CONTESTATORY CONSTITUTIONALISM: PARTICIPATORY
DEMOCRACY AS CONSTITUENT POWER AGAINST
JUDICIAL SUPREMACY

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Abstract

A constitution whose authority derives from popular sovereignty may be sustained, altered, or abandoned by, and only by, the sovereign people. Judicial supremacy—the theory that constitutional politics must be pursued through judicial review by a constitutional court—should be discarded, in favor of the exercise of constituent power through “contestatory constitutionalism:” a complex of participatory democracy, popular engagement with existing institutions, and the articulation of constitutional claims in the modality of politics rather than law. The dissertation argues for the priority of contestatory constitutionalism over judicial supremacy and competing theories of judicial interpretation of the constitutional text, by presenting an account of American constitutional development and its associated pathologies, assessing and refining the idea of popular constitutionalism (that is, popular interpretation of the Constitution), and defending contestatory constitutionalism, considered as the most preferable interpretation of popular constitutionalism, against judicial supremacy. Contestatory constitutionalism should also be preferred over competing theories that argue for more limited forms of judicial interpretive authority, such as originalism, which holds that particular interpretations of political and legal history should trump contemporary understandings and preferences; and living constitutionalism, which holds that constitutional meaning should be under constant revision across political time. Contestatory constitutionalism elides the debate between originalists and living constitutionalists; it focuses on the distribution and disposition of power, participation, and persuasion within the polity itself, and not on the fixation or fluidity of meaning in the constitutional text.

Keywords: constitutional theory, popular sovereignty, constituent power, judicial review, democratic theory
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Book! you lie there; the fact is, you books must know your places. You’ll do to give us the bare words and facts, but we come in to supply the thoughts.

Herman Melville,

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Chapter 1

Introduction

1.1 The Obdurate Constitution

Constitutional theory in the United States, particularly since the second half of the twentieth century, has adjudicated disputes between two competing sets of claims. One set is comprised by theories of popular sovereignty and concerns for the possibility of democracy; the other, by the concepts of legality and stability. Many scholars, when holding the scales of the balance aloft, see constitutionalism hanging lower than democracy: constitutional democracy properly understood means cabining and disciplining democracy through constitutional forms and values. I take the opposing view; constitutional constraints on decision-making must be subordinated to democratic oversight and, if necessary, discarded.

If such a statement sounds radical in certain ears, blame rests with constitutional theory’s conflation of constitutional interpretation and constitutional politics. The study of constitutionalism in the United States has given too much prominence to written constitutionalism and too little to the study of the constitutional order as it actually operates. This dissertation may be understood as an argument for the re-orientation of constitutional theory toward the study of constitutions, rather than constitutional meaning. Constitutions are a familiar area of concern in political theory. Aristotle’s surveys of the polities of ancient Greece have provided us with the idea of “ancient
constitutionalism,” teleologically contrasted with its modern counterpart because of its lack of institutional design through written codification (and, of course, its lack of judicial review). But the task that I pursue in this dissertation is not conservative. I do not adopt the posture of the rectitudinarian calling for a return to the proper way of doing business in constitutional theory. Instead, a more comprehensive and empirically attentive approach to constitutional theory is necessary in order to appropriately detect, diagnose, and respond to the problems of constitutional government in the contemporary United States (Whittington 2008, 294–295).

The Constitution that we in the contemporary United States have inherited from the past is extremely resistant to change. On the terms set out in Article V, the U.S. Constitution is more difficult to amend than any other in the world (Lutz 1995, 261). Article V sets out such a high bar on amendment that, while it may prevent some false positives in the identification of genuine expressions of constituent authority, it also serves to inhibit the consideration of constitutional alternatives, and also creates the illusion that constitutional change is both rare and the product of careful, explicit deliberation (Levinson 2008, Griffin 1998). In fact, in the current constitutional regime, constitutional change is a frequently occurring phenomenon and often arises out of conflicts between political actors and institutions. Constitutional change now occurs through other channels—notably, presidential politics and judicial politics—and the modifications to constitutional institutions, processes, and structure that result are no less consequential for being informal (that is, taking place outside the Article V amendment process). Constitutional change has been and remains an important feature of our political system, but it is easily obscured or overlooked by the false image of continuity and stability that emerges from the absence of formal amendments. One of the primary functions of recent constitutional theory has been to correct this oversight by drawing attention to the ways in which constitutional change is effected, not through formal parliamentary procedures but political, structural, and cultural processes (Ackerman 2007, Levinson 2008, Strauss 2010, Whittington 1999a).

In addition to merely describing such change it is also necessary to describe how it might be pursued appropriately. This dissertation argues in favor of the elaboration of constitutional
meaning through political action. The omitted capital “C” is important; the Constitution must be distinguished from the constitution.¹ The former is a written document, while the latter is the structure of the polity, comprised of values, practices, and institutions. The distinctive argument of the dissertation comes in the form of the theory of “contestatory constitutionalism,” which is a normative account of how citizens can achieve political agency in controlling and disciplining the elaboration of constitutional meaning by political actors (including political elites as well as political and social institutions). The dissertation thus expands and improves upon existing proposals for expanding the role of political contestation and participation. These usually come in the form of “popular constitutionalism,” in which popular sovereignty is understood to emanate from expressions of political sentiment from the people in the form of highly participatory, large-scale political activity (Tushnet 2000, Kramer 2004). Instead, “contestatory constitutionalism” consists in the regularization and routinization of already occurring practices. It aims to make explicit and transparent the ways in which political activity shapes and changes the constitution, so that changes are easier to monitor and endorse or contest.

Contestatory constitutionalism also seeks to fill important lacunae in the theoretical literature on constitutionalism. It is related to, but distinct from, “popular constitutionalism;” it also draws heavily upon “developmentalist” studies of constitutional change. Many such accounts attempt to derive normative conclusions from their descriptions of how constitutional change has taken place—but their recommendations are patchy, incomplete, or ad hoc. In contrast, this dissertation offers a normative argument for why developmentalist accounts of how the constitutional order has evolved should be preferred to non-developmentalist ones. As I describe it, the problem situation for normative developmentalist theory is centered around the phenomenon of constitutional construction. Constitutional constructions are changes in the meaning, structure, or values associated with the Constitution resulting from the actions and decisions of political actors responding to under- or indeterminacy in (or disagreement over) the semantic content

¹Murphy (1986), among others, argues for the maintenance of a distinction between ‘Constitution’—the written document—and ‘constitution’—the institutions and apparatus of government that that document codifies and authorizes. That distinction is preserved in this dissertation.
of constitutional provisions. The idea of constitutional construction plays a preeminent role in contemporary constitutional theory. As the developmentalist literature shows, constitutional construction (in various forms and guises) is one of the most frequently used vehicles for constitutional change in the contemporary polity. This poses a problem—a successful construction will, as a result of its success, have ramifications for subsequent constructions, and it will shape and change the path of constitutional elaboration as a whole. But success is not its own justification. Justification must come in the form of confidence that a construction was pursued legitimately; in the context of constitutional politics legitimacy derives from popular sovereignty. Contestatory constitutionalism is concerned with identifying and endorsing the institutions, practices, and concepts which promote such justified construction.

It should also be noted that contestatory constitutionalism is in at least one sense more radical than other developmentalist theories of constitutionalism. This is because popular constitutionalism can, in practice, entail the possibility of deep contestation over constitutional disagreement. Constitutional contestation need not be regarded as pathological but as the evidence of robust democratic debate. Without such contestation it is difficult to articulate and understand the many changes and developments in the constitution (as opposed to the Constitution); these developments otherwise run the risk of being submerged beneath the creed that the Constitution is unchanging, except during extraordinary moments when it is definitively changed. However, we need not fear radicalism; it is a necessary corrective to a form of constitutional politics which obscures rather than illuminates important constitutional developments.

Constitutional controversy has always been an important feature of American political practice. Political actors often have strong preferences over constitutional possibilities and seek to advance their preferred constructions of constitutional meaning both within and outside of established institutions and norms. For example, questions and controversies over the disbursement of federal aid monies to the states could hardly be characterized as “neutral” with respect to constitutional possibilities. When political actors or institutions attempt to control or alter the flow

²For useful overviews of the concept of constitutional construction, see, e.g., Whittington (1999a), Kersch (2004), Solum (2010), Barnett (2004).
of federal funds to the states they will advance constitutional claims that authorize them to do so. Another example of the possible intensity of political actors’ constitutional preferences can be found in the Supreme Court nominations process. Presidents attempt to maximize the effectiveness, impact, and duration of their constitutional views by engaging the process of “partisan entrenchment” (Balkin & Levinson 2001, Balkin & Levinson 2006). Presidents and senators alike evince substantial interest in the staffing of the Court (Eisgruber 2007). Candidates also typically make constitutional politics salient in the national political conversation during presidential election campaigns, when aspiring presidents signal either that they will maintain or upset the constitutional status quo, insofar as it inheres in the bodies of doctrine propounded by the Court. All presidential candidates tend to frame their constitutional preferences in terms of respect for the law, although the possible inflections and implications of that respect can vary significantly. In short, divergent patterns of constitutional preferences are regular if not quite constant occurrences in national politics.

The contemporary constitutional order contains a great deal of content which is submerged by a narrow focus on explicit and formalized constitutional changes. When we restrict our attention to formal changes in constitutional meaning—whether by amendment or through judicial review—we risk losing sight of the aspects of the constitution which are shaped by political action. These submerged aspects of our constitution are not trivial. They shape and constrain the ways in which we make war, choose presidents, respond to economic crises and market failures, and many other aspects of our political system. The pervasiveness of non-formal constitutional

³The differences in the campaign rhetoric of presidents since the Warren Court era can be instructive on this point. Nixon drew a contrast between “peace forces” and “criminal forces,” the latter of which had been abetted by a Court that he argued was too solicitous toward their rights at the expense of “law and order,” which he proposed to protect through the appointment of “strict constructionist” judicial nominees. Decades later, the language of “strict constructionism” would be taken up by George W. Bush in 2004, when he suggested that only strict constructionist judges could be relied upon to arrive at the appropriate decisions in moral controversies such as abortion, which he sometimes alluded to by referring to the illegitimacy of the Dred Scott decision. In contrast, recent Democratic candidates have presented their constitutional preferences in terms of their respect for the Court’s institutional autonomy, and particularly with respect to the value of precedent and settled law. Although both kinds of pledges—to appoint judges who would be restrained by strict adherence to constitutional language, or to appoint judges who would be restrained by respect for precedent and settled law—have superficially similar rhetorical profiles, they point to very different attitudes and preferences over constitutional possibilities. They are associated with an aspiration to re-shape or to maintain a doctrinal status quo, respectively.
developments has significant implications—most importantly, it militates against the notion that informal changes are presumptively or *prima facie* invalid. The wholesale invalidation of non-formal constitutional change (however one might propose to embark on such a course) would be dangerously destabilizing, far more so than any of the presumptively illegitimate developments themselves. We should also not discount the possibility, suggested by many developmentalist scholars, that many such developments are the result of the exercise of the kind of constituent power that Article V was meant to capture.

In fact, we have excellent reasons for accepting rather than rejecting many features of our constitutional arrangement despite the fact that they are not accompanied by specific provisions in the Constitution. We must expand our understanding of what is constitutional to include the elaborations of constitutional meaning which have (and will) have practical consequences in our political processes and our daily lives. Whether we call them “extra-judicial interpretations” of constitutional meaning,⁴ “constitutional constructions,”⁵ or massive participation in constitutional politics,⁶ political acts of constitutional elaboration can yield substantial changes to constitutional institutions and structures. The articulation of constitutional meaning within a political context is more likely to yield acceptance of constitutional change than legal articulation (i.e., through judicial review at the Supreme Court). This acceptance is contingent and provisional. It is more easily lost than the acceptance of “hard-wired” constitutional provisions, and it is more likely to be subject to critical examination and dispute. It is, put more simply, political acceptance, as indeed it should be. Legal articulation is a poor tool for pursuing constitutional change, and we should prefer political tools. Whatever acceptance our current constitutional arrangements—or at least those which have emerged as a result of popular development rather than sustained maintenance of show-stopping provisions—is, and will remain, contingent. They are open to further revision or rejection in the future. This is the case in part because it is the nature of constitutional constructions, which lack the permanence of textually grounded features like the basic separation

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⁴ See Whittington (2001a).
⁵ See Whittington (1999a), Barnett (2004), and Solum (2010).
⁶ See Kramer (2004) and Ackerman (2007).
of powers or the terms of office for various officials.

Accordingly, this dissertation is a brief for a form of popular constitutionalism—the view that constitutional meaning is what we, the people, say it is. Our constitution is not wholly fixed, either temporally or semantically. Instead, it is up to us in the present—those who are alive, and active in and affected by the constitutional framework of power, rights, and institutions—to provide the constitution with meaning, and to put that meaning to practical effect in politics. Although some of our constitutional apparatus does not require constant renewal or ratification, there are many other parts that do. We cannot rely on constitutional text to tell us what a person or a citizen is (Ely 1980). We cannot rely on what we can reasonably infer about the original constitutional drafters’ views to tell us whether or not electronic surveillance is an unwarranted breach of privacy, or whether it is an appropriate use of police powers (Friedman 2012). We cannot rely on judicial precedent to settle or foreclose debate in all controverted areas of public life (Thayer 1893). Instead, it is incumbent upon us, as citizens of a democracy (Rawls 1996, Rawls 1999a, Macedo 1990, Schwartzberg 2007), to address these problems on our own terms, and to embark upon the project of actively articulating and constructing our constitutional arrangements.

Popular constitutionalism is more than a simple rejection of judicial supremacy. It means accepting and embracing the inescapably political dimensions of fostering and sustaining the American experiment with democracy. Put more formally, popular constitutionalism embraces extra-judicial interpretation of constitutional meaning, and endorses the people’s ability to choose among, accept, or reject various constitutional constructions. It is not a rejection of checks and balances, or of minority rights, or of the need to ensure representation and deliberation in the pursuit of political change, through elections, multiple veto points, and separated powers. Rather, popular constitutionalism enthusiastically supports such political constraints on decision-making. Popular constitutionalists reserve their skepticism for judicial constraints on political decision-making. As Larry Kramer puts it:

[T]here is a qualitative difference between political restraints like bicameralism or a veto and a system of judicial supremacy. It is the difference between checks that are
directly responsive to political energy and those that are only indirectly responsive, between checks that explicitly operate from within ordinary politics and those that purport to operate outside and upon it (Kramer 2004, 246).

Judicial supremacy, in other words, entails a people alienated from its own institutions of self-government.

The practice of judicial review plays an important but limited role in American politics—even constitutional politics. The Court’s interventions are often only of peripheral interest at the level of national politics (Graber 1993, Schauer 2006). In making my argument for the synergy between developmentalism and popular constitutionalism, I do not restrict my focus to doctrine propounded by the Court, since it would be “fallacious [to] leap from the accurate premise that much of what the Supreme Court does is important to the erroneous conclusion that much of what is important is done by the Supreme Court’” (Schauer 2006, 8). The Court’s ability to influence and constrain policy-making and political activity, though real, should not be overstated (Rosenberg 1991). The Court’s main avenue of influence is through the elaboration of constitutional law, which shapes and channels some political disagreement. But this same process of the legalization of the Constitution—whereby constitutional claims acquire their greatest valence only when they may be articulated in front of the Justices—also creates “safe harbors” in which many policy choices are not accessible to the Court through judicial review (Graber 2008b, 308). A normative constitutional theory—particularly one which places great weight upon popular political participation, as mine does—cannot afford to concentrate primarily upon the invalidation or upholding of legislation by the federal courts. The problems and pathologies of a legalized constitution thus comprise a further motivation for the development of popular constitutionalist theories.

Other theorists have come forward with proposals for popular constitutionalism. The distinctiveness of the view that I propose is twofold. First, I offer an account of popular constitutionalisms, not popular constitutionalism tout court. That is, I treat popular constitutionalism as a modality of constitutional elaboration—one of many ways of expounding the meaning of the
constitution. The concept of popular constitutionalism is best put to work by focusing on specific episodes and movements in the history of American constitutional development, and by asking how in what ways constitutional meaning is reproduced or altered through interactions between publics and elites. Popular constitutionalism is best understood not as the irruption of popular sovereignty into “ordinary” politics. It is, instead, the means by which constitutional meaning is constructed through ordinary politics.

The second way in which my account is distinctive is its focus on conflict. Popular constitutionalism is always discursive, frequently divisive and polarizing, and occasionally disruptive. Advocates of the theory should not shy away from these features. Against its critics, I argue for popular constitutionalism’s superior capacity to legitimate constitutional change and thereby to preserve constitutional stability and continuity. However, popular constitutionalism is not easy. A plausible conception of popular constitutionalism must concede a meaningful and substantial degree of initiative and autonomy to governmental institutions; and it must maintain sufficient safeguards against majoritarian domination. For these reasons popular supremacy—that is, popular constitutionalism in which the people’s contemporaneous and sustained participation in politics is the ultimate source of constitutional authority and arbiter of constitutional meaning—is as undesirable as judicial supremacy.

But I also hone the edge of the popular constitutionalist alternative, and argue that much of the popular constitutionalist literature is too sanguine or suffused with unwarranted optimism. In particular, too little attention has been paid to the prices that are paid—in inter-partisan comity, and in the shaping of constitutional doctrine—by shifting from a regime of judicial near-supremacy to one where the power to influence constitutional change is exerted at the popular level. These are prices worth paying—but they are prices nonetheless. The egalitarianism of the

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Corwin (1955) denotes as “higher law” those aspects of institutional design which focus on the structure and distribution of power rather than specific policies, placing the latter under the heading of “ordinary” law. Despite (or perhaps because of) its stark rigidity, the distinction has displayed considerable staying power in constitutional theory—Ackerman (2007), for example, has elaborated a systematic theoretical narrative about the shifting lawmaking tracks on which the constitution runs over time—even though, as I argue below, it is impossible to preserve a formal distinction between constitutional and ordinary law when so much of the former is actuated or given content by the latter.
popular constitutionalist proposal runs counter to the elite-oriented assumptions that inform many other constitutional theories. As I develop this theme, I will argue that popular constitutionalism does not lead to chaos or intractable conflict or the breakdown of political institutions, but it does mean that constitutional conflicts would be articulated and contested in non-legal contexts and institutions. Not only would this lead to a diminution of the Court’s salience in constitutional politics, but it would also mean the introduction of yet more contention into the political arena. Popular constitutionalism entails widespread and deep disagreement that cannot be avoided—but conflict is a reality that constitutional theory cannot avoid confronting. Conflict over values is an essential and ineradicable feature of any polity that aspires to collective self-rule (Berlin 2002, Crick 1962, Hampshire 2000). Constitutional theory, like democratic theory more generally, must “affirm the inescapability of conflict and the ineradicability of resistance to the political and moral projects of ordering subjects, institutions, and values” (Honig 1996, 258).

Such disagreement is a crucial aspect of the idea of popular constitutionalism, once that advocates of the theory should not gloss over. Constitutional politics turns on questions of principle, the sharing and division of power, and the rights of minorities against majority preferences (Whittington 2001b). Such questions are, of course, controversial and the subject of intense debate; and millions of Americans’ preferences over the issues at stake inform their political behavior. Popular constitutionalists insist—rightly, in my view—that these preferences have some role in shaping the development of constitutional politics, and that judicial review’s role should be lessened (because the interventions of the Court into politics are not themselves subject to political checks); but they do not often describe in detail how it would change the practice of politics itself. We must jettison the false belief “that judicial power is separate from and outside the realm of democratic politics” (Crowe 2012, 271). In the present moment judicial power and democratic power are tightly intertwined. An historically antecedent pattern of institutional evolution and divergent paths of possible decision-making has led to the present configuration of constitutional institutions in the U.S., whereby it is not only accepted but expected that constitutional change
be monitored and disciplined through judicial intervention. Finally, there is the matter of interpretation. To the extent that contestatory constitutionalism entails a position in interpretive debates in constitutional theory, its upshots are decidedly pluralistic. Constitutional interpretation *qua* judicial review should be informed by political developments. Although this view is shared by many observers of the Court, its implications and internal structure are not usually explored at any length. However, below I will explicitly argue that the texture of judicial review should be determined through political outcomes. The judicial nominations process should seek to identify potential justices’ judicial philosophies and then discriminate among them on the basis of the nominating political actors’ desired outcomes. Congress should be more vocal about its preferences over potential judicial review attempts to strict jurisdiction for candidates should be explicit about the kinds of judicial appointments they would like to make, and their proclivity or tendency toward nominating judges to the federal bench in a way that the average voter could have expected them to do is an appropriate axis for evaluating presidents’ accountability to the public. Political parties should be explicit about their preferences and policies for staffing the courts. Insofar as engaged constitutionalism has implications for judicial review, they are decidedly political in nature. I will describe how contestatory constitutionalism entails a variety of possible judicial reforms, including the principled use of ideological vetting in the nominations process, the possibility of judicial term limits, as well as various measures to enhance and improve interbranch dialogue between Congress, courts, and presidents.

There are thus prescriptive as well as critical contributions made by the dissertation. In my critical arguments I seek to hone the edge of the popular constitutionalist proposal: I show that it entails rather more difficulty—and rupture with past practices—than many of its propo-

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⁸The current constitutional regime occasionally yields the scenario, absurd to some observers and banal to others, in which judicial behavior that is consonant with prior regimes is condemned as anticonstitutional. In the aftermath of the Court’s decision in *Kelo v. New London* (545 U.S. 469), the reactions of elite observers and policy-makers were often intensely negative—despite the fact that the Court had not overturned a legislative decision but instead merely upheld existing precedent.

⁹See Bobbitt (1982) for a useful survey of the understanding of constitutional interpretation as a pluralistic concept, consisting of many “modalities” of interpretation.

¹⁰Friedman (2009) presents a narrative argument for the justices’ capacities to attend and respond to the dynamics of public opinion. I return to his argument below.
nents are willing to accept; it also entails a more nakedly partisan form of constitutional politics (Denvir 2001). More broadly, I argue that popular constitutionalism in the form of contestatory constitutionalism is the prescriptive approach that best recommends itself to skeptics of the democratic legitimacy of constitutions. Unlike other normative constitutional theories, popular constitutionalism provides should be more appealing to those who are skeptical of the democratic legitimacy of constitutions per se (Marmor 2007). In fact, popular constitutionalism—and contestatory constitutionalism in particular—offers theoretical resources and concrete proposals for how the hegemony of constitutionalism may be challenged. Although I do not go so far as to endorse the anticonstitutionalist proposal, I consider it a strength of my argument that it can speak to skeptics and proponents of constitutionalism alike.

1.2 The Problem Situation

Americans are accustomed to two very different narrative traditions about their constitutional inheritance. The first narrative is a story of wisdom and statecraft: the founding generation had the foresight and the political acumen to lay down constitutional arrangements which would curb quick or drastic political change, encourage deliberation and consensus, and protect certain politically vulnerable groups from domination. This is the story that is central to much of our political discourse about the nation’s history: to the educational mission of the National Constitution Center,¹² to the informational materials related to the tests required for immigrants to gain citizenship, and to the plot of the musical “1776,” to name only a few examples. The story is part founding myth, part comparative political analysis: it seeks to both justify and explain why American democracy is special: because it operates within and is constrained by a written document which was the product of extraordinary people acting in extraordinary circumstances. The corollary to the story is the that we would be unwise to gainsay or second-guess the sagacity of that document or its authors.

¹¹For background on the use of narrative in law, see generally Cover (1983) and Scheppele (1989).
The second tradition is one of change, transformation, and renewal. This is the story that is alluded to in Martin Luther King, Jr.’s “promissory note” metaphor in his speech in front of the Lincoln Memorial: that the Constitution sets out certain guarantees or promises, which must be fulfilled by subsequent generations, leaders, or communities (King, Jr. 1990). This tradition forms the backdrop for popular understandings of the civil rights movement of the 1960s and the dismantling of the Jim Crow regime; the expansion of the franchise, first to black men and then to women; the tendency toward greater compliance with the principle of “one person, one vote” in electoral law; and so on. Sometimes dismissed as “Whiggism,” other times praised as a form of “redemptive” politics, this second tradition is as firmly fixated on the Constitution as the first. Unlike William Lloyd Garrison, King did not dismiss the Constitution as an “agreement with hell.” Early twentieth-century suffragettes did not attack the Constitution; they sought to amend it, much like the supporters of the Equal Rights Amendment did two generations later. This tradition finds in the Constitution the warrant and justification for the extension of rights guarantees and for the administrative and redistributive functions of the modern state. Although this tradition is frequently associated with liberal or progressive currents in American politics, it has its place in broader contexts; and it is implicitly woven into much of the Supreme Court’s doctrine and the body of precedents that it has produced.

These two traditions, and the aspects that set them apart or draw parallels between them, have of course been the subject of extensive scholarly debate. I wish to focus here, however, on one theme which unites them: that “Americans believe [that] the Constitution embraces and requires morally correct outcomes on key issues. America is good; the Constitution is good; therefore, the

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¹³ Although Butterfield’s notion of a “Whig” interpretation of history was originally applied to nineteenth-century politics in the United Kingdom, the term, with its connotations of teleological or historical inevitability, has acquired some currency in contemporary U.S. constitutional theory (Butterfield 1965). Kersch, for example, describes as “Whig” constitutional theories those which conceive of constitutional development as a more-or-less straight path toward the greater fulfillment of constitutional rights guarantees, firmly established separations of powers, a more just and fair rule of law, and so on (Kersch 2004, 2–5).

¹⁴ In 1843, Garrison introduced a resolution before the Massachusetts Anti-Slavery Society stating “[t]hat the compact which exists between the North and the South [the Constitution, which protected slavery] is ‘a covenant with death and an agreement with hell’—involving both parties in atrocious criminality; and should be immediately annulled” (Merrill 1971, 205).
outcome of major constitutional cases should be good” (Powe 2002, 34).¹⁵ That is, within both of these traditions the Constitution is the source, or the stamp of authenticity, for claims about the appropriate arrangement of institutions, schedule of rights, or scope of public power in the polity. The first narrative emphasizes fidelity to the Constitution as we receive it from the past, and the second emphasizes the support that the Constitution lends to progress in the form of democratization, more equitable provision of rights, and so on. But most of the adherents of either tradition believe that the Constitution has answers. They may not agree on what the answer is, or how we find it, but the answer is there—and it will end the conversation. The Constitution is the supreme law of the land, and that’s that. There is thus relatively little constitutional theory in the U.S.—except for Constitutional theory. We don’t argue about about constitutional arrangements, powers, or guarantees; instead, we argue about what the Constitution has to say about such things.¹⁶

The assumption underlying this way of thinking is that interpretive fidelity to the Constitution, however we conceive of such fidelity, is the right standard for assessing claims about how political powers should be separated, which minority groups are worthy of protection against the depredations of the majority, and so on. Other standards—policy considerations, feasibility or resource constraints, or, of course, political theory—are of secondary importance. Of course, participants in constitutional debates often accuse one another of distorting constitutional meaning in order to secure the desired policy or institutional arrangement—and no doubt this is sometimes the case. But it should also not be doubted that those making constitutional arguments are also capable of sincerity in making their claims. People equipped with good will and the capacity for reasoning will inevitably arrive at disagreement over what the Constitution means, establishes, or requires.

¹⁵For a more nuanced take on the overlapping but distinct domains of the constitutional and the just, see Sager (1998).
¹⁶It is instructive, even if slightly tendentious, to note that “constitutional” theory precedes “Constitutional” theory by a few thousand years; political philosophers have been debating the merits of different ways of arranging the institutional, social, and economic aspects of political communities for a long time. In much of the political discourse of the contemporary U.S., however, such conversations take place almost exclusively with reference to the written Constitution, with the entailment that interpretive fidelity is the appropriate standard for assessing claims.
The appeal of this view of the Constitution’s authority—shared by both of the historical narratives I have described—is that the Constitution becomes a show-stopper. It’s not necessary to convince one’s opponent of the merits of one’s view from the perspective of policy-making or philosophy, so long as one has the Constitution on one’s side. And in many ways the Constitution—its text, language, and publicity—is a show-stopper. Teenagers can’t run for President; no state has successfully sent five Senators to the Capitol. Less trivially, the Constitution sets out a vision of a government whose powers are separated across institutions whose boundaries are, on the whole, clearly discernible. Even in more substantive, and arguably more ambiguous, cases the text of the Constitution can foreclose debate or render it moot. The Second Amendment prevents comprehensive firearm prohibition, and certainly makes matters difficult for those who favor more restrictive gun control measures (Levinson 1989). The First Amendment’s Establishment Clause, whether or not it erects a “wall of separation” between state and church, certainly prevents the federal government from assuming a confessional character, as many other republics established in Europe did in the nineteenth century (and some still do, albeit only formally, e.g. the United Kingdom). The Constitution has also been a show-stopper in the maintenance of contested policies; for example, it served to prevent any attempts at the abolition of slavery in the early republic, and it kept the country on the wagon during the thirteen years of Prohibition. This regard, if not in many others, the U.S. Constitution shares similarities with many other national constitutions, which often enshrine specific policies which face uncertain future support (Hirschl 2004, Elkins, Ginsburg, & Melton 2009). It’s not surprising, then, that the Constitution’s support is sought by so many; it is not unreasonable to think that, with the Constitution on one’s side, one’s preferred policy, ideology, or vision will succeed. You don’t have to convince your opponents of the merits of your view if you can convince them of the constitutionality of your view.

But not all the provisions of the Constitution are show-stoppers. And many of the parts of the Constitution that aren’t show-stopping are precisely those which are thought to bear upon salient or controverted political questions. The criminal procedure guarantees specified by the Fourth Amendment, or the vision of citizenship set out in the Fourteenth, are not specific and
tailored toward specific policy domains like other provisions. They invoke generalities and invite interpretation. This kind of interpretive freedom is already anticipated by certain approaches to theorizing about the Constitution, which emphasize that the language of much of the Constitution invites abstract reasoning (Eisgruber 2001) or “constructive interpretation” (Dworkin 1986). Eisgruber (2001) notes that many of the imperative statements in the language of the Constitution are senseless unless we understand them to be commands to apply abstract concepts and general principles to concrete problems and particular situations. Dworkin (1986) makes the similar point that the concepts (equality, due process, etc.) laid out in the Constitution must be interpreted, or rendered into particular conceptions, before they can be made efficacious in legal rules or doctrine. In a similar vein, Ely (1980) points out that an “interpretivist” view of constitutional elaboration quickly runs out of dispositive guidance for readers of the constitutional text when confronted with phrases like “privileges or immunities” or “cruel and unusual.” And if we think that the most important datum for the discernment of constitutional meaning is the text itself, we sometimes encounter difficulty when the text is unclear. If, for example, the text is vague, then we may well have to elaborate its meaning by other means in the absence of anything which will allows us to disambiguate its meaning.¹⁷

In the absence of show-stoppers, Americans have had to implement the Constitution while relying on political bargaining, principled argumentation, and institutional improvisation. They have, in the parlance of constitutional theory, constructed constitutional meaning in a variety areas. Constructions, on several influential accounts (Whittington 1999a, Barnett 2004, Solum 2008), are undertaken by actors operating in the circumstances of politics—meaning that political actors are articulating and negotiating the content and application of principles even as they attempt to enact preferred policies or establish institutions or rules they find congenial.¹⁸ Arguably, the impact of political constructions, in terms of changes in the features of government that ordi-

¹⁷The related problem of ambiguity in legal texts is one that can at least be partially settled through arguably more straightforward interpretive means. I will revisit the ambiguity/vagueness distinction below in Chapter 5, especially as it relates to theories of interpretation and construction, such as Solum’s “semantic originalism.” Endicott (2001) is an excellent guide to vagueness and ambiguity in the law in general.

¹⁸This does not mean, however, that constructions are “unprincipled” (cf. Whittington (1999a), ch. 1). They are, rather, analogous to “extra-judicial” interpretations of constitutional meaning, a topic I will return to below.
nary citizens interact with on a regular basis, has been more consequential than that of judicial interpretations. And constructions, it turns out, become necessary precisely where there are no constitutional show-stoppers: where the language is vague, ambiguous, or silent; and above all where it invites construction by political actors.

It’s not the case that the show-stopper model of constitutionalism is inappropriate; it’s simply insufficient. We need some means of figuring out what the non-show-stopper elements of the Constitution mean, and what impact they should have on our lives, our institutions, and our policies. The main choice here is between judicial supremacy, on the one hand, and alternatives to judicial supremacy, on the other. Opponents of judicial supremacy argue that our awareness of alternatives to it has atrophied (Kramer 2004, 227–253). In other periods of American history, popular sovereignty has found expression in contentious and mass-movement politics (Tushnet 2000). However, the practice of American constitutionalism in the latter half of the twentieth century has tended toward greater acceptance of judicial supremacy, or the idea that the exposition of constitutional meaning by the Supreme Court when it engages in constitutional rule is the most authoritative expression of constitutional meaning (e.g., Cooper v. Aaron, Boerne v. Flores).¹⁹ Judicial supremacy is not inevitable or foreordained, however. It is as much the outcome of politics as any other constitutional construction. As such it can also be retrenched or reformed through politics.

This is not simply a theoretical concern. The contemporary American polity is in most appearances textually untethered from the constitutional materials and understandings available to a hypothetical early-nineteenth-century observer. Citizenship is, to a far greater degree than it was in our observer’s time, a national and not a local phenomenon; the rights and perquisites of citizenship are also enjoyed—to varying but real degrees—by far more people than before. The fed-

¹⁹The conclusion that judicial review has its origins in Marbury v. Madison and was the product of Marshall’s efforts to give the federal courts (or at least the Supreme Court) some freedom of action vis-a-vis the political branches is difficult to sustain in light of new evidence and interpretations. It is not clear that Marshall sought the kind of judicial supremacy that attracts broad support today, and at any rate Marbury was not a major point of reference for the role of the judiciary for most of the Court’s history, in the way that it has been so constructed more recently in the twentieth century (Whittington & Rinderle 2012). Early developments in judicial independence were as much (if not more so) the product of political actors finding it expedient to have an independent judiciary as they were the results of an assertive federal bench (Whittington 1999a).
eral government shoulders responsibilities of greater number and scope than it once did. It trumps state policies and decisions in a variety of economic domains, pursues redistributive policies in the provision of a variety of public goods, and maintains the most powerful military in the world. If we are not to jettison our current constitutional arrangements because they do not comport with a rigidly textualist reading of the Constitution then we require some other explanation as to why we have them and why we should retain them. Our current constitutional regime is the (contingent, and not inevitable) outcome of past processes of political development, in which institutional actors, political elites, and mass movements have all played a part (Whittington 2007). Balkin notes that not all precedents are judicial precedents (Balkin 2011b, 3ff); as examples of non-judicial precedents he identifies “state-building constructions” of the twentieth century, like the Federal Reserve Act of 1913, the Social Security Act of 1935, the Administrative Procedure Act of 1946, the Civil Rights Act of 1964 or the Voting Rights Act of 1965, all of which have been constitutive steps in the creation and expansion of the modern administrative state.²¹ The creation and “stickiness” (Pierson 2004) of such acts of state-building have “create[d] durable expectations about what the Constitution means” (Balkin 2011b, 5) even though they are not themselves provisions in the main constitutional text.

It would hardly be the most parsimonious explanation of the available evidence to conclude simply that the current configuration of power, rights, and institutions in the U.S. is simply an accident, or an imposition of a tyrannical Court. Again, it is worth emphasizing that, to a very large extent, the Court’s power, however limited, exists insofar as political actors find it convenient or useful (Rosenberg 1991, Whittington 2007). Nor is it the case, I will argue, that it is possible for something like constitutional false consciousness to occur, at least with respect to the kinds of provisions that invite further elaboration or construction. The Constitution sets

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²⁰Although the federal government’s efforts at redistribution are mediated by the country’s federal structure, variegated in their scope and effect, and hardly equitable across class, racial, or geographic divides, they are nonetheless recognizably redistributive policies that are typical of the modern welfare state, and it seems unnecessary to argue otherwise. However, it should be noted that the “submerged” nature of such a welfare state can render it invisible to those it benefits and politically insecure as a result (Mettler 2011).

²¹Eskridge & Ferejohn (2010) use the term “super-statute” to refer to such “state-building constructions” specifically when they come in the form of federal statutes which, they argue, have the Prudential and policy-entrenching power of constitutional provisions.
out a design which constrains future governments through separated powers and specific jur-
risdictions or spheres of application for those powers; but it so for the sake of democratic self-
government (Holmes 1995), and current and future generations must supply the content for those
provisions which identify the principles and concepts we consider important to self-government
(Michelman 1998, Eisgruber 2001); a return to an allegedly truer understanding of the Constitu-
tion’s meaning that nevertheless ran afoul of contemporary constitutional expectations would
frustrate rather than promote self-government. The positive theory that I articulate sketches out
how and why we supply content to those portions of the Constitution that invite and require
construction.

1.3 Contestatory Constitutional Politics

The most appropriate and attractive approach for the theoretical task identified in chapter 2 is
what I will call “contestatory constitutionalism.” Contestatory constitutionalism consists of the
elaboration of constitutional meaning through participatory and deliberative political action. The
outcomes produced by such action are contingent and the products of politics—and thus the prod-
ucts of the articulation and counter-articulation of rhetoric and ideological claims, the mobiliza-
tion of supporters, engagement with institutions and the aggregation of votes. Contestatory con-
stitutionalism is a prescriptive theory of constitutional politics in that it advocates for the explicit
pursuit of constitutional constructions through “traditional” politics, but as a corollary it is also
an aspirational theory of constitutional politics insofar as such engagement does not already take
place. Additionally, contestatory constitutionalism is a justificatory theory of constitutional pol-
itics insofar as it can help us to understand the relevance or impact of patterns of construction
and contestation that have contributed to the constitutional system that obtains in the U.S. today.
Finally, contestatory constitutionalism is not simply a political undertaking but also an ethical
one. It depends upon modes of communication, interaction, and relationships which do not come
easily in our current social context.
Contestatory constitutionalism, however, has a variety of features which make it distinct from the other conceptions I have surveyed. It some other conceptions it is republican:²² it functions only insofar as each of us take ourselves to be committed to exchanging reasons and participating fairly in political debates and competitions. Unlike others it is contestatory: it explicitly recognizes the potential for winners and losers in constitutional politics, and the likelihood that non-ideal outcomes will obtain. It is also not (merely) deliberative: it acknowledges the predominance of parties, the technical and affective usefulness of organization around ideological concerns, and the important role of electoral politics in securing the legitimacy of political processes and institutions. It is departmentalist: it recognizes the capacity of political institutions, particularly Congress and the president, to serve as focal points and forums for constitutional claims and counterclaims.

The positive argument for contestatory constitutionalism is that popular elaboration of constitutional meaning can serve to secure legitimacy for the currently prevailing constitutional order (in any given epoch), and to affirm that popular sovereignty is an animating principle in American democracy.²³ Such popular elaboration would be an extension of the kinds of ongoing and informal constructions of constitutional meaning that have already significantly affected constitutional development (e.g., the kinds of constructions described and noted above). The argument of chapters 3 (which makes a normative argument for the desirability of contestatory constitutionalism) and 4 (which extends chapter 3’s argument into a consideration of possible institutional reforms) can be summarized as follows: First, popular elaboration is possible. We have ample evidence—and sufficient theoretical justification—for the claim that constitutional

²²I use the term in the most capacious sense possible; as Patten (1996) notes, in their practical upshots republican and liberal (i.e., post–A Theory of Justice) normative political theories are very similar, and an attempt to establish a sharp divide between them may will likely turn up only minor differences At any rate the republican (as I have put it) aspects of the kind of popular constitutionalism I am describing do not seem to be importantly different from, for example, the requirements that Rawls imposes on a constitutional democracy—that citizens acting under a criterion of reciprocity should exchange public reasons in order to secure the legitimacy of their political institutions and the laws they enact and enforce (Rawls 1996, 137ff).

²³Just how far popular sovereignty actually is instantiated in American politics is a debatable proposition. A extensive tradition in American political thought makes the case that it is not inherently contradictory or problematic that mass participation in self-government should consist largely in the selection of elites—see, e.g., Schattschneider (1975).
meaning can be articulated through political activity and not only through legal interpretation. There are numerous examples from American historical experience (Kramer 2004) as well as that of other countries (Schwartzberg 2007, Tushnet 2008) of the possibility for democratic politics to yield substantive constitutional change, and for competing constitutional visions to be articulated and then adopted, revised, or discarded. (Kramer [2004] notes that this was something of a standard practice in the earlier history of the republic.) Contemporary politics also provides examples of contestation over foundational principles and different visions of structuring the polity. We should not assume at the outset that there is no possibility or hope for a democratic politics of popular engagement with constitutional questions.

Second, popular elaboration is desirable from the perspective of democratic political thought. Unlike judicial elaboration of constitutional meaning, it is more enduring and it conduces to greater public support for constitutional structures and institutions. Judicial interventions into constitutional politics, even when they are the interposition of “friendly hands” (Whittington 2005) into the political arena in order to resolve a deadlock or assist partners in a national coalition (Graber 1993), can also serve to galvanize opposition to the newly enacted policy and are less likely to command a general level of acceptance. Judicially-spearheaded constitutional change faces greater barriers to legitimation and implementation than do political forms of constitutional change, which require deliberation, debate, and mobilization, and which are likelier to reach larger portions of the public and involve the engagement of more citizens. Concomitantly, the level of support enjoyed by constitutional changes pursued through political means is likely to be higher. These considerations are especially relevant in cases marked by the absence of provisions or amendments which ratify informal constitutional changes which have already taken place. As Strauss (2001) notes, the predominant function of constitutional amendments in the past century has not been to accelerate pace of social change or to strike new ground for constitutional rights guarantees, but rather to “ratify” (that is, to endorse, recognize, or unify across the states) changes which have largely already taken hold at the state level or as a matter of practice or convention. Contestatory constitutionalism’s emphasis on public and explicit constitutional engagement can
provide a more prominent position for such changes in our political discourse.

Relatedly, contestatory constitutionalism contributes to the public articulation and understanding of the “constitutional essentials” (to use Rawls’s term) that underpin the contemporary constitutional settlement. This is important because the “durable expectations about what the Constitution means” (Balkin 2011, 5) that have attached to the prominent features of the contemporary constitutional order must carry weight in constitutional interpretation. Our constitutional essentials in 2012 cannot easily be said to not include the expectation that women enjoy the same rights of citizenship that men do; or that the federal government cannot enact regulations to protect the environment, ensure workplace safety, or prevent discrimination in the labor or housing markets; or that political expression should not enjoy the most stringent protections against censorship, restraint, or interference; to name only a few examples of constitutional changes which are not reflected in, or necessarily entailed interpretations of, any given constitutional provisions. Even “faint-hearted originalists” such as Justice Antonin Scalia concede as much; but it is not the case that these developments have come about and endured simply because of the juridical say-so of the Supreme Court. Such changes would not have occurred in the absence of the political engagement and mobilization that were integral parts of, for example, the women’s suffrage movement, the civil rights and labor rights movements of the 1930s through the 1960s, or the engagement of individuals and groups of citizens in politically contentious activities throughout the twentieth century. Politics can be and frequently is the antecedent to transformative or cumulative constitutional change.

Accordingly, the institutional reforms and fixes that I propose for the purpose of encouraging or enabling contestatory constitutionalism are focused on promoting and recognizing the kinds of political contestation which have led to constitutional change in the past; they also identify possible new avenues for pursuing constitutional change through politics. (It is worth noting here that a variety of political actors have adopted political strategies which supplement or replace their legal strategies; movements which have typically focused more on the courts have begun to pursue more diversified strategies instead. The movement for same-sex marriage equality, for
example, has by and large turned to a federal rather than a national approach, pursing legal change in some states and legislative change in others.)

Any constitutional theory must deal directly and at length with judicial review, and the theory I advance is no exception. Contestatory constitutionalism is not antipathetic to judicial review, and it can be seen as an adjunct to judicial review rather than a wholesale rejection of judicial supremacy. It recommends certain institutional reforms, but not others; and it is emphatically not a call for the extreme rejection of judicial supremacy (such as jurisdiction-stripping or impeachment of unpopular justices); nor does it entail a rejection of merit selection for judges. Contestatory constitutionalism is not anti-judicial; rather, it places greater priority upon the political articulation of judicial and legal preferences. The contestatory constitutional approach to judicial nomination hearings is to prefer that ideological and political preferences on the part of nominated justices and judges be emphasized rather than downplayed, and that judges/justices understand themselves to have been advanced to the bench in order to enact a particular judicial philosophy. Other judicial reforms such as judicial term limits are also considered. Finally, I will focus upon identifying the rules of recognition under which we may establish the validity or invalidity of particular constitutional constructions or developments.

Although I draw upon the lessons of various developmentalist scholars in order to illuminate my theoretical argument for how political action can legitimately produce constitutional change, I do not aim to vindicate a particular narrative of “how we have gotten to where we are.” Such a question can only be addressed through the kind of political engagement I endorse below. It may well be the case that a constitutional politics that more closely hews to the approach of engaged constitutionalism will sometimes yield results for constitutional meaning that are worse, in terms of political morality, than the jurisprudential or political conventions that currently obtain. We should not shy away from endorsing engaged constitutionalism on such grounds, however. A political constitution which is the product of political engagement should be preferred to a constitution which is unmoored from our institutions, discourse, and practices. In a constitutional democracy, it is at least as important that the laws be legitimate as it is that they are the best pos-
sible laws; “there are more goods than epistemic goods” (Swift 2011, 201), such as legitimacy, fair opportunities for contesting controverted decisions, and a basic respect for the equal standing of all citizens.

1.4 Contextualizing the Dissertation

Above and beyond the dissertation’s immediate goal—to articulate and defend a politically practicable conception of popular constitutionalism—it is also intended as a contribution to the assessment of American political development. This dissertation is an exercise in theory—constitutional and democratic—rather than in history. As such, my method is more dialectical than empirical. That is, I take myself to be guided and instructed by the findings of historical, institutional, and behavioral scholarship on the Supreme Court and American politics; but I am concerned primarily with interpreting their findings rather than contributing to them. The bulk of this dissertation consists of the articulation of claims and the presentation of normative arguments. As such I make no pretense of presenting a comprehensive or in-depth exploration of constitutional law or doctrine. Like other scholarly disciplines, the study of courts and their relationship to democracy benefits from a division of intellectual labor, and it would be unwise (in addition to being impractical) for me to attempt to recount, for example, a comprehensive history of American constitutional development while simultaneously making an argument for the people’s prerogative to control the course of constitutional development. The reader should be forewarned that no grand unified constitutional theory will be found within these pages.

Furthermore, the dissertation occupies a kind of intermediate space between such grand theories and the more practical concerns that animate studies of specific doctrines or cases. My argument is neither a full-blown grounding of constitutional democracy (a subject treated exhaustively by many other authors) nor is it advocacy scholarship. It is not a brief for how the Constitution should be read. It is, instead, a plea for allowing the people—a diverse and varied social configuration, frequently at odds with itself and riven by cleavages of class disparity, reli-
gious disagreement and ideological friction—to read the Constitution. The dissertation is also not meant to be an interpretation of American constitutional history as a whole, or, needless to say, the history of constitutionalism in general. I do rely on illustrative examples in order to motivate certain claims as I advance my argument, but the introduction of such examples is of course partial and incomplete. My use of such examples is only meant to problematize certain narratives about American constitutional development. The use of cherry-picked historical examples to support a particular view (coupled with ignoring countervailing examples) is an irresponsible practice in political theory and one that I have sought to avoid.

I also assume that an understanding of the American constitutional system is best arrived at through the use of thick description. Following Max Weber (who uses the term *verstehen*) and Clifford Geertz, I assume that the activity of thick description—an understanding of a social system’s assumptions, values, and internal explanations—is an essential part of elaborating theoretical explanations of evaluations of institutions, societies, or polities. (Thick description may in this sense be compared with the “internal” perspective adopted by Hart’s subject of a municipal legal system, although Hart does not elaborate the underpinnings of the internal perspective in any great detail—it may, or may not, depend in large part on experience, unconscious assumptions, and the social construction of “common sense” in a way similar to thick description or *verstehen*.) A strictly formal approach—such as the kind that philosophers of law might adopt when making distinctions between different concepts in the study of law or jurisprudence—is not appropriate to describing or understanding the American constitutional system. Such a task must be informed by historical understanding and an appreciation of nuance and vagueness, in order to reproduce the texture of American constitutional practice with sufficient fidelity. As such, although I will be introducing and arguing for certain concepts and distinctions—such as constitutional construction and constitutional interpretation, or the concept of political contestation—I do not pretend to be offering a philosophical account of such concepts that will yield interesting insights from the perspective of conceptual analysis. It will be adequate simply to explain certain features of political practice in the contemporary U.S. and to argue for particular approaches to them within
practical politics. The reader who cultivates a sense of *verstehen* about constitutionalism in the U.S. may find reading this dissertation to be a profitable experience, but the student of philosophy of law may not.

Finally, I do not conceal my preferences. This is not to say that the dissertation is a polemic on behalf of my preferred policy outcomes or ideological commitments; political theory should amount to something other than straightforward political advocacy (especially if that advocacy takes place, uncritically, within the given contours of political discourse and institutions). However, in presenting normative arguments in political science, the contrivance of “objectivity” through the masking of one’s priors will just as easily lead to obfuscation rather than clarity. Such an approach

has nothing whatsoever to do with scientific “objectivity.” *Scientifically the “middle course” is not truer even by a hair’s breadth,* than the most extreme party ideals of the right or left (Weber 1949, 57, emphasis in original).

I hope to have avoided putting my thumbs on the scales of my argument; ultimately it is the reader who will have to decide whether I succeeded.

Popular constitutionalism is not the only game in town when it comes to constitutional theorizing that seeks to explain the political and informal changes to our constitutional order. What distinguishes contestatory constitutionalism and other forms of popular constitutionalism from competitor theories is their stance on an important cleavage: between theories which emphasize the fixity of constitutional rules, and those which emphasize the fluidity of legal rules. Most forms of popular constitutionalism and some forms of developmentalism place greater emphasis on the fluidity of rules, while some forms of living constitutionalism and most forms of originalism and textualism emphasize the fixity of rules. I distinguish three major theories from my own: Whittington’s originalism of original public meaning; Solum’s “semantic originalism,” and Balkin’s “living originalism.” *Pace* each of these theories, respectively, I argue that the construction/interpretation distinction cannot always demarcate between the implementation and the discernment of constitutional meaning; that the fixation of meaning and rules is of less importance,
from the perspective of democratic politics, than the mutability of rules; and that constructions of constitutional meaning that occur outside the courts do not have entirely stable meanings, such that they will always be open to future contestation. Other objections—for example, that contestatory constitutionalism threatens the rule of law, or that it places an unwarranted faith in Americans’ abilities to articulate, understand, or mobilize on behalf of complicated political claims—are addressed as well.
Chapter 2

Constitutional Development

2.1 Overview

In this chapter I describe, through the analytical frames of a variety of literatures, two important aspects of contemporary political practice. First, the constitutional dynamics of the present regime may be characterized as stuck in a gridlock pattern. The steep procedural obstacles that Article V places before amendment discourage efforts at formal change to the Constitution. The slow accretion of institutional changes, laid down over previous iterations of change and development¹ provides something of a pressure release valve for efforts at constitutional change. However, such changes are often not explicitly recognized as such, and while they may frequently operate as constraining or enabling factors on political activity—much like constitutional provisions—they receive insufficient attention, even from the political actors directly affected by them. Second, judicial review at the Supreme Court has emerged as the primary motor of constitutional change, a state of affairs which ought to please no one very well. Judicial review lacks the supermajoritarian features which proponents of change through amendment emphasize in Article V, and it lacks the connection to political institutions that is inherent in the construction of constitutional meaning through political activity. The next chapter builds on this one to argue for the people’s ability to effect constitutional change through political institutions. The ability of a citizen body

to change its own constitution is a desideratum of democratic legitimacy, and I make the case that Americans should construct and reconstruct the meaning of their Constitution through politics.

