown v. Board of Education*.[142] What is important about these norms is not just their special democratic pedigree but their invulnerability to ordinary political revision or revocation. Ackerman emphasizes that

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[137] *See* Elkins et al., *supra* note 92, at 38-47.

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

[139] Thus, Mark Tushnet defines a "constitutional order" or "regime" "a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions. These institutions and principles provide the structure within which ordinary political contention occurs, which is why I call them constitutional rather than merely political." Mark Tushnet, The New Constitutional Order 1 (2003) (all but the last emphasis added).

[140] *See* Ackerman, *supra* note 4 Bruce Ackerman, The Living Constitution, 120 Harv. L. Rev. 1737 (2007).

[141] *See* Ackerman, Living Constitution, *supra* note 140t 1757-93.

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

"an all-out assault on the Civil Rights Act, or the Voting Rights Act, could not occur without a massive effort comparable to the political exertions that created these landmarks in the first place." Likewise, *Brown*'s status as a super-precedent is confirmed by the fact that "any lawyer who questions *Brown*'s legitimacy places himself outside the judicial mainstream." [143] Taking a similar theoretical perspective, William Eskridge and John Ferejohn identify a class of quasi-constitutional "super-statutes," including the 1964 Civil Rights Act and the Endangered Species Act of 1973.[144] According to Eskridge and Ferejohn, these statutes take on properties of higher law in part because of their hyper-democratic pedigree: super-statutes "acquire their normative force through a series of public confrontations and debates over time."[145] A further necessary criterion of super-statutedom is entrenchment: a super-statute is one that succeeds in "establish[ing] a new normative or institutional framework for state policy," "'stick[ing]' in the public culture," and exerting "a broad effect on the law."[146]

Other theorists more single-mindedly focus on entrenchment as the primary distinguishing criterion of the small-c constitution. Writing in the 1930s, Karl Llewellyn defined our "working constitution" as the set of norms and institutional arrangements that political actors treat as "not subject to abrogation or material alteration."[147] Following in Llewellyn's footsteps, Ernest Young sets out to define constitutional law functionally instead of formally, and he concludes that the only interesting and distinctive sense in which some legal norms are "constitutional" is that they are "entrenched" against change.[148] Young argues that many formally subconstitutional norms should be seen as functionally constitutional just because they have become politically difficult to change. He points, for example, to the Social Security Act's promise of government financial support in old age, which, he says, is less likely to be "fundamentally altered or abolished over the next ten years" than canonical constitutional norms like the rights to burn an American flag or get an abortion.[149]

These accounts helpfully emphasize the dependence of functional constitutionalism on political commitment and entrenchment, but they suffer from incompleteness or confusion at two

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[143] Ackerman, *The Living Constitution*, *supra* note 140, at 1789.
[144] William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215 (2001).
[145] *Id.* at 1270.
[146] *Id.* at 1216.
[147] *Id.* at 448-51; K. N. Llewellyn, *The Constitution as an Institution*, 34 Colum. L. Rev. 1, 29 (1934).
[148] Young, *supra* note 138, at 426.
[149] *Id.* at 427.

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

This second problem with these accounts relates to the relationship, or lack thereof, between entrenchment and other markers of constitutional status. Young is right to point to point to social security as an example of a politically entrenched norm, inasmuch as the program has become insulated against opposition by positive political feedback of the sort described above.[151]

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

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

But it seems doubtful that entrenchment in this sense should count as a *sufficient* criterion of constitutional status. After all, as the discussion in Part II highlighted, the home mortgage interest deduction, anti-smoking regulations, tort reform, and any number of other seemingly prosaic laws and policies are politically self-entrenching in much the same way as social security.[152] Political entrenchment alone seems inadequate to capture what theorists intuitively see as special about those statutes and precedents they are inclined to regard as constitutional.

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

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

Yet it is hard to see what effort would be required beyond that of ordinary, majoritarian politics. Absent some mechanism of political entrenchment that is nowhere visible in Ackerman's account, the most democratically and constitutionally sacrosanct decisions of the People will be perpetually at the mercy of the debased politics of the small-p people.[154]

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[152] See *supra* pg,. 687-90.
[153] Ackerman, *supra* note 140, at 1788.
[154] In his earlier work, Ackerman cast courts in the "preservationist" role of "block[ing] efforts to repeal established constitutional principles by the simple expedient of passing a normal statute," Thus forcing constitutional reformers

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

Here again, nothing about the process or pedigree of enactment guarantees the sustainability of general-interest reforms. What matters, instead, is that the downstream political process is structured in a way that gives residual as well as newly created supporters of these reforms sufficient political power to fend off attacks from opponents. To repeat an example,[156] the success of climate change regulation will depend as much on its longer term political viability as on the success of the social movement that pushes the regulation through. No doubt the environmental movement itself will sustain some measure of ongoing support through the lasting changes in behavior, attitudes, and expectations it has generated. But unless climate change regulation also cultivates an environmentally-indifferent but economically-invested market clientele (like the economic beneficiaries of a cap-and-trade system), its prospects of outlasting the warm glow of initial public approval seem dim. Political sustainability may be a prerequisite for environmental sustainability.

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

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

[156] *See supra* p. 688.

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

## B. Constitutions as Institutions

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

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

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[157] For an influential conceptualization of constitutional law as the second-level rules of a first-level political game, see Geoffrey Brennan & James M. Buchanan, The Reason of Rules 8-9, 19 (2000).

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

One approach to answering these questions follows a long tradition in jurisprudence and political philosophy of positing an intrinsic moral obligation to obey the law. In particular, for many constitutional lawyers and theorists, the consent of "We the People" to the original Constitution and its amendments is supposed to create ongoing moral obligations to comply with constitutional law. This contractarian view of constitutional commitment has been central to Americans' constitutional self-understanding since the Founding.[158] At the same time, however, the difficulties of attempting to derive present obligations from the consent of some fraction of our long-deceased ancestors have also been well-known since the Founding.[159] Other attempts to derive a moral obligation to comply with constitutional (or other types of) law—based on hypothetical consent, the nature of political association,[160] a "duty of fair play,"[161] or the like—are problematic in their own ways.[162] What is important for present purposes, however, is not whether a moral obligation of constitutional compliance exists, but the extent to which real-life officials and citizens are motivated by the moral pull of legal obedience. The design of most *non*constitutional legal regimes seems to reflect the view that moral obligation is not enough to secure sufficient legal compliance and must be supplemented by the threat of coercive sanctions (a threat that constitutional law lacks). This view undoubtedly reflects some measure of

[158] *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 Colum. L. Rev. 606, 655-60 (2008) (surveying the contractarian account of U.S. constitutionalism).
[159] Thomas Jefferson famously argued to Madison that no society can make a perpetual constitution ... . The earth belongs always to the living generation." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 6 The Works of Thomas Jefferson 3, 8-9 (Paul L. Ford, ed., 1904).
[160] *See* Ronald M. Dworkin, Law's Empire 206 (1986).
[161] *See* John Rawls, Legal Obligation and the Duty of Fair Play, in Law and Philosophy (Sidney Hook ed., 1964).
[162] For a skeptical survey of possible justifications for the moral legitimacy of the constitution and a corresponding duty to comply with it, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787, 1796-1813 (2005). For a skeptical survey of approaches to legal obligation more broadly, see Leslie Green, Legal Obligation and Authority, Stanford Encyclopedia of Philosophy, Section 5.1. Some political philosophers conclude that there is no general moral obligation to obey the law. See Robert Paul Wolff, In Defense of Anarchism (1970); A. John Simmons, Justification and Legitimacy (2001); A. John Simmons, Moral Principles and Political Obligations (1979); Joseph Raz, The Authority of Law: Essays on Law and Morality 233 (1978).

empirical skepticism about the strength, consistency, or distribution of moral motivations generally.[163] But it must also reflect the recognition that those who are inclined to do the right thing will not necessarily prioritize the rightness of legal compliance over the rightness (real or perceived) of their first-order political and policy goals when the two conflict. President Lincoln famously prioritized saving the Union over complying with constitutional rules relating to the power of the presidency—a choice that many officials and citizens would continue to endorse as obviously right, both prudentially and morally.

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

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

Constitutional and political theorists have taken only the most preliminary steps toward developing such an account of politically self-enforcing constitutionalism. Most significant among these has been to recognize that the efficacy and stability of constitutions must rest

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[163] Oliver Wendell Holmes famously argued that law was designed for the amoral "bad man." *The Path of the Law*, 10 Harv. L. Rev. 457, 458-59 (1897).
[164] See Frederick Schauer, *When and How (If At All) Does Law Constrain Official Action?* (forthcoming Ga. L. Rev.).
[165] The Federalist No. 51 (James Madison), *supra* note 9, at 319; *see also supra* note 12. Kant's similar but stronger aspiration was to design a constitution that could make even "a nation of devils . . . inhibit one another in such a way that the public conduct of the citizens will be the same as if they did not have such evil attitudes." Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, *in* Kant's Political Writings 93, 112–13 (Hans Reiss ed., H.B. Nisbet trans., 1970).