This chapter performs two main tasks. First, I survey the literatures on constitutional change and development in American political history. This survey serves to illustrate the constitutional order’s increasing tendency to resist attempts at formal change, as well as to show that judicial review has emerged as the dominant mode for pursuing constitutional change. This first, descriptive segment motivates the second, which is theoretical and critical. I make the case that normative constitutional theory should not ignore the reality of a constructed, elaborated constitution that changes outside of the courts or the amendment process. I thus set the stage for the dissertation’s main argument: that constitutional change may and in fact should be pursued through political means, and not simply juridical means. To fully motivate and explore the background for this claim, it will be necessary to take a step backwards and re-trace some recent steps in constitutional scholarship.

I therefore provide an overview of the developments in the study of constitutional change that have taken place in recent scholarship and their effects upon constitutional theory. First among these developments is the idea of constitutional construction—the shaping and implementation of constitutional provisions in the political arena. The practical inevitability of construction, coupled with its contested status in politics, has cast doubt upon the sufficiency of theories of judicial interpretation to provide adequate accounts of constitutional meaning. The second important development is the growing recognition of the interpenetration of constitutional law and national politics. Political actors pursue constitutional constructions for practical, short-term purposes as much as for (if not more so) long-term visions of institutional design; conversely, judicial decision-makers are animated by particular philosophies and perspectives that have political elements to them. There are close affinities between political theory and constitutional theory that should be explored by constitutional theorists. Third, the burgeoning field of empirical legal studies has yielded extensive evidence for and sophisticated theories about the effects of judicial actors’ ideological orientations upon their decision-making and about the relationships between
judicial and political institutions. The explosive growth of findings, models, and systematically accumulated observations in empirical legal studies cannot be ignored by constitutional theory. Even normative theory benefits from being empirically grounded; and insofar as normative constitutional theory yields recommendations for institutional design or for the proper functioning of institutions, the benefits of an improved stock of empirical knowledge are obvious. Fourth, I describe the ways in which our perspective on constitutional change is enhanced by certain approaches to institutional change, such as the new historical institutionalism as well as the approaches to constitutional theory falling under the heading of developmentalism.

The second part of the chapter pursues the task of identifying and diagnosing the sites of normative concern in this state of affairs. I criticize the tendency in constitutional theory to pursue elaborate or universal frameworks through which to understand the whole sweep of constitutional development. I take particular aim at the theories of Ronald Dworkin and Bruce Ackerman. While both theorists have important contributions to make when it comes to understanding the scope and limits of textual meaning, their accounts of constitutional change and constitutional interpretation are too ambitious and ultimately fail to offer practical guidance in constitutional politics. This sets the stage for the next chapter, in which I present my argument for how the people’s constituent power\(^2\)—their capacity to create constitutional forms through collective action—can become the force behind non-formal constitutional change.\(^3\)

### 2.2 Constitutional Elaboration Outside Article V

#### 2.2.1 Constitutional Construction

Constitutional provisions do not enact themselves. They must instead be given shape and form in the political world through specific acts of policy- and decision-making by political actors and

\(^2\)“In each of its parts a constitution is not the work of a constituted power but a constituent power” (Sieyès [1789] 2003, 136).

\(^3\)For a general discussion on the concept of constituent power, see Neil Walker’s discussion of its core tensions and possibilities (Walker 2007, 247–250).
institutions. These constitutional constructions are the ways in which the generalities of constitutional provisions are translated into specific patterns of practices, values, or institutions in the social world. Constructions are not amendments that fundamentally change the Constitution; they are instead the evidence of the Constitution’s presence in politics. The concept of constitutional construction—together with the argument bruited by some that there is a fundamental distinction between construction, on the one hand, and interpretation, on the other—is extremely consequential for constitutional theory. The reality of constitutional constructions is a core assumption of the dissertation. It is important that the reader has an adequate understanding of construction and interpretation before reading the remaining chapters of the dissertation. The distinction between interpretation and construction is still a powerful analytic tool, and will in fact form an important part of my argument below. It will thus be necessary to map out the conceptual structure of the distinction between constitutional construction and constitutional interpretation.

Generally speaking, when constitutional theorists invoke a distinction between construction and interpretation it may be safely assumed that they agree on the following theses regarding constitutional meaning: constitutional meaning is not indeterminate; however, it is sometimes underdetermined. The distinction between construction and interpretation is at bottom motivated by these propositions. The first proposition states that it is not an error to say “the Constitution means such-and-such.” We could perhaps characterize it as an epistemological claim: constitutional meaning is, potentially at least, a kind of attainable knowledge. Alternatively, we might say that the semantic content of constitutional provisions is *prima facie* accessible to readers’ comprehension. Some—notably, members of the Critical Legal Studies (CLS) movement—have averred that, within the law, no such knowledge is possible and that claims to such knowledge always mask attempts to advance ideological preferences. However, merely because constitu-

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4 It should be noted that the terms “construction” and “interpretation” are used differently by different authors. They have multiple nonexclusive meanings in the relevant technical literatures. They are also legal terms of art, with specific, technical applications in some contexts and quite different applications in others.

5 See generally Tushnet (1991). Even if all legal discourse is not, in fact, an ideological smokescreen, the standard CLS claim is that constructing constitutional theories purporting to offering interpretive guidance is a mug’s game: “Critique is all there is” (Tushnet 1988, 318).
tional meaning is not indeterminate is no reason to think that it is fully determinate. Plenty of the provisions of the written Constitution are vague, ambiguous, archaic, oddly worded, and so on. The second proposition is an acknowledgment that in such instances, the meaning of the constitution is underdetermined. We may have general, incomplete, or probabilistic knowledge of what the Constitution means, but it is silent or unclear about precisely what is required or permitted. In particular, it can be silent in “hard” cases.

The construction-interpretation distinction is motivated by the recognition of constitutional (under-)determinacy. Construction and interpretation are the two modalities of what Whittington (1999a) calls “constitutional elaboration”—the search for, and articulation of, constitutional meaning, within an established constitutional order. Because elaboration sometimes confronts more-or-less determinate content, and sometimes confronts underdetermined constitutional content, it will have to approach different kinds of content differently. For advocates of a strict demarcation between law and politics, the solution is to divide elaboration into subcategories—construction and interpretation. The subcategories themselves are the subject of competing definitions. Whittington distinguishes construction from interpretation by characterizing it as an additional modality of elaboration, one that “supplements other methods of determining constitutional meaning.” This “provide[s] for an element of creativity in construing constitutional meaning,” but only within the interstices resulting from textual vagueness or incompleteness. Constructions give “practical meaning” to the constitution by “resolv[ing] textual indeterminacies” (Whittington 1999a, 3, 5, 8, 9). Barnett argues that since construction is a supplementary interpretive method, it is not, as Whittington describes it, “‘political.’” Instead, it is a corollary to interpretation, a kind of discretionary gap-filling that is bounded less by political and historical factors than by anterior norms of legitimacy—which he argues are furnished by natural law (Barnett 2004, 118–130, esp. 125–128). Solum offers less guidance on the normative boundaries of construction. Instead, he argues that construction is a “supplementation of the constitutional text” in cases of missing or incomplete meaning: “interpretation gleans meaning whereas construction resolves vagueness” (Solum 2008, 68, 67). This is perhaps the most parsimonious defi-
nition of construction: when there’s no more meaning to be interpreted, further content must be constructed. “Constitutional construction begins when the meaning discovered by constitutional interpretation runs out” (Solum 2008, 69).⁶

At this point it would appropriate to consider specific examples of interpretation and construction in actual constitutional practice. The paradigm case of constitutional interpretation is judicial review, as it is practiced by the Supreme Court in constitutional cases. The Court interprets the Constitution in such cases in order to know how it should rule with respect to individual disputes and facts. Here, “interpret” stands for discovering, explaining, or understanding meaning. Simplifying quite a bit, the Court interprets the Constitution in order to know and explain what it means; that meaning is taken to be dispositive in constitutional decision-making. There are similarities between this kind of interpretation and other instances of interpretation. In the appreciation of literature, the interpretation of poetry seeks to discover and understand the meaning of imagery, allusion, and metaphor in poems. In diplomacy and tourism, interpreters are those who translate speech in one language into speech in another language. In contract law, the interpretation of contracts seeks to explain what is required of the parties to a contract and how disputes are to be resolved.

Despite the similarities, constitutional interpretation is not, for example, the same kind of interpretation found in contract law. What distinguishes literary interpretation from the interpretation of contracts, or either from inter-lingual interpretation, are questions of “who,” “what,” and “how”—that is, who may interpret, what is the thing to be interpreted, or how should such interpretation proceed? Constitutional interpretation has its own distinctive set of answers to such questions (Murphy 1986). Although the Constitution is not itself a contract, it is easy to see why such an analogical claim has been made so often. Both constitutions and contracts are formal documents that contain commands and stipulations. Furthermore, both are frequently thought to require the active engagement of some duly empowered official or institution for their com-

⁶Solum is more interested in hermeneutical method than evaluative categories, and devotes less space to building a specific framework of standards or boundaries into his conception of construction, and more space to mapping the limits of valid interpretation.
mands to take effect. However, constitutions, unlike contracts, are not bilateral agreements between nominally equal parties, cannot be enforced by third parties, and, being the products of political bargaining, address public rather than private purposes (Hardin 1999).

Similarly, constitutional construction has a superficial resemblance to statutory construction. They both consist in part in the elaboration of underdetermined, ambiguous, or otherwise vague documentary materials. However, statutory construction is more settled and better understood, both as an informal convention and as a formal doctrinal tool. Statutory construction is largely a judicial phenomenon. “Canons of construction” direct courts (or administrative agencies, or other enforcing bodies) on how they should elaborate the requirements of statutes with respect to novel, unexpected, or unclear cases. Such canons have come to command broad acceptance from legal specialists and professionals over the course of their elaboration in the common law, regulatory and administrative law, and other venues of dispute under public law. Most lawyers and judges would agree that statutory construction is a valid, recognizable component of the legal system, even if its precise form, application, or scope is contested or vague. In this bare sense, at least, statutory construction has a minimum level of formality, predictability, and recognizability.

Constitutional construction, however, is not as formal. There exists no settled body of doctrine regarding constitutional construction which is accepted, in its broad contours, by a preponderance of the relevant participants. Different institutions, and different actors or groups of actors, claim authority to construct constitutional meaning; it is by no means predictable when—or in reference to what part of the constitution—they will invoke such authority. It is true that such invocations are made frequently when the prestige or powers of different institutions are at stake (Vermeule & Posner 2008), but interbranch conflict is less formal and often much messier than a legal dispute between a state and the Environmental Protection Agency. In the latter kind of scenario, the disputants agree to the validity of a formal, decisive, and external conflict resolution stem—a complex of legal institutions, actors, and doctrine. Regardless of any complaints about the legitimacy or efficacy of that complex, the relevant actors can recognize it and the processes of statutory construction that occur within it. And there’s the rub: statutory construction, when
it occurs, is formalized, institutionalized, and has a specified domain (that is, it doesn’t just go on forever in time, or occur within any particular institution). Constitutional construction, however, isn’t necessarily any of those things.

Why not? The answer is that attempted constitutional constructions are endogenous to the political system they affect or purport to affect. The consequence of success in statutory construction is that a common understanding of statutory meaning has somehow been affected; this does not affect—at least not directly—the rules of the game for statutory construction itself. Constitutional construction, however, is a tool of constitutional elaboration, and is deeply embedded in that practice. Successful constitutional constructions not only affect constitutional meaning but also the practice of construction itself. In other words, an important difference between statutory and constitutional construction is the difference between their conditions for success. A statutory construction can be said to succeed or not if it achieves doctrinal stability or becomes a precedent. But because constitutional construction has no corresponding complex of institutions and enforcement mechanisms, the only test for ascertaining whether a construction is accepted by all of the relevant actors is sustained observation over time. More precisely it is political success—the success of some actor or actors in entrenching, institutionalizing, or otherwise gaining recognition for a novel elaboration of constitutional meaning—that makes or breaks constitutional constructions. Consequently, successful constitutional constructions change the rules of the game in fundamental ways. Because they can potentially change the structure of the constitution, they can define, close off, and create opportunities for future constructions. The same might be said of statutory construction—the pileup of precedent can have similar path-dependent properties—but its effects are more limited in domain and scope. Constitutional constructions can succeed simply if enough of the relevant actors start playing by different rules—until those new rules themselves become the rules of the game.

At this point, a possible threshold objection regarding the distinction arises. Absent any consideration of various theories of the construction-interpretation distinction, the preceding paragraphs seem to suggest that we lack clear, uncontested definitions of constitutional interpretation
and construction. Suppose that’s the case; does that mean that the distinction between construction and interpretation lacks any pretheoretical motivation, or that it is hopelessly murky or unclear? Not necessarily. A distinction does not become useless or baseless simply because its constituent concepts are vague or ambiguous. We have no difficulty in discerning that a completely bald man is in some way distinguishable from a very hairy man even if we lack a consensus definition for the point at which hair loss conduces to baldness.⁷ The lack of such a definition might arise because we are mistaken that it is possible for the purported concepts of baldness and hairiness to be coherent, or because the terms ‘bald’ and ‘hairy’ are in some way inadequate descriptions of the objects that they are applied to (they are “supervaluations”), or because the objects those terms attach to are vague themselves (Sainsbury 2009, 49–56, 63–66). Our language and common experience suggest that the first possibility is unlikely. It seems reasonable to suggest that “bald” and “hairy” are supervaluations that can meaningfully be distinguished from each other, both in theory and in typical or normal empirical circumstances. It is similarly helpful to think of the terms “construction” and “interpretation” as being “supervaluations.” Although the distinction may lack rigid stability and clarity, it is still the case that we can distinguish between construction and interpretation tout court, at least in their ideal or prototypical cases.

The idea of constitutional construction is further inspired in part by the recognition that much of the language in the constitutive texts in American constitutionalism—the Constitution, landmark precedents in constitutional caselaw, and “super-statutes” (Eskridge & Ferejohn 2010)—is under-determinate. The term “under-determinacy” is deliberately chosen, since it does not carry the same connotations of “incoherence” or “meaninglessness” that a term like “indeterminate” does. (Questions of the relative determinacy of language quickly descend into issues of the philosophy of language and ever-sharpening semantic distinctions which do not need to be explored here.) It is sufficient to note the that phrases like “Congress shall make no law...” in the First Amendment, or “full faith and credit” in Article IV, are not fully determinate. Simply reading

⁷Sainsbury provides a useful survey of vagueness in conceptual distinctions (Sainsbury 2009, 40–68).
⁸Solum (1987) offers a useful introduction both to the debate about constitutional under-determinacy and advances the view that under-determinacy does not undermine the semantic integrity of the Constitution (Solum 1987).
those phrases and understanding the ordinary language meaning of those sentences is not sufficient to know what kind of legal rules they entail or how those rules should be enforced. Unlike dispositive and determinate language found in the Constitution’s specific descriptions of eligibility for federal offices, in- or under-determinate language is highly conceptually-laden. The semantic content of “full faith and credit,” for example, taken simply as an utterance, is impenetrable except through a prior understanding of what the concepts of faith and credit might be (and perhaps also an understanding of the contested status or content of those concepts). It should be clear, then, that under-determinacy does not mean “meaningless.” Contrary to some of the claims of the Legal Realists or the Critical Legal Studies movement, indeterminacy is a problem to be solved rather than an obstacle to understanding (Solum 1987). Unclear constitutional language may be constructed—given meaning, and distinctive legal or institutional form—by political actors. Such actors have various motivations and intentions in pursuing construction, of course; and different conceptions of construction specify under what conditions it is appropriate to construct the meaning of the Constitution.

The idea of constitutional construction is closely related to the idea of constitutional interpretation, or the identification of the political or legal disposition of a text through the semantic extraction of its meaning. Importantly, the argument that construction and interpretation stand together in an important duality or opposition—the “construction-interpretation distinction”—that informs “New Originalist” theories of judicial review. On this rendering, constitutional construction does and should occur when interpretation is not possible, because of ambiguities, vagueness, or some other lack of clarity in the text. At that point, the full elaboration of the Constitution is only possible through construction, when appropriately pursued by political actors. Where the semantic content of the Constitution cannot be reasonably controverted, however, then interpretation is required, and should be pursued by the relevant interpreter (identified by New Originalism as a judiciary which operates pursuant to the rules of originalist interpretation). By demarcating constitutional elaboration into these two different activities—construction and interpretation—New Originalist theories seek to achieve a democratic justification of judicial review. If judicial
interference in the political sphere can be cabined into a clearly-delimited domain, then the practice of judicial review is democratically benign or even beneficial in that it maintains the people’s previously articulated commitments in constitutional law.

While this is not a dissertation on the appropriate hermeneutic method to employ when interpreting the Constitution, I do want to argue that the idea of constitutional construction is one which should be embraced by constitutional theory more generally. It is an important advancement in the study of constitutional change, and in particular ought to improve the theoretical underpinnings of the accounts of constitutional change in those accounts of constitutional change that ascribe the people’s constituent power to the shifts in constitutional meaning and constitutional powers across major historical transformations (Griffin 2007, Friedman 2009, Strauss 2001). Insofar as these accounts argue that changes outside of the formal amendment process are still constitutionally valid and hence democratically legitimate, some explanation of how those changes can be acceptably pursued is required. Constitutional construction should form a part of that explanation.

The theoretical significance of constitutional constructions is found in their inevitability. Any constitutional arrangement of institutions will require the regular elucidation of interstitial or unclear meanings. Any constitutional distribution of powers will require that particular officials make decisions about how to implement it. Any constitutional specification of rights requires the active institutional enforcement of those rights, and even if that enforcement is directed by courts (as in Brown v. Board, for example), decisions about implementation, staffing, resource allocation, and other nontrivial factors are left to political officials. All told, as the Constitution makes itself felt in the social world, it inevitably takes on political dimensions.

As I will argue in the next chapter, popular constitutional movements are frequently and appropriately directed at constitutional construction. Popular participation in constitutional politics is not necessarily focused on the Supreme Court. Landmark cases can attract national attention, and hearings on the confirmation of nominees to the Court make for good television. But sustained mass action in constitutional politics is more likely to focus on foundational matters:
constitutional essentials, constitutive commitments, or the basic arrangement and posture of constitutional institutions. In such cases, the idea of constitutional constructions is very important. It furnishes us with an analytical toolkit with which to understand constitutional change outside of the courts, which is the ultimate concern of popular constitutionalism.

2.2.2 The Interpenetration of Law and Politics

As the discussion of constitutional construction suggests, the Constitution cannot be understood simply in legal terms, nor is it simply a legal document. We have seen that its provisions must frequently be constructed through political action. Additionally, the Constitution does not address itself only or primarily to the Supreme Court: it purports to be universal law within the jurisdiction of American sovereignty, and expressly empowers a variety of institutions and offices to give its provisions, requirements, and grants force and efficacy in the social world. Unlike the classical constitutions that came before it, the constitutional order in the U.S. was (partially and incompletely) codified and formalized through the act of writing a Constitution. That act was consequential in that it opened the door to the “legalization” of government in the U.S. The overall result of this legalization has been the thorough intermingling of legal and political power in the federal government. Possessors of legal power at the national level have the capacity to exert significant influence in the political sphere through judicial review and the invalidation of federal legislation; while those who possess political power at the national level can influence the

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⁹Some commentators refer to this aspect of the U.S. Constitution as evidence that it is “self-enforcing.” That is, by claiming ultimate authority, derived from the sovereignty inherent in the people themselves, and then specifying how that power is to be enacted or instantiated, the Constitution enforces itself rather than relying on some other, external agent for enforcement purposes. There are at least two distinct variations on this thesis. The “self-enforcing equilibrium” thesis advanced by Hardin (1999) and others, arguing that the Constitution is not appropriately identified with legal contracts, since the latter require some external agent for their enforcement. Griffin (2007) advances a different version of this thesis, in which the “self-enforcing” character of the Constitution means something more like “self-referentiality.” That is, the Constitution, which stylistically and socio-ontologically a legal document, seeks to control its own enforcement on its own terms, with the result that the fundamental patterns and processes of governance in American politics become “legalized” (Griffin’s term). I regard the first variation of the “self-enforcing” thesis to be compelling if not entirely persuasive, but of less relevance to the present argument. It seems true that the Constitution is not appropriately analogized to a legal contract between two private parties, but that conclusion does not seem to yield any interesting insights about constitutional change. Conversely, Griffin’s thesis is more relevant, and as such I discuss it at length throughout this and other chapters.

¹⁰As the discussion of construction above shows, it is not actually possible to completely codify or prescribe a given constitutional order or pattern of institutions.
development of legal doctrine and discourse through a variety of institutional interactions with
the judicial branch.

Law and politics are intermeshed in the everyday processes of governing in the American
constitutional order. This is certainly true with respect to theories of judicial review. The various
theoretical justifications for the practice of judicially overruling legislation are generally moti-
vated by a concern to explain the compatibility of a purportedly “counter-majoritarian” practice
with a more general commitment to democracy (in a majoritarian, aggregative sense). Even if
such theories find support for the practice of judicial review simply in the nature of the legal
process (Hamburger 2008), it is not the case that they can be viewed in hermetic isolation from
the broader currents of political and democratic theory. Theories of judicial review are political
theories.¹¹ They situate the judiciary and its power vis-a-vis the Constitution in a broader ma-
trix of political values, institutions, and actors, and with good reason—if judicial review were not
politically controversial there would be little motivation for a theory of judicial review.¹²

The political relevance of the articulation of theories of judicial review is clearest with respect
to the idea of democracy. The problem situation in constitutional theory is dominated by a set
of powerful concerns about the compatibility of judicial review with the republican project of
self-government, particularly as that project has increasingly been identified with democratic,
universal inclusion over time. It is thus not the case that every theory of judicial review is simply a
brief for the theorists’ preferred pattern of decisions and nothing more. Rather, theories of judicial
review attempt to justify the practice despite its potential to disrupt popular policies or laws. As
we have seen, New Originalist theorizing about judicial review justifies the practice through the
attempt to isolate and constrain judicial activity into the sphere of “interpretation;” this is an
extension of the “older” originalist program of restricting judicial power through committing

¹¹As many have pointed out, the scope of “constitutional theory” consists of more than simply theories of how
judges ought to interpret the Constitution. What is sometimes called the “ancient” or “medieval” conception of consti-
tutional theory—that is, the study of the institutional, cultural, and social structure of a given political community—is
arguably the more “classical” approach. See generally van Caenegem (1995).

¹²It would perhaps not be too tendentious to suggest that constitutional theorizing usually only occurs around
institutional interstices or with respect to ambiguous or vague empowering clauses. In the absence of a controversy,
there is little motivation to elaborate a sophisticated theory—witness the relative dearth of “presidential age theory”
or “tetracameralism theory” in American constitutional thought.
judges to a reliable interpretive methodology.

The continued emphasis on judicial review in constitutional theory is understandable. The Court is, after all, a high-profile institution. But such an emphasis can also distract from other important aspects of constitutional politics. A juristocentric account of American constitutional development misses the forest for the trees—as does a survey of American constitutional development that relies on the history of the Article V amendment process as its guide (Ackerman 2007, 1750). A juristocentric account also fails to capture the true role of the courts in American political development. Judicial interpretations of the Constitution are not autochthonous but in fact arise out of the “intercurrences” that feature regularly in American politics.¹³ One illustrative example will have to suffice here. The New Deal Coalition’s rise and demise has been the subject of extensive empirical attention.¹⁴ The policy networks and institutional frameworks that followed

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¹³ On the topic of “intercurrence” see generally Orren & Skowronek (2004).

¹⁴ One of the signal contributions of the Legal Realist movement in the early twentieth century was that it forced students of law to recognize the possibility that the legal process could be subjected to social scientific analysis, without necessarily paying attention to the doctrinal or technical issues at hand. The research tools of non-lawyers could profitably be applied to the law as well. It is important not to tendentiously overburden this point—the Legal Realist movement is probably not best seen as a radical breach with a monolithically “non-realist” or formalist past (Tamanaha 2009)—but it is fair to say that the burgeoning field of empirical legal studies has carried some of the Realist spirit into the present and future by enthusiastically adopting research programs from other fields, especially economics, political science, and psychology. The insights gained from empirical legal scholarship include a better understanding of the motivations and thought processes of judicial actors, the strategic interactions that occur between judicial and political institutions, and the complex relationships between ideology and doctrine, or more generally between politics and law.

Empirical legal scholarship identifies judicial behavior as an important research site. There are different ways of approaching the behavior of judicial actors; the “attitudinal” model sees judges as motivated by their ideological dispositions or their party affiliations, while the “strategic” model sees judges as motivated primarily by the desire to maintain the power and influence of their home institutions relative to others. Despite intramural debates about the efficacy of these different models, empirical studies of judicial behavior provide strong evidence that judicial decision-making takes place in a field of political calculation and strategic rationality. Judges are rational actors who are aware of the optics and the consequences of their decisions, and they have the capability and the inclination to attempt to anticipate through backwards induction the reactions and responses that are likely to occur. Their goals consist of more than simply finding the “correct” decisions in the cases that confront them. Indeed, in the case of judicial review judges are not so much concerned with individual cases as they are with the task of the elaborating law at a national level (Crowe 2012). Justices on the Supreme Court do not conceive of themselves solely or primarily as the adjudicators of last resort atop an appellate hierarchy. Their remit is both smaller and larger—smaller, because they only hear (through granting cert) a minute fraction of the cases that are submitted to them; and larger, because they select cases to hear primarily on the basis of whether or not they will be able to clarify or fill in gaps, lacunae, or inconsistencies in public law through ruling on such cases. Theories of constitutional self-government in the context of judicial review cannot afford to ignore these aspects of judicial behavior, or, worse, assume that judges interested in finding the “right” constitutional answers and nothing else.

From a more general perspective, it can be seen that the elaboration of constitutional meaning through judicial review is not a strictly legal practice but one that takes place against the backdrop of national politics. The Court often plays an important role in national political coalitions, and many students of judicial politics note that it is
in the wake of the New Deal were sustained in no small part by the intercurrence of judicial re-
interpretation of constitutional commitments and the development of a national administrative
apparatus: “the New Deal’s legacy is less a fundamental break away from the law and toward federal regulatory agencies than an intertwining of law and regulatory politics...courts arguably became even more central to the state...” (Frymer 2008, 128). Courts have become enmeshed in the modern American state, and occupy far more complex roles than those envisaged in, for example, Article III. But for this very reason it would be unproductive to focus solely on the evolution of caselaw or doctrine. Courts are partners in political coalitions, and operate in opposition to or in tandem with bureaucracies. Furthermore, they are both acted upon by political actors and processes, and in turn act upon them.

2.3 Motivating Normative Concerns

2.3.1 Constitution-Writing

Constitutional theory in the U.S. has wrestled with the same familiar set of problems—such as the “counter-majoritarian difficulty,” the tension between liberalism and republicanism, balancing demands for change with the maintenance of stability—for a long time. Although these are perennial concerns for the study of constitutionalism, their pride of place in American constitutional theory owes much to Americans’ fascination with the writtenness of their foundational document. The hypertrophied concern of American constitutional theory with codification generates two related problems. It encourages a synchronic conception of constitutional time and it distracts attention from the ways in which constitutional change occurs in other forms.

The fact that the Constitution is a written document may seem like a non sequitur—why should its writtenness be dispositive in normative debates? And yet it is the case that many rarely “out of step” with overall currents in national politics for long (Dahl 1957, Graber 1993, Whittington 2007). It has proven to be a useful adjunct in the pursuit of major institutional transformations or reforms at various points in American political history. In Brown v. Board, for example, the Court’s decision was hardly sui generis, as a variety of studies have demonstrated (Dahl 1957, Dudziak 2000, Powe 2002). The Court is better seen as a (junior) partner in a national political coalition.
members of the Framers’ generation took that claim seriously (Kramer 2004, 49–52)—and it continues to command strong support today.¹⁵ Writtenness, in fact, is one of the competing desiderata most likely to be named whenever theorists are trying to reduce to constitutionalism to a cluster of essential concepts.¹⁶ There are others desiderata, of course—such as the separation of powers (Montesquieu [1784] 2009, Vile 1967), a distinction between sovereigns and governments (Locke [1689] 1988), or the entrenchment of laws against revision (Schwartzberg 2007, 8–16). Codification nonetheless attracts a great deal of attention in the U.S., since it is often seen as one of the distinctive American contributions to constitutionalism.

But codification does not exhaust the scope of constitutionalism as a form of political organization. Historically, constitutionalism has been thought to have a wider meaning: restrictions upon those who govern for the sake of those who are governed. Constitutions, in the sense of the term as Aristotle used it, are formations of institutions which channel, enable, and delimit the exercise of power (Aristotle [ca. 350 BCE] 1997, 75).¹⁷ This understanding of constitutionalism was characteristic of Western political thought from the medieval down to the early modern period. Thus, the checks and limitations upon monarchical power in medieval and early modern Europe, for example, are regularly described as constitutional.¹⁸ Seen in this light, the codifications laid down in the Magna Carta (Yale Law School [1215] 2008a) are exceptional rather than exemplary in the history of constitutionalism. More regularly, monarchs found that they had to manifest the forms (if not always the substance) of representative rule by involving popular (that is, nobles, landowners, or other elites with independent power bases) participation in foundational political decisions—almost always involving taxes, rents, or levies, the basic objects of medieval policy-making. Consensual or at least consociational government was a part of the constitutional

¹⁵See Whittington (1999b) for an extended argument as to why the Framers’ decisions to adopt written constitutions should matter to normative theories of constitutional interpretation.

¹⁶Rubenfeld (1998) argues that writtenness is a necessary condition for constitutional legitimacy.

¹⁷If anything, Aristotle’s conception of the constitution is even more expansive than that; for him, constitutions and citizenship are tightly linked, such that one cannot know the constitution of a state without understanding who is and is not a citizen, and what powers and privileges citizens possess (Aristotle [ca. 350 BCE] 1997, 65–68). Furthermore, constitutions are ordering principles behind and beyond the bare institutions of the polity (Aristotle [ca. 350 BCE] 1997, 119), and “it is by seeking happiness in different ways and by different means that individual groups of people create different ways of life and different constitutions” (Aristotle [ca. 350 BCE] 1997, 204).

fabric of Europe—not because of codified rules but because of custom, tradition, and the maintenance of very real counter-powers. Feudal monarchs, faced with opponents who could field and finance their own armies, knew “checks and balances” that far outstrip any constitutional limitations upon executives in modern constitutional democracies. The fragmentation of sovereignty in medieval Europe¹⁹ meant that constitutional balances were often tantamount to balances of (military) power—often buttressed with marital and familial allegiances. Even when swords were not drawn, kings did not have free hands to pursue policy, especially when new fiscal exactions could often only be pursued through further fragmentation of the bases of power—land and peasants. Somewhat more prosaically, the labyrinth of overlapping jurisdictions, traditions and spheres of authority in the Holy Roman Empire routinely served to frustrate political change and institutional innovation.²⁰ Nor were constitutional restrictions limited to relationships between monarchs and aristocratic or military elites. When Innocent III sought to enact extraordinary levies for the Fifth Crusade, he was forced to secure it “sacro concilio approbante”—that is, through the consent of the Curia and the conciliar hierarchy of the Church (Tyerman 2006, 617).

Traditional constitutional arrangements and constraints were, very frequently, just that—traditional, as opposed to “rational,” or written or designed. This is not to suggest that the only valid constitutional forms are those which are “traditional,” or passed down through the ages since time out of mind. Rather, it is important to recognize that constitutions, when they persist, do so through the equilibration of power and the particular disposition of institutions and roles. Like all institutions, constitutions are plastic and malleable, and structured by human action even as they structure that action in turn. It is neither necessary nor sufficient that constitutional rules be codified through writing, and we should not suppose that codification is the only way to go about achieving a constitutional order that can secure certain political goods (whether these are stability, equality, liberty, or something else.) Historically, codification has often been the sign of waning, rather than waxing, commitments to constitutional forms. Codifiers are often elites

¹⁹See Anderson on the “parcellization of sovereignty peculiar to” medieval Europe (Anderson 1974, 193ff).
²⁰This claim should not be confused with the so-called Sonderweg, a claim in German historiography whereby German political development is characterized as divergent or unusual when contrasted with an alleged “Western” model of development to liberalism from feudalism via absolutism.
who have been boxed in by prior developments and forced to ratify changes that have already occurred or are attempting to valorize a particular reading of recent history in order to shore up their position and protect their interests. The importance of such positionality in codification is vividly illustrated in the *Livre des Assises* of the Kingdom of Jerusalem. Promulgated in the thirteenth century, the *Assises* presents itself as a compendium of juridical practice in the ducal and baronial courts in Outremer (that is, the territories colonized by Europeans after the First Crusade), purporting to instruct newcomers and outsiders in the laws which must govern, above all else, inheritance and the disposition of property. The timing of the issuance of the *Assises* matters. Its precepts were not conjured out of thin air, but in fact formed the instrument by which the nobility attempted to preserve their traditional privileges in the face of the centralizing ambitions of the occupants of the throne of the Kingdom of Jerusalem. (In addition to the Angevin dynasty—related to the Plantagenets who ruled England—the Kingdom was also at one point claimed by the Emperor Frederick II, as much to burnish his claims to being a universal Christian monarch as for any actual interest in ruling a narrow class of relatively impoverished settlers.) The *Assises* can appear to be a paradigmatic example of codification along or even above the lines of the *Magna Carta*, in that they codify and outline a specific regime of procedures, privileges and protections. But the *Assises* is better read as an attempt by an embattled nobility to maintain its predominant position in the political economy. Land was the fundamental unit of both political power and economic vitality, and aggrandizing tendencies of the claimants to royal suzerainty in Jerusalem directly threatened the Frankish aristocracy. The nobility of Jerusalem opposed centralization because they recognized a fundamental threat to their own power. Thus, the codification of the laws of the Kingdom of Jerusalem was a fundamentally conservative project, meant

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²²Useful introductions to the *Assises*—sometimes also called the *Assises des Bourgeois*—as well as their changing treatment in medieval historiography, may be found in Edbury (1997), Prawer (1980), and Riley-Smith (1973). Tyerman (2006) provides what is probably the best single-volume survey of Crusades historiography to date.
²³John of Ibelin, one of the principal compilers of the *Assises*, claimed to be recovering the true legal structure of the Kingdom through in his treatise-writing, but we may well wonder to what degree he allowed himself to “discover” arrangements and rules he found agreeable. On John’s role in the promulgation of the *Assises*, see Edbury (1997).
²⁴For a general overview of the tensions between feudal prerogatives and the centralizing impulses of the royal metropole in Jerusalem, see Riley-Smith (1973).
to protect established interests against change and innovation.²⁵

The *Livre de Assises* offers an example of the complications associated with codification. What’s more, the *Livre des Assises* is more effective as such an example precisely because, unlike the *Magna Carta*, it is not a document to which generations of students of public law (in the Anglophone tradition at least) have become lazily accustomed. No hagiographical halo surrounds the *Assises* in first-year law school courses. The point I have attempted to summon in the reader’s mind, here, is that codification is not necessarily to the benefit of the public against elites. In a system of judicial supremacy, of course, codification means that judges (themselves drawn from elite classes and interests) wield disproportionate power in the elaboration and articulation of constitutional meanings and essentials. Beyond this, however, written documents require writers, whether or not their “authors” are in fact more diaphanous (Michelman 1998). Such writers will typically be drawn from the ranks of the powerful, the influential, the propertied—in a word, elites. And the Philadelphia Convention was certainly an elite affair. And yet the text of the U.S. Constitution claims, in Article VI, that popular sovereignty is the ultimate basis for its own legitimacy. Only an act of constituent power could replace the Articles of Confederation with a wholly new constitution, especially one which was drafted and presented for ratification in a novel and extra-legal manner. The framers of the Constitution thus identified the constituent power of the American people as the foundation of the new national government’s authority (Griffin 2011, 4). As the product of hard-driven bargaining and compromise outside of the Articles’ prescribed procedures, the Constitution could perhaps only be legitimated by such an appeal to the mass constituent power of the body politic as a whole. Even so, final ratification of the Constitution

²⁵A similar argument used to be made with respect to the Philadelphia Convention; Beard (1913) argues that the drafters of the Constitution sought to protect their interests and those of their class against revision of political change—only this time the threatening sovereign was popular rather than monarchic. Madison himself was unambiguous on this score:

In England, at this day, if elections were open to all classes of people, the property of landed proprietors would be insecure. An agrarian law would soon take place. If these observations be just, our government ought to secure the permanent interests of the country against innovation. Landholders ought to have a share in the government, to support these invaluable interests, and to balance and check the other. They ought to be so constituted as to protect the minority of the opulent against the majority (Yale Law School 2008b).
was in doubt until the approval of the Bill of Rights by the First Congress. It is significant that the first raft of amendments to the Constitution happened so quickly after the drafting of the original document.²⁶ Except for the modest spate of amendments associated with the end of the Civil War and the dawn of the Reconstruction period, amendments have been few and far between in the history of American constitutionalism. Furthermore, none of those amendments occurred through a national convention process, one of two possible amendment procedures laid out in Article V. They have all occurred through the alternate method of congressional proposal followed by state-level endorsement.²⁷

There is a curious gap between the people’s (theoretical) constituent authority and the actual historical performance of constitutive power in American politics. On the subject of its own justification, the Constitution explicitly derives its authority from the people (e.g., the Preamble, Article VI, and the Ninth Amendment). Its status as supreme law is built upon a common commitment to the public welfare and the coordination of collective behavior toward the resolution of collective action problems—that is, securing “life, liberty, and the pursuit of happiness.” But the drafting and ratification of the core texts—not just the Constitution, the Bill of Rights, and the Reconstruction amendments, but in fact all of them—has consistently been the province of political and economic elites who inhabit the nation’s power structures and important institutions. While this fact need not be troubling in and of itself—in any large polity, power will inevitably be unevenly distributed and this is especially true of the kind of representative democracy the framers set out to establish—it requires special attention and explanation in the case of a polity where the people are explicitly identified as the source of state power. As I seek to illustrate below, developmentalist constitutional scholarship identifies the gap between the people’s constituent power and the actual performance of constitutional politics as a puzzle to be solved or explained.

²⁶Griffin argues that the close temporal proximity of the adoption of the Bill of Rights to that of the Constitution suggests that the two events were part of the “same historical process” (Griffin 2011, 2).
²⁷See generally Levinson (1995b) for theoretical perspectives on the amendment of the U.S. Constitution.
2.3.2 Constitutionalism and Political Development

A developmentalist conception of constitutional change (Whittington 1999a, Kahn & Kersch 2006, Ackerman 2007, Whittington 2007) is the appropriate empirical backdrop for constitutional theory. Developmentalism’s emphasis on constitutional change yields a number of important insights. First, it is helpful in interpreting or revealing the foundational assumptions underlying particular regimes, doctrines, or understandings. Second, it illuminates the inadequacy of what I will call “constitutional perfectionist” theories of constitutional interpretation for the purposes of identifying and articulating constitutional meaning. Third, it suggests that (U.S.) constitutional theory is context-specific—that there is no possibility of a trans-historical constitutional theory that has robust descriptive and interpretive applications across the entire sweep of constitutional development (Rubenfeld 2001, Ackerman 1991, Balkin 2009). One possible implication is that all we can achieve instead are “regime theories” specific to particular periods or epochs. Less severely, it would seem that there are significant constraints on the universalizability of constitutional theorizing.

In advancing my argument, I also describe a problem in constitutional theories that do not conceive of change in developmental terms. Such “constitutional perfectionist” theories derive their recommended forms of constitutional interpretation from analyses of the design, structure, and functions on the constitutional order. Such theories conceive of constitutional change as discontinuous and exogenous. That is, episodes of reform, retrenchment, or amendment are discontinuous or sharply separated from the preceding period, and the changes themselves are the result of factors or causes that are not themselves endogenously generated by the institutions and norms of the preceding period. Furthermore, after the selection, ratification, or imposition of different institutional structures, values, or norms, the constitutional order resumes a self-enforcing equilibrium. Constitutional change, in other words, is synchronic rather than diachronic—it is a punctuated or stepwise pattern rather than a continuum. This perspective on constitutional change is, I will argue, a feature shared by many strands of constitutional theory, and not simply a small number of prominent theories which emphasize the occasional manifestation of popular
sovereignty in periods of major change followed by stasis (Ackerman 1991, Ackerman 2007).

The synchronic conception of change is unsupportable by the preponderance of scholarship in the historical institutionalist and American political development approaches to understanding the origins, evolution, and breakdown of institutions (Orren & Skowronek 2004, Kahn 2006). The distinctive contributions of these subdisciplines are well known in law and political science, but normative theorists have as yet not fully integrated their insights with constitutional theory. The descriptive inadequacy (with respect to constitutional change) of perfectionist theories motivates a concern with producing contextualized theories limited to particular epochs or regimes. This casts the choice between (1) entrenchment and (2) revision in a distinct light. Rather than selecting between (1) or (2) on the basis of hewing to an originalist or a living constitutionalist theory, we ought to select on the basis of which choice better integrates with our current constitutional practice. In the present circumstances I argue that we ought to select (2): the understandings and values which under-gird contemporary constitutional practice do not merely trump those from preceding regimes, but in fact transform them. The current set of institutions, norms, and values that comprise constitutional practice today require their own discrete and contextualized theory.

Perfectionist theories share two distinct claims: that the purpose of constitutions is to insulate certain values, norms, or institutions from political change; and that the fitness of a given constitution tracks its performance over time of the function of value maintenance. Perfectionist theories typically aspire to explain the whole sweep of constitutional history. They characterize different periods or regimes in constitutional history in terms of their proximity or distance from prescribed forms (such as fidelity to certain values or operating within certain institutional parameters). In this chapter I present the critical argument against theorizing from constitutional functions, arguing that constitutional change frustrates our attempts to construct theories which describe the whole of constitutional development. It is not appropriate to think of the constitutional order as a received framework which has been constructed and reconstructed over the course of a persistent history. Instead, the constitutional order is the contingent outcome of a series of transformative developments. Although it shares a genealogical relationship to previous
orders it cannot be fully understood in terms of their foundational understandings. Ultimately, constitutional theory must be historicist and contextualized. The continuous and developmental character of constitutional change militates against perfectionist constitutional theorizing. Trying to generate constitutional theories which describe broader and deeper sweeps of political time and institutional development is subject to diminishing marginal returns. The articulation of regime-specific theories for different periods and different aspects of practice is more appropriate.

There is a final payoff that results from the argument against perfectionism: namely, the idea that the exercise of judicial review cannot be legitimated simply and solely by adhering to a particular judicial philosophy, whether it be originalism, living constitutionalism, or something else.\(^{28}\) Judicial philosophies commit judges to particular patterns of ruling in cases in order to realize some higher-order value. (For example, in the case of originalism, the value that is ostensibly secured through adhering to the originalist judicial philosophy is fidelity to the meanings that were fixed at a prior date; in the case of common law constitutionalism, the value secured is that of legal continuity and the persistence of precedent, and so on.) The prize in the pursuit of “interpretivist”\(^{29}\) theories of judicial review is a kind of context-free justification: overturning legislation through judicial decision-making can be seen as justified, no matter who does it or whose ox is gored, so long as it’s overturned in a way that is pursuant to the correct judicial philosophy.

“Developmentalism” is an alternative to “constitutional perfectionism”—but what is meant by the term? Constitutional perfectionism and developmentalism have different implications for our understanding of constitutional change, and hence our understanding of constitutional legit-

\(^{28}\)Eisgruber (2007) describes a “judicial philosophy” as the set of ideas or beliefs which animate a justice’s rulings.

\(^{29}\)John Hart Ely used the terms “interpretivist” and “non-interpretivist” to refer to theories which either did or did not find the extent of constitutional meaning to be exhausted by the text of the U.S. Constitution, respectively (Ely 1980). In contemporary terms, they closely mapped on to “originalism” and “living constitutionalism.” Although the distinction has largely fallen into disuse—for which there are good reasons, not least among them the perceived tendentiousness of suggesting that a branch of constitutional theory was “non-interpretivist” and thereby nihilistic—but, I suggest, it is useful to retain Ely’s term “interpretivist” as a guide to the motivations that animate much of constitutional theory. Much of the constitutional theorizing of the past generation or two has proceeded on the assumption that nailing down the right judicial philosophy is both necessary and sufficient to arrive at a well-worked-out constitutional theory—a view which earlier constitutional theorists may well have found puzzling.
imacy. “Constitutional perfectionist theories” are theories of constitutional interpretation which argue that constitutions operate on behalf of certain values in politics. The purpose or function of a constitution, on the perfectionist account, is to structure politics and institutions such that certain values are realized, expressed, or culturally predominant. Constitutional perfectionist theories are responses to the problem of constitutional justification. They seek to ground the authority of the Constitution in terms of the work it can perform on behalf of values—such as political equality, or individual liberty, or minimal government, or the priority of governmental regulation to economic activity, and so on. Later in this chapter I will argue that constitutional developmentalism is a preferable alternative to constitutional perfectionism as an interpretive posture toward the Constitution. First, however, it will be necessary to arrive at a clear understanding of constitutional perfectionism, its motivations, and its purposes. In this section I will offer an account of the distinctiveness of constitutional perfectionism, contrast it with developmentalism, and use two episodes from constitutional history—Reconstruction and the Korean War—to highlight the differences between perfectionism and developmentalism.

Concomitant with perfectionism’s focus on constitutional values is an objective conception of constitutional meaning: its content may change over time with or without amendment procedures, but at any given time the meaning of the Constitution is fixed and, ideally, discernible. In this sense perfectionist theories are “foundationalist” in that they seek to place constitutional law on an objective or a non-arbitrary foundation or method. Put somewhat differently, they

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³⁰One of the loci classica of constitutional perfectionism is Dworkin’s account of law as integrity as well as his “moral reading” of the Constitution; (Dworkin 1996, Fleming 2001, Barber 2001, Hamburger 2008).

³¹Here I understand “constitutional justification” to be broader than Alexander Bickel’s “counter-majoritarian difficulty” (Bickel 1962, 16ff). On the latter view, the Constitution is held to be “counter-majoritarian” insofar as it provides supports for the institution of judicial review, a “deviant institution” in the otherwise electoral-majoritarian institutions of American democracy (ibid.). “Popular constitutionalism” offers a variant of Bickel’s complaint, arguing that it is the sovereign people that is empowered in the first instance to interpret constitutional meaning, and not courts empowered to conduct constitutional review (Tushnet 2000, Kramer 2004). But objections to the authority Constitution—and to constitutionalism itself—are not limited to judicial review. Constitutionalism also faces other justificatory challenges, such as the objection from the “dead hand of the past” (Whittington 1999b, Wolin 1988), and the objection from democracy and legal change (Marmor 2007, Schwartzberg 2007). It is possible to characterize a large portion of twentieth-century constitutional thought in terms of a disciplinary response to (or reception of) Bickel’s challenge. However, the justification of constitutions—of the basic features and organizing institutions of polities—is a more general problem.

³²For an argument about the impossibility of that task, see Tushnet (1988).
are attempts at trying to describe precisely what the “ball” is in the hidden ball game of constitutional law. Not all foundationalist constitutional theories are perfectionist. In particular, dualist theories (such as original public meaning originalism), and some living constitutionalist theories (such as Strauss’s “common-law constitutionalism”) can credibly be described as foundationalist in that they promulgate more-or-less precise methods by which constitutional meaning can be discerned or at least converged upon by constitutional actors. Perfectionist theories are distinguished from other foundationalist theories in that they assert that there are, prior to interpretation or construction, correct statements of the content of constitutional law as a set of general rules.

A prominent example of a constitutional perfectionist theory is Ronald Dworkin’s “moral reading” of the U.S. Constitution (Dworkin 1996). On Dworkin’s account, the Constitution’s guarantees of individual rights, and of the basic institutional conditions required for egalitarian democracy, serve as moral lodestars in the elaboration of the Constitution’s meaning in politics. They do not definitively enumerate the full extent of the rights and liberties extended to citizens. They invite, rather, the interpretation of moral principles in the practice of constitutional interpretation itself. On Dworkin’s account, the Constitution’s limitations upon governmental action—its limitations upon the will of the people—are justified insofar as they serve moral purposes: “political morality [lies at] the heart of the law” (Dworkin 1996, 2). The morality that is embedded in the Constitution takes precedence, in fact, over the “majoritarian premise:” the notion that the will of the people is best (or only) expressed through the aggregation of votes (Dworkin 1996, 33).
Before considering other examples of constitutional perfectionism, note a distinctive feature of Dworkin’s account: the content of the Constitution is far less plastic or malleable than the outcomes of legislative processes. However abstractly specified, the moral principles that lie at the heart of constitutional law are not determined or given shape by voting, or by mass political action; they are fixed in the framers’ text. This may seem like a surprising claim to make about Dworkin’s highly philosophical theory; typically it is originalist theories which privilege fixity in constitutional text. However, Dworkin sees principles and not specific moral commands or rules as being fixed in the text. The interpretation and elaboration of those principles themselves proceed according to the philosophical methods that, for Dworkin, are implicated by the inclusion of principled language in the Constitution itself. Put another way, the Constitution isolates—with a minimum of ambiguity, as far as Dworkin is concerned—who the relevant moral concepts that must be adumbrated or elaborated upon in constitutional law. The concepts themselves are fixed in the adopted and ratified text; the conceptions or morality that get realized in politics trace their origins to these original concepts. But the concepts—political equality, recognition of the rights and dignity of individual citizens, etc.—remained fixed; unless and until, presumably, they are altered or added to through the processes of constitutional amendment.

Although Dworkin’s theory may cash out in politics in terms of a great deal of interpretive latitude in judicial review—perhaps too much, as his many critics contend (Burley 2004, Waldron 1999); but perhaps not—it contains a core premise that is common to constitutional perfectionist theories. Dworkin’s theory of interpretation rests on the claim that the Constitution’s content—the semantic content which is fixed through writing and ratification—does not change with time. More specifically, the mere passage of political time—the rotation of officers in different institu-

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36It should be noted that Dworkin, the standard-bearer of modern anti-positivism, does not reject the possibility of uncertainty in law. The first three chapters of Law’s Empire are addressed to the imperative to interpret uncertainty in a principled way, rather than simply consigning uncertainty to judicial discretion per se, which Dworkin finds untethered to principle (Dworkin 1986, 1–113). His antagonist here is Hart, who remained unconvinced that discretion could be (Hart 1994, 144–150, 272–276).

37Dworkin places heavy emphasis on the distinction between concepts and conceptions, or “linguistic intentions and legal intentions” (Eisgruber 2001, 28–32).
tions, the rise and fall of different social movements or dominant ideologies or philosophies, the changing institutional makeup of the federal government—does not yield changes in the meaning of the Constitution’s content. The meaning is the same; the elaboration of the Constitution’s meaning into political action and political institutions is variable (Dworkin 1996, 7–12). The semantic content of the Constitution is settled unless and until it is rewritten—that is, amended.

At this point the reader may wonder whether it is really the case that Dworkin’s theory of constitutional interpretation really makes use of such a claim about constitutional immutability. After all, the interpretive theory that Dworkin advances requires judges to engage in practical reasoning when conducting their official tasks. The inclusion of moral concepts in the semantic content of the Constitution compels this philosophical approach to constitutional review—so Dworkin argues. This would seem to be starkly at odds with an originalism that eschews moral philosophy or normative theorizing in judicial decision-making. As it turns out, although Dworkin’s moral reading advocates a very different method of constitutional interpretation than would an originalist theory, it does share with originalism the claim that the Constitution is not ordinarily subject to change through politics. Various features of the constitutional order are of course undergoing change all the time; but the Constitution does not change through politics.

This presentation of constitutional obduracy, in which the Constitution stands apart from “ordinary” politics, is evocative of the higher/ordinary lawmaking dichotomy that is also characteristic of dualism. However, Dworkin’s constitutional perfectionism, like other constitutional perfectionisms, differs from developmentalist theories, in that it places the Constitution at a remove from day-to-day politics. It is not so much an organizing structure or a source of empowerment and authorization for political action, as it is a limitation or boundary-setter for the use of governmental power. Not only that, but, unlike developmentalists’ constitutions, the constitutional perfectionist’s Constitution is indelible. In day-to-day politics, its values are either realized or trod upon; its requirements are either met, or its promises are left unfulfilled. Constitutional democracy is in this sense a matter of reproducing in politics the values, norms and institutions that are enumerated in the constitutional text.
Most frequently, Dworkin refers to this activity—the reproduction of constitutional norms in political practice—as “interpretation.” He occasionally also uses “translation,” (Dworkin 1996, 8), and this second metaphor is, in a way, more felicitous. The principles embedded in the Constitution do not manifest themselves in our shared social life by themselves; they must be elaborated into being and sustained through deliberate activity. On his account, this is a process of “constructive interpretation” (Dworkin 1986, 52ff). Constructive interpretation may require the work of courts empowered to engage in judicial review, but this is not a hard and fast requirement; political principles do not dictate particular institutional design choices so much as militate in favor of which values should influence and inform the institutional design process (Macedo 2010). What it does require, however, is a constitutional politics of faithfulness. (I avoid using the term “fidelity” since it carries specific connotations for some theories, although constitutionalism as fidelity fits within the rubric of constitutional perfectionism.³⁸) When rendered in terms of faithfulness, constitutionalism consists, at bottom, in making sure that the right values get honored. In Dworkin’s case, the bedrock value is political equality, of which the appropriate family of conceptions is enumerated and enshrined in the first fourteen amendments to the Constitution (Dworkin 1996, 7ff). Notably, Dworkin thinks that it is the semantic content—and only the semantic content—of the inscriptions made by the framers in the constitutional text that has any bearing on the project of constructive interpretation. The principles selected by the framers for enumeration in the Constitution are what command our fealty, and not what they intended them to accomplish or what they thought them to mean. Dworkin’s reading, in his own words, “insists that the Constitution means what the framers intended it to say” (Dworkin 1996, 13).

Against Dworkin’s theory, which I have presented as a kind of constitutional perfectionism, we should now consider a developmentalist theory of constitutional meaning: Bruce Ackerman’s view that the elaboration of constitutional meaning is a kind of “intergenerational synthesis” (Ackerman 1991, Ackerman 2007). For Ackerman, the project of constitutionalism is not so much

³⁸“Fidelity” is the term sometimes used by those who argue that “changed readings” of constitutional meaning are nevertheless faithful to the Constitution’s purposes, or text, or aspirations, or some combination thereof (Lessig 1996, Liu, Karlan, & Schroeder 2010, Balkin 2011a).
about the realization or manifestation of certain values in politics, so much as it is about the preservation of collective commitments made during episodes of sustained political attention, rational reflection, and deliberate decision-making. Meanings inscribed in the text matter less than commitments made through political contestation over time.³⁹ It is less abstract that Dworkin’s view; the things which constitutions are meant to secure, or valorize, are not values but concrete commitments or decisions that have resulted in particular institutional changes and new ways of doing things or “rules of the game.” Thus, although Ackerman shares Dworkin’s view that the original intentions, purposes, or understandings of constitutional framers matter less than the particular enumerations made, he values the institutional configurations they put in place even more.⁴⁰

Ackerman’s “intergenerational synthesis” occurs through political time.⁴¹ He argues that Reconstruction was not an epoch, but a regime. At its inception it was a new, contested understanding of constitutional meaning and national politics. The (contingent) historical outcome was that the Republicans’ political vision eventually won out against the previous regime of sectionalist federal politics—the Republicans were able to embed their preferred principles in the constitutional framework. Indeed, one way to parse the difference between Dworkin’s and Ackerman’s views—between constitutional perfectionism and developmentalism—is to contrast their readings of Reconstruction and the Fourteenth Amendment. For Ackerman, the Fourteenth Amendment is the capstone in a process of regime transition. It was evidence of the “higher lawmaking pretensions” of Reconstruction Republicans, that is, their claims to be exercising “constituent authority” in the name of the people (Ackerman 1998, 11, 207). These pretensions were ultimately vindicated, Ackerman argues, by the Republicans’ success in transforming national political power, and in the final recognition of the validity of the Fourteenth Amendment in the precedent set in Slaughter-

³⁹“For most judges, the basic unit of the Constitution is The Clause; for most law professors, the basic unit is The Theory...For me, the basic unit is The Generation” (Ackerman 1996, 1519).
⁴⁰Ackerman also, unlike Dworkin, does not argue that the important commitments need not be accompanied by textual inscriptions; see below.
⁴¹(Orren & Skowronek 2004, 8–13). Political time, as a term of art in the study of political development, is unlike chronological time in that it compresses or expands with respect to the intensity, scope, and substance of the political phenomena that occur within it. Chronological time, by contrast, bundles linear series of events into eras or epochs which are held to be discrete from each other in some sense.
House (Ackerman 1998, 247). In the Fourteenth Amendment in particular, the Republicans had advanced and enumerated a vision of national citizenship and interracial politics that was meant to fundamentally change the balance of power between the national government and the states.

For Dworkin, however, the Fourteenth Amendment is best interpreted as a vindication of egalitarianism in American politics. This is of course a reading that is compatible with Ackerman’s account; the new interpretation of national citizenship set out by the framers of the Fourteenth Amendment was certainly predicated on an understanding of baseline political equality among all Americans. However, for Ackerman, the framers chose to realize the value of equality through their choice of explicit rules and institutional redesign, ultimately for the purpose of buttressing and entrenching a new regime in constitutional politics. For Dworkin, however, the Fourteenth’s framers’ goals and understandings don’t count as materials for interpreting the Fourteenth Amendment; it is the fact that they chose to ensconce the concept of political equality in our shared constitutional materials that matters. On Ackerman’s reading, the Fourteenth Amendment entrenched the Reconstruction regime (or, more narrowly, a regime characterized by a new understanding of citizenship and national power). On Dworkin’s reading, the Fourteenth Amendment requires constitutional actors to integrate a commitment to political equality into their constitutional interpretation—the translation of constitutional principles into legal rules and political action. This is the core of the difference between constitutional perfectionism and developmentalism. For perfectionists, constitutions entrench values against being overridden; for developmentalists, constitutions entrench regimes and institutions against easy removal or alteration.

Dworkin’s principled (that is, principle-centric) reading of the Fourteenth Amendment combines a static conception of constitutional meaning with a dynamic conception of interpretation. The Fourteenth Amendment’s meaning is clear: inegalitarian subordination of individual citizens is prohibited; political equality is a value which must be integrated into American law. Ackerman’s developmental reading of the Fourteenth Amendment, however, relies on a contestable conception of constitutional meaning coupled with a comparatively rigid conception of inter-
pretation. The ratification of the Fourteenth Amendment represented the lawmaking success of a political movement which had asserted and attempted to exercise constituent power in the transformation of constitutional meaning.

Not all constitutional perfectionists follow Dworkin in making the leap from seeing values entrenched in constitutions to arguing for a “moral reading” approach to constitutional interpretation. Some, in fact argue against such an interpretive approach (see discussion of Scalia below). What constitutional perfectionisms share is the normative claim that constitutional fidelity consists in adherence to or the faithful reproduction of constitutional values. Thus, the perfectionist view is, in the language of the analysis of institutions and institutional change, a functionalist view: constitutions serve certain functions on behalf of certain values. I label this a “functionalist” view because it looks to the effects of constitutions: a well-ordered constitution is, on this view, one which effectively manifests or maintains certain values in politics. Functionalism explains the emergence and persistence of institutions norms in terms of their functions—what they do for the individual actors who participate in them. At bottom, a functionalist explanation for the emergence or change of an institution is one which focuses on the effects of those institutions upon either actors or groups; the same is true for constitutional perfectionism.

Due to their institutional functionalism, perfectionist theories also implicitly endorse a synchronic model of constitutional change. A synchronic model arrays periods of change and stasis in a linear sequence. Subsequent episodes are directly related to prior episodes—either they stand in continuity with one another such that they It is thus a concern in any perfectionist constitutional theory that entrenched principles might be “strayed” from by errant political actors. But the ideal path that constitutional change should follow (according to perfectionists) is one that alternates between genesis and mimesis: the values get constitutionalized, and ought to stay constitutionalized. When political practice strays from constitutional principles, the appropriate corrective

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42 By “functionalist” I do not mean the view (elaborated, for example, by White and Blackmun’s dissent in Bowsher v. Synar) that the separation of powers does not necessarily preclude the delegation or vesting of the powers inherent in one branch of government to officers of another branch; see, also INS v. Chadha. As I discuss below, the definition of “functionalism” I rely on here comes from the analysis of institutions; see Thelen (2004).

43 For extended discussions of functionalism, see, for example, the work of Thelen on institutional change and Pierson on institutional development (Streeck & Thelen 2005, Thelen 2004, Pierson 2000).
mechanisms (in Dworkin’s case, judicial review), are brought to bear on the deviant practices. The “remedy” is synchronic rather than diachronic in that it considers the antecedent deviance to be relevant only insofar as it is a trigger for a reversion to the appropriate value or pattern. Constitutional perfectionism is thus a species of synchronic functionalism—that is, a constitution discharges certain functions by attempting to freeze or stabilize certain political decisions across time.

Another variation of the synchronic functionalism of constitutional perfectionism can be found in Stephen Holmes’s theory of constitutional precommitments (Holmes 1988, Holmes 1995). On this rendering, constitutionalism serves its function on behalf of democracy by insulating certain values from being revised or overridden by transient majorities. Constitutionalism and democracy are, on this view, “mutually supportive;” the synchronic function of constitutions is “democracy-reinforcing” (Holmes 1988, 197). Constitutional limitations on governmental power serve as democratic “stabilizing constraints” (Holmes 1988, 198). They make democracy possible over time, by inhibiting the pathologies of democracy, such as demagoguery, ochlocracy or mob rule, or the systemic exclusion of minorities from the political process. Like Dworkin, Holmes sees judicial review as a mechanism for constitutional maintenance: it serves as an obstacle to the easy revision of core constitutional values. Unlike Dworkin, Holmes does not recommend a “moral reading” of constitutional content; he offers a justification for constitutional democracy itself, and not a proposal for how judicial review should operate in such a system. Although this version of constitutional perfectionism lacks the interpretive element that is characteristic of Dworkin’s theory, it possesses the same synchronic functionalism: constitutionalizing something means “freezing” in political time, against the possibility of easy revision.

While Dworkin’s is a theory about the justification of judicial review in a constitutional democracy, Holmes’s is a theory about the political justification of constitutional democracy itself. Holmes observes that “[t]he dead should not govern the living; but they can make it easier for the living to govern themselves” (Holmes 1988, 240). The synchronic function of constitutions is, in a word, constitutive: they make democratic politics possible and sustainable, by making and
then maintaining certain foundational decisions about the structure and processes of political
decision-making. Holmes likens this to a rule set or “grammar” of politics (Holmes 1988, 227);
far from diminishing the democratic character of politics in a constitutional polity, constitutive
rules enable it, by denying discretion to officials wielding power and by making clear and plain
what the “rules of the game” are. The fact that these rules are “stuck” in political time is, in fact,
salutary: their fixity relieves subsequent generations from the epistemic burden of coming up
with rules of their own.

Holmes’s synchronic functionalism might be seen a species of constitutional perfectionism
because it justifies constitutionalism as a way of entrenching certain values in politics across time.
Proper constitutional functioning, on this account, involves the interposition of constitutional re-
straints when popular demands for legislation run counter to constitutional values. Constitutions
are anti-democratic for the sake of democracy. If we lack constitutional constraints which func-
tion to secure the necessary conditions for democracy, then “[o]ur incapacity to precommit our
successors in a semi-autocratic manner may lead to the destruction of democracy” (Holmes 1988,
226). Ultimately, however, Holmes’s is not a perfectionist theory; he does not argue that ideal-
ized constitutional practice consists in the pursuit of ordinary politics hemmed in by unchanging
constitutional restrictions:

[T]he “authorial” powers of later generations are probably greater than those of the
Framers. Successors, it could be argued, are not such hapless prisoners of the moment
as were the Founders. They are no longer victimized by the urgent need to put an end
to the chaos of a sovereignless nation...Freed from the enormous task of launching
and legitimating a new regime in a time of troubles, latecomers can devote themselves
to achieving particular political goals (Holmes 1988, 225).

Holmes’s precommitments are, in the first instance, constitutive commitments rather than re-
strictive or constraining commitments. They do not place significant substantive restrictions on
ordinary politics; they underwrite ordinary politics, by defining what is to be decided politically
and what is not.⁴⁴ Beyond that, the practices and institutions put in place by the constituent power of a founding generation are, as Holmes recognizes, fluid and far from indelible: “[t]he accumulated innovations introduced by later generations certainly rival the innovations of the Constitution...” (Holmes 1988, 225n).

Thus, Holmes’s theory occupies a middle ground between Ackerman and Dworkin’s theories. While he clearly wishes to disincentivize frequent legal change, Holmes nevertheless acknowledges the possibility of subsequent generations pursuing extensive constitutional change. Pursued heedlessly, such changes could threaten to undermine the foundations of constitutional democracy; indeed, such changes would do away with the foundations of constitutional democracy themselves—constitutional commitments. The target of Holmes’s theory is not constitutional change but rather constitutional justification. Dworkin’s, Ackerman’s, and Holmes’s theories can be used to populate a conceptual mapping of constitutional theory. On a spectrum with constitutional perfectionism on one end, and developmentalism located on the other end, Dworkin’s approaches the perfectionism endpoint, Ackerman’s approaches the developmentalism endpoint, and Holmes’s theory is somewhere in between.

The theoretical differences discussed thus far have real and distinctive consequences for constitutional politics. To illustrate how they lead to divergent outcomes in constitutional practice, consider the following case: *Youngstown Sheet & Tube Co. v. Sawyer*, in which the Supreme Court blocked President Truman’s attempted seizure of steel mills threatened by possible strikes, in order that the steel industry’s output would not go into slump in the middle of the “police action” on the Korean Peninsula. Also known as the “Steel Seizure” case, *Youngstown* saw the claims of executive prerogative in extraordinary circumstances tested against a rigid reading of the powers and duties enumerated to the Presidency by the Constitution. The Court’s decision in *Youngstown* was, *inter alia*, a rejection of Truman’s claims to “inherent” presidential powers which gave the executive a prerogative to act in the face of “emergencies.” In his concurrence, Justice Jackson interpreted the Constitution’s silence on the matter of emergency powers (with the exception of

⁴⁴There are interesting parallels here to the “decisionism” that Schmitt discusses in *Political Theology* (Schmitt 1934).
the suspension of *habeas corpus*) in the following way:

[The Framers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.⁴⁵

Justice Frankfurter also did not find a general presidential prerogative in the absence of a constitutional discussion of extra-constitutional powers: “the fact that power exists in the Government does not vest it in the President.”⁴⁶

Despite Justice Black’s refusal of the Truman administration’s demands in his opinion for the Court, it has been Jackson’s concurrence which has attracted the most subsequent scholarly attention (Griffin 2007, 62). Shortly after the ruling, at least one prominent contemporary scholar dismissed Jackson’s opinion as “desultory” (Corwin 1953, 63), but Jackson’s analysis of the evolution of presidential power through political time has garnered considerable interest. Griffin (2007, 62–63) praises Jackson’s decision for its use of “the lens of constitutional change” to determine that “the accumulation of power in the presidency during the twentieth century” was a kind of constitutional change that had been implicitly or tacitly legitimatized by the “constituent power of the people.” Unlike his more formalistic colleague Black, Jackson was prepared to consider the possibility that the presidency’s constitutional powers had been constructed politically beyond the scope or expectations revealed in Article II. In *Youngstown*, he nevertheless did not find for the administration, noting that “the president’s powers were at their lowest ebb when there was” significant legislative opposition, as was the case in 1952; he was concerned that the president’s substantial discretion in the foreign policy arena should not be “leverag[ed]…into the domestic sphere” (Powe 2009, 231–232).⁴⁷

Jackson also noted that there was a gap between “the President’s paper powers and his real

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⁴⁵343 U.S. 650.
⁴⁶343 U.S. 604.
⁴⁷It should be noted that during a period of concerted cooperation between President and Congress Jackson himself (then Attorney General) had “approved the [strategically] excellent, but probably illegal, destroyers-for-bases deal with Great Britain” in 1940 (Powe 2009, 232).
powers...Subtle shifts take place in the centers of real power that do not show on the face of the Constitution." ⁴⁸ For Black, this was mere fact without color or force of constitutional law: "...the Constitution is neither silent nor equivocal about who shall make the laws which the president is to execute." ⁴⁹ What separated Jackson and Black, at bottom, was the question of whether the accretion of discretionary and (effectively) lawmaking power in the presidency over the preceding decades had, in some meaningful way, been legitimated. Black, according to his opinion for Youngstown, wanted to see explicit delegation from Congress to President, a constitutional innovation of a kind he no doubt saw as unconstitutional without an accompanying amendment. Jackson, however, found it necessary to consider whether power had been effectively delegated to the presidency despite the absence of any formal, discrete statement to that effect by the legislature.

If Jackson was right that this was a possibility that needed to be considered, what criteria would have to be used to determine if the informal delegation of power to the presidency was constitutionally permissible? This is the central question of normative developmentalism: identifying the conditions under which informal constitutional change is legitimated by constituent power. If such conditions can be identified, and used in a systematic manner in constitutional interpretation, then developmentalism is a viable theory of constitutional legitimacy. If not, then it might be what Corwin calls a "sic volo, sic jubeo frame of mind:" ⁵⁰ one in which "the doctrine of [a] case...while purporting to stem from [constitutional] principle...is a purely arbitrary construct created out of hand for the purpose of [the] particular case, and is altogether devoid of historical verification" (Corwin 1953, 64). My claim, of course, is that developmentalism is not an ad hoc theory of pragmatic interpretation in the terms laid out by Corwin. For the purposes of this chapter, then, my challenge is to show that the developmentalist reading is a viable method of constitutional interpretation.

Developmentalist interpretation certainly has its detractors. Corwin was skeptical of the rea-
soning employed by Black and the concurring justices in *Youngstown*, dismissing the “decision’s claim to be regarded seriously as a doctrine of constitutional law” (Corwin 1953, 65). He argued that, while he was confident the Court would back down from deciding a political question in a genuine state of emergency (the criteria for which he left undefined), he was in more agreement with Justice Clark than anyone else, whose opinion declared (in Corwin’s paraphrase) that “Congress having entered the field [by passing the Taft-Hartley Act], its ascertainable intention supplied the law of the case” (Corwin 1953, 65). But Corwin’s reading of the case has not won out in the long run. The overall trend in constitutional scholarship has been to accept the claim that “political developments are integrated into constitutional doctrine” (Whittington 2006, 913), through a complex set of interactions between Court, Congress, and presidents (Whittington 2007).

Another illustration of the accommodation of political developments into constitutional law can be observed in the Court’s struggle to square a set of commitments to federalism and separated powers with the secular emergence of the modern administrative state (a process made all the more difficult by the contested and shifting nature of the aforementioned commitments themselves). Much of the struggle took place on the terrain of the Commerce Clause. In early cases such as *McCulloch v. Maryland* and *Gibbons v. Ogden*, the Court established Congress’s power to regulate inter-state commerce. During the first half of the twentieth century, the Court expanded its interpretation of the Commerce Clause to permit congressional regulation of a far wider array of economic activity, as in *Blaisdell* and *Wickard v. Filburn*. However, starting with the Rehnquist Court in the late twentieth century, the justices began to signal that the expanded interpretation of the Commerce Clause would or should be contracted. This is perhaps best illustrated in *U.S. v. Lopez*.

The Supreme Court’s seeming about-face with respect to its Commerce Clause jurisprudence in *U.S. v. Lopez* might be seen as an attempt to change the trajectory of constitutional development. In *Lopez*, the Supreme Court struck down a federal statute prohibiting the possession

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51 U.S. Constitution, Article I, Section 8, Clause 1.
of concealed firearms in or near public schools. The statute, the Gun Free School Zones Act of 1990 (GFSZA), made it a federal offense to engage in a specific kind of local activity (possession of a concealed weapon), relying upon the Commerce Clause as its textual support for constitutional authorization. Congressional reliance on the Commerce Clause as a support for the federal regulation of local activities could be seen as an “organic” extension of the growth of the federal government’s administrative and domestic policy-making powers in the wake of the New Deal: the Court’s eventual acquiescence to New Deal regulation included increased deference to the political branches in defining commerce. However, in *Lopez*, the Court balked at the notion that education—traditionally a locally administered area of policy—could fall under the rubric of interstate commerce. Recognizing that overturning GFSZA amounted to the reversal of a decades-long trend in federal lawmaking, Chief Justice Rehnquist’s opinion for the majority noted that the Court’s Commerce Clause jurisprudence had been increasingly deferential to legislative understandings of “commerce” over time. He went on to argue, however, that “[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.” No constitutional casuistry, he held, could make plausible the claim that possession of a weapon in or near a school conduced to a discernible effect upon interstate commerce. Concurring, Justice Thomas argued that extending Congressional Commerce Clause powers to education policy (albeit in this case for the sake of gun control policy) would be tantamount to granting the federal government a “national police power.”

*Lopez* could be glossed in a number of different ways. Rehnquist cast the decision as a breakpoint in the development of Commerce Clause doctrine: either the Commerce Clause had to deny Congress the authority to regulate a policy area as non-commercial and as internal to state affairs as education, or it could deny nothing at all. *Lopez* erected a signpost at the limits of Court deference to Congressional estimations of how “commerce” could be interpreted. A compatible gloss along these lines can be found in the constitutional thought of Thayer (1893), who argued that Congress should not offload its responsibility to give appropriate constructions of constitutional
meaning to the Court. Seen from another perspective, Lopez was a mistake or a failure of democracy: it enforced an obsolete understanding of a constitutional constraint and thereby frustrated the popular will, which had received a more authentic expression in Congressional enactment of GFSZA than in the Court’s revivification of of the Commerce Clause as a constraint upon Congress. For Rehnquist, this was exactly the point: the Court had to frustrate the popular will if the popular will traduced the meaning of the Commerce Clause. For Rehnquist’s opponents, and for proponents of the administrative authority of the federal government, this was anachronistic thinking. The Commerce Clause had been broadly, not narrowly construed, and this construction had become dominant, as a result of the resolution of the conflict between Court, Congress and Presidency during the New Deal. The Lopez Court was trying to fight a battle in a war that was already over.

That is perhaps too Manichean an interpretation, and at any rate the Court’s subsequent message on federalism and the retrenchment of the modern Commerce Clause arguably become more muddled in cases like U.S. v. Morrison and Gonzalez v. Raich. Moreover, Chief Justice Roberts’s opinion for the Court in Sebelius suggests, paradoxically, that the force of welfare state precedents (both legal and political precedents) can curb judicial retrenchment of the constitutional bases for social provision (especially the Commerce Clause), while at the same time the justices are increasingly skeptical of congressional reliance on the Commerce Clause as a general warrant for social policy at the national level. Ultimately, no constitutional perfectionist account can make sense of the Court’s Commerce Clause jurisprudence, or indeed guide it going forward. It is clear that the meaning of the Commerce Clause is inextricably bound up with political developments—there is no ur–Commerce Clause which is so exhaustive, or so limpid in its exposition, that it requires no construction to supplement its interpretation. Constitutional perfectionism is an unrealistic proposal for how constitutional democracy should work. It obscures the ways in which constitutional content changes over the course of political time. We should thus prefer a developmentalist perspective, coupled with its embrace of the secular and contingent nature of constitutional change.
2.4 Problems with Perfectionism

Functionalist constitutional theories lose a great deal of descriptive purchase when constitutional change is framed in terms of development rather than decisive, punctuated change. Functionalist theories are fundamentally concerned with constitutional *maintenance* rather than constitutional *change*. The notion of maintenance presupposes a stable baseline that is either upheld or departed from, or perhaps an equilibrium which is either sustained or defected from. The developmentalist perspective on constitutional change, however, counsels against this reading of constitutional history. In this section I develop a sketch of the distinctive features of functionalist theories. By focusing on maintenance and continuity, functionalist theories fail to get descriptive traction with the informal and granular reality of constitutional change. This should, I argue, prompt a concern with re-orienting normative theory toward the problems associated with continuous constitutional change.

How should theory respond to the facts of constitutional development? One approach, as I have suggested above, is functionalist: constitutions are meant to serve or discharge certain functions on behalf of certain goods or values. Functionalist theories describe the design or structure of the constitution as a framework for politics. The constitution “makes politics possible” by setting up the general shape of important institutions, identifying important values, and so on. We should value constitutions for their ability to deliver the goods, so to speak, of stability, continuity, and reliable expectations. There are many different examples of functionalist theories, and while they share the feature of emphasizing the importance of delivering the goods, they are varied and quite different from each other nonetheless. For example, originalism of intent, rights-fundamentalism, pre-commitment or deliberative democratic constitutional theories, etc. can be described as functionalist theories. They treat constitutions as stable structures which enable certain political processes, or as the embodiments of values or principles which must be upheld and maintained.

Constitutional theories framed in functionalist terms are usually either “societal” or “actor-centered” (Thelen 2004, 24). Societal-functionalist constitutional theories describe the choice to
adopta constitution in terms of the desire to secure social stability and security, to prevent breakdown or violence, and to promote the legitimacy of an ideology, ruling class, or governmental system. Actor-centric functionalist constitutional theories describe the choice to adopt a constitution in terms of the benefits that will accrue to individuals or groups as a result of constitutional cooperation. For both sets of theories, the possibility of constitutional change is presented in terms of rupture and reproduction: either the constitution is reproduced over time in a minimally adequate way, or it breaks down and is replaced. That is, change is exogenous, often in the form of shocks or disruptions to “the way of doing things.” Functionalist theories have less to say about constitutional change than they do about constitutional maintenance: by presenting the evolution of constitutions in terms of the reproduction of the same constitutional forms over time—or else the breakdown of those forms and their replacement.

Against this way of thinking about constitutional change, constitutional change should be seen as continuous—that is, characterized by variations in continuity rather than variations in fidelity to received forms or variations in the efficacy of institutional reproduction. A continuous conception of change is a better interpretation of the narrative of the previous section. To the extent that we can observe resiliency in constitutional forms it is better described as the result of feedback effects (cf. Pierson 2004) which obtain as a consequence of the large start-up costs of instantiating particular institutions. The durable parts of the constitutional order which seem to have been “preserved” over many generations are products of inertia, not mimesis. Meanwhile, there are many features of the constitutional order which have undergone considerable (re)construction over time, or have been transformed or discarded. The relevant variable here is the degree of continuity or discontinuity in the evolution of institutions, and not their maintenance or disrepair. Continuous change motivates a dis-continuous model of constitutional theory. It is otiose, for example, to apply the normative standards of the non-delegation doctrine to the contemporary disposition of the federal government: it is an established practice of constitutional politics that executive branch organs will, in effect, create policy in certain areas. This does not represent a coup or a usurpation of the “correct” (received) constitutional forms. It is instead the
result of a contingent and contested historical process of constitutional construction, in which several actors—Court, Congress, and President among them—participated.

Functionalist theories interpret the constitutional order in its current configuration as the result of a rational series of choices. But we should not conflate the roles or functions performed by constitutional institutions today with explanations for their adoption or inception. The institutions which we coordinate under today were not the inevitable result of rational design, and it is inappropriate to look to the moments in which they were originally selected to find normative guidance about how to criticize, reform, or maintain them. Because our constitutional institutions in 2010 are the result of continuous processes of change, we cannot understand their foundational assumptions and values simply by looking to a single point in history—their drafting, for example, or their ratification. We have to take account of the trajectory of their development over time. Contrary to the claims of theories which try to fit constitutional development into an overarching framework, the multilayered and continuous nature of constitutional development cannot be cabined into a single theoretical account—a “grand unified theory” of constitutional meaning, as it were. The trick is not to figure out how to show that the Constitution in 2010 is in some essential, non-reducible way identical to the Constitution of 1803, 1867, and so on; instead the task is to come up with a workable theory for the Constitution in 2010 that incorporates meaningful considerations on the historical processes that produced it. Such a theory may have no tight relationship to a similar theory about the Constitution in 1867.

Note that functionalist theories of constitutional democracy make the case that democracy is enriched rather than impoverished by the constraints imposed by a constitution. In general, the functionalist impulse takes the form of a commitment to democracy: that is, the justifications for constitutionalism should be made with reference to its salutary effects for democracy. We should not value constitutional entrenchment, or obduracy, or non-majoritarianism for their own sakes, but because of what they accomplish on behalf of democratic values. In other words, we value constitutions for their functions and their effects, and not for their natures or their essential properties. The proof of the democratic legitimacy of constitutionalism is found in constitutional
functioning: do constitutional institutions and norms, in fact, yield pro-democratic effects? There may be good reasons to think that many of the effects of many constitutional functions do indeed serve democratic ends. Only if such reasons turn out to be dispositive can constitutions be democratically legitimate. If constitutions and their effects can be considered morally justifiable, it is because, and only because, they function to improve democratic politics in a normatively attractive way.

A functionalist approach to constitutional justification therefore seems to leave out the possibility of historical justification. Historical justifications of constitutionalism attach normative importance to the facts of ratification and adoption. Our constitution is legitimate, this line of thinking goes, precisely because it is our constitution—the one that we chose to be committed to. This focus on continuity and particularity is absent in functionalist justifications, which address their claims to the individuals and communities confronting constitutional constraints in the present moment. Historical justifications, by contrast, serve as reminders of commitments made by those individuals or groups—or made in their names by their predecessors. A developmentally-inflected normative theory suggests that all prior history is relevant to understanding the meaning of a constitutional provision, and not just the history of its drafting or ratification (Friedman 2009).

Developmentalist theorizing is attended by its own problem areas and vulnerabilities, of course—and in light of developmentalism, the dead hand of the past is partially reanimated. If it loses is spectral quality because the past is less remote, the dead hand becomes no less threatening as a result. It is possible, in fact, that it becomes more and not less difficult for us to view ourselves today as the authors of our own constitution, pace Michelman (1998). The continuous and multidimensional character of constitutional change complicates the search for constitutional authorship and obscures the decisiveness and deliberation that many theories argue should accompany episodes of higher lawmaking. What’s more, higher lawmaking increasingly seems like an unreachable ideal for constitutional creation and elaboration the more we accept a developmentalist account of constitutional change. On its face, then, continuous constitutional change appears to be a threat to the democratic credentials of constitutionalism. It frustrates theoretical
attempts to identify the expressions of the popular sovereign’s will, and it suggests the prohibitive difficulty of constructing a single theoretical narrative of constitutional development. These are not insuperable problems, but they are not readily addressed from within a functionalist framework. In the next and final section, I argue that the problems of developmentalism deserve central attention in constitutional theory.

2.5 The Past’s Constitution in the Present

We now have a good idea of how the Constitution changes, through construction and not simply interpretation, over the course of time. This vision of constitutional change must now be contrasted with the conventional view of constitutional change—one of punctuated equilibria, or periods of stability divided by irruptions of new provisions inserted into the text—in order to better understand what is at stake in articulating the theory of contestatory constitutionalism. I begin by laying out the conventional view in general form, which focuses on the capacity of constitutions to entrench particular policies, institutional forms, or political decisions. (I consult descriptive as well as normative arguments about entrenchment.) I then describe the limitations and drawbacks of the conventional view, which consist of, first, its in-built barriers to full legitimation of a constitutional order and second, its insensitivity to the voices and demands of excluded and marginalized groups. This second limitation is particularly resonant in the American context, where democratization has been a long, drawn-out process that is still incomplete.

2.5.1 The Conventional View: Entrenchment

What explains constitutional continuity? One explanation is found in the view that constitutions entrench certain policies, patterns of institutional design, or values. The constitutional entrenchment thesis argues that that constitutional forms persist because political actors actively endorse and uphold certain background norms.

One way to understand the motivations behind constitutional commitment is to interpret
politicians’ acceptance of judicial review as an act of “partisan entrenchment.” On this view, politicians use judicial appointments to secure policy goals or ideological ascendancy (Balkin & Levinson 2001). Under the partisan entrenchment thesis, politicians use courts—in particular, federal courts exercising constitutional and statutory review—as repositories of ideological commitment or as anchor points where legislative achievements can be made to persist in the face of changing electoral alignments. Parties can entrench their policy preferences by appointing co-ideologues to the relevant benches in order to advance the regime’s policies. Co-ideologue judges will interpret statutes or even decide whether or not to hear certain constitutional cases in a way that is amenable to the political coalition’s goals or agenda.

Partisan entrenchment can result in “low politics” in which opportunistic or unrestrained judges will interfere with the legitimate workings of electoral politics on behalf of their co-ideologues. (In particular, Balkin & Levinson (2001) forcefully argue for an interpretation of Bush v. Gore along these lines.) Of course, under the entrenchment thesis outlined above, there is a corresponding form of “high (constitutional) politics” that can be realized through the rubric of constitutional entrenchment, in which politicians embed their constitutional understandings in the judiciary through the appointments process in order to sustain the constitutional state. “High politics” is too frequently a veil which “low politics” hides behind. Constitutional law has become increasingly polarized and absolutized, and that this state of affairs is becoming normalized to the extent that traditional conceptions of constitutional theory serve to obscure rather than illuminate the workings of power in the judicial system. The remedy is not a reversion to past practice—they regard it as plainly impracticable. Instead, political actors with particular preferences across patterns of constitutional politics must seize the reins of constitutional politics through aggressive judicial politics.⁵²

Although this may read like a cynical approach to constitutionalism and to the role of constitutional law in politics, it is in fact closely linked with electoral processes and representative politics. The Court is a site of democratic contestation; few will deny that. But the partisan en-

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⁵²This view has rightly been labeled as an inversion of Bickel’s “counter-majoritarian difficulty” (Balkin & Levinson 2001, 1067).
trenchment thesis captures a lot of what we take to be real facts about the political process. It is widely accepted that judges have policy preferences; that politicians select among judges for those with preferences similar to their own; and that judges will not be politically aligned with dominant parties if those parties are ideologically distant from the parties that placed them on the bench. Second, partisan entrenchment is normatively appealing inasmuch as it establishes a (mediate) electoral connection to constitutional law. Given that judges and justices have policy preferences, the act of partisan entrenchment offers a mechanism for forestalling judicial drift (that is, a Court that is completely out of step with the polity as a whole) and of linking the judicial construction of the Constitution with mass political preferences. On these grounds alone there is much to be said for the partisan entrenchment approach on normative grounds.

The other part of the story—the relevance of background norms of constitutionalism—is important as well. There are gaps in the explanatory story told by an unalloyed version of the partisan entrenchment thesis that appear to be best filled by explaining them in terms of political actors’ commitment to basic background norms of constitutionalism. Consider the partisan entrenchment approach in comparison with two other approaches for considering judicial power: the “precommitment” view that self-binding is a crucial means of committing to constitutive norms, procedures, or structures; and the “credible commitments” view of constitutionalization preferred by many public choice scholars. Under the precommitment approach, constitutionalization and the authorization of judicial review are ways of identifying specific background or second-order norms and insulating them from the vagaries of majoritarian politics by enabling judiciaries to protect or reinforce them.⁵³

Descriptively, precommitment is a poor account of American constitutionalism, since it is controversial even to say that the commitments lodged in the text or structure of the Constitution are clearly articulated, exhaustively dispositive or reason-conferring, or the products of authoritatively discernible intent (Waldron 1998, 267–281). Normatively, the precommitment approach is troubling, at least when it is not accompanied by a discussion of the public and political operation

⁵³This is the view of constitutionalism responsible for the Homeric imagery that often recurs in the literature, in which Ulysses is bound to the mast ad infinitum. See generally Elster (2000).
of constitutional norms, and not simply the enforcement of those norms by a judiciary against the preferences of mass publics, which, on some presentations of the precommitment view, seem to be seen as almost pathological. This is indeed the core problem with precommitment—it is starkly “constitutional” (in its insistence on legal continuities) and not particularly democratic.

Meanwhile, the credible commitments account comes out of the study of political economy and the circumstances under which regimes can demonstrate to other actors—states, firms, private individuals, creditors, capital, etc.—their fidelity to the norms and processes that conduce to the continuity and stability of a given political economic order. Constitutionalization—understood as the political support of independent and empowered judiciaries—serves to shore up legitimacy and build trust among those who interact with the regime. Constitutionalism is thus a “self-enforcing” equilibrium in which political leaders have strong incentives to limit their interference with the continuities of the established rules of the game.

Much of the scholarship in political economy that focuses on constitutionalism addresses itself to the question of why constitutional constraints on decision-making would be adopted in the first place. Although the case is strong for moving from a non-mixed constitution to a mixed one, such an argument does not, by itself, supply sufficient justification for the persistence of constitutional constraints over time. (dead hand of the past) The project of constitutional maintenance requires additional inputs from active political actors and not simply their (inferred, validly or not) tacit endorsement of the regime.

The Need for Legitimacy

Legitimacy is a necessary condition for a minimally morally justified constitution. In other words, a stable constitutional order must, as such, be legitimate. In the context of constitutional democracy, legitimacy is inextricably associated with the moral concern that each and every citizen has interests and concerns which must be taken into account in political decision-making. Rawls glosses this commitment to equal consideration (whether of preferences, interests, rights, etc.) as follows:
[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason (Rawls 1996, 137)

Rawls adds that “[t]his is the liberal principle of legitimacy” (Rawls 1996, 137). It should be noted that there are other ways of formulating this commitment to the equality of persons in a polity. Rawls stresses the need to solicit the consent (actual, or hypothetical, and hence “reasonable”) of each and every person capable of exercising reason, but we can also imagine other candidate principles of legitimacy: principles focused on the equal interests of persons affected by political power, for example, or principles focused on ensuring that each person is given equal voice, and so on. The core claim is that political legitimacy in a constitutional democracy requires and depends upon citizens’ sanctioning the constitution (considered in an Aristotelian or “small-c” sense) in terms of reasons that they themselves are prepared to accept.

For Rawls, this acceptance consists of a state of affairs called “overlapping consensus,” in which citizens who derive their preferences and beliefs from different “comprehensive doctrines” can nevertheless uphold a “political conception” of a just and well-ordered society (Rawls 1996, 134–140), such that their cooperation and mutual self-benefit do not simply reduce to a modus vivendi (Rawls 1996, 144–154). The stability of a pluralist, politically liberal democracy is thus underwritten by more than simple forbearance on the part of isolated individuals, even if it is not characterized by the horizontal bonds of robust social solidarity that communitarians or some republican theories of political legitimacy posit. It is also not, needless to say, the stability of a political order that is organized solely through violence, coercion, or subordination based on vertical differentiation with respect to class or social position. The stability of the constitutional democracy that Rawls has in mind flows from the inherence of a legitimacy of a certain kind in the institutions, practices and attitudes in its citizens.

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54Rawls’s conception of the political—as a sphere of social action that is distinct from from the personal, or the merely “associational”—is crucial to understanding the specific discursive domain in which popular constitutionalism takes place. I revisit this point below in Chapter Four.
Rawls’s liberal principle of legitimacy provides an abstract model of how legitimacy might obtain in a polity, but it cannot explain in any detail how a constitution is legitimated within historical time. The liberal principle of legitimacy is a construct of normative political theory. It is intended to identify and discriminate among the conditions which secure legitimacy for a given constitution. The principle can aid us in terms of what values should be promoted or protected in order to secure or maintain legitimacy, and it can aid us in determining whether a given observed constitution is one that is liberally legitimate, but it is not the case that any given feature of the ‘small-c’ constitution is one that was deliberately chosen, or that it represents an optimal solution (given time and information constraints) to problems facing institutional designers. It skirts the edges of plausibility, at the very least, to say that every feature of the Constitution in its contemporary form is there because it serves an important purpose today. Terry Moe’s critique of actor-oriented explanations of institutional emergence is very appropriate in this context: it is unlikely that all aspects of the contemporary Constitution obtain simply because they have “emerge[d] as good things, [or that] it is their goodness that ultimately explains them [or that] they exist and take the form they do because they make people better off” (Thelen 2004, 25). They are instead the path-dependent outcomes of complex causal processes. They aren’t necessarily there because they are delivering important goods; and even at the time of their inception they may have been suboptimal.

The current shape of our legal and political institutions owes as much to historical phenomena like path-dependency, timing, and sequencing as it does to conscious intent and design. Such a claim does not rest easily with a “dualist” conception of constitutional change, in which popular sovereignty is rarely but vividly expressed in moments or episodes of upheaval, change, and transformation (Ackerman 1991, Whittington 1999b). The possibility of constitutional moments seems diminished if constitutional change is a matter of ongoing elaboration. Ackerman’s idea of a “constitutional moment,” for example, presupposes a kind of issue framing, mass mobilization, and enactment and ratification of transformative policies (Ackerman 1991, 1998). But these desiderata of constitutional moments are absent or suppressed in a developmental conception
of constitutional change. The idea of a constitutional moment is, in fact, the idea of punctuation in a constitutional equilibrium; it represents a shift or a displacement of an old order or regime in favor of a new one. The contingency and the evolved characteristics of a pattern of developmental change, rather than a pattern of punctuated–equilibrial change, strip the products of such change of the “guarantees” that attach to formal change. How can we know with Article V–level certainty that foundational constitutional constructions command widespread consent and acceptance? Their endurance is as easily—perhaps more easily—attributable to path dependency and inertial feedback effects as it is to the will of the popular sovereign.

What theoretical resources can help us understand whether constitutional development be reconciled with a commitment to popular sovereignty as the legitimating device of constitutionalism? I have suggested that functionalism is off the table. Functionalist theories conceive of constitutions as structuring politics—but in a developmentalist constitutional culture, there is an increased possibility of the constitution becoming the central pursuit of politics, through institutional capture or “partisan entrenchment” (Balkin and Levinson 2001). In the wake of successive regimes or serially entrenched constitutional commitments, fidelity to some core function, value, or structure is not a very helpful source of normative guidance. Each wave of change pushes the ostensible object of fidelity further into an inaccessible past. In constitutional law, as in life, you can’t go home again.

An alternative route for accommodating developmental change with the democratic foundations of constitutionalism is, in point of fact, to describe such change as already being democratic. There is a lot to be said for this approach: if law and politics are so intertwined, why isn’t there at least a prima facie case to be made that democratic politics involve constitutional questions? (This claim or something like also serves as a premise in dualist theories which, after all, substitute constitutional moments for amendment procedures.) But to the extent that constitutional questions—ostensibly questions of “higher” lawmaking—become synonymous with questions of electorally mandated legislation, it becomes difficult to think of them as constitutional as such. A constitutional law which is consistently in tune with public opinion does not exhibit the en-
trenched and obdurate constraints on lawmaking which, on some accounts, are the hallmarks of constitutionalism.

Framing the question of the normative attractiveness of constitutionalism in this way points us away from the functional utility of constitutions to deliver certain goods and values, and toward an analysis of constitutional legitimacy. And it is constitutional legitimacy that, I believe, constitutional theory should aim for. That is, can the set of norms, practices, and institutions which confront us today be rendered normatively acceptable, or morally justified, or minimally permissible? If these are questions which can only be answered with reference to standards that are external to constitutional practice—using normative concepts other than popular sovereignty—then perhaps that is the price paid for a developmentalist constitutional practice. In this way we might describe developmentalist theories of constitutional legitimacy as tragic—that is, intentions and outcomes do not reliably match up in constitutional development.

Pierson argues that explanations of institutional emergence are often “ahistorical” and proceed from the implicit axiom that the institutions in question reflect, substantially if not completely, the choices and preferences of their designers (Pierson 2004, e.g., 130–139). This critique is easily and aptly extended to perfectionist approaches to constitutional theory, which are too quick to treat contingent constitutional outcomes as principled institutional design choices. Although federalism was a salient political philosophic concept in the eighteenth century, the establishment of a federal system of government in the nascent republic owed as much to calculated sectional compromises as it did to political principle (Graber 2006). Similarly, equal state representation in the Senate is less indicative of the framers’ commitment to political equality than the distrust many of them had of proportional congressional representation, and its potential to tip the balance of power toward the more populous states. These observations serve only to indicate the possibility that the practical consequences of constitutional designs do not reflect the deliberations or intentions behind constitution-making decisions, and they are well-worn ex-

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55Pierson argues that, in general, what is needed to overcome “the ahistorical proclivities of modern social science” is “a shift in focus from the problem of institutional selection to the problem of institutional development” (Pierson 2004, 14, emphasis in original). Such a critique could well be extended to much of political theory as well as political science.
amples in such discussions (Levinson 1995b, Levinson 2008). In fact, many features of the current constitutional regime are the products of path dependence.

One vivid example of path dependency is the creaking edifice that is the nation’s system for selecting presidents. Despite the shift toward popular selection of presidents, we still rely on the electoral college to actually make the selection of which individual assumes the office of the presidency. The Electoral College is a profoundly inegalitarian institution—in that it in no way honors the principle that every voter’s voice should count equally—and it further poses the threat—occasionally realized—that the person who wins the presidential election actually receives a smaller number of votes cast than another candidate. These aspects of the Electoral College vitiate any claim that the United States holds any regular occurring election that ensures equality among voters nationwide. Yet despite the Electoral College’s capacity to stymie democracy at the national level, or its sordid origins in sectional compromise over slavery (Finkelman 2002), it is an incredibly long-lived institution and will no doubt continue to be. Path dependence explains the Electoral College’s persistence, as well as its acceptance even today:

“Persons socialized in a particular constitutional order may develop relatively unthinking commitments to the constitutional procedures of their native [constitutional order]1....The framers adopted the Electoral College largely to provide additional political protections for slavery...Had constitutional law mandated different rules for electing the national executive, those rules would almost certainly enjoy the same degree of public acclaim” (Graber 2008a, 306).

The Electoral College’s persistence owes much to its success in inhibiting constitutional change, and rather less to any inherent wisdom in its design by the framers.

More generally, the features of the constitutional order should not be regarded as sui generis. They have unique histories and are the results of specific conjunctures and contingencies that arose in the course of the path of American political development. We often think if institutions as the organizational expressions of particular values, or as the embodiment of certain commitments we have made to how decisions are made and enforced. Although there is some truth to this, it
is rarely the whole story in constitutional politics. The Senate, for example, may be characterized as the embodiment of a kind of complex non-majoritarianism—but it would not exist were it not for the need to mollify the concerns of the delegates from small states to the Constitutional Convention.

I can only gesture here at how inquiry after constitutional legitimacy should proceed from a developmental conception of constitutional change, but I have already suggested that I believe it will have to be contextualized and historicist, and for those reasons, limited in scope.⁵⁶ An account of the justifiability of the current constitutional order, to those of us inhabiting it right now, will of necessity rely on premises and understandings inaccessible to those in earlier epochs and, for all we know, obsolete in later ones. We will have some features to our constitution which have outgrown their use or purpose, and will need to be explained not in terms of their functions or their usefulness but in terms of their history and their development. We cannot be assured that the history-laden and developmentally constructed constitution will be benign in all respects.

In all likelihood much if not most of the current constitutional order can be legitimated in terms that are familiar to us. Unlike the framers, we regard parties as immovable fixtures in the electoral system; unlike the antebellum polity, we conceive of citizenship in fundamentally national rather than local terms, and more importantly as something that all Americans enjoy; unlike the pre-New Deal society, we expect the federal government to play an active role in responding to the pathologies of the market. And a developmental perspective on constitutional change can facilitate the task of understanding just how such a set of governmental institutions can be legitimated. That legitimation, however, will be limited in scope, and it will not necessarily speak to the differences between today’s constitution and those of the past. In making today’s constitution our constitution, we leave previous constitutions to those who came before us.

⁵⁶For an excellent introduction to the need for an historically situated and contextualized approach to theorizing about constitutional legitimacy, see Farber & Sherry (2002, 140–168, esp. 165ff). On historicized political theory in general, see Williams (2005a, 12–17) and Geuss (2008).
2.5.2 Popular Sovereignty, Membership, and Exclusion

Not all segments of American society have been equally involved in the elaboration of constitutional meaning. The franchise has monotonically expanded over time to embrace a growing fraction of the U.S. population, but it was initially quite narrowly defined. Its borders were policed through a variety of formal as well as informal or cultural mechanisms. Even the watershed moments in the expansion of the franchise—the inclusion of large numbers of black males in the aftermath of the Civil War, and the success of the Suffragettes in the early twentieth century—were achieved only the face of sustained opposition from other organized groups as well as elected officials. Contestation over the scope and contours of the electorate was seen on all sides as a struggle not only to extend or retrench access to political power, but also as a struggle to define the makeup of the American polity. It was, in other words, a constitutive struggle. White resistance to the inclusion of black men in the electorate as well as religious and conservative resistance to the inclusion of women were in this sense not merely an attempt to preserve established patterns of patronage and privilege (although those goals were certainly aimed for as well). They were also defenses of cultural logics and of particular visions of the constitutional order.