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

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

[166] The most sustained work on constitutionalism as coordination is Russell Hardin, Liberalism, Constitutionalism, and Democracy ch. 3 (1999). *See also* Eric A. Posner, Constitutional Possibility and Constitutional Evolution (unpublished manuscript) (modeling constitutional rules as coordination equilibria).

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

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

text creates a discursive requirement that all constitutional norms and arguments be couched as "interpretations" of the big-C Constitution. Given some level of background agreement on what counts as a plausible interpretation, even the more abstract, interpretively debatable provisions of the text can serve to narrow the range of political disagreement on some issues and to rule some options off the table.[169]

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

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

What is more, the U.S. Constitution and its Amendments seem to have been drafted, or interpreted, in such a way that makes it especially well-suited to this role. The constitutional text is quite specific on many lower-stakes issues, where agreement is more important to most political actors than achieving any particular outcome. Constitutional rules setting age requirements for presidents, the end date of their terms in office, and the order of presidential

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[169] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 906-07 (1996).
[170] The constitutional system of the U.K. fits this description. *See* Colin Turpin and Adam Tomkins, British Government and the Constitution (6th ed. 2007).
[171] *See* John M. Carey, *Parchment, Equilibria, and Institutions*, 33 COMP. POL. STUD. 735 (2000); Strauss, *supra* note 169, at 907–11.

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

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

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

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

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[172] David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L.J. 1717, 1741-44 (2003).
[173] Strauss, *supra* note 169, at 916; see also id. at 916–19.
[174] *See* Strauss, *supra* note 172, at 1741–43.
[175] *See id*. at 1734-35.

advantage in doing so and are willing to sacrifice the benefits of text-based coordination.[176] The constitutional text operates as more than a parchment barrier, but only in certain contexts is it sufficiently concrete to withstand political assault.[177]

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

Both of these game-theoretical explanations of constitutional compliance and commitment—coordination and reciprocal cooperation—stem from the powerful insight that legal

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

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

[178] *See* Edmund W. Kitch, *Regulation and the American Common Market,* in Regulation, Federalism, and Interstate Commerce 9-19 (A. Dan Tarlock ed., 1981).

[179] *See* Weingast, Political Foundations, *supra* note 83; Barry Weingast, Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century (unpublished manuscript).

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

regimes are capable of constraining powerful political actors because they are also, and even more so, *enabling* for these actors.[181] Constitutional rules and arrangements that create self-constraints on the powerful or mutual constraints on contending groups can be enabling, or beneficial, in numerous ways. This is why, throughout history, groups with the pre-constitutional capacity to dominate through force alone have often found it in their interest to submit to self-imposed constitutional restraints on their power.[182] Constitutional restraints may serve to fend off revolutions or to provide "insurance" to current holders of power by offering them reciprocal protection if they find themselves on the receiving end of domination. Constitutionally predictable and limited government intervention make possible economic growth and prosperity, military organization and mobilization, and the accumulation of the massive amounts of knowledge necessary to manage a large society. And again, most fundamentally, the very possibility of collective self-rule for large populations depends on a relatively stable constitutional plan of government. The absence of constitutional stability—leaving nothing but chaos, economic stagnation, civil war, and vulnerability to external conquest—will be enormously costly to most if not all.[183]

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

[181] *See* Holmes, *supra* note 3, at 6-8.
[182] *See* Stephen Holmes, Parables of Self-Restraint (unpublished draft). (on file with the Harvard Law School Library), *available at* http://www.law.nyu.edu/ecm_dlv1/groups/public/@nyu_law_website__academics__colloquia__constitutional_theory/documents/documents/ecm_pro_063857.pdf.
[183] *Id.*
[184] The prospects of groups that defect from constitutional bargains will depend on factors like the size, power (economic or military), and capacity for independence of the relevant group, all of which will affect their bargaining power in renegotiations.

calculation that even a bad law was better than lawlessness.[185]

Once a constitutional plan of government has been put in place, moreover, we should expect its political stability to be enhanced over time through the other mechanisms of political entrenchment. Asset specific investments will give political actors a stake in constitutional arrangements, and positive political feedback will increase the relative power of those actors who benefit from those arrangements. Thus, another reason the Antifederalists came to accept the Constitution is that they were able to exercise considerable power under the constitutional scheme of government—culminating in the triumph of their coalition with disaffected Federalists (including Madison) under the auspices of the Republican party in 1800.[186] And, at the same time, residual resistance to the constitution and the potentially powerful federal government it created was suppressed in the early years of the Republic by victorious Federalists wielding the quickly-expanding powers of that very government.[187] Self-reinforcing political dynamics like these will be pervasive in any constitutional system and will become increasingly significant over time, as political actors organize themselves around, and are selectively empowered by, constitutional rules. Political parties, for instance, will shape themselves to features of the constitutional structure like federalism, presidential, and the electoral system.[188] Parties that have been successful within a particular structure of government will become deeply invested in preserving that structure and, by virtue of their early success, will be well-situated to do so. The same will be true of interest groups, government officials, and other political and social actors who have adapted themselves to and thrived within an existing constitutional framework. Constitutional frameworks thus have a tendency to build their own political constituencies.[189]

In passing, this may seem to suggest that constitutional systems will tend to become more

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[185] *See* David J. Siemers, Ratifying the Republic xiv-xvii (2002) (describing how "[f]ear induced stability" in the early Republic). Of course, there are limits to how bad the bargain can be; at some point even violent secession becomes preferable. After the election of 1860, Southerners determined that the costs of breaking from the Union, including both the short-term costs of war and the longer-term costs of foregone cooperation (particularly free trade) with the North, were still less than the anticipated costs of being forced to give up slavery.
[186] *See id.* at 193–215.
[187] Examples include the Washington administration's suppression of the Whiskey Rebellion and the Adams administration use of the1798 Sedition Act to suppress Jeffersonian opposition. See Stanley Elkins & Eric McKitrick, The Age of Federalism 461-88, 694-705 (1993). Another Federalist strategy was to use the appointment power of the federal government to generate political support through patronage. See Gordon S. Wood, Empire of Liberty 107-08 (2009).
[188] *See* sources cited *supra* note 92 and accompanying text. For a description of how political parties in the United States emerged and developed around the constitutional structure of government, *see* Larry D. Kramer, After the Founding: Political Parties and the Constitution (unpublished
manuscript) (on file with the Harvard Law School Library).
[189] *See* Elkins et al., *supra* note 92, at 19-20.

politically stable with age. But it is important to understand why that prediction does not, in fact, follow.[190] Constitutions will indeed garner greater political support over time as a result of self-stabilizing coordination, cooperation, specific investments, and political feedback effects. Consequently, all else equal, older constitutions will be more difficult to revise or reject than younger ones. But all else will not be equal. As constitutions age, we should also expect them to lose their connection to the functional and political interests that brought them into existence. Constitutional arrangements that benefitted some or all groups in society, or that successfully compromised political disagreements, at the time of their inception will increasingly become politically arbitrary and functionally obsolete as politics and society changes around them. This will create political pressure for constitutional reform or replacement to better match constitutional rules and arrangements with prevailing patterns of political power and social demands. As constitutions age, then, the stabilizing effects of entrenchment compete with the destabilizing effects of obsolescence. Without knowing the magnitude of these competing effects, there is no basis for predicting whether constitutions will tend to become more or less politically stable over time.

We can, however, predict a general paradox of constitutionalism: Enduring constitutional rules and arrangements will tend to become both increasingly dysfunctional and increasingly difficult to change over time. This is because the political dynamics that entrench institutional arrangements operate independently of both the initial motives for establishing these arrangements and their ongoing functional justifications.[191] As a result, constitutional rules and arrangements that were initially created to serve the interests of the politically powerful or of society more broadly may persist long after, and notwithstanding the fact that, they have ceased to serve any of these originating interests. For example, the U.S. Framers' reasons for designing the Senate as they did—providing representation for states as equal sovereigns, providing an elite check on democratic lawmaking, and appeasing the small states whose delegates were threatening to walk out of the Philadelphia Convention[192]—have little contemporary relevance,

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[190] *See id*. at 90-91.
[191] Recall the definitional distinction between political commitment, which entails intentionality (and therefore, at least from someone's perspective, functional efficacy) and entrenchment, which does not necessarily imply either intentionality or functional efficacy. *See supra* p. 672 and accompanying text. The obsolescence of the political commitments embodied in constitutions does not disentrench them.
[192] *See* Sanford Levinson, Our Undemocratic Constitution

and many believe the institution has become a functional impediment to good government.[193] Yet the political odds of substantially reforming or scrapping such a deeply entrenched institution, one that has become historically focal and defended by powerful groups of beneficiaries—seem vanishingly small. The same combination of arguable obsolescence and entrenchment might characterize the American system of separation of powers more broadly, the electoral college, federalism, and many of the other basic structural features of the U.S. constitutional design.[194] Much of the constitutional system we have inherited has long outlived its original purposes and political motivations; it would not be re-created today if were writing on a blank political slate.[195] Many constitutional rules and arrangements continue to exist only because of a functionally-indifferent, path-dependent process of political entrenchment.

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

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[193] *See id.* at 25–38, 49–62.
[194] For general criticisms of the constitutional structure of government, see Robert A. Dahl, How Democratic Is the American Constitution? (2d ed. 2003); Levinson, Undemocratic Constitution, *supra* note 192.
[195] The same is true of nonconstitutional law. More than one-tenth of laws in effect in Britain at the beginning of the 1980s had been enacted before the rein of Queen Victoria in 1837. *See* Richard Rose, *Inheritance Before Choice in Public Policy*, 2 J. Theoretical Pol. 263, 266 (1990).

The challenge is to make this abstract understanding of constitutional commitment and entrenchment more concrete: to better understand not just the general mechanisms of political constraint, commitment, and entrenchment but how they have worked, more or less effectively, in real world systems of constitutional law like that of the U.S. A good starting point is to recognize, with Madison, that constitutional law does not stand or fall, endure or fail, as a single package. Some parts of the constitutional system are more securely constraining and deeply entrenched against change than others.

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

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

## IV. The Institutional Core of Constitutionalism

As we have seen, it is a foundational premise of Madisonian theory that not all of constitutional law is created equal—or is equally sustainable. Recall that Madison's strategy of constitutional commitment was to leverage the relative stability of structural arrangements to

stack the deck in favor of preferred political values and outcomes. Constitutional theory and practice since Founding suggest that Madison was on to something. It has become an article of conventional wisdom that constitutional structure—the set of institutions and political decision-making processes that create our basic framework of government—is durable and constraining in a way that other constitutional rules, particularly those specifying rights, are not. Moreover, the institution of judicial review has developed into a relatively stable and centrally important "structural" commitment device, seemingly capable of creating binding constitutional rights and rules.

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

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

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[196] John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 Tex. L. Rev. 1929 (2003).
[197] *Id*. at 1948-49.

## A. Constitutional Structure (Versus Rights)

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

More interesting is Madison's stronger claim that indirect, structural protections of rights will work *better* than attempting to protect these rights directly, because structural arrangements will be more politically sustainable than "parchment" rights.[199] This claim, too, has been embraced by contemporary constitutional theorists, who have seen its apparent confirmation over the course of U.S. constitutional history. Thus, John Hart Ely celebrates the Madisonian architecture of a constitution that is "overwhelmingly concerned" with the processes of political decision-making," leaving "the selection and accommodation of substantive values ... almost entirely to the political process."[200] In Ely's view, "[T]he few attempts the various framers [of the Constitution and amendments] have made to freeze substantive values by designating them for special protection in the document have been ill-fated, normally resulting in repeal, either officially or by interpretative pretense,"[201] and he concludes that "preserving fundamental values is not an appropriate constitutional task."[202] Ely is joined by many others, who share the Madisonian perspective that the truly essential, and lasting, part of the Constitution "is a design of government with powers to act and a structure arranged to make it act wisely and responsibly. ... It is in that design, not in its preamble or its epilogue, that the security of American political and civil liberties lies."[203]

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[198] *See* Graber, *supra* note 39.
[199] *See supra* notes 15-28 and accompanying text. A further argument made by Federalists against rights and in favor of structure was that the scope of rights could not be clearly specified in advance. *See* The Federalist No. 84 (Hamilton) ( "Who can give [a right] any definition which would not leave the utmost latitude for evasion?").
[200] ELY, *supra* note 5, at 87.
[201] *Id*. at 88.
[202] *Id.*
[203] Herbert J. Storing, *The Constitution and the Bill of Rights*, *in* Toward A More Perfect Union 108, 128 (Joseph M. Bessette ed., 1995); *see also supra* p. 717. For another example, consider Sanford Levinson's argument that a number of structural features of the Constitution (including bicameralism, equal state representation in the Senate,

Nor has anyone provided a thoroughgoing demonstration that structure *has*, in fact, proved more stable than rights over the course of constitutional history. Certainly that historical judgment is not as straightforward as Ely and others suggest.[204] Some rights appear to have maintained their core content over long periods of time: Congressional appropriations of tangible property without compensation, establishments of an official national religion, or prior restraints on speech have been unconstitutional since the Bill of Rights was ratified. And while it is easy to point to dramatic constitutional change with respect to other rights, such as the development of modern free speech and equal protection law, it is also easy to point to dramatic structural changes, like the rise of the administrative state, the demise of federalism, the replacement of the constitutionally-prescribed treaty-making process with congressional-executive agreements, and the erosion of Congress's constitutional power to declare war by unilateral presidential action.

Still, the overall comparative judgment seems credible. Many of the most important structural features of the U.S. government have remained mostly noncontroversial and more or less intact since the Founding: the bicameral structure of Congress and its primary legislative authority; the procedural outlines of the Article I, Section VII lawmaking process; and the electoral cycles and terms of office for Representatives, Senators, and Presidents; among others.[205] These and other institutional arrangements have displayed significant staying power, even while they have arguably lost much of their original claims to functional and political

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and the Electoral College system) are dysfunctional, yet also fixed in place by the Constitution and very difficult to change. *See* Levinson, *supra* note 192, at 29–38, 49–62, 81–97. Levinson views constitutional rights, in contrast, as relatively unproblematic because "[i]t is always the case that courts are perpetually open to new arguments about rights — whether those of gays and lesbians or of property owners— that reflect the dominant public opinion of the day." *Id.* at 5.

[204] A prerequisite to a full assessment of the relative stability of structure and rights would be to sort out some tricky definitional issues. Which parts of the constitution count as "structural" and which count as "rights" is not self-evident. An immediate ambiguity arises in how to classify the constitutional *powers* of Congress and the President. Do these changes code as transformations of the structure of Congress and the Presidency? Or should we follow the Federalists and view powers as more closely related to rights? (Federalist constitutional theory was that rights and powers are two sides of the same coin; rights began where powers left off. *See* The Federalist No. 84.) Also complicating the classification, some nominal rights, particularly those that operate in the context of voting and elections, seem inseparable from what is conventionally understood to be part of the structural constitution. Ely's overlapping distinction between constitutional provisions governing "substance" versus "process" further muddies the water, as many nominal rights, like procedural due process, criminal procedure protections, and voting rights, address political decision-making procedures and thus might be classified as structural.

[205] *Cf.* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 Nw. U. L. Rev. 719, 767-68 (noticing that groups who disagree about many other aspects of constitutional law share convergent understandings of authoritative government institutions, like the President and Congress).

efficacy.[206] To be sure, the structural constitution is far from politically impermeable or immutable. The original constitutional structure could not withstand the tectonic economic and political changes that occurred in the late nineteenth and early twentieth centuries related to industrialization, the integration of the national economy, and the country's expanding international role. These changes created broad-based political demands for the major structural reformations of the New Deal period and beyond (and also for the concomitant and equally dramatic changes in rights[207]). Nonetheless, constitutional structure may be less susceptible to the continuous political recalibration that has characterized the development of constitutional rights in many areas. The close correspondence between the constitutional law of race and changes in racial attitudes, practices, and politics between *Plessy* and *Brown*;[208] the extension of equal protection to gender and sexual orientation following the social and political success of the modern feminist and gay rights movements;[209] the construction and subsequent dismantling of the wall separating church and state in accordance with the changing political interests of Protestant groups and diminishing anti-Catholicism;[210] and the strong correlation between constitutional protection for free speech and "the perceived severity of the threat that radical dissenters posed to the economic or political status quo"[211] are just a few of the more striking examples of constitutional rights quickly reshaping themselves to meet the shifting demands of prevailing political coalitions. It is at least a plausible hypothesis that changes to constitutional structure require a higher threshold of political dissatisfaction or broader consensus on the need for reform than comparable changes to rights.