The broader historical trend has been toward the democratization of American politics. The composition of the body politic has been increasingly egalitarian in character, at least formally so—there are fewer legal barriers now to participation in electoral politics than ever before. The “small-c” constitution is as a result more democratic in its structure. But the rotten compromises, incompletely-dismantled barriers of exclusion and privilege, and invidious cultural logics of white supremacy, masculine domination, and religious intolerance—to name only the most salient forms of discrimination and exclusion that have distorted the identity of the people in their sovereign capacities—have also been woven into the constitution throughout its history as well.

It is important to understand the structure of the problem here. Unlike “the dead hand of the past,” the distorting effects of exclusion and domination upon popular sovereignty do not invalidate constitutional provisions by casting doubt on their democratic provenance. Instead, exclusion and domination require the realization of the aspirations and goals that are contained—
implicitly or explicitly—in the Constitution. Balkin (2011a) calls this “constitutional redemption;” that is, our constitution gets legitimated over time by our faith that it will eventually, if not right now, serve to promote rights, fairness, and self-determination. Certainly some element of faith is necessary to sustain any political regime, although this does not by any stretch seem peculiar to constitutional democracy. Political faith is not sufficient to sustain the social world if the daily bread of politics is not forthcoming. The long shadows of slavery, Jim Crow, and the exclusion of many marginalized groups from the public sphere and participation in politics have all served to diminish the legitimacy of the Constitution. The fact that the Constitution is to be preferred to some anterior mode of political organization is not sufficient to justify it in perpetuity. Sustained and meaningful popular interaction with, and involvement in, the processes of constitutional development is required for the Constitution’s legitimacy to be upheld. The people must be able to construct their constitution.

The argument may be made that there are alternative modes of organizing a polity that are substantially worse than that which was set out by the Constitution of 1787; or that the fact that the Constitution was morally compromised by its accommodation of slavery arose from the necessity of compromise itself for the sake of stability and security (Graber 2006). While probably true, these claims offer little normative guidance. Not all compromises are alike, and some are to be preferred over others (Margalit 2009); even if we are likely never to have an account of compromise that can show us how to go about making them in any and all circumstances, we must nevertheless try to discern the costs and benefits of political compromises as best we can.58

57Governments of just about any regime type depend in part on the belief of a critical mass of its citizens—both among elites and mass publics—that the regime is somehow justified; this is true of the monarchistic supporters of la gloire of a given dynasty, or the adherents of the dominant faith in a confessional polity like contemporary Iran or just about any European state before the nineteenth century, or the true believers in the state ideology of an authoritarian state—as Kotkin (2008, 177) puts it, in the 1980s the legitimacy of the ruling Communist Party of the Soviet Union was riddled with “structural booby traps;” the Party still claimed to have “revolutionary” goals but its public face was one of official cynicism and pervasive bureaucratic inertia. On the maintenance and loss of state legitimacy, see generally Gilley (2009).

58Gutmann & Thompson (2012) argue that there is no master plan of negotiation that can programmatically chart out the boundaries of acceptable compromises. Against value monists like Dworkin (2011), they point out that political decision-making and the creation of legislation inevitably involve the meeting of differing viewpoints, perspectives, and agendas. Even if this does not entail full-on value incommensurability, it does require adjudicating between competing desiderata and policy aims.
This requires the use of critical judgment and carries with it the possibility that some compromises will be weighed, and found wanting.

The most significant such compromise in U.S. history is the Missouri Compromise, and synecdochally the more general sectional compromise over the enshrinement of slavery in the Constitution. (It may be said that the 1850 Compromise “brought ten years of relative peace” (Gutmann & Thompson 2012, 130), and this peace may have conduced to a certain level of stability (Graber 2006), but stability’s value in politics is too often invoked through assumption rather than argument.) The fragile equilibrium of the Compromise was shattered only a decade later; and the legacies and reverberations of the Civil War are still felt today. In 2012 the U.S. is still far from racially integrated or substantively equal, and the institutions which govern us are either the descendants of, or path-dependently related to, the institutions which, for much of the republic’s history, condoned keeping human beings as slaves and then systematically excluded slaves and their descendants from the public sphere and republican government.

The fact that black Americans, as well as women and non-Northern European immigrants may now participate in American political life and its institutions is a necessary but hardly sufficient condition for the legitimation of the constitutional order. This is evident in the fact that those same institutions have represented those groups for a shorter amount of time, and in the fact that the actual patterns of representation of those groups is still woefully inadequate (Williams 2000). The case for popular construction of constitutional meaning is bolstered by the recognition of the fact of the historical exclusion of marginalized groups.

2.5.3 Constitutional Constructions are Synchronic

Social relationships form the substrate in which constitutional constructions are embedded. They inhere in the beliefs, understandings, and agreements between social actors in political institutions and the public sphere. As such it is difficult to identify constructions in a purely positivistic manner, nor can they be isolated through the behavioralist lens of causes and effects, of dependent and independent variables. As fundamentally social objects, constitutional constructions can
only be properly apprehended theoretically. The need for thinking about constructions through the use of theory does not render them “subjective” or immaterial; in fact we know them to be objective. Nor does a theoretical approach to thinking about constructions “relativize” them. Why is this the case?

The answer is found in the fact that constitutional constructions are social phenomena; they consist of social relationships and patterns of dynamic and changing social configurations. In and of itself, this feature of constitutional constructions is not difficult to grasp, but it must be emphasized that constitutional constructions exist within “political time”⁵⁹ in a way that is different from statutes or amendments, or constitutional provisions. These latter types are also social phenomena—they relate to configurations of power, relationships, institutions, and so on—but they exist in political time in a fundamentally diachronic way.

Constitutional constructions, in contrast, develop synchronically within political time. For this reason they cannot be subjected to the same kind of analysis as provisions or amendments. These latter types are partly textual in nature; they amount to changes to the constitutional text itself. However, it is neither necessary nor sufficient for a construction to alter the text of the Constitution. (As we have seen, they affect the meaning of the Constitution without altering the text; and a constitutional change which is accompanied by a change in the text is not, in fact a construction but an amendment.) But constructions, since they are embedded in social relationships and not the text, are not diachronic and hence cannot be identified in the ways that we go about identifying provisions and amendments. We could, after all, easily identify the provisions and amendments in place at a given time when reading a Supreme Court decision from the same period. But because constructions exist synchronically rather than diachronically, they do not leave imprints on the historical record in the same way. The evidence left by provisions and amendments is diachronic—it is available in any instant, any moment in the historical record. But the evidence for constructions is not so easily discernible by the same method, since constructions are not static or stable; instead, they take place in the interactions between actors, and so

⁵⁹On political time in general, see Skowronek (1997) and Orren & Skowronek (2004).
they are invisible to the kind of historical “snapshot” analysis we use to identify provisions and amendments. Judges, in particular, are consummate users of the snapshot method, and so it is relatively rare and hence noteworthy when they attempt to venture beyond that mode of analysis and look to see what constructions are occurring within political time (for example, as Jackson did in *Youngstown*).

The synchronicity of constitutional constructions only further raises the stakes for popular participation in constitutional elaboration. Constitutional constructions can only be detected through “historical” (in the broadest sense of the term) rather than textual discernment. Put differently—identifying interpretable meaning requires reading; identifying constructed meaning requires judgment.

Thus, for the people to exert control over the processes of constitutional elaboration, it is necessary for them to monitor constitutional constructions as they unfold over time. This is a more demanding task than simply turning to the text for guidance, and consequently requires a more robustly contestatory constitutional culture as well as institutional mechanisms through which citizens may monitor, contest, or endorse constitutional constructions.

### 2.6 Summary

The constitution—unlike the Constitution—is constantly changing as a result of political, legal, and cultural factors. A failure to recognize and describe these changes not only results in an inadequate account of constitutional development but also deprives the people of tools for controlling the course of constitutional development. It will be necessary to describe the means by which the people can construct constitutional meaning through politics, and how observers—academic, political, and legal—may reliably identify and assess such efforts. That is the task of the next chapter.

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60 Constitutional constructions only take consequential and objective form across time, in the interactions, beliefs, and understandings of political actors within the constitutional system.

61 It is not necessarily a contradiction to note that, in this sense at least, judges are enjoined from using judgment; if we limit the judicial role in constitutional elaboration to interpretation rather than construction (see my discussion of the “demarcation strategy” in Chapter 6, below), then it makes sense to think of judges as readers rather than judgers. Of course, there are theories of judicial decision-making that dispute this claim; for an exhaustive historical account on behalf of the position that judgment is intimately a part of judging, see Hamburger (2008).
Chapter 3

Contestatory Constitutionalism

3.1 Popular Constitutionalism Revisited

In this chapter I argue on behalf of what I take to be popular constitutionalism’s positive contribution to normative constitutional theory—the idea that the people can and should exert powers of monitoring and control over the processes of constitutional change. Properly understood, popular constitutionalism not only diagnoses the problems of judicial supremacy, but also offers guidance on how current constitutional practice may be reformed incrementally. I also give analytic content to the concept of popular constitutionalism, so that we can identify popular constitutional movements, and so that the boundaries of valid popular constitutional construction may be mapped out with some precision. It is necessary to describe the formal features of popular constitutionalism before it can be made to pay normative dividends. Describing popular constitutionalism with greater analytic precision also clarifies the concept of “contestatory constitutionalism.” Popular constitutionalism is not found in the activities of a unified popular sovereign, one whose wishes or preferences are antecedent to the constitutional order itself; instead, it is found in contestation over constitutional meaning through participation in politics.

Popular constitutionalism is a particular vision of constitutional politics, grounded in the interpretive authority of the people and their ability to construct the meaning of their own constitu-
tion. We have seen that the Constitution is implemented and given meaning in such a way that it is constructed through political choices; as such it is both a legal and a political phenomenon; and consequently legal actors are involved in the articulation of policy and the design of institutions. Popular constitutionalism is an interpretation of popular sovereignty that consists in the involvement of the people at every step in those processes. Judicial supremacists, of course, present an alternative vision of the purpose of constitutionalism—constraining political activity within the bounds of constitutionally assigned norms and powers—as well as a hook—namely, that constitutional limits on democratic politics preserve the background conditions necessary for the pursuit of democratic politics. By contrast, existing popular constitutionalist theory is largely diagnostic and critical; it focuses on the pathologies and shortcomings of judicial supremacy, but the solutions it offers are either highly abstract or anachronistic. The most austerely abstract presentations of popular constitutionalism are not necessarily nuanced enough to serve as the foundation for popular participation in constitutional politics. We are unlikely to see—in the foreseeable future, at any rate—the kind of constitutional politics that are envisioned by the available theories of popular constitutionalism. Popular constitutionalism *qua* unitary people (re-)imagining their own constitution is politically impracticable and theoretically untenable. What I offer in its place is contestatory constitutionalism: Popular constitutionalism *qua* contestation over the construction of constitutional meaning, regularized and legitimized through incremental institutional reforms and a constitutional culture that is more accepting of the articulation of disagreement over constitutional meaning. Contestatory constitutionalism, by contrast, describes a more limited and mediated form of constitutional politics in which groups of citizens may enter and exit the process of constitutional elaboration.

The obduracy of constitutional institutions and the difficulty of changing the Constitution through the Article V amendment process have served to make judicial review the means for pursuing constitutional change that is the most attractive to a variety of actors, resulting in a negative feedback loop whereby judicial supremacy tends to reinforce its own ideological and cultural foundations over time. Judicial supremacy is firmly entrenched in our constitutional practice; it
has deep institutional roots and a fair amount of political support to boot.¹ It should be further noted that judicial supremacy is a linchpin in the system of separated powers, as the Federalist framers hoped it would become:

If we examine carefully the delicate instrument by which the framers sought to check certain kinds of positive action [such as debt relief] that might be advocated to the detriment of established and acquired rights, we cannot help marveling at their skill. Their leading idea was to break up the attacking forces at the starting point: the source of political authority [viz., popular sovereignty]...This disintegration of positive action at the source was further facilitated by the differentiation in the terms given to the respective departments of the government. And the crowning counterweight to an “interested and over-bearing majority,” as Madison phrased it, was secured in the peculiar position assigned to the judiciary, and the use of the sanctity and mystery of the law as a foil to democratic attacks (Beard 1913, 161).

And yet the sanctity and mystery of the law are today seized upon by many as the best way to effect constitutional change. In part this is the result of liberal enthusiasm for Court-driven constitutional change in the wake of “history’s Warren Court” (Powe 2002), but it is also the result of the onerous and virtually unreachable hurdles placed in the path of constituent power by the text of the Constitution.

So we have the peculiar situation in which judicial review, an instrument for the frustration of democratic self-governance, has become the preferred ground on which to contest constitutional change or stasis. But if we can’t have any confidence that popular constitutionalism will supplant judicial supremacy as the dominant modality of constitutional elaboration, then how can the concept serve as a remedy for the pathologies of judicial supremacy? The answer is to approach popular constitutionalism, taken as one of several possible modalities of constitutional elaboration, as a regulative ideal that informs and guides our political practice. Popular constitutionalism as such is not comprehensive reform program of American constitutional politics. Instead, as a reg-

¹See generally Whittington (2007).
ulative ideal it serves as the conceptual wellspring for critiques of judicial supremacy, and can guide incremental or piecemeal reforms of the constitutional settlement. In other words, popular constitutionalism is not a policy, a platform or a movement; it is a reference point. It is a *negative* reference point insofar as it helps us to understand and articulate the shortcomings of judicial supremacy; it is a *positive* reference point insofar as it provides insights into how our practices may be changed or improved. In its ideal form, popular constitutionalism delivers three important goods, to a greater degree or with more reliability than a regime of judicial supremacy: legitimacy; the constraint of political actors through the revitalized exercise of popular sovereignty; and a diminution of constitutional obduracy. These goods cannot be wholly realized in the absence of a regime of popular constitutionalism, but they can nevertheless be pursued and relied upon as standards by which we can assess actual practice.

My argument in this chapter begins with a description of the ideal case of popular constitutionalism as a system of *editorial control* over constitutional change. Under a system of editorial control, the people as a whole do not necessarily convene on constitutional matters themselves or constantly direct their representatives on questions of constitutional elaboration. In addition to being impractical this would also raise serious concerns about a crude and overbearing majoritarianism. Instead, under an ideal regime of popular constitutionalism, constituent power would be harnessed and mobilized to pursue specific changes or to monitor specific developments, and if necessary engage with institutions and officials in order to effect or resist change as necessary.

I then argue for ideal-type popular constitutionalism’s ability to uphold the central values of constitutional legitimacy, constitutional control, and constitutional flexibility; these are intrinsically valid and their partial or piecemeal fulfillment is still valuable as well. The importance of these values and their application in constitutional politics must be described in some detail. The adoption or pursuit of these values is predicated upon changes in our political culture; the final portion of the chapter is devoted to exploring the possibilities and limits of cultural change as a necessary condition for the development of popular constitutionalism. The particular form of constitutional culture that I consider is what I call “contestatory constitutionalism,” in which
contestation over constitutional construction is a core part of “ordinary” politics.

Contestatory constitutionalism is the form of popular constitutionalism that can and does occur in American national politics—unlike popular constitutionalism, tout court, which is often presented in terms of the unitary action of the people, against the Court or other institutional political actors. Contestatory constitutional movements articulate, and mobilize on behalf of, constitutional elaborations and counter-elaborations. Unlike social movements geared toward the exercise of constituent power—that is, movements for constitutional authorship, whether in the form of drafting new constitutions or amending existing ones—contestatory constitutional movements seek to advance preferred elaborations of the existing constitution, whether in the form of constitutional constructions or interpretations of constitutional language. The obdurate constitution’s unresponsiveness to change² can be overcome through exercises of contestatory constitutionalism in ways that are not possible through judicial review.

3.2 Ideal Popular Constitutionalism

How do the people get involved in constitutional elaboration? This is the rub for all theories of popular constitutionalism, and the most distinctive claim that this dissertation advances is situated precisely here: namely, that constitutional elaboration should be the site of robust and substantive political contestation. Other theories of popular constitutionalism propose different methods. These have included: institutional design and reform that limit the power of courts to overturn legislation (Tushnet 2008); the empowerment of popular revision of constitutional provisions through electoral or legislative politics, often on a majoritarian or less-than-super-majoritarian basis (Schwartzberg 2007); or even disruptive political acts ranging from civil disobedience to organized opposition to constitutional constructions to outright violence (Kramer 2004).

What unites these seemingly disparate theories is the belief that the people as a whole are the

²This chapter inherits as background assumptions the conclusions I argued for in the preceding chapters: that one of the important normative goals of constitutionalism is the popular control of state action rather than state control of popular action, that the ability to change a constitution is a prerequisite for constitutional self-government so considered, and that the current constitutional settlement is one of obdurate institutions and thick barriers to change.
repository of political legitimacy. This idea frequently comes in the guise of popular sovereignty, a contested but powerful concept that has animated American political thought since the colonial period (Wood 1998). For such reasons it is perhaps better to say that popular constitutionalism is more a species of “constitutional democracy” than it is “democratic constitutionalism” (Murphy 2007).

In its emphasis on the structuring and enabling of democracy through constitutional means, popular constitutionalism stands in contrast with many other branches of constitutional theory. Popular constitutionalists are often explicit about affirming this difference. To them, many normative constitutional theories are juristocratic to the extent that they are “rather openly antidemocratic...[and]...explicitly anti-populist” (Tushnet 2000, 180). Popular constitutionalism usually entails drawing a connection between “the people” and “the Constitution,” whatever differences remain in terms of how those units are conceived. However, popular constitutionalism is not properly reduced to the view that the people ought to take it upon themselves to amend the Constitution so that it better reflects their preferences. Instead, it is better characterized as the view that the people should take an active role in the processes of constitutional elaboration such that the resulting constitutional constructions better fit their understanding of what the Constitution requires. Of course, popular constitutionalism does not rule out the possibility and even desirability of amendment when the Constitution quite clearly frustrates popular understandings of what the best institutional outcomes are.³ It is not simply a proposal for wholesale constitutional reform through amendment, still less so a proposal for doing so on a majoritarian basis.

Popular constitutionalism should in the first instance be understood as an ideal type rather than as a description of a currently prevailing state of affairs. As described by Weber (1946, 59), the notion of der Idealtypus (the ideal type) refers not to the best version of some concept, but rather to its essential and distinguishing features, or the aspects of it that would be most important were it to obtain in the actual world. We can, in other words, conceive of ideal types of various

³For example, there is no conceivable way of (re-)constructing the Constitution such that a 29-year-old graduate student would face no legal barriers to running for President. If the people, in their wisdom, decide that they’d like to see that happen, there would be no alternative to simply amending Article II.
social phenomena even if we cannot directly observe them or have only encountered partial or incomplete instances of them. It is in this sense that popular constitutionalism must necessarily be thought of as an ideal, since it is decidedly not a reality.

What, then, are the constitutive elements of popular constitutionalism in its ideal form? To answer this question first requires that concept of popular constitutionalism be fleshed out sufficient clarity. Popular constitutionalism is, at bottom, the view that the people can advance their own claims about constitutional meaning, which, by virtue of being popular (as in of the people), are at the very least worthy of consideration even when they conflict with the pronouncements of courts. As such, popular constitutionalism entails an empirically informed concern with the relationship between law and politics. By focusing on the interpenetration of politics and law (Griffin 2007, 52), popular constitutionalist theories focus our attention upon the distinctiveness of constitutional law relative to other forms of law. Tushnet, for example, characterizes popular constitutionalism as “political law,” or a kind of law which gets elaborated through political contestation (Tushnet 2006). Kramer’s historical survey of popular constitutionalism as an approach to political mobilization suggests that constitutional law is law which derives its validity and even semantic content through mass politics. Importantly, the drawing of a connection between politics as collective action, on the one hand, and the elaboration of constitutional law, on the other, should not be confused with a majoritarian or plebiscitarian conception of the authority of constitutional law. As Sager notes, the impetus for popular constitutionalism within constitutional theory is a concern for the democratic (re-)legitimation of constitutional change; like many other constitutional theories, popular constitutionalism represents an attempt to understand constitutional limitations on state power as a way of operationalizing or enabling democratic politics (Sager 2001). Where popular constitutionalism diverges from many other constitutional theories is in the particulars of how it represents the realization of popular sovereignty in political life.

The absence of formal amendments ratifying specific constitutional constructions does not dispositively indicate the popular will with respect to constitutional change (Ackerman 2007, Strauss 2001, Lessig 1996). This is true not simply because it is impossible to infer a positive judg-
ment from the absence of an act; it is also the case that the amendment process itself serves to frustrate expressions of popular will. Frustration of this sort is both a feature and a bug. From the standpoint of many constitutional theories, obduracy in the face of easy revision is a vital aspect of constitutional maintenance (Holmes 1995). But the senescence of the amendment process has not brought about a freeze or moratorium on constitutional change. Instead, initiatives for change have simply taken a different tack. It is now the case that the primary mechanism for influencing the trajectory of constitutional change is judicial review. The rise of appellate boutiques, the elevated importance of amici briefs by interested political action groups and organizations which pursue legal change through litigation, and the high profile which the Supreme Court has in the political news cycle all testify to the ongoing relevance of constitutional discourse in the public sphere. The Constitution is a lodestar and a touchstone in the rhetoric of electoral campaigns, as is the invocation of the wisdom of the Founders. It has become habitual for private citizens, public figures, and academic to think of the “the Constitution” as a concept which can be apprehended sub specie aeternitatis and outside of a given socio-historical context.

This image of the Constitution’s inerrancy and obduracy rests uneasily next to Americans’ strong commitment to popular sovereignty. Among the candidates for core principles undergirding constitutional government in the U.S., popular sovereignty is the clear leader in terms of long-established usage, diversity of interpretations and theories, and the sheer numerical weight of proponents in scholarship and writing. Popular sovereignty has been advanced as a revolutionary or inspirational value; as a regulative ideal that is not full realizable in “ordinary” politics, and as the normative basis for many theories of constitutional democracy. As Wood (1998) notes, it gained widespread currency in colonial and revolutionary America as a counter-hegemonic principle. In contrast to the remote rule of Parliament and royally-appointed governors, the revolutionaries seized upon and increasingly relied on the idea that “the people” were the ultimate repository of sovereignty—sovereignty itself being a package of prerogatives, including the ability to make fundamental decisions of state: declaring and conducting wars, levying taxes, engaging in diplomacy, and articulating and maintaining territorial and jurisdictional claims. What (may
have) started as a “constitutional” revolution (McIlwain 1924)—in which colonial leaders saw themselves as demanding the full recognition of the constitutional rights they held as subjects of the Crown—became a more full-throated assertion of sovereignty, along with all the trappings of independent statehood which that implied. The assertion that sovereignty inhered in the people themselves, coupled with the assertion that the citizens of the colonies were a recognizably distinct public, meant that colonial sovereignty was not derived from British sovereignty. It was self-evident on the basis of the people’s existence as a distinct polity. Hence, no further justification was needed for independence—it was what the people willed, and that was enough.

This conception of popular sovereignty as a self-justifying basis for collective action has proven to be remarkably resilient. Arguably, the continued appeal of popular sovereignty can be attributed to its capacity to serve as a foundational value. It gains a great deal of rhetorical purchase by appearing to ground other political values. Furthermore, the idea that “the people themselves” should be their own rulers resonates with several other commonly avowed beliefs about political order. It offers an interpretation of egalitarianism: the equality that is held to obtain across individual citizens can be realized (it is argued) through the project of collective self-rule. Its voluntarist connotations are attractive at a visceral level: the ideal of popular sovereignty is easily cast in terms of collective self-rule as self-mastery, as opposed to collective subjection or acquiescence. Popular sovereignty also (obviously) is indebted to the value of sovereignty itself, and to the pursuit of national projects in the context of (early) modern global politics.

A focus on non-judicial (and perhaps, therefore, non-expert) interpretation of the text, an attentiveness to the real structure of constitutional institutions (that is, their constructed and culturally elaborated character), and populism itself—all of these features combine to distinguish popular constitutionalism from other normative constitutional theories. Popular constitutionalism extends the people’s constituent power past the moment of constitutional entrenchment. Although other theories allow for constitutional change past the moment of adopting a constitution—even steadfast advocates of entrenchment allow for the possibility of further amendment as specified within the text itself—popular constitutionalism goes further; the people are invited to con-
tinuously author their own constitution. Only by perpetually writing their own constitution into existence will the people be able to govern themselves. This point may be made more or less metaphysically according to taste. Norton (1988) presents this process as a kind of self-transubstantiation of the popular sovereign, through which the people reflexively inscribe their own identity upon themselves. More prosaically, Frank Michelman notes the inevitability of the logic of authorship; under constitutional democracy, “we produce an author because we have to” (Michelman 1998, 92). If constitutional government is to be self-government, then the people must constitute themselves—again and again, if necessary.

It is helpful to keep in mind the idea of “constitutional essentials,” proposed by Rawls (1996) and further developed by Michelman (2011) and others. The constitutional essentials of a given political community include not only the text of a written constitution, or its foundational public laws; they also consist of the ideas, values, cultural traditions and narratives, and institutions which give shape and form to the community as a distinctive political unit. Importantly, without some set of constitutional essentials constitutional elaboration is hardly possible. Simply attempting to interpret the bare textual materials of the Constitution requires the importation of some constitutional essentials, in the form of canons of interpretation (however contested) as well as constitutional text. But in fact there are more constitutional essentials than that. We rely on lessons and understandings garnered from the practical experience of politics, in addition to the constitutional text and the doctrines of constitutional law, in order to make sense of our Constitution and extract guidance from it.

A representative overview of the constitutional essentials would include: Constitutional doctrine, including interpretive materials and canons of interpretation, as well as roughly mapped-out conceptions of a “canon” of illustrative or foundational cases, as well as an “anticanon” of repudiated cases; foundational public laws or “super-statutes” which comprise the presence of constitutional principles and imperatives in the social world, by instantiating rules, powers, and authorities which directly bear upon citizens’ lives and projects; cultural narratives and traditions with respective to political institutions and ideals, through which citizens’ political identities are
developed and expressed, and to which affective attachments can be affixed in a normatively un-
problematic way (Stilz 2009, Jacobsohn 2010); and fundamental values, including a commitment
to reciprocity and the exchange of reasons in political debates; egalitarianism (or, at the least,
equality before the law), and the upholding of democratic patterns of political preference aggrega-
tion and decision-making. Furthermore, a basic commitment to constitutionalism, considered
as a distinctive and valuable political project, is required of the political actors who predominate
within the community in question. Sometimes characterized as a willingness to abide by “the rules
of the game,” the commitment of political elites, state officials, and other consequential political
actors to abide by constitutional norms and uphold the expected functioning of constitutional
institutions is an important component of the constitutional essentials.

Importantly, the constitutional essentials of 2012 are rather different from those of 1789 or
1850 or 1937. Like constitutional constructions (introduced below in the next section), constituti-
ional essentials are subject to revision and change, though through different processes. As a
result of developments in political attitudes and values, institutional reforms, demographic and
cultural changes, and major crises such as the Civil War and the Great Depression, our expect-
tations and concerns regarding the exercise of political power differ greatly from those of prior
generations. From the perspective of constitutional history, it is remarkable—and perhaps easy
to overlook—that twenty–first century Americans look to the federal government for at least a
modicum of social provision (through Social Security benefits and Medicare); to maintain the
most expensive and well-equipped standing military in the world; and to enforce certain rights
guarantees, attached to a concept of national citizenship, against state and local governments. It
is equally remarkable that state and federal governments alike have expanded the franchise sev-
eral times over, adopted greater protections for labor, the poor, and the otherwise vulnerable. In
general, government activity is presently directed at forms and levels of redistribution and repre-
sentation that far exceed the extent to which any government entity performed those functions
in the early history of the republic.

These changes have not, in the main, been accompanied by changes in the text of the Constitu-
tion (Ackerman 2007). But although our Constitution has not changed, our constitutional essentials have. The nature of these essentials is open for debate—but this is a reality that contestatory constitutionalism can easily accommodate. The following sections of this chapter refer to many of these changes through a variety analytic frames. What should be kept in mind while reading these sections is that constitutional change has been occurring even as the text of the Constitution has not. Under ideal popular constitutionalism constitutive commitments would always be laid bare for all to see and understand, and discontinuities between constitutional commitments and constitutional form would soon be addressed and narrowed.

So far, none of the description I have offered is terribly different from the other definitions of popular constitutionalism that are on offer. Many authors—some of whom I have already referred to above—advance similar claims about the people’s interpretive authority, or the importance of resisting and cabining judicial power to construe constitutional meaning, or the need to maintain flexibility rather than entrenchment in constitutional structures, or some combination thereof. Even some of the most sustained and thoughtful reports on popular constitutionalism are primarily historical (Kramer 2004, Schwartzberg 2007); but the diminished public sphere and increased diversity that are characteristic of the pluralist, postindustrial polity (Putnam 2001, Skocpol 2003) tend to inhibit the expressions of mass sentiment that drove popular constitutionalism in the past (Wolin 2010). There are however many theorists who seek to renovate our constitutional culture and recover that older approach to constitutional politics.

Mark Tushnet, who favors “taking the Constitution away” from courts, offers the following definition of popular constitutionalism:

“[P]opulist constitutional law...is populist because it distributes responsibility for constitutional law broadly...[C]onstitutional interpretation done by the courts has no special normative weight...[Populist constitutional law] is constitutional because it deals with the fundamentals of our political order.” (Tushnet 2000, x, emphasis in

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But see, e.g., Eskridge & Ferejohn (2010) for the argument that certain legislative accomplishments are “super-statutes” which are themselves, by virtue of their foundational nature and their political popularity, foundational in much the same way that constitutional provisions are.
Many other theorists make similar claims. Akhil Amar, himself not always thought of as a popular constitutionalist, has argued that because the Constitution’s authority is ultimately grounded in the people’s sovereignty, the people may act to change the Constitution even through means not specified in its text (Amar 1995, 90 ff)—after all, who has greater authorial justification to do so? Melissa Schwartzberg (2007), in arguing for the importance of legal change that is responsive to democratic politics, places similar emphasis on the primacy of the people’s constituent authority to reshape the law as they see fit. Todd E. Pettys reduces popular constitutionalism to the core claim that “the People” have an interpretive authority which outstrips that of the courts, even (or especially) in hotly disputed cases (Pettys 2008, 316)—a view shared by Serota (2011).

Larry Kramer, l’enfant terrible of popular constitutionalists, denies (Kramer 2004, 8) that popular sovereignty is expressed only in extraordinary moments of popular mobilization (Ackerman 1991, 15). For Kramer, the antecedents for American popular constitutionalism are found in the “customary constitutionalism” (Kramer 2004, 31–32) of the very early Republic, in which uncertainties and contested areas of constitutional meaning were resolved consociationally through direct action taken by mass publics. In a move that is evocative of the posture adopted by Arendt (1963) in On Revolution, Kramer presents popular movements to shape constitutional meaning as the continuation of a revolutionary struggle, and indeed the resistance of the institutionalization of the outcomes of that struggle: “Americans saw themselves as having conducted a struggle to preserve constitutional rule through the use of constitutional forms of opposition” (Kramer 2004, 38). More so than many other constitutional theorists, Kramer is substantially sympathetic to

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3It is easy to make too much of labels in political theory. Identifying a particular view or argument as “popular constitutionalist” should not be taken to suggest that there are clearly-defined teams of theorists, or indeed that theorists do not often pitch tents in multiple camps. This is particularly the case with popular constitutionalism, which is better understood as a tendency shared (to varying degrees) by many diverse scholars, and not as a unified or disciplined camp within constitutional theory (Gewirtzman 2005, 904). Furthermore, as I noted above (in chapter 2), many other theorists—notably Ackerman (2007) and Whittington (2007)—describe popular or political processes which affect the development of constitutional law, but are not appropriately thought of as popular constitutionalists. Whittington’s presentation of the historical evidence for politicians’ support for judicial review draws our attention to the institutional residue of popular support for constitutional constructions—particularly judicial supremacy itself. On Whittington’s account, presidents have not only found it expedient to empower the judiciary to resolve constitutional conflicts, but they have enjoyed the support of the public in so doing.

4It should be noted that for Kramer the revolutionary character of the early republic was demotic, egalitarian, even
Democratic-Republican suspicions of the Federalist vision of power, linking popular constitutionalism to the struggle to resist the concentration of power in the hands of a wealthy or privileged few (Kramer 2004, 128–130). In fact, he seeks to renovate a form of constitutional politics in which “choices were imagined and ultimately made against a background of unmediated popular intervention, which provided the implicit baseline for measuring legitimacy” (Kramer 2004, 53).

In the next section I outline the major differences between two abstract theories of interpretive authority: popular constitutionalism and judicial supremacy. Being abstract, both theories yield descriptions and recommendations which are never likely to correspond with the messy reality of political practice. But there are good reasons for this simplification; articulating and comparing ideal theories helps to bring out in sharper relief the differences between them, and we can also identify which visions of constitutionalism they are animated by. Note, however, that ideal popular constitutionalism as I have described thus far—and as it has been described by the theorists I have referred to as well—assumes a unitary “people” acting as a counterweight or antagonist to the constitutional state that represents it. This is an important feature distinguishing popular constitutionalism’s vision from judicial supremacy’s—roughly, the former stresses the “democracy” in constitutional democracy, while the latter stresses the “constitutional”—but it is also a limitation. “The people” as a unit of analysis is simply far too big to be made to do useful work in prescribing how popular constitutionalism should proceed in practice. Furthermore, carelessly talking about “the people” serves to occlude and obscure the very real divisions within the citizenry, along lines defined (however roughly fluidly) by class, religion, ideology, and a

levanting; but of course another interpretation is that the real revolution was elite-driven and top-down. The processes of constitution-making that Wood presents as revolutionary were examples not of constituent power through direct action taken by mass publics; they were instead examples of representation, delegation, and mediation. For Wood, the idea of the constitutional convention was an extraordinary invention, the most distinctive institutional contribution, it has been said, the American Revolutionaries made to Western politics. It not only enabled the constitution to rest on an authority different from the legislature’s, but it actually seemed to have legitimized revolution (Wood 1998, 342).

This has been true of popular constitutionalism for decades; thirty years ago, Richard Davies Parker issued the call “to imagine a political life far different—far more democratic” than one dominated by judicial supremacy (Parker 1981, 257).
dozen other dimensions of affect, belief, and preference. The difficulties with monism of this kind in thinking about popular agency helps to motivate the turn to contestatory constitutionalism as the clearly preferable conception of popular constitutionalism.

3.2.1 **Differences Between Judicial Supremacy and Popular Constitutionalism**

The popular constitutionalist vision of politics is one that lacks some of the central features of our current politics. First of all, under a regime of (ideal-type) popular constitutionalism, there is no “judicial overhang”—that is, when Congress contemplates the constitutionality of the legislation it is considering, it does not assume that the legislation is likely to be invalidated through judicial review if the constitutional interpretation entailed by the legislation departs from Court doctrine.⁸ In the absence of the judicial overhang, Congress may take on a more active role in asserting its capacity for constitutional interpretation, along with other institutions like the executive branch and non-governmental organizations as well. In general, under a regime in which judicial supremacy no longer ruled, “the question of whether the judiciary possesses unique insights into the constitutional text” would no longer be begged (Whittington 1999a, 209).

The possibility of a Congress that intervenes more actively and consistently in constitutional politics is a recurring theme in public law scholarship, the prospects for such an undertaking seem dim. Fisher (2011) modernizes the argument made by Thayer (1893) over a century ago, insisting that Congress recover its former primacy as representative of the people and wrest the initiative to construct constitutional meaning from the courts and the President. Fisher’s analysis trades a dubious reading of the goals held by individual legislators and the incentive structure they confront. The Presidency has eclipsed Congress as the institution most commonly thought of as representing a national constituency (Lowi 1985), which makes it much less likely that Congress can serve as the institutional stage for wide-ranging constitutional deliberations. Pickerill (2004)

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⁸Mark Tushnet coined the phrase “judicial overhang” to refer to the threat of judicial review affecting Congressional decision-making (Tushnet 1995). See also Tushnet (2009).
and Zietlow (2006) have both made cogent arguments that Congress is *able* and *ought* to assume a more active role in constitutional interpretation, in what would amount to a revivification of coordinate construction. It’s true that Congress already engages in constitutional deliberations while considering policy choices (Pickerill 2004, 2–3, 9, 16). And Mark Tushnet has assembled a considerable body of evidence to suggest that, in general, legislators can serve as competent constitutional interpreters (Tushnet 2008, 79–100). However, the scope of those deliberations is distorted; anticipation of the likelihood of the Supreme Court overturning or sustaining legislation through judicial review—Tushnet’s own “judicial overhang”—is not equivalent to “coordinate construction” of constitutional meaning. The Framers’ republican vision of a national legislature with a national constituency has always been more fantasy than fact, and Congress will not be the beachhead for any putative popular constitutionalist insurgency.

At this point in the dialectic a third possibility should be considered: departmentalism. Under departmentalism, each branch assumes responsibility for safeguarding its powers and prerogatives. “Coordinate construction”—the elaboration of constitutional meaning through the repeated interactions of the three federal branches (and, perhaps, between the federal government and the states)—replaces the interpretive hierarchy of judicial supremacy, in which non-judicial officials must not only obey the interpretive judgments of the judiciary, but internalize them as their own constitutional reasons (Murphy 1986, 407, ff).

Despite these shared characteristics, differences remain between departmentalism and popular constitutionalism—though the two theories can still be complementary and not antagonistic. Departmentalism advances an institutionally decentralized theory of constitutional interpretation, in which the separation of powers and the distribution of responsibilities and offices is determined through interbranch contestation. Such a pattern of constitutional elaboration is possible under popular constitutionalism, but it is not a sufficient condition for popular constitutional politics. In addition to coordinate construction, popular constitutionalism envisions a state of affairs in which the scope and content of the constitutional regime are articulated and contested.

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*I described the idea of a “constitutional regime” in the previous chapter; recall that it consists of institutions, norms, and expectations about governmental powers and responsibilities (Skowronek 1997, Ackerman 1998,*
while, under judicial supremacy, the separation of powers is maintained primarily through courts policing the institutional boundaries among the coordinate branches (Eisgruber 2001, 168–204). At its best, this system can in fact serve to constrain institutions’ attempts to ignore or arrogate the powers of other institutions—that is, in preventing gross violations of the separation of powers; it has fared rather less well in preventing institutional actors from re-imagining the scope and application of their own powers—a phenomenon illustrated most vividly by the unilateralism (in foreign policy as in constitutional politics) of the Bush/Cheney administration (Holmes 2007, 235–285).

As I argued in chapter 3, challenging, maintaining, or changing a constitutional regime is not something that happens simply—or even primarily—through institutionalized constitutional interpretation. Judges do not have top billing in such a show. A varied cast is involved, including political parties, public interest groups (single-issue or otherwise) and political action committees, litigation campaigns, and other civil society actors. The role of judicial review in regime politics is largely one of regime maintenance—through judicial review striking down constitutionally ambitious legislation—unless and until the regime (or its supporters) are overcome by a different set of actors.

Another major difference between extant judicial supremacy and possible popular constitutionalism is found in the relative resistance and receptivity of established institutions and regimes to revision. Under judicial supremacy, the conserving function of the Supreme Court is substantially amenable to the discretion of the justices. They may impede legislative efforts to revise or reform major institutions, structures, or practices, more readily than under a regime of popular constitutionalism, in which different branches and institutions are in perpetual dialog (and perhaps conflict) over constitutional meaning. Such dialogues already occur, of course (Fisher 1988, Pickerill 2004), but popular constitutionalism entails inter-institutional deliberations that are more robust, public, and consequential. At present, the Court does to a certain extent act

Whittington 2007). For attempts to characterize the current constitutional regime, see Tushnet (2003) (arguing that the current regime is one of disciplined parties and constitutional inertia) and Balkin (2008a) (describing the current regime as being distinguished by a "national surveillance state" of broad security powers centralized in the federal government).
variously as a brake or an accelerator to constitutional change, but it does not substantively en-
gage its coordinate institutions on questions of constitutional elaboration (Ely 1980). This point of
difference should not be overstated; in practice judicial supremacy has frequently served to assist
rather than impede transformative presidents (Whittington 2007) and has not often strayed out-
side the boundaries of mainstream national opinion (Dahl 1957, Friedman 2009). The exceptions
to that pattern, however, are notable, and they are common signposts for criticisms of judicial
supremacy from a number of perspectives. Among such cases the frontrunners are *Dred Scot*
and *Lochner*, with *Roe* and *Bush v. Gore* close behind in terms of relative controversy. (Other
cases—*Brown v. Board, Griswold, Bush v. Gore, Citizens United*, etc.—may also be substituted in
this analysis according to the reader’s taste.) On those occasions when the Court appears in the
eyes of observers to be substituting its own judgment for that of policy-makers, it is not merely
the Court’s legitimacy that is threatened; the quality of constitutional dialogue in the broader
public sphere is also diminished.

More broadly, when the Court is in conflict with other branches under judicial supremacy it
is often seen as “out of step” with Congress, or with the president, or with the national majority,
and so on. The complaint that the Court is “out of step” only carries weight insofar as the Court’s
interventions in the political arena have real staying power. Conversely, under popular consti-
tutionalism judicial review can actually have a greater capacity to contribute to inter-branch
dialogue, since the decisions of the Court would not prematurely foreclose debate on contentious
issues (Waldron 1999, 290). Instead, because its decisions are not held to have authoritative final-
ity, they can actually do a *better* job of promoting the inter-branch dialogue favored by Friedman
(2009) and other advocates of a politically-engaged Court (Peretti 1999). Hard cases decided un-
der judicial supremacy may make for bad law, but that need not be the case under a system of
popular constitutionalism, since the law is, by definition, more readily open to revision.

To put the point another way: Judicial supremacy gives rise to the conditions under which
it is possible to pursue significant constitutional change through judicial review—and constitu-
tional change of a particular kind, namely, policy entrenchment (Balkin & Levinson 2001, Balkin
Under judicial supremacy, the policy effects of Court decisions can be long-lasting. A Court which speaks with finality on questions of constitutional meaning can lodge interpretations in the constitutional matrix which persist for some time. This ought to be normatively troubling whether the Court’s decision helps or hinders the expression of the majority will. The case has already been made many times for why we ought to be concerned with the Court overturning valid outputs of democratic institutions (Bickel 1962). However, a Court that serves as an “accelerator” (Ely 1980) for national majorities is also cause for concern. Accelerated outcomes in constitutional elaboration could discourage deliberation, and, more importantly, suppress minority voices. When the Court’s opinions are final (at least until a different cohort of justices is appointed), as they are under judicial supremacy, they cannot credibly be described as utterances in an inter-branch dialogue. To the extent that they entrench decisions, they do not improve democracy but supplant it.¹⁰ There are sociological differences, as well as institutional differences, between judicial supremacy and popular constitutionalism. The foremost of these is the process by which constitutional changes are (or are meant to be) legitimated. Under judicial supremacy, constitutional change that does not occur through the amendment process but through judicial review is legitimated indirectly, through the Court’s own institutional legitimacy (Gibson & Caldeira 2009). In contrast, popular constitutionalism envisions a legitimation process whereby political contestation, deliberation and participation conduce to the legitimacy of constitutional changes emerging from such activities. That is, the same features of democratic politics that serve to legitimate the outputs of democratic institutions would also serve to legitimate the constructions and elaborations that emerge from contestation over constitutional meaning. (In the next chapter I explore the institutional and organizational measures that are necessary such that we may be confident in the legitimacy of the outcomes of contestatory constitutionalism.)

In sum: ideal-form popular constitutionalism envisions a polity in which active participation

¹⁰The possible objections to this line of thought about popular constitutionalism are counterfactual: to wit, what if the Court had not accelerated some processes (racial integration, electoral redistricting, etc.) or had not retarded some other processes (resistance to economic reforms in the early twentieth century, etc.). But counterfactual objections quickly become unanswerable. What’s more, in this case would seem to have to rest on appeals to the virtue of the justices—if the “right” justices had been in place, if the justices had been convinced of the “right” arguments, etc.—and such appeals are similarly unanswerable from within political science.
by many citizens and not a select few is a desideratum of the proper functioning of constitutional government. Popular constitutionalism consists of the elaboration of constitutional meaning through participatory and deliberative political action, culminating (if successful) in new or changed constitutional constructions. As we have seen, constructions emerge from political actors’ attempts to give content to gaps or unclear provisions in the Constitution. Many of the most consequential constitutional changes of the twentieth century are the result of constitutional constructions. Contestatory constitutionalism holds that in many cases constitutional constructions should be pursued through democratic politics, rather than within political institutions such as Congress or the executive branch. There are important legitimating and educative effects that result from pursuing constructions through politics rather than institutions, as I will argue below. Additionally, under the contestatory constitutionalist account of constitutional change, such constructions are likelier to command consensus appeal, to persist over time and to stabilize the constitutional settlement. This is in fact the case because constructions are contingent and the products of politics—and are thus the products of the articulation and counter-articulation of rhetoric and ideological claims, the mobilization of supporters, engagement with institutions and the aggregation of votes. By remaining open to future contestation, and with a clear means available to contest them, constructions that emerge from contestatory constitutional politics can enhance rather than diminish the stability and legitimacy of the constitutional regime.

### 3.2.2 Popular Constitutionalism’s Core Values

We are in a position to isolate and identify the core values of popular constitutionalism, now that we have contrasted it with its theoretical foil, judicial supremacy. First, popular constitutionalism is egalitarian, broadly speaking. Its egalitarianism is implicit in its conceptual structure. If we consider popular constitutionalism to be a corollary to popular sovereignty, its egalitarianism should be readily apparent. While there are multiple conceptions of egalitarianism on offer—particularly in contemporary political philosophy, where the concept is often interpreted as pertaining to the division of public goods—ideal form popular sovereignty is agnostic as to which conception of
egalitarianism is appropriate for understanding or prescribing popular participation in politics; it is simply linked to the concept of egalitarianism per se: the people are not simply voters, or entities which are acted upon by the government, but are actually in some sense rulers and not ruled.

(As always, “egalitarianism” in the context of political action should be qualified with respect to “egalitarianism” as theoretical proposition. The equality that defines a group of political actors working concert toward a shared goal can quite easily amount to the exclusion or subordination of others. So we should be careful to note that an egalitarianism in popular constitutionalism does not necessarily conduce to an egalitarianism of equal recognition for the claims of co-citizens. Nativist opposition to non-European immigration was egalitarian insofar as its participants beheld themselves as co-belligerents in a common cause. Much the same could be said for the policies—formal and informal—of hostility to and ethnic cleansing of Native Americans, which enjoyed deep support from white citizens. Egalitarianisms of exclusion, in which a community is defined in opposition or contradistinction others, are certainly one of the possibilities for collective action under the heading of popular constitutionalism.)

The egalitarianism of popular constitutionalism allows it to confer legitimacy upon constitutional law and constitutional constructions. Democratic legitimacy depends in part on citizens’ perceptions that they have some level of meaningful input into the laws which constrain them—if not now then in the future. The constitutional obduracy recommended by judicial supremacy, by contrast, renders it perennially vulnerable to charges that “dead hand of the past” is holding back the living and tacitly delegitimzing current law. Jefferson argued that “the earth belongs in usufruct to the living,” and while he seemed content to deny the extension of that usufruct to the human beings he owned as chattel, his claim is an appealing one nonetheless. Popular

\[1\] For a survey of recent attempted responses to the “dead hand” objection, and their limitations, see Pettys (2008). Whittington (1999h) argues that an originalism of public meaning does not lead to the dead hand problem, because the amendment process holds out the continuing possibility of revision. However, the difficulties presented by the Article V process are so high as to create the danger of false negatives—the absence of amendment does not indicate the absence of contestation or the desire for change (Ackerman 2007). This is of course one of the perennial problems of thinking about legitimacy more generally—a positivist account of the presence of legal norms does not itself provide sufficient warrant for believing those norms to be broadly internalized or accepted by those under them (Simmons 1979, Greene 2012).
constitutionalism offers a way through which the claim can be put to work in politics.

The egalitarianism implicit in popular constitutionalism serves to burnish its democratic credentials. Although at its inception American constitutionalism was nowhere near democratic, it has exhibited a secular trend toward democratization (Wilentz 2006, 3–19), at least in terms of increased formal access to the political process. (Its record in terms of substantive representation is less impressive, however; see Williams (2000).) This trend has undoubtedly contributed to citizens’ expectations about popular participation in politics. As originally understood by its framers, the Constitution posited a system whereby mediate institutions represented popular sentiment and preferences—a system that would be unthinkable today. Although some degree of representation is inescapable in a large polity, the expansion of the sphere of democratic politics is an important achievement that is also necessary to secure the legitimacy of the constitutional regime. Popular constitutionalism fits into this tradition of democratic expansion quite well.

Additionally, ideal-type popular constitutionalism sets out a vision of how constitutions should change. It is a rejection of the view that constitutions must be obdurate, or difficult to alter, in order to perform their distinctive functions. Instead it places far greater emphasis on constitutions’ abilities to constrain governmental activity such that it—the government—is representative and reflective of popular preferences and concerns. At this point in the dialectic it is clear that popular constitutionalism differs from conceptions of constitutionalism that place heavy emphasis on entrenchment.

In addition to its emphasis on equality and the proper course of constitutional change, popular constitutionalism gives expression to the value of legal flexibility. The ability of a polity to change its own laws is a hallmark of democratic constitutions (Schwartzberg 2007, 209). The tendency of the American constitutional system is to retard and suppress change and institutional dynamism. Popular constitutionalism opposes this tendency and embraces the greater instability that comes with regular contestation and deliberation over constitutional politics.

In sum: contestatory constitutionalism is a prescriptive theory of constitutional politics in that it advocates for the explicit pursuit of constitutional constructions through “traditional” politics,
but as a corollary it is also an aspirational theory of constitutional politics insofar as such engagement does not already take place. Additionally, contestatory constitutionalism is a justificatory theory of constitutional politics insofar as it can help us to understand the relevance or impact of patterns of construction and contestation that have contributed to the constitutional system that obtains in the U.S. Today. Finally, contestatory constitutionalism is not simply a political undertaking but also an ethical one. It depends upon modes of communication, interaction, and relationships which do not necessarily come easily in our current social context.

How do these values cash out in political practice? It seems clear that popular constitutionalism is closely engaged with the text of the Constitution, though not always in the same way that the Supreme Court does. It is also intimately, though not always explicitly, attentive to constitutional constructions and not simply the text. Third, popular constitutionalism addresses foundational questions. Fourth, popular constitutionalism is extensive, socially and spatially. Finally, popular constitutionalism is public—meaning not simply that it involves individuals comprising mass publics, but that they declare or avow themselves to be contesting or constructing constitutional meaning.