This, at any rate, has been a widely-shared and politically efficacious belief throughout U.S. history. The politics of slavery, from the constitutional design through the antebellum period, provides a vivid illustration. While it was generally accepted at the Founding that some

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[206] *See supra* pp. 713–15.
[207] The central dynamic with respect to rights, of course, was the post-New Deal demise of anti-regulatory, economic liberty rights, giving way to modern civil rights focused on racial equality, free speech, criminal procedure, religious liberty, and the like. For a richly textured historical account of how the political forces surrounding the state-building project of the Progressive- and New Deal eras affected the development of modern civil rights, see Ken I. Kersch, Constructing Civil Liberties (2004).
[208] *See* Michael J. Klarman, From Jim Crow to Civil Rights (2004).
[209] *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 9 (1996) (gender); Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 Mich. L. Rev. 431, 443-45 (2005) (sexual orientation).
[210] *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279 (2001); Klarman, *Rethinking*, *supra* note 209, at 15-16.
[211] *See* Klarman, *Rethinking Revolutions*, supra note 209; *see also id*. at 34–35.

sort of constitutional protection for slavery was a necessary condition for Southern states to join the Union, there was little inclination at the Philadelphia Convention to write explicit, substantive protections for slaveholders into the constitutional text.[212] In part, this was because some of the Framers were squeamish about their peculiar institution. Madison, for one, thought it would be "wrong to admit in the Constitution the idea that there could be property in men."[213] But it was also because Southern Federalists shared Madison's broader philosophy that "parchment guarantees for human bondage would not restrain a Northern majority committed to abolishing slavery."[214] White Southerners preferred to stake their fortunes on the structural design of the federal government. Proportional representation in the lower house of Congress and the electoral college, bolstered by the three-fifths clause, promised to ensure Southern control of the House of Representatives and the Presidency. Even if the North were seized by abolitionist sentiment, Southern control over the federal government would block any national movement to do away with slavery. Or so slaveholders were assured at the Founding.[215]

As it happens, the Founding bargain over slavery reflected a major miscalculation about the demographic future of the Republic. Northerners and Southerners alike had expected faster population growth in the South than the North, and therefore increasing Southern representation in the House and consolidated Southern control over the Presidency.[216] In fact, the opposite turned out to be true: The relative population and political power of the North increased dramatically through the early decades of the 19th century. By the late 1850s, the Northern white population was more than double the Southern white population, and Northern representatives had come to dominate the House of Representatives.[217] Although a Southerner occupied the Presidency for all but twenty of the seventy years of the antebellum Republic, the longer-term prospects of Northern dominance loomed there too.[218]

The best remaining hope for structural constitutional protection of slavery was the Senate—and the sectional balance rule that came to govern its composition. The rule required

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[212] On the debates over slavery during the Convention, see generally Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in Beyond Confederation: Origins of the Constitution and American National Identity 188 (Richard Beeman et al. eds., 1987).
[213] Speech of James Madison at the Constitutional Convention (Aug. 25, 1787), in 10 Papers of James Madison 157, 157 (Robert A. Rutland et al., eds. 1975).
[214] Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* 114 (2006).
[215] *See id.* at 101-06.
[216] *Id.* at 102.
[217] *Id*. at 126-27.
[218] *See* Jesse T. Carpenter, The South as a Conscious Minority, 1789-1861 at 89-92 (2d ed. 1990).

that the North and South would have equal representation in the Senate and therefore would hold a mutual veto over any attempt by one side or the other to turn the nation against or in favor of slavery. Instituted as part of the Missouri Compromise, the sectional balance rule become a quasi-constitutional substitute for the original constitutional bargain over slavery.[219] For the next thirty years, a relatively stable equilibrium was maintained as new states entered the Union in pairs and sectional balance was preserved. Only in the 1850s, when economically and politically viable opportunities for the expansion of slavery ran out, and it became impossible to rebalance the Senate after the admission of California as a free state had tipped the balance in favor of the North, did this political settlement unravel.[220]

In any case, throughout the antebellum period, Southern political thought was wedded to the idea that structural protections for slavery would provide more security than substantive constitutional rights. Although Southern politicians like John C. Calhoun advocated for recognition of the rights of slaveholding states—or, what amounted to the same thing, for the limited constitutional power of Congress to ban slavery in the territories—slaveholders were dubious about how effective such substantive constitutional guarantees would be when push came to shove.[221] Like the Federalist Framers, antebellum white Southerners doubted that a national majority united against slavery would be long detained by constitutional limitations. Echoing Madison, James Randolph declared, "I have no faith in parchment."[222] Elaborating on this common wisdom during the debates of the Virginia Constitutional Convention, Abel Upshur confidently proclaimed that no "paper guarantee was ever yet worth anything, unless the whole, or at least a majority of the community, were interested in maintaining it."[223]

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

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[219] *See* Graber, *supra* note 214, at 140–44; Barry R. Weingast, *Political Stability and Civil War: Institutions, Commitment, and American Democracy*, *in* Robert H. Bates ET AL., Analytic Narratives 148, 153–55 (1998). Notice that the balance rule was motivated by a rather obvious political feedback effect: every free territory created the potential for a free state that could enter the Union and shift the balance of power in the Senate, allowing the North to dominate national politics and threaten slavery, or vice versa.

[220] *See* Weingast, *supra* note 219, at 156-59.

[221] *See* Graber, Dred Scott, *supra* note 214, at 135-40.

[222] 42 Annals of Cong. 2361 (1824), quoted in Graber, *supra* note 214, at 139–40.

[223] Cited in Carpenter, *supra* note 218, at 141.

> The adoption of some restriction or limitation, which shall so effectually prevent any one interest, or combination of interests, from obtaining the exclusive control of the government, ... can be accomplished only in one way—... by dividing and distributing the powers of government [to] give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing laws, or a veto on their execution ... .[224]

Calhoun and his fellow Southern politicians advocated a number of institutional instantiations of this principle, on the model of sectional balance in the Senate. These included Calhoun's proposal of a dual executive (comprising a Northern and a Southern President, each with veto power over national legislation)[225] and like-minded suggestions for balancing the Supreme Court between Justices from slaveholding and non-slaveholding states.[226] The Madisonian premise of these proposals, and of Southern political thought more generally during the antebellum period, was that institutional arrangements allocating political decision-making power would prove more reliable than prohibitions on particular political outcomes.

As we have now seen, this premise has been widely shared by politicians, lawyers, and theorists since Madison. Yet no one has ever provided a convincing explanation of why we should expect constitutional structure to be more stable or constraining than rights or other constitutional rules. A straightforward explanation would be that the constitutional text simply happens to be more specific about structure than rights.[227] Certainly it is true that constitutional provisions like those specifying the bicameral structure of Congress, the minimum age of the President, and the requirement of two Senators per state seem more concrete and less susceptible to politically expeditious reinterpretation than abstractly-stated rights like free speech and equal protection. As discussed above, the greater utility of these structural provisions as focal points for coordination may stabilize their meaning.[228] But it seems doubtful that differences in textual

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[224] John C. Calhoun, A Disquisition On Government and Selections From the *Discourse* 20 (C. Gordon Post ed., 1953). *See generally* Carpenter, supra note 218, at 77-126; David M. Potter, The South and the Concurrent Majority (1972).
[225] *See* Carpenter, *supra* note 218, at 94-95.
[226] *See id*. at 98-99.
[227] *See, e.g.*, Adler, *supra* note 205, at 767; Strauss, *supra* note 172, at 1741.
[228] See *supra* pp. 709-11.

expression alone can fully account for the longstanding conventional wisdom about the relative durability of structure. After all, that conventional wisdom traces back to Madison and the other Federalist Framers, for whom textual specificity versus generality was not a given but a choice.[229] Antebellum slaveholders, too, doubted that even the most clearly-stated rights could provide the security they saw in structural arrangements.

An alternative and perhaps more convincing explanation for the strength and prevalence of the Madisonian intuition about the relative stability of structure is that this intuition reflects the broader belief, explicated in Part II, that political decision-making processes tend to be more stable than the substantive outcomes of these processes.[230] Carrying over the earlier discussion, we are now in a position not only to recognize this intuition but to provide a tentative justification for it. If constitutional structure means roughly the same thing as a set of political decision-making institutions, and constitutional rights are understood to specify a type of (prohibited) policy outcome, there might indeed be good reasons to expect structure to be more durable and constraining than rights.

To review, the basic set of mechanisms through which political arrangements become entrenched—including coordination, reciprocity, asset-specific investment, and political feedback—should operate similarly at the levels of policies/ rights and institutions/structure. Indeed, some rights seem susceptible to significant political entrenchment. It is easy to see, for example, how constitutional protection for political speech and dissent might be stabilized by way of a cooperative equilibrium between political factions that compete for control of the government; and also how media and telecommunications interests that benefit financially and politically from freedom of speech might come to constitute an effective constituency in favor of

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

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

extensive First Amendment protections. Similarly, religious pluralism may create reciprocity-based political incentives in support of religious liberty and nondiscrimination; and religious liberty in turn may sustain pluralism, creating a self-reinforcing feedback loop.[231] Antidiscrimination protection for women and racial minorities will enable more members of these groups to attain positions of wealth and power in society—which they may then use to defend or expand constitutional protection. The constitutional protection of property rights, too, may be reinforced by a self-reinforcing "rich get richer" dynamic, as property owners leverage their initial advantages into more expansive protection over time.[232]

All else equal, however, we might expect these kinds of dynamics to create more powerful entrenchment effects at the institutional/structural level. Political decision-making institutions like separation of powers, the Senate, and electoral democracy effectively bundle numerous prospective policy outcomes. By doing so, these institutional arrangements both facilitate compromise and blunt the incentives of political losers to defect. Decision-making institutions that will generate a large number of policy outcomes in future periods will blunt the resistance of political losers to any single outcome by offering them the prospect of more favorable policies along other policy dimensions and in future periods. Bundling outcomes in this way also increases the benefits of coordination and cooperation and therefore the costs of non-coordination or defection. Finally, because political decision-making institutions tend to have a larger cumulative effect than isolated policy decisions on the distribution of power and resources among groups in society, they should generate stronger self-reinforcing political feedback. For all of these reasons, we expect the kinds of institutional arrangements that code as constitutional structure to display greater political stability than the particularistic policy prohibitions represented by rights. [233]

Thus, returning to the example of slavery in the antebellum South, the reasoning of white Southerners might be reconstructed as follows. In the abstract, the structural security of a Senate veto over national legislation and direct protection of the property rights of slaveholders might seem equally precarious. Rights could be ignored or interpreted away. At the same time, as

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[231] *See* Anthony Gill, The Political Origins of Religious Liberty (2008).

[232] A particularly striking example is the successful lobbying by copyright holders like Disney for greater protection for their intellectual property. See Jessica Litman, Digital Copyright 23 (2001); Larry Lessig, Copyright's First Amendment, 48 U.C.L.A. L. Rev. 1057, 1065 (terming the Copyright Term Extension Act of 1988 the "Mickey Mouse Protection Act").

[233] *See supra* notes 121-125 and accompanying text.

Calhoun and others recognized, the South's vetogate in the Senate could be bypassed through unilateral executive action once the North took control of the Presidency.[234] Which of these imperfect alternatives was a better bet? White Southerners may well have believed that the political costs to the North of subverting the separation of powers would be higher than the costs of ignoring the property rights of slaveholders. In part this was because the Senate, and the balance rule in particular, provided *mutual* security—for the South against abolition; for the North against the spread of "slave power" throughout the country. This reciprocity of benefit, behind a partial veil of ignorance as to which section might ultimately control the rest of the government, helped support an equilibrium in which both North and South remained committed to both the authority of the Senate and the balance rule.[235] Ceding power to a monarchical President with no guarantee of his regional sympathies might be less desirable for both sides, not just because of the threat to slavery but because of the broader risks and disadvantages of proto-dictatorship and the elimination of an effective legislative role. Congress was an institution that benefitted many constituencies, in both the North and South, not least its own Members and their political parties. Moreover, one of these parties, the Democrats, was built upon Southern representation and veto power, both within the party and in government. This asset-specific investment gave the Democrats strong incentives to maintain sectional balance.[236]

Of course balance in the Senate eventually broke down, the Democratic Party divided, and the country went to war. Still, the structure of the Senate had held—and held together the Union—for more than three decades. Would rights-based protection for slavery have worked as well?[237] White Southerners may have had good reason for doubt. In contrast to the bundled and reciprocal structure of the Senate, a right to own slaves would be free-standing and unilateral. The costs to Northerners of violating a right might be considerably lower than the costs of a

[234] *See* Carpenter, *supra* note 218, at 89-97.
[235] *See* Weingast, *supra* note 219, at 154–55.
[236] *See* GRABER, *supra* note 214, at 144–48; id. at 155–56 (examining the demise of national parties' ability to maintain bisectionalism during the 1850s).
[237] In 1861, in a last-ditch attempt to prevent more Southern states from seceding, Congress proposed, President Lincoln endorsed, and three states ratified, a constitutional amendment (knows as the Corwin Amendment) that made explicit Congress's lack of power to interfere with or abolish slavery in any state, and that prohibited any subsequent constitutional amendment to the contrary. Southerners were dismissive of this proposed thirteenth amendment, and it did nothing to prevent secession and war. See generally A. Christopher Bryant, Stopping Time: The Pro-Slavery and "Irrevocable" Thirteenth Amendment, 26 Harv. J. L. & Pub. Policy 502 (2003). Interestingly, Southerners had been much more receptive to the Crittenden Compromise, an earlier package of proposed "unamendable" amendments highlighted by a reinstatement and extension of the Missouri Compromise line that would have protected slavery in the southern territories. The Crittenden Compromise was rejected by Republicans. See David M. Potter, The Impending Crisis, 1848-61, at 531-35, 549-54.

complete breakdown of the system of separation of powers. It is also hard to see how such a right could attract asset-specific investments or generate the kinds of political feedback that would give some constituency other than slaveholders a stake in preserving it. Minus these sources of political stability, property rights for slaveholders might indeed have proven more fragile than the structural Senate veto.

Needless to say, much more work would be needed to substantiate these sketchy speculations—and more still to generalize beyond these specific examples. The most that can be done here is to suggest that this work would be well worth undertaking. The relative durability and inviolability of constitutional structure has been an article of faith since Madison, exerting a powerful hold over our thinking about the possibilities of constitutionalism and the pathways of constitutional change. Constitutional designers, courts, and social movements in the real world are regularly confronted with consequential choices about whether to pursue structural or rights-based strategies for protecting vulnerable groups. Present sympathies for Southern slaveholders run thin, but consider the choice confronting the NAACP in the Jim Crow South of whether to allocate resources to achieving greater access to the political process and representation for black citizens (a functionally structural strategy, even if cast in the vocabulary of voting "rights") or to securing substantive rights, like the desegregation of public schools.[238] Or consider the perspective of a constitutional designer who must determine whether the stability of property entitlements will be better assured through structural arrangements like federalism—as the political science literature on market-preserving federalism implies[239]—or instead through the direct protection of constitutional property rights. In these and other contexts, constitutional lawyers and theorists would do well to build upon their intuitions and investigate the conditions under which structural protections do, in fact, outperform or outlast the protection of rights.

B. Judicial Review

In the view of many constitutional lawyers and theorists, the efficacy of constitutional commitment depends largely if not entirely on judicial enforcement of constitutional rights and

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[238] Having been stripped of both the votes and the rights they had briefly enjoyed during Reconstruction, Southern blacks must have been acutely aware of durability and political resilience as an important variable in thinking about how to advance civil rights.
[239] *See* Weingast, *supra* note 57; *supra* p. 677.

rules. But if the Supreme Court[240] is to serve as the primary institutional solution to the problem of constitutional commitment, then the institutional stability of the Court itself must be explained.[241] Courts can enforce the constitution effectively only if political actors have incentives to comply with judicial commands and precedents and to preserve judicial independence.[242]

In fact, powerful political actors—Presidents, Members of Congress, state officials, and social movements—have not always deferred to the Court. Presidents Jefferson, Jackson, Lincoln, and Roosevelt all famously declared, and in some cases acted upon, their willingness to defy the Court.[243] Congress, too, has often pushed back against judicial authority—by routinely considering and occasionally enacting statutes stripping the Court of jurisdiction to hear politically important cases that the Justices might decide the wrong way,[244] and also by manipulating the size of the Court to shift its political balance.[245] In response to deeply controversial decisions like *Dred Scott* and *Brown v. Board of Education*, large segments of the public, joined by national and state officials, have resisted the Court's authority.[246]

Still, open defiance of the Court has been the exception rather than the rule. The extent to which political actors have been willing to challenge judicial authority and supremacy in constitutional interpretation has varied somewhat over the course of U.S. history,[247] but in the broad run of cases, judicial decisions about constitutional law have not been seriously contested. The puzzle thus arises: "Given the evident power of elected government officials to intimidate, co-opt, ignore, or dismantle the judiciary, we need to understand why they have generally chosen

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

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

[242] *See* Whittington, Political Foundations, *supra* note 8, at 26 ("Political actors must have reasons for allowing the court to 'win.' ... [They] must see some political value in deferring to the Court and helping to construct a space for judicial autonomy."); Bernd Hayo & Stefan Voigt, Explaining De Facto Judicial Independence, 27 Int'l Rev. L. & Econ. 269, 269-74 (emphasizing that the judiciary can serve as a constitutional commitment mechanism only if political actors maintain a higher-order commitment to judicial independence).