How can we make the shift from current constitutional practice—in which judicial supremacy commands considerable if not absolute political support—to one which fulfills the desiderata listed above? In the next section, I explain in greater detail what distinguishes an actual, possible popular constitutionalism from ideal popular constitutionalism: a focus on “editorial” control, or the regularized and institutionalized monitoring of institutional change and development by engaged publics.

### 3.3 Editorial Control of Constitutional Change

Inasmuch as it descends from the earlier conception of sovereignty, it might seem that popular sovereignty militates on behalf of an active, constant, or robustly participatory role for the people in controlling and constraining governmental activity—especially with respect to the elaboration
of constitutional forms, rules, and values. But on closer inspection, such active oversight of constitutional change is an impossibility: quite simply, other things need to be taken care of. This is true both at the level of mass politics and at the level of individuals’ lives. At the political level, policy decisions must be made, and they must stick; they need to be implemented and not merely debated (Ferejohn 2000). More generally, the collective action problems that make politics a necessary fact of social life have to be solved at some level by solutions that stick; we can’t go on talking forever. At the personal level, individual citizens have life projects and responsibilities of their own; additionally, they have varied levels of political awareness and attentiveness, and have divergent—if not incommensurable—commitments which usually supersede political participation (Putnam 2001, Zaller 1992). Constitutional theories should not therefore unduly frustrate individuals’ commitments in a way that is evocative of Oscar Wilde’s complaint that the “trouble with Socialism [or constitutional democracy] is that it takes up too many evenings.”

A familiar conundrum, then: How can citizens exercise popular sovereignty—or even credibly maintain the claim that they possess sovereignty—when the pace of constitutional change far outstrips (as I have argued it does, above) their capacities for constitutional oversight? It would seem that active or constant oversight is a functional impossibility. A realistic (or realizable) theory cannot insist on constant citizen intervention in the processes of constitutional politics. The answer to the conundrum, I argue, is a different constitutional culture, one which instantiates the values of contestation and citizen oversight of state activity. Contentious constitutional culture is a form of “editorial” political control (Pettit 2000). Pettit uses the term ‘editorial’ because of its interventionist connotations. Unlike “authorship,” something which could be said to take place at moments of constitutional inception (design and drafting), “editing” occurs after the “authoring” process (Pettit 2000). Another metaphor that is felicitous for describing this kind of control is that of feedback. A feedback process is dynamic and diachronic: its equilibrium state is one in which all the parts of the system are constantly responding to one another. A contentious constitutional culture is one in which feedback is an integral part of the conduct of politics. Citizens would not be silent in their criticisms of state power from a constitutional perspective anymore.
than they would be silent in their criticisms of particular political choices from a policy-making perspective.

The first step is to distinguish between authorial and editorial control. Constitution-writing—including formally amending the Constitution in the protocols specified by Article V—is a paradigmatic form of authorial control of government (Whittington 1999b, Pettit 2000, Sunstein 2001, Pettit 2004). Authorial control consists in the active pursuit of political decision-making. Legislators enacting statutes and administrative bodies propounding rules and regulations are other forms of this kind of “authorship;” however, these latter instances of authorship are pursued by representatives of the people rather than the people themselves. In addition to the familiar reasons for preferring representative democracy to plebiscitarianism, the usual tendency for authorial control to occur through the action of representatives rather than the people can be accounted for by its interventionist character (Pettit 2004). The expectation that the people as a collectivity be constantly, actively, causally involved in constitutional elaboration is unrealistically demanding. As above, the multiple commitments and demands on citizens in a pluralist democracy would defeat any strong requirement that citizens keep abreast of constitutional developments in their political deliberation and participation. Thus, the use of authorial mechanisms—such as regular elections—would be impracticable as a method for constraining or shaping the processes of constitutional change.

This is not a new problem—it is in fact familiar, as the notion of the people as author(s) of the Constitution has a great deal of currency. Many originalists describe the relationship between people and Constitution as one of author and text (Whittington 1999b); and the idea that the Constitution was the product of popular authorship—for the purpose of controlling and constraining the government—was a familiar trope for Madison and Hamilton in the Federalist. Finally, the idea of the people as author of the Constitution is also well-known in non-originalist theorizing as well; Michelman (1998), for example, argues that revisiting received meanings and re-interpreting the Constitution is an imperative of democratic self-rule which is fruitfully understood in authorial terms. One of the consequences of conceiving of the Constitution as “authored”
by the people is that it thereby acquires a certain autonomy—even if, as seems likely, it does not somehow become a *fully* autonomous or self-enforcing entity\(^\text{12}\)—such that the people do not need to constantly intervene and ensure that their government is acting properly on their behalf. Put another way, the Constitution is an enforcement mechanism by which the people can efficiently monitor and sanction their agent, the government (I revisit the idea of modeling the relationship between people and government as a principal-agent relationship below).

Nevertheless, difficulties remain. If popular control is authorial, then constitutional change and constitutional revision become herculean tasks, and as they become more difficult to pursue the prospect of judicial intervention, instead of political attention upon the contested or problematic constitutional issue, becomes a more enticing prospect. Experience shows that even when constitutional change is considered desirable its difficulty discourages *political* approaches to change and causes interested actors to pursue legal change instead; additionally, the paradigmatic form of authorial control that the text of the Constitution itself recommends—writing constitutional amendments—has fallen into desuetude. Amendments are now typically written not to initiate constitutional changes but to give recognition to constitutional changes that have already taken place, and—in a manner similar to the Court’s self-conception—to unify the constitutional landscape and drag laggard peripheral communities into compliance with the center (or vice versa) (Crowe 2012). The lesson for aspiring constitutional entrepreneurs, revisionists, or reformers is that amendment-drafting, and constitutional convention-calling, are *not* the way forward. They are capstone achievements, laurels which are awarded to successful constitutional movements. The pursuit of popular control over on-going constitutional change by means of a constitutional amendment would be almost certain to fail. Authorial control cannot be the primary means of constitutional change. Something else is required to actually get successful constitutional change off the ground.

How, then, should we think about popular control of constitutional government? One useful way of addressing the pathologies of a bare conception of authorial control is to instead explore

\(^{12}\text{On the theoretical issues presented by the claim that constitutions are self-enforcing, see Hardin (1999).}\)
the idea of editorial control, which Pettit (2004) characterizes as “virtual” control that is “guided by public valuation.” Editorial controls are those forms of control which discipline or guide authorial decision-making through a variety of contestatory mechanisms. The relevant contrast here is with authorial mechanisms of control which are, perforce, active and interventionist. Such controls are “potential” rather than active; they do not require participation or deliberation per se. Instead, they work through the credibility or probability of future intervention rather than active or “causal” intervention. Editorial controls are therefore those controls which keep channels of contestation open so that policies or decisions which countervail publicly avowed preferences or the common good (however antecedently specified). Importantly, the non-causal nature of editorial control means that meaningful popular control of government activity can still be possible without constant, active intervention on the part of the people.

As noted above, historically, the use of authorial control to monitor and constrain the development of constitutional powers and institutions has been difficult, if not impossible, to achieve (Strauss 2001). American constitutional development exhibits a strong trend toward unamendability (that is, through Article V means). Constitutional change has instead often been pursued through institutional conflict between Congress, the president, and the Courts. Sometimes, one or more of these actors will reach out to the public for support or in order to legitimate its actions, but the arrow of causality is often pointed in the direction contrary to the one that Publius, or indeed more recent proponents of authorial control, had in mind: institutions are the first actors, and not the public. Vivid illustrations of this phenomenon can be found in presidential politics (Skowronek 1997).

The proposition that exercising control over the government requires an authorial stance is unlikely to garner acceptance or enthusiasm, as it would place onerous demands on public time, attention, and resources. Editorial control, by contrast, comes closer to resembling a “fire alarm”-type approach to popular control over constitutional change, rather than the “police patrol” approach that authorial control would require.¹³ In the logic of the authorial/editorial distinction,

¹³This metaphor is originally found in McCubbins & Schwartz (1984).
editorial controls operate as fire alarms in two senses. First, the maintenance of channels of contestation means that when minority, under-represented, or subordinated interests can contest partial or discriminatory policies; second, such contestation serves as a trigger to institutional review of the decision-making process, and can activate or draw attention to veto mechanisms and their possible use. In the context of constitutional theory, then, editorial control can operate as a meaningful tool of political control over constitutional change.

Editorial control, unlike authorial control, is indirect. We must think of the people’s control of constitutional change not in terms of “police patrols” but “fire alarms.” That is, it cannot hope to Appeals to virtue will not achieve the appropriate fire alarms. Continued exhortations along the lines of Thayer, for the past 120 years, have failed to induce a sense of constitutional responsibility in Congress. Although members of Congress engage in constitutional deliberations when crafting legislation, their deliberations are necessarily focused a great deal on the Court (Pickerill 2004).

3.4 Contestatory Constitutionalism

As a tool of constitutional self-government, editorial control consists of institutional and communicative mechanisms through which the public can be alerted to important constitutional shifts or ruptures, since, as we have seen, it is not possible for the public to actively monitor all constitutional constructions. Editorial control also consists of procedures and forums through which the public can contest constitutional changes. As such, contestatory constitutionalism stands in marked contrast to more Court-centric theories of pursuing constitutional change. Contestatory constitutionalism begins with the premise that Court cannot be the primary motor for constitutional change.¹⁴ In this and other respects, contestatory constitutionalism has strong connections to other conceptions of popular constitutionalism. Recall that popular constitutionalism, in

¹⁴Despite accusations of “judicial activism” in the public sphere, and significant amounts of skepticism about the legitimacy of judicial review among some legal, political, and academic elites, the Court is still the natural object of attention for American constitutional theory. Implicitly or explicitly, the Court is often foremost in the minds of constitutional theorists who think about how the Constitution should appropriately be interpreted. Perhaps more importantly, the Court features prominently in the public mind as the expositor of the Constitution’s meaning, and shares some of the same veneration that Americans often habitually extend to the Constitution itself.
its ideal form, places the popular sovereign at the top of the pyramid of interpretive authority. Contestatory constitutionalism similarly emphasizes the capacity for citizens to become directly involved in the elaboration of constitutional meaning—but in an altogether more mediate and less straightforward way. Contestatory constitutionalism is more fruitfully conceived of as a theory of constitutional control, rather than interpretation. Contestatory constitutionalism consists of popular control over constitutional change, through the maintenance of forms and channels of “editorial” (see below) or contestatory control over governmental decisions. This model of popular constitutionalism also informs a particular theory of constitutional culture that I call contentious or contestatory constitutional culture. For that reason the remainder of this chapter also offers a description of the distinctive features of contentious constitutionalism, an argument for why it should be preferred over rival theories, and rebuttals to important objections. It does not explore contentious constitutionalism’s implications for institutional design and reform, which I leave for a later chapter.

Popular constitutional control takes as a precondition the existence and flourishing of a certain kind of political culture. Constitutional structures in general depend upon cultural systems and social support in order to persist (Ferejohn, Rakove, & Riley 2001, Macedo 1990). Thus, it is important to clearly articulate visions of the kinds of constitutional culture which would empower citizens to exercise some level of effective control and oversight of constitutional government. “Culture” may seem like a diaphanous or chimerical concept. It may also seem difficult or unwise to speak of a singular or monolithic constitutional culture. With the appropriate level of abstraction, however, it is possible and useful to describe and compare aspects of different political cultures. In section I want to outline the salient features of a contentious constitutional culture and see how they differ from those of a non-contentious constitutional culture. What would change in the transition from the currently prevailing constitutional culture to a more contentious one? To illustrate these points I highlight below the differences between a constitutional culture that features sustained contestation and the currently obtaining constitutional culture in the U.S.

First, the transition to a contentious constitutional culture would see a breakdown or a re-
duction of discursive hegemony. Discursive hegemony obtains when the terms of discussion are captured by a particular interest, group, or institution; the scope of the debate becomes narrowed and option sets are diminished. Waldron (1999) offers an example of discursive hegemony in his discussion of death penalty jurisprudence in the United States. He notes that while many values and projects are implicated in the question of whether or not the state should have the power to execute certain individuals—including theories of punishment, desert, and deterrence; racism and the problem of racially disproportionate applications the death penalty; etc.—debate over the implementation of the death penalty in the U.S. revolves largely around the jurisprudential question of whether or not execution is a form of “cruel and unusual punishment.” In the case of the issue of the death penalty, the hegemonic discourse is narrowly doctrinal, rather than broadly moral or policy-related. Debates about the morality, efficacy, or deterrence factor of the death penalty are pursued on the legal sidelines—they are “merely” political, as it were.

Another single-issue example along these lines is that of the contested status of sexual equality; as Waldron notes, the quality of moral debate at the level of the Supreme Court is often rather poor on this topic, particularly in Bowers v. Hardwick: “If the debate that actually takes places in American society and American legislatures is as good as that in other countries, it is so despite the Supreme Court’s framing of the issues, not because of it” (Waldron 1999, 290). The Supreme Court has not served as an exemplar of public reason with respect either to Americans’ sexual privacy or to the liberty of citizens not to be subject to ascriptive heteronormative ideologies, at least in their encounters with public institutions and government agencies.¹⁵

The judicialization of constitutional discourse (Griffin 1995, 16–19) tends to give greater salience to legal constructions of constitutional meaning than to political constructions. This means that public and media attention tend to focus on high-profile jurisprudential debates at the Supreme Court and less so on the on-going elaboration of the Constitution through politics. A constitutional culture in which the inter-penetration of law and politics had higher discursive salience would likely entail more frequent contestation over or in response to non-legal constitutional

¹⁵Rogers Smith’s analysis of “ascriptive hierarchies” is particularly helpful in this regard (Smith 1993).
construction. Such contestation would, for example, take the form of public debate revolving around the constitutional bases for political decisions, as well as public debate about the constructions of constitutional meaning that should be (dis)preferred in political decision-making and policy-making; it would see a rise (relative to the prevalence that currently obtains) in the level of constituent-representative communication that is framed in constitutional terms; it would also come in the form of constitutional issues being presented and debated in electoral campaigns without being framed restrictively with respect to doctrinal or jurisprudential concerns, and so on.

A constitutional culture that featured such forms of contestation would diverge sharply from the general tenor of currently prevailing practice in that it would feature greater conflict and disagreement over foundational norms and values. In this sense it would be a popular constitutionalist culture, one in which claims about constitution meaning which are purported to be authoritative are frequently found in mass discourse and not (or not only) institutional discourse. “Popular constitutionalism” can come in many forms. Some previously mooted examples include majoritarian mechanisms for constitutional amendment (Tushnet 2000), a general weakening of the use of entrenched institutions or norms to inhibit legal change (Schwartzberg 2007), or the use of collective mobilization and resistance to enforce popular understandings against recalcitrant officials (Kramer 2004). At bottom, popular constitutionalism rests upon a particular rendering of the ideal of popular sovereignty—if the people are to be the final and most authoritative source of constitutional meaning, then their expressions of displeasure or disagreement with official interpretations must somehow be dispositive in constitutional interpretation.

Popular constitutionalism comes in for particular worries and objections, not the least of which that it offers an unworkable or unrealistic account of the procedures that could be put into place in order to operationalize popular sovereignty. I deal with some of those objections below, but it is important to emphasize here that the constitutional culture of contestation that I have articulated can resist a particular objection that any conception of popular constitutionalism must resist at the outset: Namely, that it places too high of a burden on the cognitive and physical
resources available to most people by insisting that they be in a state of constant constitutional engagement. A contentious constitutional culture as I have described it does not require such constant engagement; instead, it would feature episodes or sites of constitutional contestation when specific concerns, institutional boundaries, or norms and commitments are traduced. Thus, while contentious constitutionalism may presuppose one of the sociological features of “populist constitutional law” (Tushnet 2000)—a citizenry predisposed to the articulation of distinctive constitutional visions and understandings—it would not necessarily result in constant constitutional “activism” on the part of the people.

Contestatory constitutionalism is a normative theory of American constitutional practice, one which discharges certain claims about the kind of constitutional culture that should be preferred in U.S. politics, and also what institutional or procedural reforms should issue from such a culture. In the next chapter I will look at what those reforms might consist in. In part, they would consist in explicit constitutional reforms, either through amendment processes or through “counter-constructions;” however, such reforms could also take the form of expanding “notice and comment” requirements for administrative agencies, efforts to make the decision-making of administrative officials more responsive to electoral incentives; expanded or improved polling measures; and so on. But what would be the distinctive features of popular developmentalism prior to its institutionalization?

First, contestatory constitutionalism entails a transformed constitutional discourse, one in which the topic of on-going constitutional change is a frequent subject of discussion and debate. I have already indicated that such a discourse need not be pervasive or that it should always occur at a high level of intensity. What distinguishes it from the kind of constitutional discourse in a dualist theory of constitutional practice, however, is that its default mode is not one in which constitutional issues are articulated or debated in terms of variance with or fidelity to a constitutional baseline, but rather in terms of whether or not recent constitutional developments are expressive of or compatible with popularly avowed views or commitments. Thus, the mere recognition of constitutional change would not, by itself, trigger contestation. Contestation would only occur
after the change had been hashed out in the arena of public opinion and broad discussion.

The phrase “public opinion and broad discussion” hints at a second feature of contestatory constitutionalism—the need for a public sphere that meets certain requirements with respect to the quality of deliberation over constitutional disagreement. In addition to the generic virtues that should obtain in any well-functioning public sphere—such as publicity, civility, and reciprocity—the public sphere envisioned by popular developmentalism would require institutional/procedural guarantees of voice for groups or individuals at risk of domination or subordination; it would require that a diversity of forums for debate were available; it would require that elites or narrowly-organized groups not dominate discussions; and it would require the broad availability of information that was accessible at a general level.

Contestatory constitutionalism also weakens—to a variable degree—some of the institutional features of the currently prevailing constitutional order in the U.S. It constitutes an implicit challenge to judicial supremacy in that it restores, in practice, a larger share of authority and responsibility to the public in the elaboration of constitutional content. While this does not necessarily place the Court in direct confrontation with the public, it does mean that there would not be a single locus of constitutional deliberation in American politics. (Whether or not this would lead centripetally to a destabilization of constitutional meaning is an objection I take up below.) Notice, however, that the weakening of judicial supremacy is not the same thing as the weakening of judicial authority—in particular, the authority of the judiciary to engage in judicial review. Judicial supremacy is at any rate largely the product of political intervention, chiefly by the executive (Whittington 2007); it is equally vulnerable to retrenchment at some future point, and it would consistent with current practice for one of the outcomes of a popular developmentalist culture to be an increased demand on the executive that judicial supremacy be reduced or challenged.

Contestatory constitutionalism provides the tools for the cultural legitimation of constitutional changes; additionally, it furnishes a method for advancing and understanding claims about the kinds of constitutional commitments that we as a people have adopted and regard as binding—even in the absence of formal amendments. Contestatory constitutionalism may unsettle absolute
judicial supremacy, but it is necessary to distinguish judicial supremacy from judicial review as such. It is not necessarily antagonistic to the practice of judicial review, although it does deny the Court any claim to interpretive finality. I will argue in the next chapter that contestatory constitutionalism can and ought to be realized in a series of institutional reforms, including curbs on the power of judicial review, but within this chapter I have confined myself to the articulation of the argument for a culture of contestatory constitutionalism.

Opening up institutional spaces for contestation, and attempting to forge a cultural logic of regular public attention to constitutional development, will in a certain sense be unpredictable and difficult to forecast. However, it is vital to set out the background limitations and constraints which should govern contestation; and to offer some kind of vision of a constitutionally contentious actor, which may be a citizen, an interest group, a party, and so on.

A culture of constitutional contestation which exhibits the kind of solidarity described above will, among other things, depend upon the prevalence of a norm of public reason. Here, I interpret the concept of public reason in a very ecumenical sense. Many different conceptions of the idea of public reason are on offer (Rawls 1996, Rawls 1999a, Wenar 2004); let me stipulate that I am agnostic as to whether the controlling conception should be strong (admitting those arguments which arise from politically liberal conceptions embedded in an overlapping consensus, and only such arguments), more flexible (admitting some arguments from comprehensive doctrines, such as religious arguments);, or substituted out in favor of something like “incompletely theorized agreements” (Sunstein 1995). The theoretical literature on public reason is vast and I cannot hope to do exegetical justice to it here. All I mean by “public reason” in this instance is the existence of a norm of discussion which privileges moral suasion and reasoned argumentation over discursive marginalization, exclusivity-seeking appeals to ideas of in- and out-group identities, and other forms of discursive hegemony.

Closely related with public reason is the claim that a norm of reciprocity should govern contentious political discourse. Like public reason, reciprocity is a concept which has been the subject of extensive theoretical elaboration, which I can only partially summarize here. The “criterion of
reciprocity” (Rawls 1996, 17ff) consists in the expectation on the part of individual citizens that all citizens will fulfill, to a reasonable level of expectation, the duty to rationally endorse the basic and fundamental laws which constitute the political community. When the criterion of reciprocity is in play, then the (often coercive) enforcement of laws and rules will be regarded as a legitimate exercise of power—power which is not simply being exercised for its own sake, or for the advantage of those in power. Reciprocity is consequently a key background condition for the legitimacy of the constitutional order, and by extension the constitutional culture which helps to sustain and define that order. Its power to conduce to legitimacy is found in its capacity to overcome “the strains of commitment” between various citizens holding different views about foundational values and the common good. It should be clear that reciprocity is more substantial than, and conceptually distinct from, Tocqueville’s “enlightened self-interest,” or mutual cooperation solely for the sake of the advancement of (various and unrelated) individual projects. In a community where the criterion of reciprocity obtains, citizens see themselves sharing commitments to certain procedures and values which secure the particular benefits of constitutional self-government. The same core idea—that inhabiting a political community entails commitments, obligations and relationships that transcend or are orthogonal to individual preferences—can be found in the republican notion of common interests or, perhaps, Dworkin’s argument for “associative obligations” (Pettit 1997, Dworkin 1986).

Reciprocity should not be confused with the idea of bipartisan or disagreement-effacing civility—that is, “civility” as the term is commonly understood in everyday, non-technical speech. We should be careful not to confuse that conception of civility with philosophical conceptions. For example, Pettit instructively distinguishes between “group-centered” civility, which is necessary to sustain or “ground” the deliberative procedures of a flourishing republic, and “partial” civility, which operates to insulate views from appropriate criticism. The former is a desideratum of “a politics of common interest,” while the latter can only drive “a politics of difference” (Pettit 1997, 249). It should also be noted that the conception of civility that I criticize here is not what Rawls calls “the duty of civility,” which is the requirement made by the criterion of reci-
proximity that political debate be conducted in accordance with the idea of public reason (discussed above). This is similar in effect to Pettit’s call for group-centered civility.

However, I believe it is important to still refer to the idea which is not Rawls’s as “civility” because that particular word is frequently invoked in popular political discourse to define the boundaries of acceptable debate. When campaign ads that contain information about opponents’ views or legislative records are rebuked as “negative advertising,” when topics or issues of contention are tabled or effaced because they are “divisive,” the conception of civility being appealed to is clearly partial, and not group-centered or general in focus. Reciprocity is rooted in respect and is fundamentally intersubjective. By contrast, (partial) civility is a content-filter. It discriminates between different issues or areas of discussion, the mooting or introduction of some of which is held to be “civil,” but of others, “uncivil.” Partial civility is heuristically and antecedently applied to an array of potential topics, with the aim of collapse into a facile heuristic device which elides real disagreement.

I have not yet spoken about citizenship in the context of contentious constitutionalism. In part, I am wary of the dangers of advancing a vision of ideal citizenship.¹⁶ Even if I were to articulate a detailed notion of citizenship but insisted that it was only a regulative ideal rather than a threshold ideal which all must be held up to, it is too easy for the former to slide into the latter in practice. I am also skeptical that contentious constitutional citizenship can be usefully distinguished from contentious citizenship more generally. But two distinct claims about citizenship in the context of contentious constitutionalism are worth making here. First, contentious constitutionalism is not possible without citizens who have a taste for argument and an inclination toward deliberation. Second, contention always comes with psychic costs for the contender. Alienation, isolation, and the social costs that attach to dissent will be occupational hazards for citizens who engage in constitutional contestation.¹⁷

¹⁶But see Stilz (2009) for an argument about the essential features of liberal citizenship that nevertheless declines to valorize nationalism or ethnocentrism.

¹⁷For surveys of the ethical challenges and personal costs of engaged citizenship, see Allen (2006) and Villa (2008). The civic republican tradition in general emphasizes the need for the adoption of durable public identities by citizens. The masculinist overtones of the early modern republicans need not be retained by present readers looking for guidance on the formation of citizen identities and civic virtue.
3.5 Identifying Constitutional Contestation

We must now turn to the problem of identifying contestation. How will we know contestatory constitutional movements or actions when we see them? Several important criteria or signposts can be adduced. First, constitutional contestation will almost always involve engagement with the constitutional text. Second, contestation should be oriented toward constitutional constructions: either existing constructions, or likely sites for future construction. Third, because constitutional contestation focuses on intermediate constitutional changes, and not (i) altering the constitutional text itself or (ii) mere policy changes, it should focus on constitutive commitments—the rules of the constitutional game.

It is important to note at the outset that this task is not so simple as looking to see what constructions have stuck. First, and most obviously, success is not its own justification; simply because a construction has persisted does not mean that there are good arguments to support it or a coherent political consensus behind it. The desuetude of the Privileges or Immunities clause,\(^\text{18}\) the ambiguities latent in the doctrine of tiers of scrutiny,\(^\text{19}\) and the Senate filibuster\(^\text{20}\) are appropriate examples in this regard. Second, and more importantly, not all constructions are popular in character or origin. This need not trouble us in all circumstances; the division of political la-

\(^{18}\)The far-reaching implications of the Privileges or Immunities Clause (together with the goals of the Radical Republicans) were truncated, not long after its ratification, by Justice Miller in Slaughter-House (Powe 2009, 134–137). The clause can not only be plausibly interpreted to mean that the national citizenship of individual Americans transcends questions of specific localities—that is, that all Americans are national citizens, rather than citizens of states, and subject to and protected by the national (federal) government—but, in fact, that was the correct interpretation, according to the dissenters (and a number of subsequent commentators) (Powe 2009, 136). On the other hand, the interpretation that such a reading is too radical—even for the Radical Republicans—is sometimes made, perhaps most importantly by Ely (1980). He makes the case that, while Miller’s construal is too narrow, the clause merely invites and empowers Congress to further define and expand the scope of citizenship in the future (Ely 1980, 22–27). But little of the sort has occurred. The judicial closure effected in Slaughter-House has, in many respects, not been wholly undone.

\(^{19}\)“[T]he creation of a bifurcated all-or-nothing regime of strict and rational basis scrutiny has subverted the principles underlying the equal protection clause. Strict scrutiny gives judges relatively little discretion to evaluate classifications...Because strict scrutiny intrudes so heavily on democratic decision-making, judges have resisted extending equal protection to new groups, even groups widely acknowledged to have suffered long histories of discrimination and invidious treatment...The bifurcated system of strict and rational basis scrutiny defeats this larger goal [of social equality]” (Balkin 2011b, 235).

\(^{20}\)Levinson (2008) is among the most forceful critics of the Senate filibuster. Not only is it lacking in any textual warrant, it creates one more of “many veto points with regard to blocking the wishes of even an energized majority” (Levinson 2008, 52) and it places the operation of that veto in the hands of “particular states electing particular senators. It has literally nothing to do with measuring national majority sentiment” (Levinson 2008, 53).
bor that representative government entails inevitably and appropriately leads to representatives pursuing agendas and making decisions without explicit instruction or consent from their constituents. However, it is both interesting in its own right, and important in terms of democratic theory, to be able to know whether constructions are pursued in accordance with popular preferences, or in spite of them.²¹

By definition (as being a kind of popular constitutionalism), contestatory constitutional movements are popular—they are characterized by the participation of mass publics in constitutional politics. But this in itself can hardly be a desideratum of contestatory constitutionalism. Other forms of constitutional politics are also characterized by the involvement of mass publics. Originalist advocates of constitutional change via Article V (Whitlington 1999b, McGinnis & Rappaport 2002) argue that the amendment process necessarily excites and entails mass participation in constitutional politics. Ackerman (2007), who abjures formal amendment, also stresses the need to engage the public in pursuing transformational constitutional change. Popular enthusiasm for constitutional change is hardly the sole province of popular constitutionalists. It is for this reason, though, that “popular constitutionalists owe their critics a persuasive response” on the question of how, under popular constitutionalism, mass publics “exercise their interpretive power” in a way that is distinct from other modalities of constitutional change, and is readily identifiable. This is where the desiderata of contestatory constitutionalism enter the dialectic.

The first criterion, then, is engagement with the constitutional text. Constitutional construction, as I noted in chapter 2, inhabits interstitial zones within the constitutional text; disagreements over the scope and applicability stem in large part from differing views over the degree of vagueness and ambiguity in the text. Such disputes are unlikely to be resolved quickly and may anyway be examples of an essentially contested concept—the authority of written constitutions.

²¹It should be noted that few, if any movements for constitutional construction are spontaneous irruptions of popular sentiment into national politics. (It would, at any rate, be highly unlikely in the twenty-first century to see something resembling the Whiskey Rebellion emerging as a major political movement.) Public opinion does not form in a manner that is exogenous to either the political institutions it interacts with or the political actors that are (or are not, as the case may be) responsive to it. A large body of research in the study of political behavior indicates that public opinion is mediated by and often responsive to cues from elites (Zaller 1992, 6–22), and that opinion formation is something which frequently occurs inside of, or is mediated by, institutions (Lippman 1922, Tulis 1987). I discuss these issues at greater length below in the next chapter.
Nevertheless, the text of the Constitution is central to the American political tradition. Appealing to the text as something with an authority which transcends the passions of the moment or the preferences of transient majorities is a move that gets made in any systematic argument about constitutionalism in the U.S., and serves to ground projects for political change in the realm of the possible. Since the theory of contestatory constitutionalism is a species of popular constitutionalism, it rests on the assumption that the text is more protean and polysemous—capable of supporting multiple valences of meaning and patterns of vagueness which persist across interpretive controversies—than it is seen by textualist or “old” originalist theories. Although I have stressed that contestatory constitutionalism is not primarily a theory of how the Constitution should be *interpreted*, it is important to note that my account diverges from an originalist one on this point. Although originalism should not be confused with textualism *per se*, it is nevertheless the case that originalism attaches an importance to the constitutional text that contestatory constitutionalism does not.

Closely related to the first criterion is the second: responsiveness to constitutional constructions. Constitutional contestation is distinguished from movements to amend the Constitution by the focus of the former on intermediate constitutional change. As such, constitutional contestation is not equivalent to pursuing constitutional *amendment*; the latter, as will be shown below, is something which typically occurs *after* contestation over a constitutional question has been substantially resolved and a new consensus achieved. In what I present below as a paradigm example of contestatory constitutionalism—the movement to advance the individual rights-construction of the Second Amendment—movement activists focused not on changing the constitutional next, nor (or at least not solely) on implementing policies which best expressed their preferred reading of the Second Amendment. Instead, they made a case for their preferred reading, to the public, to political leaders, and to the judiciary.

Another important requirement is that contestations should deal in constitutive commitments. Protests over discriminatory policies, tax revolts led by homeowners and businesses, letter-writing campaigns to administrative agencies, Labor Day parades—all of these are forms of polit-
ical action, but none of them deal with constitutive commitments. That is, they do not focus upon the core values or common understandings which underpin the constitutional regime. Much in the same way that constitutional constructions are not simply policies but are instead ways of deciding upon or pursing policies, constitutive commitments are commonly avowed understandings of public institutions and principles which animate constitutional politics. There are close similarities between constitutive commitments and Rawls’s “constitutional essentials,” but the latter are more fundamental in that they are the objects of common affirmation and recognition in the legitimation of the constitutional state itself.

Constitutive commitments, according to Cass Sunstein,

have a special place in the sense that they are widely accepted and cannot be eliminated without a fundamental change in national understandings. These rights are “constitutive” in the sense that they help to create, or to constitute, a society’s basic values. They are also commitments, in the sense that they have a degree of stability over time. A violation would amount to a kind of breach—a violation of a trust (Sunstein & Barnett 2004, 217).

As Frank Michelman puts it, “[on] Sunstein’s account, [constitutive commitments] are top priority, popular canonical expectations for the conduct of American government” (Michelman 2008, 665–666). Contestatory constitutionalist episodes will naturally revolve, to a given extent, around such constitutive commitments. It is worth noting, however, that from the perspective of contestatory constitutionalism constitutive commitments look somewhat different than the way in which Sunstein sees them. Constitutive commitments are constantly in flux. As Sunstein notes, they have a “degree of stability over time,” but this stability will tend to decay if it is not sustained by regular deliberation. Like all constitutional values, constitutive commitments are social in their construction, and without continuing social construction they will wither away.

Fourth, contestatory constitutionalism is national rather than local. A contestatory constitutional movement articulates national concerns, responds to national problems, or otherwise operates at a national level. This is not to say that massive, nationwide movements of the kind
valorized by Ackerman (1991) are the desiderata of contestatory constitutionalism. Instead, the
national character of contestatory constitutionalism arises from a path-dependent outcome of
American constitutional development—constitutional questions *qua* constitutional are national
questions. The national integration of politics—through the Fourteenth Amendment, the consoli-
dation of the administrative state in the early twentieth century, the New Deal, and the emergence
of the Presidency as the premiere “nationally representative” office—entails that constitutional
questions inevitably have national import. To say that contestatory constitutional movements
must be national is not to say that they must command nationwide attention or acclamation. In-
stead, this desideratum must be understood as an extension or corollary of the third desideratum—
that constitutional contestation should include a focus on constitutive commitments, construc-
tions, or some other salient aspect of the constitutional order.

Finally, contestatory constitutionalism must be public. The requirement that contestation be
public does not simply mean that it involve members of the public—this is popular constitutional-
ism we are discussing, after all—but that the movement publicly offer reasons for its contestation
and be prepared to accept counter-claims. Rawls’s criterion of reciprocity is a useful analogue here
(Rawls 1996, 48–54). Contestation is a dialectical process. Those who are engaged in it should be
prepared to both offer reasons for their contestation and to accept reasons offered on behalf of
counter-claims or counter-contestations. So we can see that the desideratum of publicity does not
simply entail that contestation should occur “in public” but that it be public-spirited, as it were.

Overall, these desiderata serve to distinguish popular constitutionalist movements from extra-
judicial interpretation as such (Whittington 2001a). Importantly, contestatory constitutionalism
is not necessarily equivalent to the elaboration of constitutional meaning in institutions other
than the Court, since this latter type of elaboration need not involve the participation of mass
publics. In the next section I apply these desiderata to a variety of movements in constitutional
politics. I show how different contestatory movements fulfill the desiderata to greater or lesser
degrees, and what the consequences of fulfilling or failing to fulfill those desiderata might be.
3.6 Recent Contestatory Movements

Contestatory constitutionalism provides a useful grammar for identifying, describing, and understanding collective political action that is directed at constitutional elaboration, and this grammar can be put to good use in identifying past episodes of contestation. Contentious constitutional politics finds a natural home in the egalitarian and communitarian impulses that run through America’s political traditions. In addition to historical examples of such impulses—abolitionism, revivalism, temperance movements, labor organizing, bimetallism, Populism, Prohibition, and the civil rights movement, to name just some examples—four more recent examples should draw our attention precisely because they have taken place during the period when judicial supremacy has been in the ascendant: the success of the conservative-led movement to popularize the individual right to bear arms under the Second Amendment; the failed movement to enact the Equal Rights Amendment (ERA); and two more recent movements with ambiguous results: the “Tea Party” movement that emerged in the wake of the bailing out of the financial sector during the global recession that began in 2008, and the Occupy Wall Street movement that gained worldwide attention starting in September 2011.

3.6.1 Reconstructing the Second Amendment

One of the most vivid examples of a successful contestatory constitutional movement can be found in the rise of the “law-and-order” reading of the Second Amendment (largely eclipsing the “republican” reading) (Siegel 2008, 239ff). The “new” reading of the Second Amendment, enshrined in *Heller*, authorizes the individual citizen to bear arms for the purposes of self-protection, whereas the “old” reading authorized the maintenance of state and militias against foreign aggression and, *in extremis*, a tyrannical central government. Justice Scalia’s construction of the original public meaning of the Second Amendment in *Heller* represented the apotheosis of one of the most successful fronts in what Teles (2010) dubs “the conservative legal movement.”

²²Teles (2010) focuses largely on two impulses in what are broadly right-wing conservative movements: supply-side or neoliberal advocates of deregulation and privatization, as well as libertarian advocates of the withdrawal
gagement on multiple levels—grassroots organizing (the National Rifle Association), state and local politics (Siegel (2008), for example, draws attention to anti-gun control positions staked out by California Governor Ronald Reagan), national politics in congressional and presidential campaigns, and finally an intellectual movement in legal scholarship and activism all combined to transform (enough of) public as well as elite opinion to precipitate a new construction of state regulatory power—one in which the state’s power to limit firearm ownership, possession, and use is heavily circumscribed.

By no means is the new construction of the Second Amendment the object of universal acclaim or consensus. Numerous public interest groups and campaigns oppose the Heller-style reading of the Second Amendment, citing gun violence in the U.S. that is unparalleled in the developed world; for example, Former Chief Justice Warren Burger told the MacNeil/Lehrer News Hour in 1991 that the Second Amendment “has been the subject of one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime.” But Burger erred in categorizing the modern Second Amendment as a “fraud;” he was in fact describing a successful movement to reconstruct the constitutional status of gun ownership. Certainly that reconstruction was radically different from the prior consensus—hence Burger’s heated language—but it would be difficult to deny that the movement to strengthen and nationalize the Second Amendment met the criteria for constitutional contestation outlined above.²³ The movement engaged with the text of the Second Amendment; it offered a construction of the meaning of the Constitution and its extensions into the worlds of policy and social life; it engaged with constitutive commitments (personal liberty, the rule of law, and trust or the lack thereof in public institutions like police departments and the armed forces); and it marshaled intellectual resources as well as political support in order to bring pressure to bear upon political actors and institutions.

²³Burger himself identified the resources with which a counter-construction might be pursued, noting that the Constitution guarantees “domestic tranquility,” and pointing to other constructions of the state’s ability to regulate private ownership—of cars, pets, and even bicycles (Burger 1990, 4).
Part of the explanation for the success of the movement to reconstruct the Second Amendment lies in the movement’s engagement with the Supreme Court. The intellectual resources which were amassed and deployed by the movement were directed in part to a distinct conservative constituency in the legal academy and on the federal bench. The confluence of systematic arguments and sympathetic ears resulted in constitutional change through the exercise of judicial review (as well as legislative restraint). The law-and-order Second Amendment’s success must be attributed in part to the conservative legal movement’s embrace of judicial review as a tool of constitutional change. As such, its democratic legitimacy remains underspecified, especially since, absent a different Court, few options are available to future counter-constructors. It is significant that the conservative legal movement chose to pursue power within the judiciary rather than outside it. Although *Heller* was not the only outcome of the movement—and perhaps not even the most important—Justice Scalia’s interpretation of the Second Amendment indubitably owed something to the movement’s success in the wider field of politics.

Of course, there are some who argue that *Heller* does not mark the judicial culmination of a movement to advance a new construction, but the excavation of the Second Amendment’s original meaning (Barnett 2008). However, the arguments made by Barnett (2008) and Solum (2009) to the effect that the *Heller* interpretation of the Second Amendment is the original interpretation of the amendment must be qualified: they are “New Originalist” arguments and make use of the concept of construction to arrive at their conclusions. And it is just as easy to construct the Second Amendment’s meaning in such a way that it discharges different principles.²⁴ The success of the campaign for a new understanding of the Second Amendment however, is owed to that campaign’s members’ realization that persuading their fellow citizens in the field of politics would be far more consequential than the articulation of interpretive theories. Of course, judicial intervention has now given the campaign to re-imagine the Second Amendment an added boost; the new judicial regime of maximal rights to gun ownership and possession will undoubtedly

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²⁴ “[E]ven once we know the original meaning, we must fill in vague principles with constitutional constructions. We know there is a principle [in the Second Amendment]: don’t abridge the right of the people to keep and bear arms. But we don’t know what the content of that principle (or set of principles) is; and the original meaning of the sentence, the clause meaning, does not tell us. It could point to any number of different principles” (Balkin 2008b).
The new Second Amendment offers a vivid illustration of the degree to which potential constituent power that may be exercised by a political campaign the more that it fulfills the desiderata of contestatory constitutionalism. The maximalist Second Amendment was not the product of judicial legerdemain but the sustained political efforts of groups and networks of citizens. The constitutional change that resulted was clearly attributable to this sustained exercise of constituent power. The new Second Amendment—the constitutional consensus that individuals may permissibly carry deadly weapons absent some seriously compelling requirement of public safety—has sufficient purchase in the public mind that it will not soon disappear on its own.

Of course, the new Second Amendment differs from the original Second Amendment in some significant ways, most of all in its substitution of individualistic for collective premises regarding the scope and justification for an armed population (Cornell 2008). The new Second Amendment is libertarian rather than republican, and protects the ability of individual to carry guns without any express duties, responsibilities, or purposes. Akhil Amar notes that

“[t]he Framers envisioned Minutemen bearing guns, [rather than] Daniel Boone gunning bears...Libertarians...wrongly privatize what is an inherently collective and political right....The legal and social structure upon which the amendment is built no longer exists...Voters no longer muster for militia practice in the town square” (Amar 2002, 106).

Under the new Second Amendment, however, the right to bear arms has been universalized and consequently stripped of political significance. The facile claim that armed citizens serve to constrain a threatening state is belied by the lack of any significant correlation between patterns of gun ownership and political freedom worldwide; it also blithely ignores the disparities in resources and effectiveness between, say, the dues-paying membership of a shooting range and a battalion of Marines.

Proponents of the maximalist interpretation of the Second Amendment will naturally seek to preserve it, and will be cheered by favorable judicial outcomes and seek to extend their reach and
ensure their doctrinal durability. Opponents of the maximalist interpretation will not succeed in implementing their preferred policies or convince their fellow citizens of the wrongness of the maximalist interpretation simply by referring to obsoleted precedents or by advancing particular theories of the interpretation of the Second Amendment. Instead they will must meet the challenge of the new Second Amendment in the same way that its proponents advanced it—and the more they fulfill the desiderata of contestatory constitutionalism, the more likely it is that they will succeed.

3.6.2 The ERA and the Limits of Rights Formalism

The failure of the ERA (Mansbridge 1986) is an instructive counterpoint to the success of the conservative legal movement in pursuing new readings of the Second Amendment, and it also points to the Court’s persistent capacity to impose lasting results upon the process of constitutional elaboration. Unlike the movement to reconstruct the Second Amendment, the movement behind the ERA did not directly engage with the constitutional text. Beyond the trivial point that the movement for the ERA sought to directly change the constitutional text, through the cumber-some and almost sure-to-fail amendment process, its participants also did not make use of other parts of the Constitution’s text—such as the aspirational language of the Preamble, for example—and were ultimately flat-footed by the superior rhetorical strategies of the ERA’s opponents, who sought to convince the public that formal equality would undermine traditional “family values” (Berry 1988). The ERA movement would perhaps have met with greater success had it sought to pursue a broader-based strategy of articulating and advancing claims about constitutive commitments (citizen equality, expanding suffrage, cultural pluralism with respect to gender roles) and constitutional text (the Preamble, or the vision of national citizenship set out in the Fourteenth Amendment). At any rate, the task that ERA’s supporters set themselves was much harder than that of conservative gun ownership advocates: they sought to alter the constitutional text, rather than construct it.

The push for the ERA was the last significant attempt to amend the Constitution in order to
explicitly expand the sphere of individual constitutional rights. Its failures and setbacks may be regarded as instructive for students of constitutional amendment (Mansbridge 1986, Lutz 1994, Levinson 1995b, Strauss 2001). It provides grist for the mill operated by critics of the Article V amendment process by showing the almost insuperable barriers it places in front of movements seeking to effect changes to foundational norms and constitutional rights guarantees. However, Strauss (2001) shows that amendments have largely been “irrelevant” since Reconstruction, as they have not initiated foundational legal change but merely “ratified” or recognized processes of change which had already taken place in the polity as a whole. (Prohibition is aberrant in such an analysis, but it was, in historical terms, repealed very quickly indeed.²⁵) Strauss’s argument suggests that the actual spadework of changing minds and organizing a movement had not really gotten done before the nationwide push for ERA. Many advocates of the ERA quickly realized this in the aftermath of its failure (Mansbridge 1986, Berry 1988). Real changes in legal or political institutions, pursued from “below,” must be preceded by social change in order to be effective—indeed, changed social attitudes are a precondition for national political movements seeking represent real constituencies.

It remains the case that gender equality is not yet a reality in the constitutional system. The law has a powerful ability to reproduce gender- and sexuality-based patterns of domination and subordination, and to insulate them from direct opposition, and yet the pursuit of gender equality through the traditional route under judicial supremacy—judicial review—has been singularly unsuccessful (McClain & Grossman 2009). The construction of the problem of gender inequality at the Supreme Court, in the form of an ambiguous and unstable “intermediate” tier of scrutiny, is hardly an adequate bulwark of rights protection. It is necessary to move beyond the goal of altering the text, and instead to focus on re-constructing the text. The paradoxical constitutional regime I described above—where the text remain stable but the institutions it refers to are in flux—is not one where editorial control is possible. We have reached the limits of what our ersatz system of constitutional amendment can achieve in terms of accommodating popular demand for

change within the confines of an eighteenth-century system. Moving beyond that system requires the adoption of editorial control through the move to contestatory constitutionalism.

3.6.3 The “Tea Party” and “Occupy” Movements

The lessons of the “Tea Party” movement are other than they might seem at first glance. Early critics of the movement were rightly troubled by the Tea Party’s less-than-populist corporate funding, its racist overtones, and the exclusionary and lopsided ideological tics that were at odds with its ostensibly egalitarian rhetoric. But the critics—especially liberal and progressive ones—erred in dismissing the Tea Party’s use of history and its enthusiasm for framing its arguments in terms of constitutional values. Of course, the Tea Party’s constitutional vision really was absurd. It traded on a stylized, even burlesqued reading of constitutional history, and anachronistically framed past controversies in modern terms—in the process paying unintended tribute to Benedetto Croce’s dictum that “all history is contemporary history.” And the Tea Party’s rapid development of intimate ties to movement conservatism and the Republican Party gave the lie to its populist, non-ideological pretensions. But the appropriate response from observers who did not share the movement’s premises or worries should have been engagement rather than derision. The nationwide fascination with the Tea Party in 2009–2010 was an opportunity for national discussion on the topics of constitutional change and constitutional values that was largely wasted.

The Tea Party’s constitutional vision and reform proposals centered around the idea of “small government” and the retrenchment of federal power and authority. If nothing else, the Tea Party’s prominence suggested that there is a non-trivial constituency for the idea that the New Deal “inversion” (Gillman 1997) of federal and state roles in economic regulation was a mistake, and that constitutional principle requires us to roll back substantial portions of the modern administrative state. Treating this as an off-the-wall or unreasonable proposal is not the appropriate response;

²⁶For all their claims about preferring “small government,” many rank-and-file Tea Partiers, when polled, often indicated high degrees of enthusiasm toward (federal) government power, particularly in foreign policy, military action, and domestic security policy. See generally Skocpol & Williamson (2012).
instead, an articulation of what would be lost, and what might not be gained, by an abandonment of the New Deal settlement is what is needed. Such an argument has been conspicuously absent from discourse among academic and legal elites favorable to the post–New Deal settlement. This is all the more puzzling because another recent non-elite political phenomenon illustrated that there could be a constituency for such an argument.

The Occupy movement might seem like an inapposite example of a constitutional movement. Its origins were certainly not found in any contestation over constitutional law. What began as a protest movement centered around student debt metastasized into a more general protest against creeping “neoliberal governmentality” (Brown 2003) in a variety of policy domains. Although the specific policy demands and proposals for reform pushed by members of the movement were frequently obscured by media coverage that emphasized their civil disobedience, the Occupiers did succeed in altering the public narrative about the course of the national economy. The rhetoric of “we are the 99 percent”—and the complementary label of “the one percent” applied to those in the rightward tail of the income distribution—has gone mainstream; income inequality is a topic that has gained national attention; and, however belatedly, financial regulation as a policy agenda has begun to gain traction in some quarters of the public. It also rekindled attention and concern over a variety of topics related to urban civil disobedience and the contradictions and limits of the contemporary free speech regime (“free speech zones,” the Obama administration’s war on whistle-blowers, eroding privacy and reputation protections, and so on).

John Rawls provides a discussion of civil disobedience in Theory of Justice; on his view, disobedients may civilly violate the law in order to draw the majority’s attention to violations of the two principles of justice on the part of public officials. This is a fairly narrow view of the appropriate scope of civil disobedience, especially since Rawls asserts that disobedients must give “fair notice” to the authorities in advance of their disobedience (Rawls 1999b, 321). For a more comprehensive survey of the philosophical issues related to civil disobedience, see Singer (1973), especially for an outline of what are generally regarded as the desiderata of genuine civil disobedience as opposed to opportunistic law-breaking: non-violence, a willingness to accept punishment (when legitimately merited) and the pursuit of publicity for moral concerns of general interest or the common good. Both Rawls and Singer wrote in the wake of the protests in the U.S. against the Vietnam War, which clearly influenced their understanding of the scope and purpose of civil disobedience. It is not clear that contemporary protest movements operate in the same way; they confront a more highly empowered (and in many cases, paramilitarized) security apparatus and in a jurisprudential environment that gives little pride of place to public (as opposed to private) spaces, even in urban centers. On contemporary protest movements, see David Harvey, who argues for a human right to cities—that is, a right of access to the urban commons—in part to empower bottom-up political action such as protest movements (Harvey 2008, Harvey 2009); see also Hayward & Swanstrom (2011). Finally, see Lefkowitz (2007) as a guide to more recent philosophical thought on civil disobedience.
Like the Tea Party movement, the Occupy movement has been lampooned by its critics and treated with puzzlement by elite observers, rather than engaged or seriously considered. Occupy began as a genuinely bottom-up movement. It lacked—although in many participants eyes’ this was rather to its favor—the coherence and discipline that some media observers assumed were the desiderata of a successful social movement. Although many leading activists, academics, and fellow-travelers articulated policy proposals and reforms related to the Occupiers’ central concerns—burdensome student debt, a constricting job market, diminishing social mobility and stagnant real wages—Occupy was often tarred as “lacking” any “solutions.” On this reading it was more of a peasants’ revolt—a collective expression of frustration—than a “genuine” social movement in the mold of the Civil Rights Movement, organized labor protests, and so on. These criticisms seem crudely drawn; Occupiers did have a set of concrete proposals, centering around personal debt and finance, priorities in higher education, and (most importantly) the remediation of income inequality. However, it is clear that Occupy had far less influence in the 2012 national elections that the Tea Party movement had in 2010.