[243] *See* Fallon, Constitutional Constraints, supra note 2, at 1016 (collecting examples). *See generally* Whittington, Political Foundations at 27 ("[w]e can easily imagine presidents dismissing the authority of the Court and ignoring its opinions").

[244] *See* John A. Ferejohn & Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.U. L. Rev. 962, 986-87 (2002).

[245] *Id*. at 981-82.

[246] *See* Barry Friedman, The Will of the People 110-21 (2009) (Dred Scott); Klarman, Jim Crow, *supra* note 208, at 385-421 (Brown).

[247] For an historical overview, *see* Larry Kramer, The People Themselves (2004).

not to use that power and instead to defer to judicial authority."[248] What accounts, in other words, for the apparent institutional stability of judicial review?

A simple answer is that the institutional stability and independence of judicial review is *merely* apparent, an illusion created by the observational equivalence of constraint and non-constraint. Judicially created constitutional rules and rights do not function as constraints on political actors if these rules and rights simply align with their interests or correspond to what they would have done in any case. Political scientists and constitutional historians have long observed that judicial interpretations of constitutional law generally track the preferences of politically powerful domestic constituencies, particularly national-level majorities.[249] The reasons for this are well-understood. Federal judges and Supreme Court Justices are selected by ruling political coalitions based largely (albeit not entirely) on their political and ideological views.[250] And once these judges and Justices have been appointed, they are subject to ongoing political control by the political branches and the public, who possess the power to coerce or marginalize a judiciary that seriously interferes with the agenda of dominant national coalitions.[251]

For whatever combination of these reasons, [252] over the course of American history the Supreme Court has usually—and since the New Deal quite consistently—remained safely within

[248] Whittington, Political Foundations, supra note 8, at 11.

[249] *See* Robert G. McCloskey, The American Supreme Court 224 (1960) ("It is hard to find a single historical instance when the court has stood firm for very long against a really clear wave of public demand); Robert A. Dahl, Decision-Making in a Democracy, 6 J. Pub. L. 279 (1957) ("the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.").

[250] *See* Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments 26-27, 47-66 (2005). Of course, federal judges serve for long periods of time, and their political preferences may fall out of line as different coalitions become dominant. Thus, Dahl predicted that the Court would come into serious conflict with the political branches only during rare periods of electoral instability, when a newly dominant electoral coalition confronted Justices appointed by their defeated ideological rivals. Id. The New Deal was Dahl's paradigm case. This pattern seems to have recurred less often than Dahl expected, however. See Whittington, Political Foundations, supra note 8, at 12.

[251] *See* Ferejohn & Kramer, supra note 244, at 994 ("Taken as a whole, the miscellaneous devices available to the political branches to obstruct the courts afford ample means to cow or even cripple the federal judiciary."); Richard A. Posner, How Judges Think 375 (2008) (observing that Justices are constrained by "an awareness, conscious or unconscious, that they cannot go 'too far' without inviting reprisals by the other branches of government spurred on by an indignant public").

[252] A growing empirical literature attempts to sort out the contributions of indirect selection and direct political control on judicial behavior. For recent surveys of (and contributions to) this debate, see Michael W. Giles et al., The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision-making (forthcoming J. Pol.); Christopher J. Casillas et al., How Public Opinion Constrains the Supreme Court (forthcoming).

the bounds of political tolerance.[253] The Justices have steered clear of, or tread very lightly in, policy areas where elected officials and their constituents have intense political preferences, like economic regulation, war, and foreign affairs.[254] It is nearly inconceivable, for example, that the current Court would play a major role in the war on terrorism or the financial crisis—by, for instance, ordering the release of detainees or denying the Treasury Secretary authority to administer the bank bailout—and even less conceivable that the Court would set (or even set a limit on) tax rates, order the redistribution wealth, or end the wars in Afghanistan or Iraq. A Court that tried to do any of these things would almost certainly be defied or disciplined; and the Justices probably are not inclined to do them in the first place.[255]

Moreover, even in the relatively low-stake areas where the Court has focused its attention, seldom has it attempted to stand in the way of the strongly-held preferences of national political majorities. Quite the opposite, most of the Court's major interventions have been to impose an emerging or consolidated national consensus on local outliers.[256] As Madison recognized, compliance with judicial authority is not a problem when it is backed by the political, financial, and military supremacy of the national government over state or regional minorities. Less commonly, the Court has intervened in a contentious political debate that has split the country approximately in half. Landmark decisions like *Brown v. Board of Education*, *Roe v. Wade*, *Regents of the University of California v. Bakke*, and *Bush v. Gore* fit this description.[257] While these decisions have been predictably controversial, the support of half the country is usually enough to protect the Court against political retribution. Most of the approximately 50% of the voters who cast their ballots for George W. Bush were pleased with the Court's intervention in *Bush v. Gore*, and the newly elected President Bush and the Republican-controlled Congress certainly had no inclination to second-guess the decision.

In sum, if the Court typically operates not against but as "part of the dominant national

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[253] *See generally* Friedman, *supra* note 246.

[254] *See* Frederick Schauer, *The Supreme Court, 2005 Term — Foreword: The Court's Agenda — and the Nation's*, 120 Harv. L. Rev. 4 (2006).

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

[256] *See* Lucas A. Powe, Jr., The Warren Court and American Politics 489-94 (2000); Klarman, *Rethinking*, *supra* note 209, at (1996).

[257] *See* Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 Cal. L. Rev. 1721, 1749-50 (2001).

alliance, "[258] then the political stability of judicial review is easy to understand. Real questions about the viability of judicial power arise only when courts act counter to the interests of the national political branches or popular majorities. These cases do exist: Supreme Court decisions invalidating school prayer, striking down criminal bans on flag-burning, requiring procedural protections for criminal defendants, and failing to protect the property rights of homeowners have been unpopular with majorities of the public.[259] And controversial decisions like *Roe* have survived long stretches of Republican political ascendance without generating serious political reprisals against the Court.

The apparent ability of the Court to defy dominant political coalitions in these cases is corroborated by the political science literature on "diffuse support" for the Court.[260] Surveys of public opinion find a "reservoir" of institutional support for the Court that outruns "specific support" for particular judicial decisions.[261] The public—and therefore, we might suppose, their elected representatives—are apparently willingly to go some distance in supporting the Court and defending its independence even when it generates particular outcomes with which they disagree. This also seems to be the lesson of historical episodes like the New Deal Court-packing threat. Although an obstructionist Court was ultimately brought into line with the views of the dominant national political coalition, the political unpopularity of Roosevelt's Court-packing plan seemed to reveal a significant measure of support for an independent judiciary.[262]

Unfortunately, the existing empirical evidence sheds little light on precisely how much judicial independence is politically supported.[263] The qualitative impressions of informed observers range broadly. At one extreme is the common but implausible portrayal of the Court as a (potentially) heroic protector of minorities and leader of progressive social change, even in

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[258] Dahl, *supra* note 249, at 293.
[259] *See* Klarman, Bush v. Gore, at 1750. While these decisions have been modestly countermajoritarian, it is still the case that substantial minorities of the country support them.
[260] Gregory A. Caldeira & James L. Gibson, The Etiology of Public Support for the Supreme Court, 36 Am. J. Pol. Sci. 635 (1992); see also Barry Friedman, The Politics of Judicial Review, 84 Tex. L. Rev. 257 (2005) (surveying the political science literature on diffuse support).
[261] *Id.*
[262] On the political history of the New Deal Court-packing episode, see Friedman, supra note 246, at 195-236; William E. Leuchtenberg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (2005). As Ely summarizes, "The message is mixed, but what now seems important about the episode that an immensely popular President riding an immensely popular cause had his lance badly blunted by his assault on judicial independence." Ely, supra note 5, at 46.
[263] *See* Friedman, *Will*, supra note 246, at 373-74 (noting this empirical deficit). Existing quantitative measures of judicial independence are highly imperfect. For an example of the state of the art, see Hayo & Voigt, supra note 242, at 279-80.

the face of majoritarian political opposition; or as a pervasively antidemocratic usurper of political authority from the people and their elected representatives. At the other lies the possibility of political subservience:[264] a Court that follows the election returns—or, more precisely, the political preferences of democratic majorities, ruling elites,[265]or dominant political parties or coalitions. [266]

Notwithstanding the empirical uncertainty about the extent of judicial independence, it may be instructive to consider how judicial review could have—and probably has in fact, to some indeterminate extent—acquired and maintained the latitude to act against the interests of powerful political actors. The explanation most commonly advanced (or assumed) by constitutional lawyers and theorists, and by judges themselves, is that "the Court's power lies ... in its legitimacy."[267] This assertion rests on the idea that political support for judicial review will depend on the public's normative assessment of whether the Court as an institution is playing an appropriate role in American democracy,[268] or (relatedly) on the extent to which the public believes that judicial decision-making is based on "law" or "principle" as opposed to "politics" or the "personal preferences" of the Justices. [269] There must be some truth to these ideas. It certainly seems plausible that the public's tolerance for substantively undesirable judicial rulings will depend to some degree on perceptions of whether the Court was acting within the scope of

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

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

[266] *See* Friedman, Will, *supra* note 246; Gerald N. Rosenberg, The Hollow Hope 1991); Klarman, Bush v. Gore, *supra* note 257, at 1749-50.

[267] Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992).

[268] *See* Kramer, The People Themselves, *supra* note 247, at 230-31.

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

its rightful authority.[270] And there is at least some empirical evidence that public support for the Court is influenced by perceptions of the procedural fairness of its decision-making, and particularly by the perceived "neutrality" of its judgments.[271]

At the same time, it also seems clear that much of the variance in public and political support for the Court depends not on normative assessments of the judiciary's institutional role or decision-making processes but instead on the substantive outcomes judicial review produces. To give just one example, a great deal of the institutional prestige enjoyed by the modern Supreme Court stems from *Brown v. Board of Education*—a decision that is now widely applauded on its substantive merits but that was heavily criticized contemporaneously as illegitimately political, non-neutral, and beyond the bounds of the judicial role.[272]

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

One well-rehearsed model of judicial independence dates back to Madison's suggestion that constitutional rights might serve "as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community."[273] To the extent constitutional law is supposed to help solve the agency problem of representative government by "guard[ing] the society against the oppression of its rulers,"[274] then courts might play the valuable supplemental role of authoritatively identifying and publicizing constitutional violations and thus facilitating coordinated retaliation by the public at large.[275] Since the public would benefit from judicial monitoring of government officials, it would have an incentive to resist any attempt by

[270] *See* Kramer, The People Themselves, *supra* note 247, at 229-31.
[271] *See* Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 Duke L.J. 703 (1994).
[272] *See* Klarman, Bush v. Gore, *supra* note 259, at 1722-23.
[273] Letter to Jefferson, *supra* note 10, at 162.
[274] The Federalist No. 51. *See supra* note 9 and accompanying text.
[275] *See* David S. Law, A Theory of Judicial Power and Judicial Review, 97 GEO. L.J. 723 (2009); Weingast, *supra* note 83.

self-serving officials to interfere with the Court or undermine its authority.[276] This "fire alarm"[277] account of the judiciary's role in protecting popular sovereignty against untrustworthy government agents resonates with modern empirical evidence that the Court's decisions are no less—and possibly more—consistent with public opinion than those of the political branches.[278] But the fire alarm theory also has a major limitation (seemingly not recognized by its post-Madison proponents). As Madison emphasized, constitutional law is addressed not just to problems of agency but also—and in modern constitutional law, predominantly—problems of faction.[279] In a system of constitutional law that is primarily geared toward protecting individuals and minorities against majorities, political support for judicial review cannot be adequately explained on the model of the people versus their governors.[280]

Other sources of institutional stability and entrenchment offer greater explanatory potential. For one, the coordination benefits of authoritative judicial interpretations might be extended beyond the fire alarm model. As discussed above, the benefits of coordinating on a common plan of government provide a general source of constitutional compliance incentives for political actors.[281] The constitutional text is one important focal point, but because the text is so often vague, irrelevant, or substantively unacceptable, judicial review has emerged as an alternative locus of constitutional coordination.[282] Judicial settlement of political controversies is valuable to political actors, giving them reason to respect and preserve judicial authority, irrespective of their substantive agreement or disagreement with the outcomes.[283] To illustrate, the two sides of the election dispute that the Court resolved in *Bush v. Gore*, notwithstanding the intensity of their disagreement on the substantive merits, shared an interest in coordinating on a

[276] *See* Law, *supra* note 275, at 786.
[277] *See id.* at 731.
[278] *See* sources collected by Law, *supra* note 275, at 6-7 fns. 17 & 18. It also resonates with anecdotal observations that the Court has been markedly more aggressive in standing up to unpopular Presidents during times of war and crisis. *See* Youngstown, the Bush administration war on terror cases, and commentary.
[279] *See* Levinson, Empire-Building Government, *supra* note 30, at 971-72.
[280] In the special context of voting and election law, where representatives have especially strong self-serving incentives, constitutional scholars have emphasized the strong normative case for judicial enforcement of agency-focused "anti-entrenchment" rules. *See* Klarman, Majoritarian Judicial Review, *supra* note 107. The complementary descriptive observation is that public support for judicial enforcement of these rules will come naturally.
[281] *See supra* notes 166-77 and accompanying text.
[282] *See* Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1377 (1997).
[283] *See* Elkins et al., *supra* note 92, at 106-108.

peaceful settlement of the controversy and uniting the country under a single President.[284] In this and many other contexts, everyone may be better off agreeing to accept judicial resolutions of political controversies (at least within some tolerable range of substantive outcomes) than continuing to fight.

Further reasons for supporting judicial authority follow from the logic of repeat-play and reciprocity. Another standard model of judicial independence envisions competing political coalitions that tacitly agree to support an independent judiciary in order to hedge against the risk of all-or-nothing reversals of political fortune.[285] On this "insurance model" of independent judicial review, the coalition in power may do better to cede some authority to the courts in order in order to deprive its rivals of plenary power when they take over the government.[286] Thus, Democrats who are temporarily in control of the national government may tolerate a judicial check on their ability to suppress Republican political speech on the tacit understanding that Republicans will be similarly constrained when they take their turn in power.[287] Note that the emergence and stability of judicial independence on this model depends upon a competitive political marketplace. In the early years of the Republic, when competitive political parties were a new and possibly fleeting phenomenon, Federalists and Republicans alike engaged in blatant partisan manipulation of the judiciary.[288] Likewise, during periods when a dominant party or coalition is securely in control and the prospects of being on the losing side are beyond political time-horizons, the immediate benefits of unchecked power will outweigh the prospective benefits of judicial independence. Political attacks on the Court by the relatively secure Republican majority in Congress during Reconstruction, and by the relatively secure Democratic majority during the New Deal, may be examples of this point. In contrast, we might hypothesize that close political competition between the two parties and frequent rotation of control of the Presidency and Congress in recent decades may have contributed to an increase in the political acceptability of judicial supremacy.[289]

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[284] *Cf.* Richard A. Posner, Breaking the Deadlock 150-89 (2001) (defending the Court's intervention in Bush v. Gore as pragmatically necessary to avert a constitutional and political crisis).
[285] Mark J. Ramseyer, The Puzzling (In)dependence of Courts: A Comparative Approach, 23 J. Legal Stud. 721 (1994); Stephenson, *supra* note 8.
[286] *See* Tom Ginsburg, Judicial Review in New Democracies 21-33 (2003).
[287] Here again, the value added by judicial review lies in coordinating actors' understandings and expectations of what counts as a constitutional violation. *See* Stephenson, supra note 8, at 68-69.
[288] *See* Ramseyer, *supra* note 88, at 742.
[289] On the apparent rise of judicial supremacy in recent decades, *see* Kramer, The People Themselves, *supra* note 247, at 219-26.

Political coalitions that do have a secure hold on power may benefit from judicial review in different ways. For one thing, courts can be useful in implementing their policy agendas.[290] Political scientists have documented the important role played by courts in helping national officials and constituencies "overcome federalism," by constitutionalizing dominant national policy preferences and enforcing them against oppositional political forces at the state and local level. Prominent examples include the famous "nationalizing" decisions of the Marshall Court and the activism of the Warren Court in imposing prevailing national norms on the South.[291] The Court has also stood ready to advance the policy goals of governing national coalitions when other political pathways have been blocked by gridlock, minority veto gates, or other forms of political friction.[292] For instance, *Brown* and other progressive civil rights decisions served the interests of the postwar liberals who for many purposes dominated national politics during the Roosevelt and Truman administrations but were repeatedly thwarted on race issues by Southern Democrats.[293] An independent judiciary can also serve the interests of political leaders by taking responsibility for contentious or divisive issues they would prefer to avoid.[294] The Court's willingness to take on segregation in *Brown* probably benefitted President Eisenhower by allowing him to "shift[] the burden of ending segregation outside areas of specific executive authority to the courts."[295] The attempt by the antebellum Democrats to defuse the divisive issue of slavery in the territories by delegating it to the Court was less successful, but it reflected the calculated risk that the Court could defuse the major threat to their political dominance.[296]

For all of these reasons, maintaining an independent judiciary can be beneficial to powerful political actors—government officials, parties, and democratic majorities alike. And to the extent that these actors do benefit from an independent judiciary, they will be willing to tolerate and even support some constitutional decisions that cut against their immediate interests.