Occupy and the Tea Party movement shared more salient features than their participants might be willing to concede. Both are preoccupied with normative questions about the role of the state in society, particularly with respect to debt, employment, and the division of public goods. These questions can properly be called “constitutional” in that they touch on the constitutive principles and foundational decisions and compromises that constitute collective life. There are, however, deficiencies to the constitutional politics of both movements. As discussed above, the Tea Party movement often traded on historical and philosophical claims that bordered on parody. On the other hand, the Occupy movement’s members had policy proposals aplenty, but relatively few alternative visions of how the structural problems they see in the American political economy—overfinancialization, disproportionate pooling of risk and rewards between the banking sector and individual citizens, and an elite enthusiasm for deregulation and state withdrawal from the economy that prizes ideological coherence over welfare-improving policy outcomes—might be addressed at the constitutional level. The Occupy movement can in a certain
sense be described as conservative. Its rhetorical strategy is as moralized as the Tea Party’s, with the virtues of compassion and solidarity substituted for self-reliance. Many Occupiers are apparently animated by indignation and outrage (though it must be remembered that in this they are in good company, with just about every other major American social movement). Such moralization is not accompanied by demands for major constitutional reform such as many Tea Partiers made. Arguably, if the Occupy movement is to mature it will have to begin to think along those lines.

There are clear continuities between the Tea Party and Occupy movements and previous episodes of collective enthusiasm in American public life. Like the movements for abolition, religious revival, or black civil rights, they not “single-issue” constituencies seeking discrete policy outcomes, such as the National Rifle Association or the Audubon Society. The centrality of normative, constitutive questions in the ERA, Tea Party, and Occupy movement suggest that objections to extrajudicial interpretation of the Constitution seem overblown. Reasoned disagreement over questions of principle and rights can and does take place outside the Court. Nor are the movements I have described unique. As Keith Whittington notes,

> Continuing extrajudicial debates over affirmative action, euthanasia, the death penalty, pornography, school prayer, gay rights, Internet privacy, sexual harassment, and gun control reflect sustained concern with individual rights, constitutional values, and political principles. We may disagree with the conclusions that various extrajudicial bodies reach in these debates, as we may disagree with the conclusions of the courts. But it is difficult to maintain that such extrajudicial decisions are unconsidered or neglect considerations of justice and principle (Whittington 2001a, 821).

There remains, however, the problem of vagueness—what counts as an example of a contestatory constitutionalist movement, and what doesn’t—and such vagueness is illustrated well by the Tea Party and Occupy movements. Occupy does not, in fact, meet all of the desiderata that I have laid out. Its members and its message are not focused on the constitutional text. The neoliberalization of the American political economy that is Occupy’s primary target of antagonism is not primarily
the outcome of any particular constitutional constructions. The contemporary fragmentation of public power and the dissociation of classes and communities from one another are the products of a constitutional order in which powerful minorities can use multiple veto points and disparate distributions of voting power to suppress competing or contrary viewpoints.

Do the Tea Party or Occupy serve as models for contestatory constitutionalism? It is true that both movements feature contestation over foundational political questions, but we need to look closer to be sure that they actually fulfill all the desiderata of contestatory constitutional movements. The Tea Party would appear to fulfill all of them, but if it is vulnerable at any point it would be with respect to the desideratum of publicity. There are noticeable discrepancies between Tea Partiers’ rhetoric, on the one hand, and their partisan affiliations, policy proposals, and organizing efforts, on the other. There is, of course, substantial disagreement over the meaning of the Tea Party. Somin (2011) describes the Tea Party movement as a prototypical popular constitutionalist movement, while Skocpol & Williamson (2012) present a more skeptical view of the Tea Party as an essentially reactionary protest movement. Certainly the Tea Party’s arrogation of the topoi of the Revolutionary period, their allusion to images (sometimes violent) of resistance to central authority, their valorization of the Framers as lawgivers in the Lycurgian sense, or their dismissal of political opponents as (interchangeably) “socialist” or “fascist” do them no favors in the public reasons department. Behind the predilection for tricorne hats lurks a rejection of liberalism (Lepore 2011)—not simply “liberalism” as it is construed in contemporary discourse but political liberalism as such (Rawls 1996). The Tea Party fails the test of publicity, not only by defining American constitutionalism in exclusionary, in-group and out-group terms but by approaching the Constitution with a fundamentalist mindset.

It may be objected that such an approach should not necessarily disqualify the Tea Party from consideration as a constitutional movement, but such an objection results from a category error. The desiderata of contestatory constitutionalism do not distinguish those movements which are constitutional from those which are not; rather, they serve to identify movements that may credibly be called popular. Similarly, the desiderata of contestatory constitutionalism are not sufficient
guides for evaluating constitutional movements. As normative standards they are inadequate unless they are coupled with additional arguments. In Chapter 3 I argued for why popular constitutionalism should be given greater pride of place in American constitutional politics; but in this chapter I have been concerned with describing what popular constitutionalism might actually look like in practice. The desiderata of contestatory constitutionalism give the concept analytic purchase on actual politics, but they do not justify it. Thus, to say that the Tea Party is not in all respects a contestatory constitutional movement is not to say that it is for that reason illegitimate or off-the-wall. Instead, the Tea Party’s failure to wholly fulfill the desiderata of contestatory constitutionalism only suggests that it is a constitutional movement of another kind. What kind, exactly? One possibility not frequently bruited by academic observers is that the Tea Party comprises a kind of resistance to what Stephen Engel calls “liberal pluralism” in the constitutional culture of the U.S (Engel 2011, xxx). On this interpretation, the Tea Party is not a contestatory constitutional movement but rather a rejection of the legitimacy of a constructed constitution altogether. It is a movement for the restoration of a “civic republican” vision of constitutionalism in which constitutional provisions require or forbid certain policies. Of course, it is certainly the case that the quest for finality in American constitutional politics has a long pedigree; both Federalists and Whigs sought to cast constitutional meaning as ironclad and beyond contestation (Whittington 1999a, 28–29, 50). But it is not the case the Tea Party should be regarded as suspicion because its aims are somehow anachronistic. The Tea Party’s failure to wholly fulfill the desideratum of publicity lies not in its aims but in its failure to acknowledge the ambitious scope of those aims—which are tantamount to the reversion of the constitutional culture of the U.S. to a previous mode of discourse.

²⁸On Engel’s account, the first constitutional culture in the U.S. was marked by “civic republicanism,” in which it was commonplace for political actors to conceive of themselves as having the appropriate understanding of the Constitution; conversely, it was typical to portray one’s opponents as mistaken about constitutional meaning, or even as seeking to subvert it. More than anything else, the experience of the Civil War persuaded Americans that moral suasion and what has been called “institutionalized interpretation” (Knight 2001) should be the preferred approaches to constitutional politics. Engel calls this a shift to “liberal pluralism” in constitutional politics.

²⁹It is noteworthy that the Democratic Republicans resisted this approach to constitutional politics; for them, “it was arrogance to imagine that the law was ever completely closed...The value of a written constitution was in its ability to be easily seen and to resist bad interpretations attributed to it” (Whittington 1999a, 54).
Occupy, meanwhile, was a protest against the features of the constitutional order that entail technocratic management of the political economy. Many of the political and institutional actors that Occupiers identified as their antagonists—central bankers that seek to govern the economy through monetary policy alone, decision-makers who a chary of increasing historically low levels of taxation as a source of revenue, an overfinancialized and increasingly deregulated banking sector, and an elite discourse that, when it condescends to mention the problem at all, refers to unemployment as an individual failing rather than a structural defect in the economy—but the movement has conspicuously failed to articulate its complaints in constitutional terms. Occupy has not directly targeted or contested specific constitutional constructions, focusing instead on agenda of specific policy reforms—student debt relief, interventionist unemployment policy, and so on.

A consideration of the Tea Party and Occupy movements serves to illustrate the contestatory constitutionalism is not a dichotomous concept. Different movements will fulfill the desiderata to varying degrees, which can in some instances help to predict the likelihood of success for achievement of the movement’s goals. Examining the cases of the modern Second Amendment and the failure of ERA, meanwhile, helps to identify the advantages and disadvantages of direct engagement with established institutions and political leaders. While both of these movements had popular components—mass publics were engaged as a part of the process—the proponents of an individual right to own firearms succeeded where the proponents of codifying gender equality did not. The former benefited from dense intellectual and political networks among interested parties and actors, but—importantly—they also pursued constitutional change through the courts rather than through amendment. We have yet another example of the fact that the contemporary constitutional order is extremely obdurate in the face of attempted amendment—and yet constitutional change occurs through alternative channels with greater ease.
3.7 Vagueness and False Positives

It is as important to be able to say what isn’t an example of contestatory constitutionalism as what is. There are two aspects to this. First, we want to know whether or not a given movement, organization, or community of actors is seeking to advance or contest a constitutional construction. Second, we want to know whether or not a constitutional change that is effected through contestation should subsequently constrain or alter the behavior of other actors, particularly courts and legislatures. The first question is, simply, “when is a contestatory movement not seeking to effect constitutional change?” The second question is, “how can we know if a given contestatory movement has been successful?”

The first question can be answered by the considerations addressed in the previous section. If it looks and feels like a contestatory constitutional movement, it might nevertheless not be one: Occupy is proof enough of that claim. More broadly, though, the question of what is and isn’t a contestatory constitutional movement is adjudicated in two ways. First, the desideratum of publicity can help to discriminate between movements that are actually contestatory and constitutional movements of another kind. For example, the emergence of a “national surveillance state” (Balkin & Levinson 2006, Balkin 2008a) pursued by the Bush Administration and “normalized” through its retention by the Obama Administration is certainly a consequential constitutional construction. However, it is at least partially beyond the purview of the courts and has not been subject to ratifying elections; it has also not been the object of popular demand. There are other constitutional constructions than those which are pursued through popular constitutionalist movements; the desiderata described above help to distinguish the two categories.30 More broadly, however, the analysis of contestatory constitutional movements can frequently benefit from adopting the “internal point of view” (Hart 1994, 88–91) in understanding the American constitutional order. Ronald Dworkin once claimed that an adequately rich and textured understanding of a legal system can only be acquired by someone who has lived and experienced that

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30 Of the dozens of constitutional constructions surveyed by Whittington (Whittington 1999a, 12), most are the result of elite- or institutional-level decision-making rather than agitation from below.
system from the inside (Dworkin 1986, 13–14). Whether or not that is the case for the study of the philosophy of law as a whole, Dworkin’s dictum is instructive for our present purposes. As a multitude of constitutional theorists have argued, the constitutional order is not exhausted by the text of the Constitution;³¹ it is arguably not even exhausted by the doctrinal residue that has been left behind by successive Supreme Courts. While the perspective of the participant/“insider” is not in itself a sufficient condition for a sophisticated analysis of a constitutional order—the discipline of comparative law puts the lie to that claim—it can certainly be helpful. Ackerman (2007) presents the story of a expert legal academic who is innocent of experience in U.S. constitutional culture; the expert fails to grasp many of the essentials of the prevailing constitutional order. Similarly, there can be no formula or algorithm for easily discriminating between those political movements which are contesting constitutional constructions and those which are not.

The second question—how can we know when a contestatory movement has been successful?—presents a similar demand for clear-cut answers which must, again, be met with a more nuanced account. It must be remembered that contestatory constitutionalism is aimed primarily at the constructed constitution, rather than the Constitution that is interpreted (in part) through judicial review. Recall that constructions themselves are, to a greater or lesser extent, contingent and unstable. They are not typically judicially enforceable—less so because they do not result in textual changes than because they rest upon consensus and the equilibration of interests and incentives. For these reasons, it is inappropriate to look to judicial enforceability when trying to ascertain whether or not a contestatory constitutionalist movement has been successful. A better test is to look for “altered constitutional practices” (Whittington 1999a, 218). Successful contestatory constitutionalism leaves its mark by producing changes in the values, norms, and practices in constitutional politics. They will alter the institutional framework in such a way that future actors must take note of them and be constrained by them. And the most successful movements will, perhaps, undo the conditions of uncertainty, ambiguity, or vagueness in the constitutional order which allowed them to arise in the first place.³² Furthermore, one need not look to elections

³¹See, e.g., Llewellyn (1934), Ackerman (2007), Tribe (2009), and Amar (2012).
³²“The erasure of the contingency of a construction’s adoption is a crucial part of the process of institutionalizing
for proof of a successful contestatory movement; again, its success will be legible in the enduring institutional changes it leaves behind.

3.8 The Constituent Power of Contestation

Popular constitutionalism in its ideal, abstract form—the constituent authority of the people to interpret their own constitution—is not a practical guide to constitutional renovation. Furthermore, theorists of popular constitutionalism who are mindful of this problem usually propose institutional reforms which are either incentive-incompatible or disruptive. Calls for members of Congress to rediscover their collective institutional interest (Thayer 1893, Fisher 2011) will go unheard by politicians who are more mindful of their partisan and electoral interests (and not without reason) (Levinson & Pildes 2006, 12, 25ff).

³³ Calling a new constitutional convention (Levinson 2008, 173–180) is, functionally, an impossibility. More violent or insurrectionary measures, some examples of which are provided by Kramer (2004), cannot truly be said to be democratic as we understand the term today.

The value of the idea of popular constitutionalism lies in its ability to provide us with instructive examples and contrasts. It may act as a regulative ideal which guides our conduct in the circumstances of politics as we actually confront them. As such, I have argued that the appropriate extension of the popular constitutionalist argument into the world of politics is contestatory in character: groups of citizens should organize to articulate and advance preferred constructions of constitutional meaning, and to engage multiple institutions in the process. Judicial supremacy cannot be challenged through judicial review. Under a regime of obdurate constitutionalism, in which amendment is a functional impossibility and judicial review a blunt instrument at best, popular constitutionalism will have to look elsewhere for modalities of constitutional change.

The model of contestatory constitutional politics that I have outlined in this chapter is focused on political practice and not ideal theory. By looking to past popular constitutionalist movements,
and by consulting the theoretical concept of popular constitutionalism, we can identify several desiderata of properly- or well-formed contestatory constitutional movements. These movements involve significant participation by mass publics as well as elites. Despite such participatory goals, however, it is important to remember what contestatory constitutionalism is not: namely, ideal popular constitutionalism. Ideal popular constitutionalism trades on the idea that “the people” possess an authoritative and coherent vision of their own self-government, which necessarily becomes obscured and distorted when mediated by institutions, parties, and political representatives. The latter claim may be true, but the first claim is dubious. As the authors of the Federalist papers themselves noted, a fully participatory democracy is asymptotically impossible—as a polity gets larger, the challenges and pathologies of massively direct rule become even greater. I have not argued for such a vision of constitutional politics. The preceding pages contain an argument for the desiderata or requirements that a contestatory movement should strive to fulfill if it is to, first, engage in constitutional contestation, and second, achieve recognition as an attempted exercise of constituent power. They do not contain a specification of how such movements should begin, of what their strategies or organizational structures should consist, or what their immediate or final goals should look like. Public engagement, and direct participation in politics, come in many forms (Rowe & Frewer 2005). It is likely to include deliberation, in the specific meaning of the concept isolated by many democratic theorists (Goodin 2008, Fishkin 2009). But deliberation as such will not conduce to the successful exercise of constituent power. It will also require greater citizen participation in politics, both at the immediate level and mediated by institutions (Pateman 1970, Fung & Wright 2003, Smith 2009). It is, after all, inevitable that citizen participation in politics will be mediated by existing institutions, but those same institutions will most likely need to be challenged directly if constituent power is to prevail against constituted power (Piven 2006).

Contestatory constitutionalism will almost certainly not occur at the ballot box. I argue in Chapter 5 below that elections are a necessary but insufficient condition for the minimal justifi-

See, however, Dryzek (2007), Mutz (2008) and Thompson (2008) for the competing formal and empirical claims made with respect to the ideal of deliberative democracy and its feasibility in democratic practice.
cation of any democratic polity. Beyond that, however, lies the danger in thinking that elections are not merely sufficient but are actually synonymous with democracy. American political culture is already saturated by a kind of de-politicized discourse, in which the political is relegated to a set of formalities and procedures—elections being among the few such procedures in which ordinary citizens do participate (Skocpol 2003, Crenson & Ginsberg 2004). Contestatory constitutionalism requires a different approach to thinking about constitutional culture and the boundaries of the political. In this chapter I identify some examples of the contestatory movements that may guide our thinking about the public exercise of constituent power, and in the next I explore some of the possible institutionsl tweaks that could encourage contestatory constitutionalism. There is no roadmap for contestatory constitutionalism, however, and I do no propose to offer one. When it comes to participation in politics, practice will always outpace theory.
Chapter 4

Institutions and Contestation

4.1 Taking Democracy Very Seriously

Popular constitutionalism requires constitutional theorists to take democracy very seriously. It asks us to accept the outputs of deliberative and aggregative processes as valid constructions of constitutional meaning. Such processes are quite unlike those which characterize the Supreme Court, which is comparatively secretive, unrepresentative, and unresponsive. Opening up constitutional elaboration to the democratic process should not be cause for alarm. Many constitutional theorists have often been chary of the possibility that democracy can be self-undermining. They have focused a great deal of intellectual effort in showing that democratic institutions must be constrained by adequate safeguards that can preserve the processes and substantive guarantees that prevent such institutions from dominating under-represented or powerless groups. However, I have argued in the preceding chapters that the “gridlock constitution” is far too obdurate to serve such constraining functions without also impairing the functioning of democratic politics.

In Chapter 2, I argued that constitutional theory—including theories of constitutional design—ought to focus closely upon institutional change and dynamics in public opinion; in Chapter 3 I argued that political movements and popular participation in politics can inform and alter our understandings of the Constitution. This chapter seeks to show that, from the perspective
of democratic theory and institutional design, there are compelling reasons to regard such contributions to constitutional elaboration as authoritative and furnishing reasons for enabling or constraining certain political institutions. I seek to situate contestatory constitutionalism within the framework of what Eisgruber (2001) calls “complex majoritarianism.”

Thus in this chapter I tie together the descriptive, historical, and critical threads of the preceding chapters to offer some prescriptions for institutional reforms in the spirit of developmental constitutionalism. I have argued that America’s constitutional essentials consist of more than a limited set of founding documents; that those essentials are the product of bargaining, contestation and compromise over time, and that a normative theory of constitutionalism which fails to involve those processes which give rise to the constitutional essentials is incomplete. The previous chapter offered a candidate set of principles and values which should animate the elaboration of the constitutional essentials; this chapter goes on to identify the institutions and mechanisms by which the constitutional essentials can be sustained or maintained. Constitutional maintenance, properly understood, must be undertaken with the awareness that the Constitution is constructed through politics. The project of popular constitutionalism must include the institutional arrangements and designs that can best give voice to the citizenry in their elaboration of their constitution.

Several themes will recur in this chapter. These include the necessary but limited role that elections play in legitimating democratic government; the distinction between a democratic majority per se and the ideal of popular sovereignty; and the persistence of partisanship in political discourse. Linking all three of these themes is the dissertation’s overall persistent emphasis on political contestation over the construction of constitutional meaning. Another common theme through this discussion of institutional reform is the focus on institutional arrangements which empower or channel popular participation in constitutional politics. Just as contestatory constitutionalism is not a recipe for ochlocracy or mob rule, the institutional reforms explored here are not intended to subvert or dissolve the constitutional order. Instead my aim is to explore possible ways of freeing or enabling the exercise of constituent power within American political culture.
And, in fact, the exercise of constituent power will emerge again and again as the best option available to the people themselves.

Finally, it is worth pausing to note that constitutional reform is increasingly attracting the attention of students of politics (Macedo 2005, Vermeule 2007, Levinson 2008, Sabato 2008, Macedo 2009). Some have proposed the wholesale revision of the constitutional framework on the grounds that it is undemocratic (Levinson), while others have argued for piecemeal reforms of the constitutional system (Sabato); others express reservations about the wisdom of “partial” reform that might unbalance the distribution of powers and responsibilities across institutions (Vermeule). It does seem likely that some far-reaching reforms—notably, Senate reapportionment and the abolition of the Electoral College—are for all intents and purposes impossible. This should not diminish our moral concern with the democratic deficiencies of those institutions, but practicality should be a contributing factor in focusing political energies on particular problems and solutions. Should not diminish our moral concern with the democratic deficiencies of those institutions, but practicality should be a contributing factor in focusing political energies on particular problems and solutions. Furthermore, I argue that constitutional change should be pursued within the extant constitutional framework rather than from outside it. Constitutional reform is best pursued as a form of constitutional construction aimed at improving the democratic performance of existing institutions. But we should remember that practice will always outpace theory. The exercise of constituent power through contestatory constitutionalism will often take place in ways that confront, frustrate, or ignore existing institutions.

A theme that will continually re-emerge in this chapter is the pervasiveness and unexpected effects of complex majoritarianism. In light of developments such as national citizenship, the growth of federal power, and the broad acceptance of judicial review, complex majoritarianism is a modern restatement of one of the central claims of American constitutional thought: that a plurality of institutions and sources of authority with overlapping ambits and responsibilities is a necessary precondition for self-rule (Eisgruber 2001, Macedo 2010). The two principles of American democracy that are perhaps its most essential—citizens’ equal access to and voice in political
decision-making, and the protection of individual and minority rights—are competing desiderata in the constitutional system, and give rise to the need for an institutional pattern in which it is very difficult for any one group or party to dominate others. I have some disagreements with this model, which I discuss below—first, I do not share with some complex majoritarians the same level of skepticism about majority control of institutions (still less with earlier theorists of complex majoritarianism like Madison and Hamilton). Second, I am skeptical of the Supreme Court’s ability to provide what Eisgruber (2001) describes as a special form of moral representation for the popular sovereign—an argument which would be more persuasive under a judicial regime other than supremacy. Nevertheless, complex majoritarianism describes well a central feature of constitutional theory in the U.S.: there are multiple sources of authority, even at the level of constituent authority, and the authority to say what the Constitution means, or requires, or protects, does not decompose onto a single preferred institution or group. The prospect of electoral majorities controlling political institutions is, justifiably, the basis for complex majoritarianism’s solicitousness toward the need for minority rights protections and their institutional enforceability. For Eisgruber (2001), this requires reasonably strong judicial review by an independent Court. However, I have already surveyed (in Chapters 2 and 3) the reasons why we might be skeptical of ceding so much interpretive authority to the Court. Furthermore, the pathologies of majoritarianism—such as the domination of historically subordinated groups and the potential for minority voices to go unheeded—must always be distinguished from majoritarianism itself, which is an institutional manifestation of the value of political equality. Of course, majoritarianism exists in tension with other institutional desiderata of equality—a majoritarian vote aggregation scheme unconstrained by norms of fairness could quickly lead to elections being dominated by economically powerful minorities, for example. Still, as I argue below, institutions of majoritarian preference aggregation are necessary (though not sufficient) grounds for giving social life to the value of equality.

Complex majoritarianism is not a monolith. There are multiple possible configurations of institutions and values which could plausibly be said to enable self-government. The selection and design of such configurations must depend in part on context and circumstances. However,
there are several aspects of the constitutional order in the U.S. where complexity—of institutional design, of countervailing pressures from interest groups or elites—outweighs majoritarianism to a substantial degree. These are the places in the constitutional order that will be the focus of this chapter.

4.2 Contestation as Constitutional Engagement

Consonant with complex majoritarianism’s emphasis on multiple channels of authority and powers for decision-making, contestatory constitutionalism may be shown to be a mandate for significant measures of popular control over the processes of constitutional construction. Instantiating such control requires institutional reforms to better enable citizens’ political agency vis-a-vis constitutional actors engaging in constitutional construction; regular and accessible channels of feedback and contestation over constitutional change, and changes in the behavior and composition of political parties.

4.2.1 Political Agency

In the social world, a politics of engaged constitutionalism begins with the realization that it is possible for citizens to influence the processes of constitutional construction and re-construction. The most important means of citizen participation is voting in regular, formalized, and fair elections. Elections serve both symbolic as well as instrumental purposes in legitimating American constitutional democracy. Symbolically, by counting votes equally, electoral mechanisms give actual weight to the egalitarian ideal that all individuals who are affected by political power should have an equal chance at influencing that power. Instrumentally, elections are a way of aggregating and translating collective preferences into collective action (policy-making). Of course, elections are not the only means of democratic legitimation; nor are they sufficient by themselves. But the features I have just described—the affirmation of the people’s voice in self-government, the maintenance of a direct line of accountability between voters as principals and officials as agents,
and the creation of an institutional space for the meaningful participation of the individual citizen in the political process—make elections an indispensable ingredient in the legitimation of a democratic government.

However, elections are imperfect and incomplete tools for enabling popular control over constitutional elaboration. Elections are in fact imperfect tools of political control more generally—which is not to say that they are not important, only that they are insufficient by themselves to adequately constrain political actors. In the literature on popular control of political officials, the “principal-agent” model predominates as the preferred vehicle for understanding the relationship between governed and government. It is thus important to consider its relevance to the articulation of contestatory constitutionalism.

The question of what institutional tools might constrain political actors has been the focus of extensive work in various studies of collective or political rationality within economics and political science. Elections are generally regarded as important but incomplete tools of political control; they are not the be-all and end-all of democratic institutional design. A brief survey of the pathologies and limitations of elections shows why this is the case, and why engaged constitutionalism cannot simply mandate the use of electoral mechanisms to enhance popular control over constitutional elaboration.

Elections are tools of political agency: they empower otherwise incapable actors to act effectively in the political world. In the case of a large and diverse citizen body, elections are necessary to enable citizens to overcome their collective action problems and pursue their general interests. In the first instance, such interests consist in basic security guarantees as well as disciplining state officials to the extent that they can be expected to protect the general welfare. Furthermore, . They serve important legitimation and accountability functions as described above, but introduce new problems as well, and do not solve all of the political problems and ills that democratic institutional designers seek to address (Macedo 2010, Eisgruber 2001). Majoritarian voting procedures do not allow groups to speak with unanimity or to aggregate all individuals’ preferences in such a way that each and every individual’s preference can be said to be equally represented by the
resulting decisions (Arrow 1963, List & Pettit 2011). What’s more, straightforwardly majoritarian aggregation mechanisms systematically marginalize and disempower persistent minorities, such that they cannot effectively contest measures that are pursued to their disadvantage.

For example, Barro (1973) argues that in the absence of any electoral consequences for their behavior while in office, political office holders will tend to seek rents and maximize their own utility at the expense of the public good. In general, if their actions while in office are not constrained by the expectation that they could be voted out of office, politicians can be expected to expand public expenditures beyond the level that would be conducive to optimum efficiency for society as a whole, resulting in “deadweight loss;” put simply, politicians unconstrained by electoral controls will seek to spend more than their constituents would deem appropriate. Furthermore, the mere introduction of electoral controls into the model does not simply make the problem of politicians seeking to advance their own interests go away. Even if there are many qualified competitors for office, the effectiveness of elections in constraining the rent-seeking of those currently in office will be hampered by countervailing factors such as the relative frequency of elections and the extent of “political income” office-holders expect to be able to extract from their position. Temporally distant elections will have a discounted effect in terms of discouraging politicians’ profligacy.

Given these considerations, Barro takes stock of the tools that are available to restrict the kind of behaviors on the part of politicians which are socially costly, including salary caps, different rates of the frequency of elections, and term limits. Barro lumps these together as “political structure variables.”¹ The precise values for these will vary based on certain background conditions, antecedent facts about the political structure, and market conditions. All told, elections are seen as incomplete and imperfect tools for private citizens to use for controlling the behavior of public officials, and are best complemented with other institutional and procedural constraints like term limits, rules of electoral procedure, and so on.

Ferejohn (1986) extends Barro’s analysis by asking what incentives, if any, elected office-

¹Oddly, the separation of powers is not treated as an important political structure variable; see discussion of Persson, Roland, & Tabellini (1997), below.
holders might have to remain aligned with the policy positions laid out in their campaign promises. (In other words, once in power, what stops elected officials from simply doing as they please?) Ferejohn notes that “it is usually hypothesized that citizens vote for the candidate whose platform they like best, ignoring further strategic considerations” (Ferejohn 1986, 6) and therefore attempts to construct a model of how voters might continue to influence the behavior of politicians once they are already in office. If voters chose among candidates merely on the basis of their stated policy positions, he argues, then they would have little control over the politician’s subsequent behavior while in office. Instead, he suggests that voters do not merely select candidates on the basis of their campaign promises but also evaluate their past performance. (He also notes the empirical evidence which suggests the strong predictive power of recent economic performance for incumbents—if the economy is doing well right before an election, incumbents get an electoral boost; if it’s doing poorly, they take a penalty—and the accumulated evidence in the subsequent quarter century only adds weight to this hypothesis.) So, Ferejohn asks, we need to “know how voters ought to behave if they wish to get their representatives to pursue the interests of the electors” (Ferejohn 1986, 8). He explicitly frames his argument in terms of picking up where Barro (1973) left off (Ferejohn 1986, 9ff), noting that Barro’s model makes electoral oversight of last-term or “lame duck” officials impossible (knowing that they face no future sanction at the polls, they will do as they please).²

Ferejohn’s solution is to frame the relationship between voters and office-holders as a principal-agent problem. Principal-agent problems can be used to model situations where some actor, the principal, delegates some power or authority to a (sometimes nominally subordinate) actor, the agent, under some arrangement that incentivizes the agent acting in a way that benefits the principal rather than (or in addition to) the agent’s benefit. The challenge for the principal in any principal-agent model is to constrain the agent to be effective on the principal’s behalf; such constraint is typically modeled in terms of incentivizing the appropriate behavior on the part of the

²Of course, abstract game-theoretic considerations aside, lame-duck presidents have had “an important arrow” removed from “the old presidential quiver” of informal powers (Amar 2005, 437), and if they wish to preserve their legacies, aid allies and protect preferred policies, they will not, in fact, simply do as they please.
agent. In the absence of such incentives, the agent will tend to act in such a way that enhances the agent’s utility-maximization, with suboptimal outcomes for the principal. In this context, Ferejohn focuses on the incentives for incumbent officeholders to be responsive to the preferences of voters as they are reflected in electoral behavior.

Ferejohn argues that the greatest control—what he calls “limits of control”—that the electorate can have over incumbents’ behavior occurs when there exists an array of credible challengers that the electorate can choose from in the next election; and, crucially, when the electorate is able to coordinate on the kind of criteria that will be used to assess the performance of the incumbent in order to either reward the incumbent with reelection or punish the incumbent by electing a challenger instead. The specific degree of control that is achievable in this best-case scenario will depend upon “the structure of the party system and the rewards of office” (Ferejohn 1986, 22). The effectiveness of this control will degrade, however, to the extent that the electorate cannot coordinate upon a single standard or index of incumbent performance upon which to base voting systems. If the electorate does not use the same standard consistently, then electoral control is weakened as the incumbent is not held to the same level of “discipline” by all voters. Thus, in the real world sociotropic patterns of voting are an essential part of effective control of elected officials by voters: “[C]ontrol of politicians requires more than simple retrospective voting. It seems to require, as well, a refusal to vote selfishly” (Ferejohn 1986, 22). Ferejohn notes that this hypothesis is consistent with the evidence of sociotropic voting patterns in American electoral behavior.

Additionally, the quality and quantity of the available challengers matters as well. Particularly in the absence of a robust multiparty system, it is possible for incumbents and challengers to “collude” and coordinate their electioneering in such a way as to maintain party control of institutions.

Over and beyond Barro and Ferejohn’s analyses, Persson, Roland, & Tabellini (1997) advance a formal argument that the separation of powers serves to enhance citizen control over (or at least diminish citizen vulnerability to) the power and discretion of elected officials, by (a) forcing different officials to converge on policy-making and (b) forcing officials to reveal information that
will be useful to voters in subsequent elections. They thereby hope to reframe the arguments of Montesquieu, Locke, etc. in terms of economic theory (Persson, Roland, & Tabellini 1997, 1164). They share with Barro and Ferejohn the assumptions that all voters share, if nothing else, the goal of disciplining or controlling officials through elections, and that the relationship between electorate and elected officials is usefully modeled through the principal-agent framework. They also frame the stakes of electoral control in similar terms: the “informational asymmetries” between elected officials and voters are such that the former can potentially abuse their power to extract rents from their offices to the detriment of the commons.

We might ask whether there are other tools in addition to elections that can be used by citizens to control officials. This complicates the principal agent model by situating the interactions between citizens and officials in a suite of institutions—a constitution—which may feature the checks and balances characteristic of separated powers, but also frustrate the project of directly sanctioning officials through electoral mechanisms. “Political constitutions only specify who has the right to make decisions, and according to which procedures for which circumstances” (Persson, Roland, & Tabellini 1997, 1165); it is hard, if not impossible, to impute responsibility for specific policies (or their consequences) to individual officials when they are up for election. A “simple” separated powers constitution—in which there are distinct executive and legislative functions, but they do not have conflicting prerogatives or powers—can actually worsen electoral accountability, since colluding executives and legislators can exploit informational asymmetries to extract rents in ways that are at least partially obscured to the public. Separated powers are not only insufficient, in and of themselves, but they can actively work against the public’s interest if they do not feature an appropriate scheme of checks and balances.

Persson, Roland, and Tabellini derive the following conclusions from their model: First, separation of powers can enhance the accountability of officials to voters if the structure of the constitution is such that (a) the legislature and executive have conflicting interests (checks and balances), and (b) legislative enactment requires agreement between the legislature and the executive (such as a presidential signature on bills originating in the legislature). Second, the competi-
tion between officials fostered by a functioning scheme of checks and balances in a constitution of separated powers allows voters to glean information that would otherwise be hidden from them. However, “this truth-telling equilibrium is not collusion proof” (Persson, Roland, & Tabellini 1997, 1167).

An interesting corollary to the first conclusion is that adopting a constitution of separated powers is not an absolute gain for voters; they may still achieve a net gain in terms of added means of frustrating rent-seeking behavior on the part of officials, but the difficulty of ascribing responsibility to specific actors for specific decisions can be interpreted as a local loss in (direct) electoral control. It should also be noted that the separation of powers only diminishes the informational asymmetries between public and officials if one of either the executive or legislature has agenda-setting power: that is, if one of them is able to set the terms for debate or independently describe the scope of contestation on a given issue or decision. “[G]iving full agenda-setting power to one body improves accountability via information revelation” (Persson, Roland, & Tabellini 1997, 1190, and see generally 1190–1192). If, for example, only the legislature may draw up a budget, or only an executive may nominate an appointee to a given post, then they set the agenda and, in the reaction of the other body, a greater quantity of information is revealed to the public that will be of use in evaluating behavior in office when the next election comes. Finally, important complicating factors are left out of their analysis, notably the supervisory role of the media as well as the conflicting preferences revealed by a heterogeneous body of voters (Persson, Roland, & Tabellini 1997, 1198–1199).

The question of whether contestatory constitutionalism could be accomplished solely or primarily through a principal-agent relationship—the “people” as principal and the constitutional state as the agent—is worth considering at length. Elections are necessary but insufficient conditions for democratic legitimation (Burnham 1987) However, not all electoral mechanisms are equally capable or appropriate to the function of democratic legitimation. Staffing national offices by lot—that is, election through random assignment—would lack the legitimating capacity of elections through voting because it would vitiate the principal-agent relationship between rep-
resented and elected parties. Similarly, restricting voting eligibility in such a way that those who are represented are unable to participate in elections would undermine the principal-agent relationship. If, for example, the citizens of North Dakota—and only North Dakota—were those who voted for the national representatives of South Dakota, South Dakotans would rightly complain that they were being deprived of a voice in government, and burdened with “representatives” who were not effectively responsive to their interests or concerns. Perhaps if North Dakota’s representatives were, in turn, elected by South Dakotans, an uneasy tit-for-tat equilibrium could prevail in which the citizens of each state selected representatives in such a manner that those of the other state would not be overly inconvenienced by the self-regarding voting habits of the others. But this would be a rather complicated and unwieldy form of holding elected representatives accountable through voting, and it would strip voting of its capacity to give individual citizens a space within which to experience meaningful participation in politics, however limited or narrow.

As far-fetched as this scenario of ersatz representation in the Dakotas may seem, something not unlike it has obtained in real-world electoral politics in the U.S. The Electoral College is, as I have noted above, a feature of the American federal system that descends from the debates and compromises that produced the federal Constitution in the late eighteenth century. Coupled with the state-centric representation scheme in the Senate, the Electoral College is one of the two main ways in which the sectional compromises of the antebellum republic continue to have lasting effects in contemporary American political life. The election of presidents through the more than two hundred years old mechanism laid out by the Constitution is a cumbersome and inegalitarian procedure, one that is inappropriate for one of the most consequential political selection problems in the world.

Although proposals to abolish the Electoral College are frequently derided as “off the wall,” since they presumably entail the pursuit of constitutional amendments sorely lacking in political appeal, the presidential selection process can in fact be substantially reformed without the formal abolition of the Electoral College. Just as the makeup and internal procedures of the College have
been constructed over time, they may be further constructed or reconstructed such that they accord with our understanding of how democratic representatives should be elected. Proposals along these lines are not uncommon, and as of this writing at least one has made substantial progress. The National Popular Vote (NPV) initiative, an effort by the governments of several states ranging in size from Vermont to Illinois to California, seeks to statutorily commit state governments to rewire all of their electors to vote for whichever presidential candidate receives the most votes nationwide.³ A participating state would thus cast its votes in the Electoral College for the winner of the popular vote even if a different candidate had carried the state. As of 2013, the NPV consists of 132 votes in the Electoral College. It is unclear if the initiative will ever obtain the requisite minimum of 270 electoral votes that would furnish a majority within the Electoral College. And although the supporters of the NPV have been careful to construct it in such a way that it is not a “compact” among several states, it is highly likely that the NPV would face extensive resistance in the federal courts, and perhaps in the federal government as well. Nevertheless, the NPV illustrates the point that there is open space for institutional innovation and amelioration with respect to the Electoral College.

Recent Gallup polls suggest that a majority of Americans would prefer to see the Electoral College reformed or abolished through constitutional amendment or federal statute.⁴ This preference cannot be explained simply as the result of Americans declaring their preferences for various policies, since the residents many of states would stand to lose more than they might gain in terms of national political influence. Revealing a preference for national electoral reform is clearly sociotropic—that is, it reveals a second-order preference for democratic or at least group-oriented decision procedures. And given that Americans, as a group agent, frequently rely upon representative institutions to express and give form to their collective judgments and preferences, their collective preference for the reform of the composition of those institutions is worthy of serious consideration. In the immediate future it does not seem likely that a sweeping reform of

the Electoral College is imminent, but it is a natural site of focus for debates about constitutional reform in the U.S.

An additional distortion to electoral equality in constitutional politics comes in the form of the political primary processes that select the presidential nominees for the two major parties, as well as the pseudo-nominating contests such as “straw polls,” caucus events, and other pre-election gatherings that propel and influence the parties’ nominations. The presidential primary system as a whole grants vastly disproportionate power to a small number of states that are non-representative of the nation at large in terms of their populations, demographics, economies and key industries, to name only a few important factors. Just as Wyoming and Vermont exert disproportionate influence over the selection of the one truly national office created by the Constitution, the presidential party primaries grant disproportionate influence over setting the agenda for that selection to Iowa and New Hampshire (to name the most prominent offenders in the rogues’ gallery of prominent primary states). The two major parties’ methods for selecting their presidential candidates magnify the democratic deficits of the already seriously imbalanced presidential selection process.

In some ways, reforming the party primary system is an even taller order than reforming the Electoral College. Political parties are quasi-private entities, and the Supreme Court has lent jurisprudential support to the proposition that state-level primaries cannot be externally regulated. As above, the point is not to insist on unworkable or extremely unlikely changes to existing practice, but rather to reflect dispassionately and at a critical remove on how current practices can either enhance or diminish popular control of constitutional change. The existence of a two-party equilibrium in American national politics has significant implications for constitutional elaboration. The primary contests set much of the agenda for the general elections that select presidents; what’s more, the effective reduction of voters’ choices down to two candidates renders the expression of voters’ constitutional preferences ambiguous and mutes their voices with respect to monitoring constitutional change.

Given that constructions of the Constitution are pursued politically, it is important that the
lines of accountability between president and electorate not be obscured. And yet the process by which Americans select their presidential representatives remains cumbersome and inefficient at best. At its worst, it yields profoundly negative externalities—most recently, the contested national election of 2000, in which the candidate who received fewer votes nationally was awarded the Presidency by an intervening Court that itself voted along partisan lines (with respect to justices’ nominating presidents). Independently, the task of determining who is the president’s relevant constituency is already complicated—the president represents the entire nation in his capacity as the head of state, the head of the executive branch, and as the commander in chief—but the current system of selecting the president only further complicates the principal-agent relationship between president and people. Electoral reform is thus a vitally constitutional issue, and not simply an issue of democratic reform per se. The people cannot express their constitutional preferences coherently through the electoral process if their voice is distorted or obscured through electoral processes that do not provide clear lines of accountability between elector and elected. Reforming and streamlining the national electoral process is highly relevant to enabling and empowering the project of engaged constitutionalism.

The democratization of the presidential selection process and the reformation of the Senate into a more equitably representative body would constitute real gains for the extension of popular control over constitutional elaboration, via their strengthened principal-agent relationship with governmental officials. However, neither such step would be sufficient in and of itself, such that popular control of constitutional development is meaningfully realized. Both the reformation of the presidential selection process and the redesign of the Senate would only go so far in addressing inequities and distortions in national participatory politics, the most important of which the prevalence of presidentialism in American politics, and the electoral relationship between the president and the public.

No discussion of electoral reform in the U.S. could be complete without considering the place of the president in the overall scheme of national representation. The Presidency is in some re-

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⁵On the connections between equality and electoral institutions, see, e.g., Ansolabehere, Gerber, & Snyder (2002).
pects the only truly national office in the system set out by the Constitution—at least, the president is the only official with a national constituency. But the president alone cannot be the only repository of representation, especially if he is only responsive to those who elected him. One of the Framers’ goals in establishing a system of separated powers was, of course, the diminution of the capacity of majoritarian voting schemes to suppress or marginalize numerically disadvantaged groups and classes.⁶ The profusion of veto points throughout the federal system was one means of accomplishing this. Arguably, however, the proliferation of those veto points has served to significantly frustrate the responsiveness of the government to the governed (Levinson 2008).

### 4.2.2 The Limits of Institutionalizing Contestation

As citizens of a diverse and pluralistic society facing the burdens of judgment, we need a complex constitutional democracy; electoral majoritarianism is insufficient to empower constitutional self-government (Eisgruber 2001). How, then, can sufficient contestation and feedback be built into our constitutional system such that popular preferences over constitutional elaboration receive their due consideration by elected and appointed officials? The first step is to recognize that, as I argued above, elections are flawed and incomplete, at best, at serving as “transmission belts” between popular preferences and public policy. Public opinion does not necessarily have a substantial direct effect upon policymaking, and elections are not necessarily reliable indicators of public opinion.⁷ Public opinion is at its most efficacious when it undergoes significant and discernible change (Stimson 2004), and only when electoral institutions are in place in such a way that they are sensitive to such changes and make them publicly legible. However, those institutions are not equally responsive to all kinds of shifts in public opinion, and are in fact

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⁶However, the numerically disadvantaged groups the Framers—and especially vocal Federalists like Madison and Hamilton—were not the same minority groups that we are concerned about today, a point I elaborate upon below.

⁷Canes-Wrone (2006) argues that presidents, who have direct access to mass publics as more-or-less direct constituencies (Tulis 1987), may influence or marshal public opinion on behalf of particular policy agendas; furthermore, this mobilization of public opinion can, in fact, help to move policy in the direct of public preferences. However, this does not necessarily indicate that public opinion exerts and autonomous or unmediated effect on the course of policy or decision-making. Lee (2002) argues that public opinion can, in fact, exert a kind of independent effect upon policy, but only after being mobilized by interest groups, unions, or other dedicated organizations. In either case, the pressure that is exerted by public opinion upon public policy is mediated by and endogenous to the existing institutions and power relationships in the polity, an observation that can be traced at least as far back as Lippman (1922).
increasingly only sensitive to shifts in elite opinion (Gilens 2005). We must therefore investigate other avenues for popular participation in constitutional politics, above and beyond the traditional electoral process. The prototypical form of popular participation in constitutional politics—the Article V amendment process—is not, as I have observed already, the appropriate avenue for institutionalizing constitutional contestation.

The Article V Amendment Process

The “traditional” amendment process is a necessary but insufficient route for constitutional contestation. Its insufficiency stems from the fact that it is exceedingly difficult to effect, and that it has been undermined by various actors’ recourse to other methods of constitutional change. Still, that should not discount the consideration of the amendment process as a form of constitutional feedback. Importantly, the amendment process continues to serve as a lighting rod for some forms of constitutional politics, especially in budgetary and allocative disputes. “Balanced budget” amendments are frequently mooted in national politics, although they have not achieved the level of salience that other amendment attempts, such as the ERA (itself an eventual failure) have achieved. We would be mistaken in inferring that the amendment process has “stalled” simply by observing the slow rate of amendment—as I have argued above, far better evidence for the brokenness of the amendment process comes in the form of the alternative channels of constitutional change that have developed. The possibility remains open that new amendments may be adopted in the future. But if the process has fallen into relative disuse, and the prospects for success appear slim, in what sense is it important to consider the relevance of the amendment process?

There are at least three ways in which the amendment process continues to be relevant: First, the amendment process is an avenue of contestation. It is the site of mobilized, organized, and vocal articulation of ideas in politics. It thus differs from issue advocacy or candidate electioneering.

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*The transformation of the American political economy into a neoliberal regime with widening income inequality has only exacerbated this phenomenon (Bartels 2010, Gilens 2012).*

*There are in fact many possible avenues for popular political participation (Piven 2006, 19–35); in this chapter I restrict myself to considering those which are oriented toward or around the constitutional order in the U.S.*
(although it can certainly figure in both of the latter phenomena) insofar as participants in the amendment process are likelier to be advocating on behalf of propositions about the structure of the polity or the political process, rather than for specific policies or issue outcomes. In this way, organizing on behalf of a proposed amendment can act as a “lightning rod” or consciousness-builder in which political learning takes place.

Secondly, the amendment process can sometimes serve as a signaling mechanism between different political actors, such as organized mass publics and official institutions, or between different elites. The capacity of the amendment process to serve as a signaling message is a two-way relationship. It can obtain between political activists and the Supreme Court, or it can move in the other direction, from, for example, a political party’s congressional leaders to key constituencies or interest group. Historically, relationships in both directions have obtained. In *Frontiero v. Richardson*, when the Court was in the midst of a series of cases wrangling with the jurisprudential status of sex and gender discrimination, Justice Powell found it pertinent to note that passage of the Equal Rights Amendment (ERA) seemed imminent and, at any rate, the higher-than-normal public interest in the question of gender equality suggested that the Court’s intervention would be inappropriate. (Eventually, ratification of the ERA failed and gender discrimination remains in a contested and under-specified, “intermediate” category of scrutiny.) Conversely, bruiting a “balanced budget amendment” is a frequent trope in fiscal policy debates, one that serves a variety of political uses—it signals (sincerely or not) a commitment on the part of policy-makers to fiscal prudence in a way that seems more disciplined or long-lasting than simply pushing for desired budgetary or allocative outcomes; it casts a preferred policy outcome as one that is constitutionally appropriate (that is, worthy of being constitutionalized, unlike other policy areas of less concern); and it provides a convenient rhetorical trap-door, in that any failure to arrive at a desired outcome can be blamed on the intransigence of legislative colleagues or on the unwillingness of political opponents to commit to constitutionalized balanced budgeting.

Finally, the amendment process is educative. Political learning increases generally during periods of heightened political activity, and the amendment process is no exception. It focuses citizen
attention upon the constitutional underpinnings of government; it also draws attention to the relationships between values, practices, and institutions. The discursive experience of participating in the amendment process, or in constitutional politics more generally, also forces the consideration of abstract and difficult questions and propositions while at the same time sharpening those questions by posing them in concrete terms. Debating the merits of a balanced budget amendment, for example, is richly illustrative of the paradox of the (contested) possibility of an “unconstitutional amendment”—more so than simply considering the abstract arguments.⁹ Similarly, debating the interpretation of specific amendments or provisions motivates the consideration of thorny theoretical concerns about the relative primacy of different provisions vis-a-vis one another. None of the preceding is meant to suggest that proposing new constitutional amendments will somehow result in a substantial increase in the political attention or cognition of all citizens. Elites will continue to exercise disproportionate sway in political discourse as they do now; and it is perhaps not reasonable to suppose that dozens of millions of Americans will put their current life projects on hold for the sake of advocating on behalf of a proposed amendment, in the manner of a general strike, religious revival, or other forms of political mobilization or direct action.

The amendment process has sometimes been presented as a kind of “ratification” of political changes that have already taken place (Strauss 2001). On this reading, later amendments such as the Seventeenth (requiring direct election of senators) or the Nineteenth (enfranchising women) were not themselves the instruments of major changes to the constitution. Instead they were the formalization or recognition of patterns of change that had already largely been completed—direct senatorial elections and women’s suffrage being movements which had already made substantial gains in many states by the time the respective amendments were ratified. The amendment process cannot be relied upon to reflect popular constitutional preferences in a timely or representative manner. It should not be ignored, of course, and it remains open as a possible route for constitutional revision. But experience—and, hopefully, the preceding pages—show that formal amendment neither captures all relevant constitutional changes nor exhausts the scope of possi-

⁹See, e.g., Dellinger III (2011) for an argument as to why certain amendments (such as those placing constraints on Congress’s budgetary powers) are “unenforceable.”
bility for effecting such changes. Simply dispensing with the formalities of the Article V process would not solve the problems of institutionalization either. This is, in fact, a proposal has that been bruited; Amar (1995) interprets the Constitution to be, in the first instance, an instrument of popular sovereignty, and as the product of an exercise of constituent power it may be revised through that same power whether or not that power is codified in the Constitution’s text itself. This is fine so far as it goes, but it is neither feasible nor perspicuous to propose that contemporary popular sovereignty find expression in a nation-wide referendum, which is what Amar proposes. This should not come as a surprise. Constituent power cannot be neatly channeled or routinized. As the entailment of mobilization and organization on the part of groups that comprise, in part or in whole, mass publics, constituent power cannot be neatly cabined in a theoretical expression or pattern of constitutional design. Contestatory constitutionalism will tend to resist institutionalization. This is not to suggest that it will always be disruptive, let alone violent; instead, it is a reminder that we should remember that practice will almost always outshine theory. The task of constitutional theory in this case should be to recognize the possibility and acknowledge the permissibility of contestatory constitutionalism as a modality of constitutional politics.

The Media Environment and the Public Sphere

It is important to pause to note how the media environment also complicates attempts to institutionalize constitutional contestation. The media environment—the discursive space in which political choices are articulated and contrasted—can have significant effects on constitutional elaboration. The ways in which policy choices are presented, agendas are set, or issues are framed can be profoundly consequential in political life. Much the same can be said of the way in which constitutional issues are portrayed in mass media. Despite such similarities, however, there is an important distinction between the portrayal of policy controversies and constitutional controversies in mass media. Policy controversies are often displayed through the lens of journalistic objectivity, such that competing policy choices and parties are given rough parity in terms of how

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11See discussion of Prior (2007), below.
they are described and reported upon. In contrast, constitutional controversies—"hard cases"—are often presented as technical problems to be adjudicated by competing experts, and while different putative solutions in constitutional controversies are often reported upon, the relevant decision-makers are cast narrowly—jurists, specialist lawyers, and academic observers. This difference in the portrayal of political partisanship, on the one hand, and of constitutional law, on the other, is emblematic of the legalization of constitutional meaning. It is a commonplace in media circles, as in other elite domains, to discuss constitutional politics as a specialized, technically demanding pursuit—and one that is distinguished from politics, *per se*. This an unfortunate state for our national discourse to be in, as it limits the extent to which constitutional possibilities, alternatives, and justifications are seriously debated and considered.

What, specifically, is a "media environment?" The term to refer to communications media available to a public at a given time, the technological varieties of that media, the regulatory regime it inhabits, and the kinds of content disseminated through that media (Prior 2007, 9–15). This idea is closely related to what Hallin & Mancini (2004) call a "media system:" the web of political, economic, and informational relationships which come to define the scope and presence of media organizations in an overall power structure. In its current configuration, the media environment of the contemporary U.S. is one in which constitutional politics receives limited and partial coverage. Political information, as distributed though the U.S. media environment, comes in the form of information about candidates, parties, and platforms during election campaigns; major policy debates in Congress and, to a lesser extent, local governments; and coverage of policy decisions, broadly construed (national policy, including budgetary, regulatory, and foreign policy; administrative policy-making; and policy change or continuity as directed by the Supreme Court. These are important domains and the necessity of covering them is clear. However, when they constitute the only or primary form of political coverage the extent and nature of constitutional change or continuity is obscured rather than highlighted.

The currently obtaining media environment in the U.S. is not optimal for engaged constitutionalism. It has structural as well as cultural defects. Structurally, the media environment is
subject to centripetal, decentralizing trends that alienate and divide citizens. As Prior describes the “post-broadcast” epoch in American media development, the emergence of cable television (as well as the Internet) has precipitated the decline of regular, broad consumption of broadcast news programming. Although greater depth of political information and coverage is available from some media outlets, only those who are already predisposed to acquire such information seek it out. Meanwhile the proliferation of entertainment media options, coupled with the greater degree of choice enjoyed by media consumers, means that the substantive news coverage of the “broadcast era,” however paltry or superficial it may have been, has been replaced by—nothing. Thus, for Prior, the electorate as a whole has lost a core source of political information and learning, and the modest gains in quality and depth of political information brought about by the consumption habits of “news junkies” are insufficient to offset the losses to political learning by the preponderance of consumers.

The American media environment has cultural defects that also diminish its capacity to contribute to engaged constitutional discourse. It is a commonplace that American journalism strives for “objectivity” and eschews “partisanship” or at least that major outlets—such as broadcast television networks, metropolitan newspapers, publicly-funded radio broadcasters, and so on—seek to avoid being perceived as unbalanced. There are two flaws with this approach to seeking accuracy and truth-telling. First, the cultural logic that supports it is beginning to unravel, as cable news, online media, and other new developments in information dissemination supplant and replace the traditional forms of news media. Many such information sources have distinct institutional and cultural histories that have not been shaped by the mid-century emphasis on objectivity through balance. Second, defining objectivity as a stress on the midpoint between the two relevant ideological poles on an issue is both artificial and subject to distortion if one or both poles move radically in one direction or another. Truth-telling becomes an increasingly precarious enterprise if judgment and discernment are discarded in favor of the heuristic of balance.

There are, besides, other stable forms that a media environment can take, as Hallin and Mancini show. They distinguish between three different media systems observed in contemporary democ-
racies that are all arguably constituent parts of functioning democratic societies, and yet perform that function in different ways. The differences among media systems tend to track local variations in power systems, such that it makes sense to distinguish between a “Mediterranean,” “North European,” or “North Atlantic” model of media systems. Such differences are not merely structural but historical as well, and are also informed by the different paths of political, economic, and social development in different political communities. The three models are named the Liberal (North Atlantic—that is, Anglo-American) Model, the Democratic Corporatist Model (North/Central Europe), and the Polarized Pluralist (Mediterranean) Model. The Liberal Model is characterized by the predominance of private, commercial, for-profit media outlets and an ethos of market competition. The Democratic Corporatist Model is characterized by an historically emergent web of relationships between media outlets and specific interest groups (businesses, unions, other social/political groups), actively monitored and mediated by the state. The Polarized Pluralist Model consists of a very active role for the state in the media environment, a weaker or slower pattern of the historical emergence of private or commercial media outlets, and close ties between media outlets and political parties. As Hallin and Mancini gloss their argument,

[W]e could summarize the differences among these systems by saying that in the Liberal countries the media are closer to the world of business, and further from the world of politics. In the Polarized Pluralist systems they are relatively strongly integrated into the political world, while in Democratic Corporatist countries the media have had strong connections to both the political and economic worlds, though with a significant shift away from political connections particularly in recent years (Hallin & Mancini 2004, 76).

What lessons do Hallin and Mancini’s findings have for thinking about changing the practice of constitutional politics in the U.S.? To begin with, the simplest lesson is that there are workable alternatives to the media environment that currently obtains in the U.S. It is not a necessary feature of our society that we have the media outlets and institutions that we have, but rather a contingent outcome of complex, multidimensional historical processes. For just reason, how-
ever, it would be difficult to impose wholesale transformative changes upon the American media scene. Patterns of historical development influence the structures of media systems primarily through path dependence and knock-on effects. The historical development of political cultures and state institutions has a powerful effect on the growth of media systems and accompanying regulatory regimes and media cultures. (Socio-cultural developments matter for the subsequent development of media; Hallin and Mancini make much of the relative correlation between a nation’s literacy rates in 1890 and its newspaper subscription rates a century later—the higher the former, the higher the latter.) However, development is not a one-way street; they point out that global economic integration is pushing national media systems towards convergence rather than divergence.

Hallin and Mancini’s comparative analysis throws the distinctive features of the American media system into sharp relief. Perhaps the most important observation to be made here is the deleterious effect on political discourse that is engendered by the myth of a “disinterested” or “balanced” Fourth Estate. Lurking behind the valorization of objectivity is the assumption that individual citizen-consumers can and should seek out their own sources of information and form their own individual judgments about the news. This epistemic hyperindividualism derogates the value of other forms of acquiring and sustaining knowledge about politics—especially the affective and the associational. Revival tents, temperance meetings, union halls or sit-ins—all of them are sites where political learning take place. However, the ideation, communication, and informational transmission that they entail are far removed from the contemporary ideal of the citizen who conscientiously and judiciously forms his own conclusions on the basis of hearing all sides of the story through objective media. Two observations may be made here. One, the “embourgeoisement” of the public sphere—as articulated by Habermas (1991)—can proceed and in fact has proceeded to the point where the importance of individual judgment has superseded the communication or mutual criticism of those judgments in collective contexts. Two, the belief in the importance of presenting “both sides of the story” serves to suppress rather than promote political communication and learning, especially across ideological or partisan cleavages. Few
media consumers actually manifest the ideal of the citizen-consumer. As such, obscuring rather than specifying the ideological valences of media outlets—in the contemporary U.S., FOX News and MSNBC are ideologically antagonistic, no matter their claims to “objectivity”—yields two perverse results. First, only a sophisticated minority apprehends the ideological freighting of media coverage. Second, mobilization on behalf of shared values, commitments, or preferences is not applauded but actively deprecated—as “partisanship” or “divisiveness.” Unfortunately, the epistemic outlook that is implicit in the contemporary media system in the U.S. tends toward encouraging status quo bias and suspicion of organization on behalf of firm commitments. The net result is the reproduction of ideological and rhetorical stability (for better and often for worse) in mass media discourse.

Like constitutionalism itself, the institutional and economic development of media is subject to various historical constraints—path dependency, knock-on effects, and cultural norms. Re-structuring the American media environment would not only be procedurally difficult but, in sociological terms, very hard to imagine. Moreover, one of the important historical constraints on the development of the American media environment has been the growing jurisprudential importance of the First Amendment and the emergence of a markedly libertarian approach to the regulation of speech. Consequently, even if there were any significant political pressure to enact legal requirements with respect to the scope, frequency, or depth of political reporting in American media would face significant legal, cultural, and institutional barriers. Improving the contributions of American media to political discourse must therefore come from resources that are more familiar or internal to our journalistic traditions. It should also be remembered that much of the cultural impetus toward balance in American journalism can be traced to the regulatory regime that coalesced around the first nationwide markets in broadcast news in the mid-twentieth century, when balance between ideological poles was to a greater or lesser extent statutorily required.

Expanding and improving the contributions of the media to constitutional discourse must

¹²It should be acknowledged that a major—if not the sole—mover behind this shift has been the federal judiciary itself, noticeably in the form of the Supreme Court’s twentieth-century First Amendment jurisprudence.
come in the form of encouraging the creation and expansion of media outlets that are oriented
toward coverage of politics and policy in general, as well as constitutional issues as they arise
in politics. Public broadcasting and privately-sponsored public interest media outlets such as C-
SPAN might serve as models for such ventures, but their limited share of the public’s overall
media consumption patterns should disincline us from regarding them as sufficient measures.
Serious effort on the part of politicians, other elite opinion leaders, and engaged citizens would
be required to redress the shortcomings of the current media system with respect to its impact
(or lack thereof) on political discourse in the U.S. Even that would most likely prove insufficient
without, at the very least, the tacit approval of an increasingly consolidated media industry, one
which may see little to gain in the democratization of mass communications. There will likely be
no easy or simple solutions.

4.3 Constitutional Partisanship

Political parties comprise one of the main sites for organized political behavior in the U.S. Any
movement seeking to instantiate the kind of constitutional culture described in the previous chap-
ter must take account of this fact. The importance of parties to pursuing political change (in this
case, change in the sphere of constitutional politics) lies not, however, in the apparent rough
equilibrium of power between the Republican and Democratic parties: nor in the secular trend
over the second half of the twentieth century toward greater ideological polarization between
the two parties (with the Republicans arguably further to the right than the Democrats are to
the left, as well as being more ideologically coherent). Rather, the importance of the parties lies
in their ability to overcome collective action problems and channel individual energies toward
productive and concerted efforts.

Modern political parties must be distinguished from “factions,” decried by James Madison in
\textit{Federalist} \# 10. Modern parties are important vectors for political action in any pluralist, postin-
dustrial society. The potency of individual voices is infinitesimal in a polity of hundreds of mil-

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lions; collective action is a precondition for success in effecting political change of any kind, constitutional or otherwise. One of the functions which parties have taken on the in American system is that of organizing geographically scattered individuals into effective coalitions. Party coalitions are unlike the “sectional” factions of the early republic in that they are vertically as well as horizontally striated, rather than regionally defined. The sectional conflict between the ante-bellum North and South, for instance, was articulated by national political leaders in terms of the perceived clash of economic interests between two geographically distinct areas of the country. Modern party coalitions, by contrast, do not map onto a cartographical dichotomy. They bring together different groups for the purposes of political action rather than a clearly articulated group interest.

This is a well-known phenomenon in political science; Converse (1964), for example, stressed the ideological incoherence—unstable “belief systems,” as he put it—within mass publics. It should be unsurprising to the contemporary observer of politics that partisans—even the highly-educated and well-informed—should exhibit what might otherwise seem to be inconsistent or unrelated preferences. They take their cues from party and opinion leaders, and they are accustomed to particular configurations of preferences and coalitions which have as much if not more to do with the development of political coalitions over time rather than the articulation grand theories or principles. Again, this is not necessary a bug, and perhaps a feature, of parties: they serve to link individuals with institutions and they embed political activity in a matrix of power and possibilities.

Ideological incoherence is not in itself problematic, or even noteworthy. Sunstein (1995) proposes the concept of “incompletely theorized agreements” to capture the idea of parties in disagreement over particulars working toward shared ends. As an alternative to the idea of public reason (Rawls 1999a), incompletely theorized agreements do not require that co-participants in a common project share all the same premises or starting positions, only that they share the same concrete commitments to goals, norms, or institutions. While the canonical instance of and incompletely theorized agreement might be a polity’s coordination on constitutional rules, the
same logic applies to the organization and discipline of modern political parties. These are of course alliances and coalitions of disparate groups separated by ideology, preferences, numbers, and geography. A willingness to accommodate, sublimate or transcend internal ideological contradictions is the hallmark of any successful party. This observation also helps to understand the present composition of the two major parties in the U.S., both of which have undergone various transformations over the course of electoral history. However, there are notable limitations to the utility of political parties for contestatory constitutionalism. Most notably, contemporary American parties are not deeply ideological in their aims or organization. Despite the trend toward greater ideological polarization between the two major parties, their increased ideological valence is still relatively minor in global, comparative terms. Parties in the U.S. do not operate with the levels of discipline or ideological coherence exhibited by parties in parliamentary democracies. Additionally, they serve multiple purposes. Not only do they mobilize large constituencies in order to elect politicians to national offices; they also coordinate and mediate between different constituencies, interest groups, and localities; they devote substantial portions of their resources toward encouraging co-partisans to vote and otherwise engage with electoral institutions, and they (together with interest groups, lobbies, and non-governmental organizations) supply party members in office with information, resources, and communications platforms.

To a certain extent, it would be quixotic to expect that parties will, unbidden, change their behavior such that they can become more effective platforms for contestatory constitutionalism. But this is not the proposal on offer. It can be observed that both parties are, asymmetrically but monotonically, moving toward greater ideological coherence. The circumstances and condi-

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¹³It is important to note that the idea of electoral “realignments,” most famously advocated by Burnham (1970), has more recently come under criticism as an empirically suspect hypothesis (Mayhew 2004). Be that as it may, the current composition of the Democratic and Republican parties can only be understood in historical terms. The parties are not *sui generis*; instead they are coalitions constructed within what Skowronek (1997) calls “political time” as circumstances change, coalitions shift and new challenges arise. Hence, while historically the Democratic Party was disproportionately white, Southern, and opposed to the formalization of racial equality, African-Americans now identify with the Democratic Party in far greater numbers than with the Republicans, who have themselves captured many of the Democrats’ former constituents in the erstwhile “Solid South.” This turnabout can only be understood in terms of the dialectical process of partisan evolution that Burnham asked scholars to attend to. The inevitable historicity of party coalitions is also illuminated by the insights of scholars who emphasize sequencing and path dependency in political development; see especially Pierson (2004).
tions which incentivize this behavior are not likely to disappear of their own accord (Mann & Ornstein 2012), and rather than scold partisans we must instead constrain and channel their behavior (Levinson & Pildes 2006). Parties must be constrained by adopting appropriate institutional constraints, and not by appealing to the angels of their better natures. Rather, the consequences of the capture of parties by ideological coalitions must be mitigated.

Levinson & Pildes (2006) helpfully point out that a Madisonian analysis of the separation of powers does not fit well with our contemporary political landscape. Under the Madisonian view, institutional concentrations of political power threatened to undermine republican comity and had to be suppressed. However, such concentrations—in the form of modern parties—are now commonplace. The fact that parties are firmly entrenched is not necessarily cause for dismay. In an era of “robust democratic competition” (Levinson & Pildes 2006), parties are essential sites for the articulation of interests, claims, principles, and projects.

Ultimately, it is inevitable that popular constitutionalists embrace constitutional partisanship. Pace advocates of Congress, like Thayer and Fisher, the inhabitants of legislative institutions are partisans first and advocates of their home institutions’ interests second. In a system of ideological polarization, party discipline, and multiple veto points, an appeal to the enlightened self-interest and statespersonship of legislators will not fix anything.

Equality and Voice

Two additional electoral reforms might significantly improve the people’s ability to actively observe constitutional elaboration and efficaciously express their preferences over constitutional possibilities: public financing of electoral campaigns and the unified federal administration of election law. The U.S. is a profoundly unequal society. Unequal concentrations of wealth and the access to power and influence that it brings can have baleful effects upon the overall pattern of political participation and can foreclose meaningful access to political institutions for those who lack sufficient resources to compete effectively with large, well-funded organizations. Two proposals thus seem worth considering.
First, the effect of money upon the political process should be curbed. A large literature focuses on the ways in which wealth produces distorting effects on the political process (e.g., Bartels 2007, Hacker and Pierson 2008, Lessig 2011, McCarty, Poole & Rosenthal 2003), with varying proposals for change. Among the available modalities of reform are campaign finance regulations, including limits on campaign donations (a task complicated by the Court’s rejection of McCain-Feingold in *Citizens United*), efforts to lessen the gap between the class composition of the nation as a whole and the class backgrounds of their representatives in Congress (Carnes 2013), tightened limitations on campaign spending and advertising, and greater transparency with respect the use of financial resources on the part of lobbying organizations. The constellation of reform possibilities in this region is large and only partially mapped out; we may be wise to hew to an incrementalist approach (Vermeule 2007) when it comes to undertaking large reform programs; however, it seems clear that the current system is in need of reform.

Second, a constitutional right to vote would go a significant distance in minimizing the distortions of democracy arising from the effects of the power imbalances that emerge from unregulated and anonymous campaign contributions; it would also help ameliorate the pathologies of a flawed electoral system that is itself in need of repair.¹⁴ Although the Constitution as it stands contains various provisions preventing Congress from depriving citizens of suffrage under various circumstances, there is in fact no provision in the text of the Constitution which positively and unequivocally guarantees citizens a right to vote. This is a glaring omission especially in light of the historical exclusion of marginalized groups (see Chapter 3). By placing a specific provision in the constitutional text which protects citizens’ rights to participate in the political process, we can enhance the courts’ capacity to protect access to institutions and forums of democratic politics (Ely 1980, Gerken 2009). Such a right would in all likelihood require growth in the capacity of the federal government to administer elections (Hasen 1997, Hasen 2012)—but the fact that the federal government does not already administer elections is a curious lacuna in the constitutional system (especially when contrasted with the constitutions of other developed democracies). Even

¹⁴“[A] notoriously misshapen, utterly sorry excuse for a majoritarian process” as one critic calls it (Sager 1994, 426).
absent the adoption of a textual provision guaranteeing suffrage without qualification, a federal right to vote could be buttressed by an appropriate construction of the Fourteenth Amendment’s guarantees of national citizenship.

4.4 Judiciary-Specific Reforms

Judicial review has an important but limited role to play in the enablement of engaged constitutionalism. Importantly, engaged constitutionalism does not specify a single theory of judicial review that will provide guidance across all domains of constitutional interpretation in judicial review. Instead, in concert with the other two prongs of my institutional argument, I contend that guidance for constitutional interpretation must come from democratic procedures that are open to contestation and feedback—notably, the judicial nominations process, presidential elections, as well as various forms of increased transparency such as the televised oral arguments and participatory public forums with sitting justices.

The judicial nominations process should seek to identify potential justices’ judicial philosophies and then discriminate among them on the basis of the nominating political actors’ desired outcomes. Congress should be more vocal about its preferences over potential judicial review. Presidential candidates should be explicit about the kinds of judicial appointments they would like to make, and their proclivity or tendency toward nominating judges to the federal bench in a way that the average voter could have expected them to do is an appropriate axis for evaluating presidents’ accountability to the public. Political parties should be explicit about their preferences and policies for staffing the courts.

4.4.1 An Ideologically-Driven Judicial Nominations Process

Few measures to enhance the principal-agent relationship between people and government vis-a-vis constitutional elaboration are as practically relevant as the reformation of the judicial nominations process such that it has a more explicitly ideological character. The basic argument for the
inclusion of ideology in the judicial nominations process is straightforward: citizen preferences should drive the selection of judicial interpreters of constitutional meaning, much in the same way that citizens’ preferences over different approaches to constitutional elaboration should receive the same level of responsiveness from elected officials that other forms of electoral incentives and accountability measures do. Fleshing this argument out requires, first, a consideration of the institutional design choices which could create a greater space for ideology in the nominations process; and, second, a response to the various objections which present themselves.

How might ideological considerations be put into place in the nominations process? Any proposal worth serious consideration must avoid endorsing the conceit that the judicial nominations process is one in which it is possible for legislators to fail or succeed at the identification of judges on the basis of the idea of “judicial competence” rather than the prospective judges’ philosophies, experience, or ideologies. As other proponents of reform have noted, merely insisting that the judicial nominations process be constrained to a principled search for the most qualified candidates is unlikely to substantially repair its flaws.

Two recent historical episodes illustrate the severe limits of the conception of the nominations process as a search for qualifications and competence. The confirmation hearings for John Roberts in 2005, for example, contained numerous references to the idea of “justices as umpires” as well as the valorization of the conception of judging as impartiality (as opposed to judging as the exercise of judgment) (Eisgruber 2007). The future Chief Justice repeatedly parried questions from senators by insisting on his fidelity—not to a particular judicial philosophy, or to the Constitution (“constitutional fidelity” being, after all, a kind of judicial philosophy), but to the ideal of impartiality. Roberts argued for what might be called “judicial impersonality”—the idea that the ideal judge does not allow his or her personality to intrude upon the task of judging. Judicial impersonality would seem to rule out “personal beliefs,” doctrines, theories, and so on; the ideal judge on Roberts’s stated account would appear to hew to an ideal of formalism derided as a charade by the Legal Realists. Judging as impartiality also rules out any possibility of judicial construction, which was no doubt one of Roberts’s motivations in propounding his claims.
But Roberts’s tenure as Chief Justice has been over a Court that has become starkly polarized in ideological terms, with the justices with conservative ideological scores consistently lining up against those with liberal ideological scores.

And yet all the relevant observers and participants in the drama were well aware of the ideological stakes for Roberts’s confirmation. The chance for a public teachable moment about constitutional law—as in the Bork confirmation hearings two decades earlier—was lost. Instead, Roberts delivered a coded defense of a narrow vision of judicial construction which was itself a broad vision of judicial activism.¹⁵ The terms of public debate were defined largely by the trope of “impartiality”—and who would want to argue with impartiality? As a result, discussions of the proper role of the judicial branch, the scope of judicial review, and the different modalities of constitutional elaboration—construction as well as interpretation—were sidelined. Roberts’s successful pursuit of sprezzatura in the public eye came at the cost of depriving the public of a much-needed debate about constitutional elaboration. But Roberts’s confirmation was not simply the case of a missed opportunity for national lesson about constitutional law. An older lesson was reinforced: the lesson, learned in the wake of Bork’s failed confirmation hearings, that “stealth” nominees—those who came with minimal or non-existent “paper trails” of prior rulings on lower courts—were the safest bets in terms of placing co-ideologues on the Court. Roberts himself was the ideal stealth nominee; he served as an advocate in front of the Court was it was until 2003 that he joined the federal bench, where his rulings gave little indication of a broader judicial philosophy.¹⁶

The “umpire” topos that Roberts advanced—and hewed to unrelentingly—is too thin to serve as a coherent judicial philosophy. It presupposes the wrong kind of background considerations—first and foremost, that the Court is primarily concerned with meting out justice to individual parties, rather than unifying or clarifying important controversies in federal law. It also furnishes

¹⁵As Keck shows, defining judicial interventions in public law as “restorations” of correct interpretations of true constitutional meaning is a useful rhetorical shield for engaging in judicial review which frequently strikes down legislative decisions (Keck 2004).

¹⁶Jeffrey Toobin suggests that remaining off the bench for so long served Roberts well: “If Roberts had been confirmed [as a federal judge] in 1992, of course, he would have amassed an extensive paper trail of controversial decisions on the D.C. Circuit by the time George W. Bush took office in 2001” (Toobin 2008, 307).
little guidance for judicial reasoning in specific cases, and gives outside observers little indication of how an umpire-judge will rule. In fact, the “umpire” topos comes close to being a tautology. It seems to reduce to the basic proposition that “a good judge is a fair judge”—as if being fair and impartial were not already core attributes of our notion of what kind of person a judge is. We gain no new or useful information from a prospective justice when he professes his fidelity to the principles of fairness and impartiality. Finally, the notion that Roberts’s views on the role and purpose of Supreme Court decision-making are exhausted by the “umpire” topos takes a lot of believing—far too much of it, in fact. It is neither unduly cynical or an ad hominem attack to want to know more about a prospective justice’s philosophical views, or to ask what it might mean that a prospective justice is a member of the Federalist Society (or, for that matter, a member of the American Constitution Society; etc.).

In a different way, the confirmation hearings for Sonia Sotomayor also illustrated the limits of the search for judicial competence, as well as the value of the nominations process for identifying potential judges with the traits and views that are desired or not desired by political representatives. A controversy erupted around Sotomayor’s inclination toward “empathy” in judging. The furor over “judicial empathy” and whether it would come into conflict with values of constitutional fidelity largely missed the more important point, which was that Sotomayor endorsed a different vision of the judicial role than Roberts did. For Sotomayor, judging requires an ability to transcend individual differences, or at least to critically inhabit the situations of others in order to better understand their views, positions, and preferences. Although Sotomayor received ridicule from some commentators for promoting the value of “empathy” on the grounds that it was an inappropriate trait for a judge to emphasize, it should be noted that empathy has been valorized before. Justice White has sometimes been lauded for acknowledging that he lacked the relevant understanding of the psychosocial experience of homosexual men and would have ruled otherwise in Bowers v. Hardwick if he had had such prior knowledge. If that is so, it would have been preferable that, before rendering his decision, Justice White had possessed the empathy and imagination that would have enabled him to critically inhabit the position of subordinated sexual
minorities. A judge who made a positive virtue of her capacity for empathy might well have been better suited to the task.

Both of these episodes illustrate the centrality of judicial philosophies or ideologies to the nominations process. They demonstrate the futility of trying to silo or compartmentalize considerations of ideology from the selection and appointment of judges. Not only do all judicial officials have views about the appropriate institutional role of the judiciary as well as the appropriate scope and application of judicial review, but their nominating and confirming counterparts in the executive and legislative branches have such views as well. Indeed, those views comprise the motivation on the part of such political actors to confirm and place their preferred judges. Roberts and Sotomayor were both nominated because Presidents Bush and Obama, respectively, identified them as holders of views or traits which they wish to promote—a conservative reading of federalism in the case of Bush/Roberts, and an insistence on the positive contributions of diversity to judicial decision-making in the case of Obama/Sotomayor. Furthermore, what enabled Bush and Obama to see their nominees confirmed was their capacity to muster the required numbers on the Senate Judiciary Committee. Such support could be had only insofar as President and senators were able to agree upon a desired profile for new justices.

Neither of these episodes, however, compare to the experience of Robert Bork during his confirmation hearings in 1987. Bork did not dissemble and stated plainly that he preferred a textualist-originalist approach to judicial review, although he did indicate that he felt partially constrained by precedent. The price Bork paid for his candor came in form of the Senate Ju-

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¹⁷Sotomayor’s nomination was also dismissed as “identity politics” by some commentators, although this is a curious claim. Sotomayor’s putative ethnic self-identity qua identity is no different that that of Chief Justice Roberts. What most likely motivated those deploying the “identity politics” trope was the belief that Sotomayor, was advanced by Obama simply because she was a Latina, and that this identity somehow completely described her—unlike the white male identity of Chief Justice Roberts, for example. As Toni Morrison has observed, “whites see themselves as unraced”—leading them to overlook their own hegemony and regard their own status as not merely normal but not requiring any further comment or reflection.

¹⁸Bork’s position bore a closer resemblance to first-wave or “interpretivist” (Ely 1980) originalism than to “modern” public understanding originalism. Written text trumped ratifiers’ understandings for Bork, and this enabled him to argue, after his failure to be confirmed, for judicial construction in certain cases, not on the basis of textual indeterminacy, but on the basis of ratifiers’ mistakes:

Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation [in Brown]. The purpose that brought the fourteenth amendment into being

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diciary Committee refusing to confirm him, but Bork’s loss was arguably the nation’s gain—not because his judicial philosophy was necessarily inappropriate, but because it was, in a word, unchosen. Had his nominating president (Ronald Reagan) made his preferences and goals for the judiciary plainer, both on the campaign and while in office, Bork might well have gotten a different reception. In a de-politicized nominations process, Bork sounded a dissonant note in comparison with the bland harmonies of competence and impartiality that nominees before—and especially after—have played. The wrong lessons were learned; rather than take the opportunity to turn the nominations process into a chance to learn about candidates justices and to have frank, public debates about the course of constitutional elaboration within the federal judiciary, subsequent nominating presidents and confirming senators have stuck to the playbook of searching for an ideal of a judicial competence that has no “partisan” bias.

The most important unlearned lesson, however, was the failure of future presidents and senators to recognize the centrality of transparency and effective political communication to the nominations process. Although Bork was no doubt the kind of justice whom President Reagan wished to advance to the bench, Reagan engaged in relatively little spadework to make a case, either to the public or to the Senate, that Bork and his philosophy were appropriate for the Supreme Court. Whether or not Senators Kennedy and Biden’s criticisms of him during the confirmation hearings were “scurrilous,” as Bork would later claim, they seem to have caught the Reagan White House unawares. Senate Democrats efficaciously communicated their belief that Bork’s judicial philosophy was not consonant with broadly-shared understandings about constitutional law (this efficacy was due in part to the administration’s comparative quiescence). Future confirmation hearings have thus seen nominees striving to obscure their views, rather than broadcast them. This is unfortunate. Whatever else may be said for or against his views, a judge like Robert Bork is the ideal Supreme Court nominee in that, à la the celebrated advertising slogan, such a product

was equality before the law, and equality, not separation, was written into the law (Bork 1997, 82, emphasis added).

Bork’s argument for the precedential validity of Brown can only be explained by some degree of acceptance on Bork’s part of the developmentalist view that subsequent usage can outweigh prior meanings or understandings (Levinson 1995a, 35).
“does exactly what it says on the tin.” Bork meant what he said and gave every indication that the views he elaborated for the Senate Judiciary Committee were those that would guide him as a justice. Few contemporaneous nominees, confirmed or otherwise, can make the same claim to the same degree. This is so because of the trend toward theatrical, but information-poor, nominations processes in which discussions of constitutional law are pushed aside in favor of bromides and nostrums about the importance of impartiality and the evils of partisanship.

Reversing this trend would be relatively simple to implement; the main requirement is the political will to make it happen. Presidents can and should advocate forcefully for their preferred co-ideologues on the bench, and senators should feel empowered to ask questions of prospective justices that aim at ascertaining their ideological inclinations and judicial philosophies. Some templates are on offer for how this might be achieved (Eisgruber 2007, Ringhand 2009) What unites them is a concern for the legitimacy and transparency of the judicial branch, rather than any attempt to subvert it (see discussion of objections to ideological nominations, below); it is not too pithy to say that the people deserve to know what kind of justices they’re getting. The problem with the Roberts nomination is that the focus on “impartiality” obscured and sidelined any discussion of Roberts’s particular views. Worse still, the trope of impartial umpires further perpetuated the conceit that it is possible for a judge not to have any views about the appropriate function or role of his office whatsoever (at least while he is in robes and behind the gavel). The problem with the Sotomayor hearings, on the other hand, is that discussions of her views were, once again, sidelined—but with the twist that President Obama was accused of engaging in “identity politics” by nominating a Latina woman (apparently a white male nominee would not have prompted such accusations). But the lessons of the judicial nominations process since Bork’s time have all shown that all nominating presidents are engaging in “politics”—that is, constitutional politics. They have views, values, and preferences over the possible paths that constitutional elaboration could take. In seeking to advance particular prospective justices and not others, they are very deliberating engaging in (constitutional) political action. If we are troubled by, or skeptical of, a nominating president’s choice, the solution is not to insist upon the chimera of impartiality
but upon getting and knowing the truth about a candidate justice.

Objections to an ideological nominations process come, in the first instance, in the form of the insisting on the “separation” of law and politics. This objection is often made through reference to the ideal of judicial independence.\(^{19}\) The meat of the objection is that “ politicizing” the judiciary by choosing its officers with explicit reference to their partisan affiliation, ideology score, or interpretive philosophy would do one of the following: (i) undermine public confidence in the impartiality of judicial institutions; (ii) compromise the ability of federal appeals courts (including the Supreme Court) to be able to intervene in intra-institutional disputes about constitutional meaning—by depriving it of the appearance of being a disinterested party; and (iii) by creating perverse incentives for cascading patterns of partisan entrenchment on the bench.

In responding to the first objection, it is important to re-visit the problem of the interpenetration of law and politics. It is true that the legal functions of courts are in some important ways distinct from the political functions of the legislative and executive branches. However, the functions performed by federal appeals courts—and especially the Supreme Court—are unlike those of municipal courts that do not deal primarily with matters of public law. It is simply inappropriate to ignore the significant differences between the missions, functions, and prerogatives of municipal courts and appellate courts (or baseball fields, for that matter.) As to the second objection—we might wonder whether a judiciary staffed by “political appointees” might in some way be compromised as a result; it is possible, the reasoning goes, that such judges would lack the necessary credibility as disinterested arbitrators or invigilators in inter-institutional disputes. As I just noted above, however, we would be mistaken in thinking that federal judges are ever completely de-politicized in this fashion. Additionally, politically-appointed judges may well be better suited to make such interventions—if they are the products of ideological nominations procedures, then we may well have better grounds for taking them to be appropriately authorized to act as the people’s monitors of institutional boundaries, instead of entrenched partisans who will act to preserve the extant constitutional order.

\(^{19}\) See generally Burbank & Friedman (2002) on the concept of judicial independence and associated problems.
The phenomenon of partisan entrenchment is the kernel of the third objection to the inclusion of ideology in the judicial nominations process. We might worry that the “ideologization” (as it were) of the nominations process might tempt political coalitions to entrench their policy preferences in the judiciary in such a way as to ensure the long-term obduracy of their preferred policies well beyond their own tenure in office.²⁰ Judicial entrenchment—as opposed to constitutional entrenchment, per se—may be normatively troubling from a democratic perspective, but the judicial appointments process is no less vulnerable to entrenchment and “partisan capture” under an explicitly ideological nominations process than it is under one that is merely implicitly ideological. The solution to concerns about the abuse of the phenomenon of judicial entrenchment is not to attempt to purge the nominations process of partisanship, tout court—we have seen that that won’t work. Nor can the solution come in the form of attempting to limit the selection of potential justices to those who have “moderate” views or philosophies. Instead, the best solution is that of judicial term limits, which will accomplish the twin goals of constraining the duration of judicial entrenchment, as well as ensuring that political actors have reliable access to the judicial nominations process.

4.4.2 Judicial Term Limits

Due to what has been dubbed “the Framers’ greatest (lasting) mistake” (Powe 1998), justices, once they are appointed to the Supreme Court, may stay on for as long as they wish. Life tenure on the Court enables “partisan entrenchment” and allows for the possibility of judicial regimes of constitutional doctrine which remain at odds with the political branches for decades at a time:

A regime that allows high government officials to exercise great power, totally unchecked, for periods of thirty to forty years, is essentially a relic of pre-democratic times. Although life tenure for Supreme Court Justices may have made sense in the eighteenth-century world of the Framers, it is particularly inappropriate now, given the enor-

²⁰Hirschl (2004) provides a useful comparative perspective on the use of judicial entrenchment—or “juristocracy”—to secure desired policies or power arrangements against later electoral revision.
mous power that Supreme Court Justices have come to wield (Calabresi & Lindgren 2006, 772).

A schedule of judicial term limits of reasonable duration could serve to promote two ends in constitutional politics: ameliorating judicial entrenchment and assuring the (relative) regularity of judicial vacancies such that they are more open to contestation by political actors. In this subsection I describe the desirability of judicial term limits, the various ways in which they might be adopted, and the objections that are leveled against term limits.

Many advocates for judicial terms limits propose tenures in office that last for the better part of two decades; the modal term seems to be eighteen years. Calabresi and Lindgren propose a complex system of eighteen year terms, staggered in such a way that sitting presidents have the opportunity to appoint two justices per term (Calabresi & Lindgren 2006). Compared to the terms for political offices described by the Constitution, these are lengthy tenures in office; more than sufficient to allow justices to get their sea legs and make their mark, while at the same time curbing their ability to stay on indefinitely.

The foremost objections to judicial term limits revolve around the assertion that term limits constitute a threat to judicial independence, in one or both of two ways: First, they might create perverse or distorted preferences for justices, who will rule in self-serving or self-protecting ways as they near the end of their terms and worry about the security of their privileges, careers, or lives once they are out of office. However, this is an immoderate objection. American politics are not so destabilized or chaotic that officials leaving office need regularly fear reprisals on the basis of their performance while in office. More importantly, however, appropriately lengthy judicial term limits cannot be said to constitute a serious threat to judicial independence. A justice who serves eighteen years could outlast an appointing president by up to a decade, many senators, and all but the most incorrigibly incumbent representatives in the House. (We should at any rate update our understanding of the value of judicial independence—what it is for, how it is achieved, and what threats it faces.) Under such a system, a sitting justice would not face unexpected or

²¹Helmke persuasively makes the case that that is a concern for judges staffing constitutional courts in emerging or fragile democracies, however (Helmke 2005).
unseen extra-legal or institutionally inappropriate pressures to conform to the preferences or agendas of hostile politicians.

The primary function of judicial term limits would be to limit the undue influence of regimes of unelected officials in constitutional elaboration, but it is not clear whether they would also conduce to patterns of increasing judicial accountability. It is not even clear if judicial accountability is a good worth pursuing.²² The experience of judicial elections in lower federal and state courts suggests that linking judicial appointments to the ballot box has yielded mixed results at best (Shugerman 2012b). At any rate resolving a conflict that is perhaps “unresolvable” is beyond the present scope of argument.²³ Judicial terms limits at the Supreme Court would not enforce accountability but would instead limit the capacity of the Court to enforce compliance with judicial regimes that are unsupported by the political branches. Furthermore, judicial term limits, especially as described by Calabresi & Lindgren (2006), serve the additional function of improving the Court’s democratic representativeness, by giving presidents opportunities to affect the composition of the Court.

4.4.3 Other Checks on Judicial Review

The Court’s current rules for decision-making—largely the result of its own devising over many years—do not currently obligate it to achieve anything more than a simple majority when overturning legislative acts (whether state or federal). Shugerman (2012a) observes that this produces an asymmetry in the separation of powers: while Congress is required to achieve supermajorities in order to override presidential vetoes or amend the Constitution, all that is required for the Court to override Congress is a bare majority of five justices to four. Imposing a supermajority rule on the Court, under which it would be necessary for two thirds, or more, or perhaps even a unanimity to agree in order to invalidate legislation on constitutional grounds, could serve to

²²For a lucid account of the development—and shortcomings—of judicial elections in the United States, see Shugerman (2012b).

²³“This debate [over elected versus appointed judges] is ultimately unresolvable because it involves two conflicting goals: one, that...conflict resolvers be independent; two that lawmakers be responsible to the people” (Shapiro 1981, 34).
repair the balance of power between Congress and the Court without requiring regular, nationwide confrontations with the Court.

If we desire a much more expansive check, we can consider the idea of a national veto on judicial review. Tom Donnelly elaborates the idea of “the People’s veto,” through which judicial review may be overturned though a national referendum. As he outlines it, it would be restricted to instances of five-to-four decisions by the Court; in such cases, Congress may then decide whether or not to refer the case to the electorate, which could by a two-thirds majority overturn the controverted decision (Donnelly 2012, 187–189). While intriguing, this proposal is still an example of popular constitutionalist theory’s proclivity for conflating “popular” with “nation-wide.” A “people’s veto” would most certainly not be a kind of contestatory constitutionalism, since it would pit nationwide majorities against minorities and result in a plebiscitarian, rather than democratic, check on on judicial power.

More generally, the institutionalization of additional direct checks on judicial power would most likely be unwise and almost certainly result in unintended and undesirable consequences. Furthermore, we should not think of the constitutional responsibilities of the political branches as nothing more than their capacity to respond to judicial review; this would lead to reprises of such shortsighted moves as the passage of the Religious Freedom Restoration Act, in which Congress simply reacted to a (comparatively straightforward) Court ruling (Employment Division v. Smith) without engaging in any constitutional deliberation or suasion on its own part. A shift toward a more departmentalist reading of the powers of the political branches to construct and interpret constitutional meaning is the safer course for reform.

4.5 Summary

This brief survey of the range of possible institutional tweaks to the current constitutional order provides at least two lessons. First, there are many sites of possible reform or alteration with an aim toward enabling contestation over constitutional possibilities. Second, however, none of
these possibilities is a silver bullet for empowering contestatory constitutionalism. Constituent power, it seems, cannot be represented; it has to be pursued directly, by the people. Inevitably, elites will often enjoy first-mover advantages in constitutional politics, and it makes sense to lodge some capacity for articulating popular constitutional claims in representative institutions like Congress and the presidency. But there can be no institutional substitute for the people’s own constitutive authority.
Chapter 5

Objections and Limitations

This chapter consolidates and responds to various objections to contestatory constitutionalism. I begin by considering threshold objections to the overall argument itself, before moving on to consider objections to specific aspects of the argument. Special attention is paid to the interpretation/construction distinction, especially on the differences between my application of the distinction and the ways in which Whittington (2010), Solum (2010), and Balkin (2011b) have applied the distinction. The final portion of the chapter is devoted to exploring alternative views and explaining why contestatory constitutionalism should nevertheless be preferred.

5.1 Threshold Objections

The first threshold objection is the “utopophobic” objection (Estlund 2009): the notion that the impracticability of the conclusions of a normative argument somehow invalidates the structure of the argument that preceded those conclusions. It is true that utopophobia is often warranted. Some political theories are sometimes criticized for being unrealistic or utopian. In many instances, such criticisms are justified or warranted; they strike not at the validity of the theories’ arguments but at the soundness of their premises, casting doubt on the theories’ perspicacity in describing important political concepts or in providing practical guidance to political projects. But the simple observation that current political practices or preferences do not appear likely to
yield the changes recommended by a theory does not itself constitute an objection to the valid-
ity of the theory’s arguments. It rests on an invalid inference, the structure of which is similar
to the equally invalid inference that the currently prevailing institutions, values, and behaviors
in a given political community accurately reflect the preferences or considered judgment of the
individuals who comprise that community.

The invalid inference driving the objection from utopophobia is a distortion of the deontic
dictum that “ought implies can.” It is certainly a true characterization of many ontological theories
that they regard moral reasons as action-guiding only if they point toward choices or policies that
are within the capacity of moral agents. However, the perspective I take in this dissertation is
broadly consequential rather than ontological. In other words, it is concerned not with providing
guidance for individual agents, but in clearly articulating and comparing the normative valences
of various choices in institutional design, legal interpretation, and political contestation. I thus
dispute the premise that the lack of any positive impact somehow counts as a dispositive objection
to my argument. The mere fact that a theory’s prescriptions cannot immediately be translated into
action should not disbar it from consideration.

The second threshold objection concerns the way in which I make use of constitutional law—
particularly constitutional doctrine as it is propounded at the Supreme Court—to motivate my
argument and to illustrate various points. Let me state plainly that for the purposes of my argu-
ment I am agnostic about the truth or applicability of any given theory of judicial review. After
all, the ultimate normative upshot of the dissertation’s argument is that we should disprefer ju-
dicial settlement of major constitutional questions in favor of a contentiously political approach.
This entails a higher level of skepticism or caution with respect to the elaboration of constitu-
tional meaning through judicial review. Thus, although the roles played by the Supreme Court in
American politics remain vital and consequential, the mere fact that my argument does not yield
a distinctive philosophy of judicial review for the Court should not qualify as an obstacle.
5.2 Revisiting the Construction/Interpretation Distinction

Contestatory constitutionalism must be distinguished from other views that integrate informal constitutional change into normative theories of constitutional politics. Most of its competitor theories fall under the umbrella term “dualism”—those theories which divide constitutional law-making into “higher” and “ordinary” tracks. As I describe below, dualism has often been regarded as an apparent solution to the problem of informal constitutional change. It is worthy of some consideration, and it may even be an attractive approach to judicial review, but as a theory of constitutional interpretation it cannot serve as a blanket substitution for the exercise of constituent power. Additionally, there are unresolved tensions in the body of dualist theories, and it is not yet clear whether dualists’ use of the construction/interpretation distinction will reconcile originalists and living constitutionalists.

The construction/interpretation distinction distinguishes between two different aspects of constitutional understanding and elaboration. I argue that dualist theories rely on the construction/interpretation distinction to “demarcate” between different areas of decision-making or institutional power in a constitutional order. By making this distinction, dualist theories can accommodate forms of constitutional change that occur as a result of political contestation and institutional inertia, without abandoning the dualist two-channel test of legitimacy. Most frequently, the distinction is used in an argument for a principal-agent model of constitutional government: governmental institutions are merely agents of the sovereign people. Any changes that government officials make to the constitution—constructions—must be within certain narrow parameters. These parameters are furnished by democratic theory, theories of meaning and philosophy of language, and jurisprudential conventions. The federal judiciary in particular usually comes in for strong restrictions. It may perhaps only interpret constitutional and statutory texts in order to ascertain their meaning, or it might also be allowed to “ratify” or integrate previous constructions as consistent elaborations of or additions to constitutional meaning (Graber 1993, Friedman 2009).

Demarcation is a pattern of overlapping and interactive powers, competencies, and jurisdictions. By implementing the construction/interpretation distinction as a demarcative strategy,
dualists build some slack into their theories of constitutional change. The demarcation strategy allows for some constitutional change to happen at a relatively informal level, compared with the formal requirements of Article V. At the same time, it describes boundaries to that change, which, when crossed, prompt the need for justification and ratification.

Contestatory constitutionalism does not rely upon the demarcation strategy because it is not always possible to neatly disentangle interpretive and constructive activities in the context of constitutional politics. While it does make sense to distinguish between interpretation and construction with respect to constitutional elaboration, it is not always possible to disaggregate them in the specification of institutional duties or powers. The demarcation strategy presupposes the veracity of a categorical distinction between interpretation and construction. But the distinction is better understood as modeling a continuum of related but nevertheless distinguishable activities.¹ The dualist project of demarcation is more complicated than it may have seemed at first glance, since it will not always be possible to limit or temper constitutional change by delineating institutional boundaries with respect to constructive or interpretive functions.

But the interpretation/construction distinction is not the whole story. Dualist theories accommodate the problems of informal constitutional change through establishing two layers of formal distinctions. The first layer of distinctions consists in the distinction between constitutional decision-making and political decision-making. The former is an infrequent occurrence in social life; drafting and enacting a constitution is a disruptive and highly contentious experience. However, political decision-making—what Corwin called “ordinary law”—is a desideratum of social life. Collective actions problems will always have to be overcome or addressed. Within the realm of political decision-making, or perhaps sub-constitutional decision-making, however, dualism advances a second formal distinction: between the construction of constitutional provisions, and the interpretation of constitutional meaning. Both of these activities are a part of constitutional elaboration.

Dualist theories have descriptive and critical features. They describe when or how changes in

¹Barnett (2004) and Whittington (2010) make similar claims on this point.
constitutional norms, practice, or institutions occur. They also offer critical standards for assessing such changes. Dualists claim that knowing when such standards have been transgressed or lived up to is a matter of determining how and by whom constitutional change was made.

There is considerable diversity within dualism. Formalists such as Whittington (1999b) insist on fidelity to previously established procedures, like constitutional amendment. Structuralists such as Ackerman (2007) argue that changes can be real and legitimate if support for them is broad enough, even if they are not formally enacted. This chapter focuses on the strengths and weaknesses of formalism. Formalists acknowledge that constitutional change occurs frequently, and not always inside established procedures (an empirical assumption I also make throughout the chapter). One way they have of responding to the challenges posed by informal change to their theories is demarcation: the strategy of specifying when those changes are permissible. By distinguishing between appropriate roles or contexts for construction and interpretation in constitutional elaboration, it is possible (the arguments go) to discern when substantial constitutional change that was not ratified through formal amendment or enactment procedures is nevertheless legitimate.

5.2.1 The Normative Motivation for the Distinction: Demarcation

The construction-interpretation distinction builds upon the denial of semantic indeterminacy and the acknowledgment of underdeterminacy. That is, constitutional meaning is a form of attainable knowledge. The phrase “constitutional meaning” is not a contradiction in terms). However, constitutional meaning is sometimes incomplete, vague, or ambiguous. When that happens, constitutional elaboration (according to proponents of the distinction) switches from interpretation to construction. Construction of underdeterminate meaning is, in some crucial way, held to be distinct from discretionary legislation by statute or amendment.

In fact, it is not possible to understand the demarcation strategy’s use of the interpretation/construction distinction without considering the demarcation strategy’s normative motivation. The normative motivation for the demarcation strategy is a concern for designing or ide-
eralizing constitutional institutions in a way that reflects or entrenches democratic values. I refer to the normative underpinning of the distinction as demarcation: the assignment of powers or duties to institutions or officers.

Demarcation is a constitutional design philosophy. It has a number of distinctive features that distinguish it from other philosophies of constitutional design. First, it is what I will call institutionalist: it seeks to embody or manifest certain political values within the routine functioning of political institutions. Relatedly, it is preservationist. Demarcation is institutionalist precisely because it seeks to preserve or entrench certain values, norms, and practices. Finally, demarcation is dualist in the sense of the term described in the previous chapters: its most basic animating value is a commitment to popular sovereignty and the frustration of political actors claiming to represent the sovereign. The goal of preserving values and practices by institutionalizing them is to sharpen and maintain the distinction between the subordinate government and the authoritative sovereign.

The demarcation strategy is an approach to institutional design. It is meant to preserve or maintain constitutional structures in such a way that makes clear when lawmaking is higher and when it is ordinary. By assigning different powers to different institutions, demarcation raises the bar for aspiring constitutional constructors: Institutions are formally and publicly recognized as a “constructive” or “interpretive” as such, or they are only empowered to act “interpretively” in certain modes of its operation (for example). The ideal is that it should thus become difficult for any particular institution—in particular, the coordinate branches of the federal government—to arrogate additional constitutional authority to itself without crossing such boundaries.

The paradigmatic instance of the demarcation strategy is the analytic parsing of interpretation and distinction by Solum (2008). He describes them as distinct activities in legal understanding and decision-making. Interpretation is fundamentally the task of deriving the “semantic meaning” of a text. Construction consists in the “further specification” of specific constitutional rules when the text’s meaning is indeterminate in some way. Not just any indeterminacy can motivate construction. Forms of “underdeterminacy”—such as vagueness, ambiguity, or inter-
nal contradictions—in the semantic content of the Constitution itself call for the elaboration of constitutional rules beyond those specified by the text. For Solum, this is a “factual” claim: the elaboration of constitutional rules that amend, revise, or extend the meaning of the text is not, conceptually or empirically speaking, a part of interpreting the text (that is, figuring out what it means).