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[290] *See* Whittington, Political Foundations, supra note 8, at 287-88; Keith E. Whittington, "Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 Am. Pol. Sci. Rev. 583, 584-86 (2005); Mark A. Graber, The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary, 7 Stud. Am. Pol. Dev. 35 (1993); Eli M. Salzberger, A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?, 13 Int'l Rev. L. & Econ. 349 (1993). Madison himself anticipated that courts would play this role. See Whittington, Friendly Hand, *supra*, at 586.
[291] *See* Whittington, Political Foundations, *supra* note 8, at 105-20.
[292] *See* Whittington, Friendly Hand, *supra* note 290, at 589-91.
[293] *See* Whittington, Political Foundations, *supra* note 8, at 130-34.
[294] *See* Whittington, *supra* note 290, at 591-93; Whittington, Political Foundations, *supra* note 8, at 134-52; Graber, Nonmajoritarian Difficulty, *supra* note 290
[295] Whittington, Political Foundations, *supra* note 8 at 147.
[296] *See* Graber, Nonmajoritarian Difficulty, *supra* note 290 at 46-50.

Notice the importance of bundling and prospectivity to this analysis. If judicial review is assessed by political actors as a package of probabilistic policy outcomes rather than one case at a time, then the expected policy value of the Court as an institution can be positive on net despite some negative-value decisions. Bundling and prospectivity thus create the possibility that institutional stability can exceed policy stability. Judicial decisions that would not be politically acceptable in isolation can be protected under the umbrella of institutional-level political support.

In fact, political actors do seem to assess judicial review as a package deal. To illustrate, some progressive Democrats were willing to support the New Deal Court against Roosevelt's political attack because they believed that an independent judiciary would protect not just economic liberty but also the rights they valued, like freedom of speech and religion.[297] "Even many people who believe in President Roosevelt ... were haunted by the terrible fear that some future President might, by suddenly enlarging the Supreme Court, suppress free speech, free assembly, and invade other Constitutional guarantees of citizens."[298] The empirical literature similarly suggests that diffuse support for the Court is based on a "running tally" of the Court's performance as an institution.[299] Evidently, the Court can build up a savings account of approval that it can then spend down by issuing unpopular decisions without losing public support. Thus, an increasingly conservative Court has maintained the support of a cohort of African Americans who continue to remember and value the outcomes generated by the liberal Warren Court some decades ago.[300] (An analogous anecdotal observation is commonly made about law

[297] *See* Whittington, Political Foundations, *supra* note 8, at 269-70; Friedman, Will, *supra* note 246, at 218-22. For another example, Michael Klarman hypothesizes that one reason the Rehnquist Court survive[d] Bush v. Gore reasonably unscathed, [is] because the remainder of the Court's constitutional jurisprudence has been such a political grab bag of results," including liberal decisions on abortion, school prayer, gender discrimination, and free speech. Klarman, Bush v. Gore, *supra* note 257, at 1763-64. *See* also Thomas M. Keck, The Most Activist Supreme Court in History (2004) (describing the Rehnquist Court's activism in enforcing both liberal and conservative rights).

[298] Quoted in Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 Minn. L. Rev. 1154, 1162 (2006).

[299] *See* James L Gibson et al., *Measuring Attitudes toward the United States Supreme Court*, 47 Am. J. Pol. Sci. 354, 364 (2003).

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

professors.[301])

Viewing the Court in this light, as a relatively stable political institution, suggests some additional explanations for judicial independence. For instance, we might trace the support of some groups for the Court to their asset-specific investments in judicial authority. Lawyers may be a good example. While the bar has always been divided along political and ideological lines, lawyers have displayed a guild interest in defending and expanding judicial authority.[302] The political mobilizations of the bar in defense of judicial independence during the Progressive era and the New Deal are at least suggestive in this regard.[303]

The mechanism of positive political feedback must also be at work in sustaining judicial power. The Warren Court's invalidation of malapportioned legislative districts pursuant to a constitutional requirement of one person, one vote provides a clear example of this dynamic. Not surprisingly, incumbent politicians whose jobs were threatened by reapportionment mounted a vehement attack on the decision and on the Court more generally.[304] Once reapportionment took hold, however, the one person, one vote rule effectively generated its own powerful political coalition, comprising officials who were elected from reapportioned districts and now had a vested interest in preserving equipopulous districts.[305] The political feedback effects of reapportionment operated at the level of a single decision (or short line of decisions), but it is easy to imagine broader effects with greater institutional-level consequences. The business interests that defended the Court through the early decades of the twentieth century were no doubt all the more influential on account of the economic and political clout that ongoing judicial protection had helped them to amass [306]

At the same time, however, judicial decisions are distinctively likely to provoke *negative* political feedback.[307] Prominent "progressive" decisions like *Brown*, *Miranda*, *Furman*, *Roe*, and *Lawrence* have all incited an immediate political backlash against the causes these decisions

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[301] *See*, e.g., Laura Kalman, Border Patrol: Reflections on the Turn to History in Legal Scholarship, 66 Ford. L. Rev. 87, 90 (1997) ("Because of the nation's experience with the Warren Court, liberal legalism has been linked to political liberalism since mid-century.").
[302] See Stephen M. Griffin, American Constitutionalism 98-99(1996) ("Support, respect, and reverence for the Supreme C ourt remain strong today among American lawyers and constitutes one of the main pillars of the Court's power."); William G. Ross, The Resilience of Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks, 38 Wake Forest L. Rev. 733, 763 (2003).
[303] *See* William G. Ross, A Muted Fury: 242-43, 302 (1994).
[304] *See* Friedman, Will, *supra* note 246, at 268-69.
[305] *See* Klarman, Bush v. Gore, *supra* note 257, at 1754-55.
[306] *See* Friedman, Will, *supra* note 246, at 171-87.
[307] *See supra* note 95.

were supposed to benefit—and to varying extents against the Court itself.[308] To illustrate, *Roe* generated a politically powerful pro-life movement that catalyzed the Religious Right, helped the Republicans take over Washington, and put abortion rights under siege through the 1980s and 90s. Conservative Republicans waged war against the Court, attacking judicial activism, promoting originalism (as a jurisprudence of judicial restraint), and making abortion a litmus for Supreme Court nominees.[309] In short, "Having tried to take abortion out of politics, the Court now found itself a victim of the politics of abortion."[310] The retrospective politics of *Roe* and the broader phenomenon of backlash suggest that political feedback—both positive and negative—is an important variable in understanding the political sustainability of judicial review.

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

## Conclusion

Constitutional change is a constant. The average lifespan of written constitutions since 1789 has been nineteen years.[311] In the United States, where a single Constitution has been formally "alive" since 1789, the constitution in practice has been revised continually—occasionally through formal amendment but more often and more substantially through changes in judicial interpretation, political construction, and popular acceptance. Some of the most breathtaking theoretical contortions of contemporary constitutional scholarship have been provoked by the need to rationalize and legitimate constitutional transformations as somehow consistent with the rule of law and not merely concessions or outright surrenders to the unrelenting force of ordinary politics.[312]

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[308] *See* Michael J. Klarman, Backlash (unpublished manuscript).

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

[310] John C. Jeffries, Justice Lewis F. Powell 358 (1994).

[311] Elkins et al., *supra* note 92, at1- 2 (noting the coincidence that 19 years was Thomas Jefferson's proposed expiration date for constitutions, on the principle that the "dead should not govern the living").

[312] *See*, e.g., Ackerman, We the People, *supra* note 4.

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

The minimal ambition of this Article is to remind us that these familiar features of constitutional law as it appears to operate in the U.S. and elsewhere are far from self-explanatory. In order for constitutions to serve as the rules of the political game, they must avoid becoming the political game. Yet, as Madison well understood, constitutions cannot succeed by standing outside of politics altogether; to the contrary, social and political support is all that makes a constitution more than parchment. Understanding how constitutions, systems of constitutional law, and other political institutions can constrain politics while remaining embedded in politics is a fundamentally important theoretical challenge in law and the social sciences—one with immediate practical implications for constitutional law and design. The more constructive ambition of this Article has been to develop a conceptual framework and marshal a set of resources that might help solve the puzzle of how political, and particularly constitutional, commitments can succeed.