Thus, for Solum, if an institution is one that is tasked with constitutional interpretation, there is no pro tanto reason to think that it is also authorized to construct constitutional meaning:

[T]he power to adopt supplementary rules of constitutional law that contradict the semantic content of the constitution is limited to exceptional cases of constitutional necessity. In particular, the Supreme Court does not have a general power of constitutional revision (Solum 2008, 7).

Of course, a political position made after the adoption of the constitutional text as law might furnish the authorization to construct to the Supreme Court, as Solum acknowledges (cite). But the mere fact of judicial interpretation does not entail permission for judicial construction. Our observation of the phenomenon of interpretation does not authorize construction. Nor does it allow us to infer that by interpreting the meaning of the text that the Court is also constructing additional or contradictory meaning. Again, this is not a “factual” claim if “factual” means that Solum’s argument turns on the Court’s status as a court of law as opposed to a central bank or a regulatory commission. Instead, insofar as the Court is described as interpreting and elaborating the meaning of the constitutional text, the ordinary and obvious meaning of that description is that the Court is an interpreter and not necessarily a constructor. Solum’s argument unfolds as an account of what can be called, following Barnett (2004), “constitutional method:” how particular institutions should approach the problem of understanding constitutional meaning.

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3 I do not intend to be describing a different sort of claim: whether judicial review is an institution that is supported by the meaning of the text of the Constitution, or it is the product of an amending or revising construction. Such a debate can only be entered into after it has been established whether judicial review is an interpretive or a constructive activity. Solum’s argument suggests that judicial review is itself a possibly legitimate amending construction. Barnett, on the other hand, argues that the Supreme Court has a power to construct—through judicial review—and that power is inherent in the text’s original meaning (Barnett 2004, esp. 130–147).
In a sense, Solum can be said to be writing from the perspective of the interpreter, while a theorist Balkin like can be said to be writing from the perspective of the designer, or perhaps the anthropologist or external observer (Balkin 2009, Balkin & Siegel 2009).³ Balkin stresses the continuity between constitutional interpretation and constitutional politics, and his conception of the interpretation/construction distinction can be characterized as an axis or a continuum. Interpreting constitutional meaning and constructing constitutional effects, structures, and rules are different parts or phases of constitutional politics. They are different but related tasks that are assigned to different but related institutions. The interpretive role of Article III courts is to “rationalize, legitimate, and supplement” the construction of constitutional meaning as pursued by the coordinate branches. In this “framework originalist” model of constitutional government, Balkin tackles the demarcation problem institutionally and processually. The model demarcates the activities of interpretation and construction by assigning an interpretive role and competency to courts, and by recognizing and describing the coordinate branches’ constructive goals and preferences. The model is processual in that interpretation and construction are presented as components or phases of a process—in this case the process of constitutional politics. For Balkin, one of the payoffs of this model is its apparent ability to unite or reconcile “originalism” and “living constitutionalism” as related modules in the same theory. This is part of a broader constitutional theory project which argues that judicial review is “nationalist” rather than “countermajoritarian” and the political contest to staff the Court is a game of institutional capture played by competing aspirant national majorities (Balkin & Siegel 2009). For present purposes, it is relevant because it explicitly extends the demarcation of construction and interpretation into a theory of constitutional politics. The extension suggests that Balkin and Solum intend for demarcation to solve different problems. For Solum, demarcating interpretation and construction illuminates the proper domain of the judicial task: understanding and articulating constitutional meaning. For Balkin, the demarcation of interpretation and construction is an instructive way to conceptualize an interactive institutional model of constitutional politics.

³There is a sense in which Solum occupies Hart’s “internal” standpoint with respect to American public law, while Balkin is approaching constitutional law and politics from an “external” perspective.
Balkin’s model is not the only way to conceptualize such interactions. Whittington also deploys the construction-interpretation distinction in his normative constitutional theories. Balkin’s “framework originalism” describes a constitutional system in which the Supreme Court is rarely on the bleeding edge of constitutional change. Instead, it is usually a supporting player in national coalitions. By implication, the Court is usually in the backseat when it comes to constitutional innovation and reform, since its interpretive capacities can only effectively be brought to bear on antecedent constructions pursued by the political branches. Whittington’s originalism is departmentalist, assigning complementary powers of construction and interpretation to the coordinate branches. The Court does not simply have a supporting role to play in the constitutional process, but that doesn’t necessarily mean that it is less constrained. Originalist interpretation is bound by adherence to original public meaning (Whittington) or the constitutional text as illuminated by natural law (Barnett). Demarcation plays an important role in originalist constitutional theory by conceptualizing the boundaries of judicial discretion with respect to constitutional meaning.

What motivates these approaches to demarcating the distinction between construction and interpretation? Recall that I argued above that demarcation is necessitated by upstream conclusions about political justification and institutional design. Balkin’s demarcation pattern is intended to illuminate the democratic and majority-serving credentials of the contemporary constitutional order. Whittington describes demarcation as an integral part of a constitutional system that entrenches and preserves the foundational decisions of the popular sovereign. Demarcation is valuable because it furnishes tools for assessing or implementing political values in constitutional arrangements. As such, it becomes important to examine the distinction closely to see whether it has the coherence to stand up to close scrutiny. In the next section I consider three ways of conceiving of the construction-interpretation distinction, their consequences, and their limitations.

An intermixing of construction and interpretation is incorporated by accounts of judicial decision-making that describe judges as active participants in the elaboration of legal meaning. The *locus classicus* is Dworkin’s account of “constructive interpretation.” The ideal judge dealing with constitutional meaning seeks to integrate novel claims or difficult judgments or delibera-
tions about constitutional meaning with core principles and common structures in the law. As such, what he is doing cannot be unpacked into ‘interpretation’ and ‘construction,’ in the senses of the terms given by the construction-interpretation distinction. The ideal judge moves seamlessly between undisputed and disputed, determinate and indeterminate, vague and lucid content. There are no pivots in the quality or focus of constitutional meaning where interpretation—the quest for meaning—ends and construction—the elaboration of implied meaning, or of structure, or of new rules compatible with common prior understandings—begins. This is an example of the cleavage between the continuum model(s) and the holistic model. In the Dworkinian rubric, distinguishing between ‘interpretation’ and ‘construction’ simply isn’t possible. The phrase ‘constructive interpretation’ manages to use both of the words but neither of the terms. For this reason, Dworkin is untenably “collapsing” the construction/interpretation distinction as part of a project of “absorbing” ‘interpretation’ into ‘construction’ (Solum 2008). Conversely, “[p]assing off construction as mere interpretation obscures the real issue: how should judges construe a statute when interpretation fails?” (Tiersma 1995, 1101).

5.2.2 Limitations of Demarcation

Rigid demarcation is not an appropriate normative theory to guide constitutional elaboration. Dualist narratives⁴ unduly restrict and distort our understanding of the history of constitutional law and politics. They force us to make distorted choices in constitutional interpretation.

The demarcation strategy cannot be made to do the work that advocates such as Solum wish it to do. It difficult to pin down precisely where interpretation and construction pull apart at the practical level. Furthermore, the distinction between the two does not, by itself, provide guidance as to how either activity should be pursued. If we know what ideally separates construction from interpretation, that knowledge does not in and of itself enable us to know what it is to actually engage in the practices of construction and interpretation. At best, the construction-

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⁴As above, I use the term “narrative” in the sense described by Balkin (Balkin 2007, 517–519): a shared “language” or vocabulary for collective understanding of foundational political decisions and commitments; see also (Cover 1983, Ringhand 2009, 132).
interpretation distinction helps in the task of understanding what it is that legal actors are doing when they do their work. It is a semantic distinction, between two different aspects of an idea. But without further knowledge of what it means to do the work of a legal actor, for what purposes that work is done for, and so on, the construction-interpretation distinction itself cannot necessarily show us how to decide whether to construct or to interpret; and it cannot furnish us with the tools that are necessary for doing a better rather than a worse job of either task. Of course, in the practical world that legal actors inhabit, such prior knowledge is available—but of course its content is not described or exhausted by mapping the construction-interpretation distinction. It has to be found elsewhere.

Solum himself comes close to asking his readers to accept the existence of a constitution which can be apprehended sub specie aeternitatis. The interpretable Constitution, for Solum, is semantically fixed—in part, if not in whole. Only at the boundaries of interpretation, where meaning “runs out,” does Solum permit construction to occur. It is true that, if we are committed to Solum’s view of semantic fixation, it would be inappropriate for judges qua interpreters to construct altered meaning if discernible meaning was already available in the text. However, while judges are perhaps paradigmatically interpreters, the people are not. If new meanings are constructed on top of, or in opposition to, the received judicial understanding of the text’s meaning, it would seem that Solum’s implementation of the demarcation strategy would be unable to prevent the modification of the text’s meaning.

It might perhaps be further objected at this point that, however the people may wish to construct the meaning of this or that provision, this should not influence the interpreting judge. In other words, judges must rely on text and not stray from the text’s meaning, at risk of substituting their judgment for that of legislatures, representatives, or whomever; and in order to stick to text judges must approach it with the hermeneutical tools that Solum lays out. This line of objection misses the point. Contestatory constitutionalism is a theory of how the Constitution is constructed in politics, and not how judges should interpret the Constitution. As such, if the people choose to (re-)construct constitutional meaning, that’s their business; and the more as-
assertive they are in pursuing new constructions, the less likely they are to countenance judicial intervention. This particular objection—the objection that judges aren’t good at judging constructions, and should stick to interpretations, and that as a result the people should not pursue (re-)construction—puts the cart before the horse; it unjustifiably presupposes judicial supremacy as a background condition in a hypothetical situation where judicial supremacy is being challenged. More simply: if the people were to reject judicial supremacy, the objection to the effect that in so doing the people would be rejecting judicial supremacy would be little more than a tautology.

Solum’s pursuit of demarcation takes place almost entirely within the realm of judicial hermeneutics. As such, it has few resources for responding to political concerns and it is hard to see how it can offer guidance in the field of constitutional politics. Whatever its virtues as a guide for judicial conduct, it does not pose serious problems to implementing contestatory constitutionalism. Ultimately, there are relatively inelastic limits to the normative load that can be borne by an analytic distinction. Solum demarcates between interpretation—the province of readers and understanders, and the sole province of judges—and construction—in which the creation of new meanings is restricted to narrow avenues of vagueness and ambiguity; but this restriction on judicial power is always vulnerable to political revision. A judge who shares Solum’s view may try to hew to original interpretations (whether of original intent, original meaning, original public meaning, and so on), but the people are free to construct their own meanings of the Constitution through politics, through means that could conceivably extend to reining in the judicial power itself.

An additional difficulty with Solum’s use of the demarcation strategy that it is unclear what the boundaries of “the construction zone”—the space within which meaning cannot be ascertained or resolved through interpretive methods (Solum 2010, 108)—are, and how they can be identified in practice. As Ringhand notes, a “normative theory of constitutional construction” is required in order to map out the boundaries of the construction zone; without such a theory, the construction—interpretation distinction is only an aid to theorizing about the philosophical or semantic features of the mental activity of legal actors.
Proponents of the demarcation strategy have not yet agreed upon how to draw the boundaries of the construction zone, and its extent remains underspecified. In the absence of a reasonably accurate map to the construction zone, imprecision unavoidably becomes a problem for views that rely on the construction-interpretation distinction to do normative work. In particular, it commits such theories—such as originalist theories of constitutional meaning—to *ad hoc* acceptance of legal changes even if they could not credibly pass muster through a legitimation device like the construction-interpretation distinction. This is a vulnerability shared by New Originalist theories of constitutional interpretation (Ringhand 2009, 17).

### 5.2.3 Other Applications of the Interpretation/Construction Distinction

Other writers, such as Whittington (2010) and Balkin (2011b) also make extensive use of the interpretation/construction distinction, but the former has moved away from a purely demarcative application of the distinction (Whittington 1999b) while the latter diverges sharply from the more conventional use of the distinction.⁵ Both make use of the distinction in ways that diverge from a straightforwardly demarcative approach, and they must be distinguished from the way in which contestatory constitutionalism deploys the distinction.

Recall from Chapter 2 that Whittington (1999a) introduced the distinction between the construction and interpretation of legal materials as an analytic category in constitutional theory. For Whittington, the distinction is a dual one: a formal distinction between two modes of describing constitutional politics (politicians construct meaning, judges interpret it) as well as a normative distinction between two modes of elaborating constitutional meaning (politicians will construct meaning, but judges should merely interpret meaning). Whittington now supports the view that there is a “continuum” of constitutional elaboration, where interpretation is clustered at one end and construction at the other.

In principle there is no reason why Whittington’s approach is incompatible with contestatory constitutionalism. In fact, since contestatory constitutionalism stresses the pursuit of con-

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⁵There are also writers who think that the relevant cleavage between interpretation and construction is not institutional but ideological; Barnett (2004), for example, invites judges to construct...
stitutional change through political processes, it would seem that there need not be any friction between Whittington’s vision of demarcation and contestatory constitutionalism. Since contestatory constitutionalism consists in the people pursuing constitutional change through construction rather than judicial review (interpretation), it might seem that there are no incompatibilities between Whittington’s demarcation and contestatory constitutionalism. Some tensions remain, however. Whittington insists, unlike Balkin (2011b), that constructions are not only temporary but are also primarily aimed at creating new meanings in the margins of constitutional meaning. “Constructions are, by their nature, temporary…they reflect contingent choices made within the constitutional framework not essential requirements of the Constitution itself” (Whittington 2010, 121–122). For fundamental changes, textual revision is to be preferred—and the deliberate construction of new meanings of the text, which is a part of contestatory constitutionalism, is discouraged. Whittington’s theory of democratic dualism (Whittington 1999b) requires decisive expressions of popular sovereignty—in the form of constitutional amendments—in order for new textual meaning to be created. Constructions cannot supplant or revise textual meanings.

It seems, however, that contestatory constitutionalism offers solutions to certain problems that are preferable to the application of democratic dualism. Consider the desuetude of the Privileges and Immunities Clause of the Fourteenth Amendment.⁶ There is some historical evidence at least to suggest that the phrase “privileges and immunities” was to have specific content (rather than merely aspirational meaning). However, since the Slaughter-house Cases the concept of the privileges and immunities of national citizenship has largely disappeared from the constitutional framework. Suppose, however, that there was a concerted movement by Americans seeking to restore the privileges and immunities of citizenship. Must they do so by amendment, when an amendment is already in place? It would seem that when textual meanings are supplanted by constructions—as in the case of judicial supremacy, which in practice has vitiated the Privileges and Immunities clause—further constructions are the only remedy.

⁶See Ely (1980) for a sustained treatment of the problems of the Court’s Fourteenth Amendment jurisprudence.
There is also the question of the abstraction or specificity of the Constitution itself. As an originalist, Whittington is committed to the view that much of the Constitution’s meaning is fixed, ascertainable, and amenable to propositional truth tests. (That is, we can ask questions like, “Does the Commerce Clause empower Congress to regulate intra-state manufacturing?” and arrive at a “yes” or “no” answer. If we cannot arrive at such an answer—through the use of original public meaning interpretation—then and only then may we construct the meaning, an act which is still bound by textual and historical constraints.) This position is not necessarily entailed by contestatory constitutionalism. Of course, it is likely that, in some nearby possible world where contestatory constitutionalism is the norm, many contestatory movements and initiatives would be originalist in character. Originalism, is, after all, a rhetorical and political position with a lot of intuitive appeal (Strauss 2010, 31). But there is nothing intrinsic in contestatory constitutionalism that requires constitutional construction with an originalist flavor—and it explicitly invites non-originalists to advance their own counter-constructions (in the political sphere).

For Balkin, the relevant distinction is not between interpretation and construction, but between the different referents of the term “interpretation.” Balkin’s “interpretation as ascertainment” (Balkin 2011b, 4ff) is, roughly speaking, interpretation as it is understood by other proponents of the interpretation/construction distinction. But his “interpretation as construction,” while it obviously resembles construction per se, is distinct. Balkin argues that in ordinary language the term “interpretation” is normally understood to involve both ascertainment (what does it mean?) as well as construction, which is more creative or integrative (what does it mean to me, or in a particular context, or in relation to other things, etc.?). This is certainly true in some contexts. For example, in the arts we frequently refer to performances as “interpretations;” while both Arturo Toscanini and Wilhelm Furtwängler conducted Beethoven’s Fifth, for example, we refer to their renditions of the symphony as “interpretations” since they are quite different even though they both follow the same score. But it is of course easier to accept that multiple inter-

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7The analogy can be extended even further; as Balkin notes frequently, constitutional interpretation involves treating with moral seriousness the products of political compromise and the accommodation of political evil (Balkin 2011a); this can be true (on a rather less significant scale) in the arts as well. Thus it is possible to interpret artistic works of questionable moral provenance, such as Wagner’s operas, in a way that expresses faith in
interpretations can be equally valid when the subject of interpretation is a work of art rather than a public document. As Whittington (1999b) points out, the authors of a constitutional provision undertake to write it in the hope, or belief, or conviction that the provision will be read and understood in a certain way. To return to the arts, it is true that there are temperamental composers who disavow certain interpretations of their music, but artistic feuds hardly carry the same level of concern as disagreements over constitutional meaning.

Interpretation–as–construction cannot by itself generate stable consensus around new constitutional meanings. (It is of course the case that there are and will continue to be disagreements within the sphere of interpretation–as–ascertainment, but these at least can be refereed with respect to constitutional text, while interpretation–as–construction lacks such a common denominator.) “Interpretation–as–construction” can, in fact, be a useful way to think about the construction of a constitutional order that is incomplete at its inception and requires the regular input of democratic participation in order to remain legitimate (Balkin 2011b, 76–77, 335). However, interpretation–as–construction is too unstable to support the “framework” (Balkin 2011b, 21–23) of a living Constitution. Construction is not a one-way ratchet, such that once new constructions take hold they are fixed; they remain open to contestation and, unlike textual provisions, only retain their effective power within the constitutional framework for so long as they are commonly avowed and socially supported. Constructions are not “super-statutes.”

Balkin, like Ackerman, seeks to adumbrate a theory of originalism with living constitutionalist characteristics, in which changes, once they occur, take root and persist over time. But constructions are vulnerable to contestation and are as a result flimsier than textual provisions with interpretable meaning. Balkin is right to point out that political mobilization and mass movements are the desiderata of successful constructions, but is wrong to suppose that successful constructions

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This seems to be the sense of “interpretation–as–construction” as Balkin imagines it when applied to the U.S. Constitution, itself a morally compromised document; we can interpret it as a democratic charter even though in its origins it was hardly a democratic document. As Toscanini is reported to have said of Richard Strauss—who, like Furtwängler, Herbert von Karajan, and many other German artists did not demonstrate moral courage in the face of the Nazi regime—“To Strauss the composer I take off my hat; to Strauss the man I put it back on again.”

⁸On the use (whether successful or, as is often the case, not) of constitutional design to place definitive signposts on the timeline of a nation’s historical development, see Scheppele (2008).
can persist without regular inputs—contestation, ratification, revision, etc. It is true that throughout his (rather extensive) corpus of constitutional theory, Balkin has given substantial focus to social inputs into constitutional construction.⁹ But Balkin follows Ackerman in claiming that a consensus that is arrived at socially must perforce be enforceable through judicial review.¹⁰ But judicial enforcement is most responsive to—and reacts most predictably to—constitutional changes that have been accompanied by corresponding legal changes; in the absence of such changes, Balkin is in no better position than Ackerman to be able to claim that only certain preferred constructions (such as the gradual and as-yet-uncompleted shift toward regarding gender as a suspect classification) are deserving of judicial protection against legislative encroachment.

To state the point more generally: in many normative constitutional theories, constructions are frequently placed in contrast with interpretation as such, understood as the ascertainment of constitutional meaning. On this account, the interpretation of constitutional meaning is and can be accomplished when texts are neither vague nor ambiguous (about which more below). This conceptual division may have descriptive rather than normative motivations. (It will become clear, though, that it is very difficult to neatly separate the descriptive from the evaluative in analyzing constitutional meaning or constitutional politics.) In fact, many normative theories of constitutional change rely on a threshold test of legitimacy: changes must occur in what has been called the “higher” lawmaking track in order to be counted as legitimate. However, many theorists recognize that contemporary constitutional practice forces many changes to occur below that threshold.¹¹ One way in which many theorists committed to the threshold test of legitimacy respond to such empirical claims is to deploy what I will call the “demarcation” strategy. Demarcation is essentially a corollary to, or extension of, the separation of powers; it consists in assigning different kinds of powers or duties to different institutions with respect to consti-

⁹McGinnis and Rappaport, two of Balkin’s most ardent foes in the originalist camp, find that throughout his writings “[Balkin] gives pride of place to social movements” in describing the development of constitutional law (McGinnis & Rappaport 2009, 785). They note this feature of Balkin’s thinking disapprovingly—preferring a juristocentric theory of interpretation coupled to a traditional reading of Article V’s gatekeeping function (McGinnis & Rappaport 2002)—but from the perspective of popular constitutionalism this need not be a flaw in Balkin’s theory.

¹⁰See, e.g., Ackerman (2007).

¹¹Many theories, notably Ackerman’s and Whittington’s, couple developmentalist analyses of constitutional change with dualist or departmentalist prescriptions for the normative evaluation of those changes.
tutional elaboration. Thus, within a constitutional order in which judicial review is considered legitimate, the judiciary may interpret the constitutional text, but it may not construct it.

This strategy is meant to give normative theories of constitutional change more textured and nuanced vocabularies for describing changes in constitutional meaning. It also allows normative constitutional theories to accommodate different levels of constitutional change. It builds slack into such theories by making it possible for changes to be legitimated without being initiated in the “higher lawmaking” track. Changes in constitutional meaning that are “constructed” can be valid, with reference to certain standards, even if they are not amendments as such. Some examples of such “constitutional constructions” are the presidential policy veto, the practice of judicial review, and the Federal Reserve (Whitington 1999a, 12). All of these are important features of the contemporary constitutional order, but none of them were created through explicit, formal amendments. To review: constitutional interpretation is differentiated from other forms of interpretation, and constitutional construction is differentiated from other forms of construction, chiefly because they are endogenous to the constitutional content they elaborate. Because of their indignity to constitutional institutions, interpretation and construction are not bounded or defined by some “higher” authority in the way that statutory construction is (by canons of construction and norms about judicial independence) or the way that the interpretation of poetry is (by academic professionals, and public opinion and taste). Constitutional interpretation and construction are also not disciplined or formalized by well-developed institutional roles and norms, nor are they explicitly bounded by a well-defined concept of jurisdiction. Contestation about the boundaries and proper roles for interpretation and construction is part and parcel to the practice of constitutional elaboration.

Demarcation is an important component of constitutional originalism. Originalist theories of constitutional interpretation hold out the promise that the past can be made relevant to the present in a fixed and enduring way. This is not so straightforward as it might seem, however. “Old” originalism12 stressed textual fidelity—interpreting the text’s meaning as literally as possible.

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12Whitington (2004) correctly points out that the purported distinction between “old” and “new” originalisms is, beyond a strictly generational sense, unilluminating; instead, it would be better to understand originalist arguments
ble, or else construing it in the strictest and narrowest sense available—as a means of preserving constitutional commitments over time and in the face of countervailing political pressures. Such an approach also addresses concerns about judicial activism by providing (what looks to be) a clear benchmark against which judicial performance can be measured. However, “old” originalism began to lose adherents and persuasiveness as the challenges it faced became clearer. Rigid textualism provides little by way of predictable hermeneutic guidance when confronted by general invocations of principle or concepts, as in the First or Fourteenth Amendments. The impracticality of the “old” originalism is one of the motivations for what has been called the “New Originalism,” which might be better referred to as public meaning originalism.

Under the new originalist rubric, the meaning of constitutional provisions is fixed, not by textual inscription, but by the public arriving at a consensus about what it understands the meaning of provisions to be at the time of their drafting, adoption, or ratification. Importantly, this means that the new originalism may expand the scope of the materials to be interpreted beyond the text of the Constitution. Although it preserves the demarcation of interpretation and construction between judicial and political branches, the “new” originalism also embraces realism with respect to the construction of constitutional meaning within politics, and furthermore it typically requires the consideration of public statements and understandings at the time of the ratification of specific constitutional provisions. The new originalism, which has rapidly emerged as the preferred modality of interpretation among originalist theorists (Whitwington 2004), thus takes the reality of constitutional change outside of the amendment process quite seriously.

New originalism insists on a meaningful distinction between construction and interpretation. The latter may be appropriate to judges in regimes where judicial review is permitted; but construction is not appropriate to the judicial function. Construction, meanwhile, insofar as it is a practical necessity, is best left to the political branches, whose political accountability through

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¹³See generally Whitwington (1999b). However, Hamburger (2008) makes the case that construction qua judicial discretion has always been considered a part of the judicial role in the common law system.
elections and other mechanisms will help to ensure that the popular sovereign’s preferences are not flouted. It remains a matter of contention as to whether new originalist theories of interpretation should take construction into account. The duality between judicial interpretation and political construction tends toward a contradictory state of affairs, in which politicians may permissibly construct constitutional meaning but judges are required to stick to interpretable materials. What, then happens when constructions conduce to changed constitutional power structures or guarantees? In a system of judicial supremacy, it usually falls to judges to enforce or uphold constitutional requirements. This leads to a tension whereby popular constitutional expectations and judicial interpretive philosophies may be seriously out of step. New originalists have a variety of proposals for how this problem should be addressed. Barnett (2004) argues that judges may, in fact, construct constitutional meaning in certain circumstances (if they are guided by precepts of natural law). Whittington (1999b) suggests that the new originalism, like any theory of interpretation, is in many respects ideal or aspirational, and that it would be preferable to seek to effect constitutional change that is meant to be enduring through amendment procedures, so that its democratic imprimatur would not be in doubt. However this difficulty is to be resolved, it is important to note that contemporary originalist theory is as concerned with constructed constitutional meaning as other theories, if not more so.

Beyond the tensions and contradictions that inhere in the body of dualist theories, there is the practical question of whether and how any one of them should be adopted as the most appropriate approach to constitutional interpretation. Dualist positions as a whole assume a mediate form of popular sovereignty, expressed in institutions or the actors who occupy them. For this reason any debate as to whether one, if any, of the dualist theories is more authoritative is orthogonal to the concerns of contestatory constitutionalism. Strictly, speaking, the contestatory constitutionalist does not have a set of preferences over the range of dualist positions. All such positions represent conclusions drawn from, among other propositions, the claim that popular interpretive authority may be substituted by some other mechanism or actor. It may be that some contestatory constitutionalists would even agree with such conclusions, but they must continually be argued
for, rather than assumed. Similarly, the bare fact that judicial review is practiced by the judiciary and supported by the executive is not a sufficient warrant for its continuation—particularly if the practice is sufficiently contested that its justification may be thrown in doubt. Partisans of judicial supremacy can breathe easy in the knowledge that such a contestatory movement is likely not in the offing in the near future; but the possibility should not be dismissed out of hand at the theoretical level.

5.3 Objections to Popular Constitutionalism

5.3.1 “‘Popular?’ ‘Constitutionalism?’”

Is “popular” constitutionalism a contradiction in terms? That is, does it override the entrenched features of the Constitution, thereby rendering it incapable of discharging its core function? In the Politics, Aristotle claims that “there is no constitution where the laws do not rule” (Aristotle [ca. 350 BCE] 1997, 111). Opponents of popular constitutionalism often claim that this precisely describes the state of affairs imagined by popular constitutionalists. For example, Alexander & Solum (2005) argue that opening constitutionalism up to popular control verges on incoherence, since as they describe it the function of constitutions is to constrain popular passions and to preserve legal settlements. The model of constitutional law they implicitly draw upon is one of entrenchment—for them, the purpose of constitutions is to entrench certain features of the institutional landscape, and to place some questions within the scope of political contestation and others outside of it. Judicial supremacy is the preferred tool for maintaining constitutional constraints against legislative encroachment. The claim that the Constitution’s purpose is to limit or restrain government power is foundational to American political thought.¹⁴ But there are parallels between Alexander and Solum’s argument and that of Holmes (1988). Holmes defends the constraints that constitutions place upon political decision-making as salutary; they

¹⁴“Constitutions restrict the reach of the state by a proper specification of what it may and may not do. They may do this by defining an exclusive grant of public power and/or by removing from its control certain favored private activities...Central to constitutionalism...is security” (Kay 1998, 22, 27).
serve to preserve democracies by protecting them from their own self-destructive tendencies. Holmes’s more recent writings emphasize the need for constitutional constraints upon discretion and the invocation of special authority in the case of emergencies—especially in *The Matador’s Cape* (Holmes 2007), where the role of the Constitution is described as one of restraining a creeping security and surveillance state that expands unilateral executive authority and constricts the sphere of individual rights. (There are also analogues to the description of the “national surveillance state” diagnosed by Balkin & Levinson (2006).)

An important premise shared by many constitutional theorists is that constitutional entrenchment (that is, the persistence of obdurate institutions that resist change) delivers important democratic goods in not one but two ways: First, by maintaining the background conditions under which democratic electoral politics and democratic legislative politics may be sustained, but also by placing a high bar to be cleared by attempts to change constitutional institutions.

The contestatory constitutionalist’s response should be to emphasize the growing gap between the theory and practice of constitutional amendment (in the U.S.). Judicial supremacy has breached the levee of constitutional entrenchment by providing an alternative venue for pursuing constitutional change. The amendment process cannot be relied upon to prevent false positives—that is, the absence of amendment does not indicate the absence of constitutional construction. Construction, of course, is part of the normal practice of constitutional maintenance and elaboration. But this is problematic for objections to “passions” (Holmes 1988) or to extra-judicial interpretation (Alexander & Schauer 1997). These objections rest on a fundamentally static conception of constitutional meaning, one which is at odds with the lessons of developmentalist and institutionalist scholarship in American constitutionalism.

More generally, the objection that popular constitutionalism is a contradictory or internally incoherent concept (Alexander & Solum 2005) is built on top of two errors. First, Alexander and Solum assume that “constitutionalism” and “democracy” *per se* are, if not diametrically opposed, then at least mutually antagonistic; second, they draw an unwarranted distinction between constituent power—“diffuse, unclear, and ambiguous” (Alexander & Solum 2005, 1596)—and written
constitutional law which, they assume, furnishes a clear and unambiguous rule of recognition. If these assumptions—which the popular constitutionalist does not share—are not granted, then it becomes hard to see how their objection gets off the ground. The best resource that Alexander and Solum can mobilize in their argument is their recognition that judicial supremacy—their preferred (indeed only) method of constitutional interpretation—derives its legitimacy from popular support, mediated through representative institutions (Alexander & Solum 2005, 1601–1602). But popular legitimation is a two-way street. There is no necessary or a priori reason why judicial supremacy should retain popular support indefinitely, and as Kramer (2004) notes, that has not always been the case. Ultimately, if the disagreement between Alexander and Solum, on the one hand, and popular constitutionalists, on the other, comes down to a disagreement over the acceptable limits to extra-judicial constitutional interpretation, or the acceptable rate of informal or constructed constitutional change, and thus ultimately a disagreement about the permissibility of tinkering with institutions at all, then popular constitutionalists may simply have to pound the table and insist that they are right. But in so doing, they would be in distinguished company:

It is true that what is settled by custom, though it be not good, yet at least it is fit. And those things which have long gone together are as it were confederate within themselves: whereas new things piece not so well, but though they help by their utility, yet they trouble by their inconformity. Besides, they are like strangers, more admired and less favoured. All this is true, if time stood still, which contrariwise moveth so round that a froward retention of custom is as turbulent a thing as an innovation; and they that reverence too much old times are but a scorn to the new

(Bacon [1625] 2006, 43).

¹⁵Of course, popular consent to judicial supremacy is only “tacit” as even Alexander and Solum recognize (Alexander & Solum 2005, 1602).
5.3.2 Partisanship and Majoritarianism

To some, the phrase “popular constitutionalism” conjures unpleasant or unwelcome connotations. “Popular” suggests “populism,” which may be interpreted as the fulfillment of the mob’s revealed preferences rather than the informed or hypothetical preferences of a reflective and representative set of individuals. Or it may even connote plebiscitarianism or “the tyranny of the majority,” in which vulnerable or marginalized groups—racial minorities, the poor, the disenfranchised, marginalized or excluded religious communities, and so on—lack adequate protection against the privations of a majority that monopolizes the means of power and denies the minorities goods, rights, or voice. These are legitimate and serious objections. Other advocates of popular constitutionalism, however, have advanced counter-arguments that bear consideration here. First, as noted above, popular constitutionalism need not be conceived of in reductively majoritarian terms. A variety of means are available to increased the participation or voice of ordinary citizens and public in the politics of constitutional elaboration, without simply bringing all questions of constitutional construction or interpenetration up for a vote.

The final option for popular constitutionalists is to bite the bullet and insist that the empowerment of mass publics to participate in constitutional politics is simply an indispensable component of constitutional self-government. This is not to say that popular constitutionalism is not without its dangers; but no approach to democratic government is ideal, nor are there any schemes of institutional design or public policy choices that will not generate any undesirable externalities or yield any unanticipated consequences. It may also be the case that the people are not the most qualified to make decisions in all domains; but, first, popular constitutionalism does not simply put everything up for grabs, as I have argued; and second, “there are more goods than epistemic goods” (Swift 2011, 201). If we value democracy, then the set of things we hold valuable and worth pursuing to be larger than and not exhausted by the set of decisions that are objectively right. This is neither incoherent nor novel; it is a familiar and inevitable feature of popular rule.
5.3.3 The “Mischiefs of Faction”

Contestatory constitutionalism—both as a mode of political culture and also in its instantiation in various institutional reforms, such as an ideologically driven judicial nominations process—encounters objections from partisanship, i.e. that it encourages the politicization and ideological polarization of constitutional law. Although I have already argued above that (constitutional) law and politics are inextricably intermingled, there is another aspect to the objection from partisanship that requires further consideration.

The major parties in the contemporary U.S. are ideologically polarized and, currently, come closer now than they often have in the past to acting with parliamentary levels of discipline. We can complain about how (asymmetric) ideological polarization between the two parties is detrimental to democratic politics, to policy-making, to the state of political discourse, and so on. Certainly, extreme, hostage-taking antics from hyperpartisans did no one any favors during what is now apparently only the first of many debt ceiling battles, back in 2010. But for better worse, the parties are now closer to being ideological coalitions, rather than sectional congeries, or uneasy alliances of groups with interests that sometimes overlap and sometimes conflict.

What the major parties are not are “factions,” which James Madison worried about at length in the *Federalist*. Madison comes from a long line of political theorists worried about groups within larger communities using power to enrich themselves at the expense of the public good. “Parties” meant, to the framers, “factions”—political sub-groups which sought their own aggrandizement or advantage at the expense of the general population. The diminution of the influence of factionalism in this form was a prime goal for the framers. However, the party system that has evolved since the founding—an evolution which began not long after the founding, in fact—is unlike the factional partisanship that the framers feared. Partisan organization in the contemporary U.S. is the descendant of an evolutionary process in which political parties emerged as essential tools of collective political action.

Ideological parties are not factional parties; instead they seek to advance particular agendas or visions of how the economy should be structured and regulated, whether and how certain rights
or liberties should be enforced, how the country should conduct its foreign relations, and so on. There can be better or worse approaches to these questions – that is to say, some ideologies are to be preferred over others. But both parties today pursue ideologies at the national level. In glib terms, the Republicans favor austerity, while the Democrats favor social provision; the Republicans favor national unity, while the Democrats favor cultural pluralism, and so on. These are not, however, “factional” agendas that are pursued simply or solely for the sake a particular sub-group. For examples of that kind of behavior we have to look to the past – for example, to the antebellum Democrats, dominated by a powerful southern pro-slavery wing. Nowadays, although individual party politicians strive to serve their local constituencies (of course!), they do so in concert with a broader ideological agenda that has implications for the nation as a whole. This is not to say that parties do or should have rigid ideological agendas from which they do not deviate: “[c]omplex, internally coherent logic is disabling in a democracy; the sophistication we seek in ideological vision is instead to be found in the practice of politics” (Bensel 2000, xxi). “Ideological vision” is not a sufficient condition for robust democratic politics. But neither is partisanship as such a barrier to robust democratic politics.

Popular constitutionalists should embrace partisan politics. They should not join the discordant and ultimately futile chorus of those who decry parties as divisive or “negative.” Politics consists of disagreement, and political disagreement can run deep—hence party polarization. For the purposes of popular constitutionalists, who want to democratize the interpretation of constitutional meaning, modern parties offer powerful tools for advancing new constructions of constitutional meaning and giving them force and efficacy in the social world.

5.3.4 Majorities and Minorities

Related to objections to partisanship is the objection that contestatory constitutionalism, as a form of popular constitutionalism, serves to undermine one of the most important features of modern constitutionalism. The protection of minority rights and interests against encroachment

¹⁶For a thoughtful meditation on the role and importance of parties in democracy see Rosenblum (2010); see also Muirhead & Rosenblum (2012).
by majorities is a central concern of contemporary constitutional theory. But is it really the case that contestatory constitutionalism poses a threat to minority rights? Is it, in fact, ochlocratic—a form of mob rule? It is perhaps the case that some more extreme variants of popular constitutionalism are vulnerable to this accusation. However, contestatory constitutionalism does not pose a new or significant threat to the substantive or procedural rights of minorities, particularly when it is instantiated through the kinds of reforms detailed in the previous chapter.

We must be careful to define the terms of the debate here. “Minorities” are not fungible commodities; they are not all equivalent forms. The framers, in particular, evinced a concern with minority rights that is far removed from the assiduity with which modern democratic theorists are attentive to the rights of subordinated or marginalized groups. James Madison stated that the minorities he was concerned with protecting were minorities of wealth and influence—and not minorities of class, gender, or ethnicity (Beard 1913, 153–159). Madison’s concern—echoed by conservatives in his own era, such as Edmund Burke, as well as those of later generations, such as Rossiter (1962)—was that truly democratic government would fall prey to a leveling impulse which would result in “democratic autophagy” (Schwartzberg 2007, 7), or the self-destruction of the polity. Anticipating the classical political economists who believed that inequalities generated wealth both locally and, as a result, for society at large, Madison argued that various elites—mercantile, landed, financial—had to be constitutionally insulated from majoritarian pressures. Expropriation of estates and goods, debt cancellation, a “rage for paper money”—all these fears loomed large in Madison’s mind. A democratic form of government, in which all citizens could participate—or rather, in which a very large portion of the population was accorded the powers and privileges of citizenship—posed a threat to elites, who could not simply outvote the masses.

It is not important here to explain once again the system by which Madison hoped that ambition would counter ambition, and in which the salutary effects he saw emanating from inequality would be preserved over time.¹⁷ We need only note that the fear Madison and the Federalists had

¹⁷This perspective on Madison’s political economy—in which class conflict is inevitable, and the unequal partition of the commons redounds to the “common good” by ensuring production and the markets to absorb it, was first drawn by the muckraker Charles Beard in his *Economic Interpretation of the Constitution of the United States* (Beard 1913, 154–159). It is also worth noting that where most readers of Madison have taken him at face value—that is, as a
about a fully democratic franchise was overblown. In the contemporary United States the extension of suffrage—and, notionally, political power—to the bulk of the adult citizenry has not resulted in the dispossession of the wealthy or the mass expropriation of their property. If anything, accelerating income inequality and the increasing financialization of the American political economy (Bartels 2010, Stein 2010), coupled with a shift to a rentier mode of production relying on “extractive institutions” (Acemoglu & Robinson 2012, 79–83, 430), have better enabled wealthy Americans to acquire and retain political influence than any mere constitutional arrangement could. Arguably, the institutional arrangements in the Constitution have served to insulate various elites from the vicissitudes of democratic politics. We don’t really need to worry about the fates of the “interests”—landed, industrial, financial—that Madison fussed over, at least as far as their insulation from political power is concerned.

An equally important area of concern with respect to minority rights, of course, concerns minorities who are subordinated or marginalized as a result of racism, classism, or other hegemonic systems of subordination. Contestatory constitutionalism’s focus on the inclusion of mass publics in constitutional politics might arouse the worry that politically vulnerable or under-represented minorities would find their voices unheard or drowned out. Such minorities, imbricated within cultural logics that render them voiceless as well as powerless, might well fare poorly under a regime of unbridled popular constitutionalism—that is, one in which majorities exercise constituent power unconstrained by institutions, norms, or culture. The concern here is that popular constitutionalism is too amenable to forms of majoritarianism in which only large numbers count.

realist who sought to promote the “general good” through the careful balancing of material interests in a particular pattern of constitutional design—Beard turns a skeptical eye on Madison’s conception of the “general good.” He reads Madison’s arguments in The Federalist less as a program for ensuring economic growth through a particular incentive structure and more as a means of securing the future of particular interests: “[T]he general good is a passive force, and unless we know who are the several individuals that benefit in its name, it has no meaning. When it is so analyzed, immediate and remote beneficiaries are discovered; and the former are usually found to have been the dynamic element in securing the legislation” (Beard 1913, 155).

¹⁸For a more global perspective on the shift from production to financialization in the 1970s, culminating in the global trend toward neoliberalization in the 1980s onward, see Blyth (2002).

¹⁹For arguments about the susceptibility of the contemporary American political economy to the control of economic elites, see Hacker & Pierson (2010) and Lessig (2011); on the political problems associated with massive income inequality see Wilkinson & Pickett (2010) and Gilens (2012). For a comparative perspective on the politics of wealth defense, tax evasion, and other strategies used by wealthy elites to capture and tame political institutions, see Winters (2011).
That would, in fact, be troubling from the perspective of democratic theory. But contestatory constitutionalism is not ochlocratic; it does not enact a mob rule vision of constitutional politics. The virtues stressed by contestatory constitutionalism—deliberation, reciprocity, an attentiveness to social realities and not simply constitutional formalities—hardly present a threat to formal checks and balances that is somehow unique. And we should be careful, at any rate, about being over-reliant on formal checks and balances:

Because we are taught to believe in the necessity of constitutional checks and balances, we place little faith in social checks and balances. We admire the efficacy of constitutional separation of powers in curbing majorities and minorities, but we often ignore the importance of the restraints imposed by social separation of powers...[I]n the absence of certain social prerequisites, no constitutional arrangements can produce a non-tyrannical republic (Dahl 2006, 83)

The idea that contestatory constitutionalism emphasis on constitutional culture is not inherently destabilizing, and in fact that appropriate constitutional functioning depends upon the kind of political culture that sustains it, is of course not new:

Does constitutional structure cause a political condition and a state of public opinion or does the political condition and a state of public opinion cause the constitutional structure?...[P]ublic opinion usually causes constitutional structure...As Rousseau contended, it is, in the end, the law that is written in the hearts of the people that counts (Riker 1976, 12).²⁰

Beyond considerations of political culture and its capacity to curb or exacerbate the potential pathologies of majority rule, there is the question of whether majoritarianism is in fact better at protecting minority rights. McGann (2004), for example, argues that majority rule presents a better bulwark for minorities against domination than do supermajority decision rules, since the

²⁰Of course, Riker’s reading of Rousseau oversimplifies the question: the law written in the hearts of the people is subject to constant revision and interpretation as well, and the institutions and social relations that the people find themselves within will inevitably affect “the law that is written in the hearts of the people.”
latter present aggregative challenges that truly marginalized minorities are likely never to overcome, whether or on their own or in concert with larger coalitions. Although supermajorities enjoy a hallowed place in American political folklore as the best guarantee against false positives in the constitutional amendment process, we may in fact be better off by trusting in the perpetually unstable processes of majority rule rather than relying on supermajoritarian barriers to political change.

5.3.5 Stability, Reliance Interests, and the Rule of Law

Related to the objections to popular constitutionalism and partisanship are objections from stability, reliance, and the rule of law. In this family of objections, the shift away from judicial supremacy carries costs in political stability, in the ability of individuals to pursue projects that are in some way shaped or constrained by the law, and in the public’s general expectation that the law will be enforced solicitously and equitably. Stability, reliance, and the rule of law are all desiderata of a decent political regime; but the objection that contestatory constitutionalism would threaten them is overblown. The concern that contestatory constitutionalism threatens stability and other related goods arises from the belief that it would too easily allow rapid, heedless changes to constitutional law and doctrine. This is a mistaken characterization of popular constitutionalism, but more fundamentally it’s a mistaken understanding of the value of political stability.

It is a commonplace in political rhetoric to think of “stability” as something that slowly builds up over time, and that it is fragile and delicate – and therefore in need of constant care and protection. Political stability, on this reading, is like a coral reef in that it can only grow and develop slowly, but it can be damaged or destroyed overnight if it isn’t protected. This is one possible sense of what “conservative” may mean: being protective of established institutions and skeptical about radical change. Burke said this; and Michael Oakeshott, and other conservatives. The problem is that they’re rather mistaken.

Burke argued that “[c]ustom reconciles us to all things” in art as well as political life, and is
often held up as example of principled conservatism; that is, a conservatism that is an ideology—valuing establishing institutions, trusting tradition, and skeptical of radical change—rather than a tendency, a preference for the old and familiar simply for familiarity’s sake. Oakeshott is often held up as a more recent example of a skeptical conservative in the classical liberal tradition. Both thinkers cautioned against an enthusiasm for change or sweeping reform, on the grounds that doing so could usher in unanticipated consequences and instability. They emphasized a view of the development of political institutions in which they are built slowly over time, and those bits which survive over long stretches of time should be regarded as “fit” or serving some useful purpose.

G. K. Chesterton—who is not always thought of as a political thinker—elaborates a similar sentiment:

> It is extremely probable that we have overlooked some whole aspect of the question, if something set up by human beings like ourselves seems to be entirely meaningless and mysterious. There are reformers who get over this difficulty by assuming that all their fathers were fools; but if that be so, we can only say that folly appears to be a hereditary disease. But the truth is that nobody has any business to destroy a social institution until he has really seen it as an historical institution. If he knows how it arose, and what purposes it was supposed to serve, he may really be able to say that they were bad purposes, or that they have since become bad purposes, or that they are purposes which are no longer served. (Chesterton 1990, 157).

Burke, Chesterton, and Oakeshott were all subtle thinkers; they did not treat political institutions as sacred, and they recognized—sometimes implicitly, sometimes explicitly—that they would change over time. They weren’t atavistic traditionalists, who believe that that what is old is *ipso facto* good and justified. But they and others like them looked back in time, not forward, in order to understand how political stability and institutional continuity might be preserved. Change, especially rapid change, was suspect; reforms should be piecemeal, and enthusiasm met with skepticism. This is a mistaken notion, at least with respect to constitutional development in
the United States.

Stability, where it inheres, is neither old nor fragile:

There is a general folk belief, derived largely from Burke and the nineteenth-century historians, that political stability is of slow, coral–like growth; the result of time, circumstances, prudence, experience, wisdom, slowly building up over the centuries. Nothing is, I think, farther from the truth... Political stability, when it comes, often happens to a society quite quickly, as suddenly as water becomes ice (Plumb 1967, xvii).

The periods of comparative political stability in U.S. history—such as the Era of Good Feelings, Reconstruction after the Civil War, the state-building period at the beginning of the twentieth century, the post-World War II economic boom, the Reagan era—were not the result of “slow, coral–like growth.” They were temporary respites from the churning of political contestation, often bought at a high price in institutional power, political coalitions, or even lives, and they were often characterized by superficial or perceived levels of stability that concealed deeper divisions and ongoing conflicts and disagreement. And when disagreement upsets stability, it is not the case that the resulting destabilization is sui generis. We would be mistaken to infer, for example, that no one was agitating on behalf of black civil rights before the Civil Rights Era; but national and Southern elites managed to suppress the institutional and cultural precursors to the Civil Rights Movement during the Depression, World War II, and into the Eisenhower presidency. Political stability didn’t suddenly evaporate in the South when “Bull” Connor turned firehoses and police dogs on protesters in Selma in 1963. Instead, the bargains, cultural logics, and configurations of power that had sustained white supremacy finally began to fray. And the stability that had preceded the protests was not the result of wisdom or prudence or the generally relaxed attitude commended to us by Chesterton; it was actively maintained by the Jim Crow system and through the power of political institutions dominated by whites.

A recent illustration of the mindset that Plumb argues against can be found in the work of political scientist Terry Moe, who describes the arguments of many students of institutions as
reducing to the idea that “institutions emerge as good things, and it is their goodness that ultimately explains them: they exist and take the forms they do because they make people better of (Moe 2005, 216).²¹ It’s a cousin of the “just world fallacy,” the Panglossian view that things are already the way they’re supposed to be. The folk wisdom that Plumb rightly rejects—the idea that it must somehow be the case that we have the institutions that we have because they’re good—has a lot of rhetorical purchase, which is why it’s necessary to resist it when thinking about popular constitutionalism and constitutional change. The Constitution is not a delicate flower that grew and blossomed slowly over time; it began as a disruptive, destabilizing move in the national politics of the early republic, and the meaning and authority of its text and the institutions it describes have been contested ever since. The major lesson here is that legal dynamism and political stability are not incompatible.²²

It is certainly possible that shifting to a more realist paradigm in staffing or confronting the Supreme Court could disenchant members of the public who believe the Court’s decisions to be driven by constitutional text and doctrine. But it difficult to imagine why the public’s mystification about the actual workings of the Court should be the default state:

There might be some public perception that constitutional law is not mechanical, that it turns substantially on the political theories held by a current majority of the Court; but that hardly seems destabilizing. It might, in fact, encourage the people and other government officials to begin developing their own political theories, relevant to the constitutional law issues of the day, to challenge the Court. Such dialogue could be healthy, rather than anarchic (Greene 2012, 191).

Reliance interests are not endangered by the shift from judicial supremacy to a more popular form of constitutionalism. That is, individuals’ expectations that their projects, businesses, or organizations will be able to continue operating as expected are not likely to be disrupted as and

²¹The view that institutions are organic and emergent outcomes of human action as individuals seek mutual benefit is also one that tends to distract our attention from institutions as sites of power: “political institutions are more than just structures of cooperation. They are also structures of power” (Moe 2005, 228).
²²Schwartzberg (2007) provides numerous historical examples showing that systems in which legal norms are responsive to popular demands can persist and indeed thrive.
when competing constitutional constructions are bruited in the public sphere by citizens engaged in political contestation. It is possible, of course, that markets, regulatory regimes, and so on may be affected by changed understandings of constitutional powers—but there is no reason why it is necessarily the case that this danger should be considered elevated compared to the current regime, in which judicial review may alter constitutional regimes at a stroke. Finally, the rule of law per se is not threatened by the shift to contestatory constitutionalism. The primary expectations which are referred to by the term “rule of law” are not directly affected by the disposition of the justices on the Supreme Court. The expectation that laws will be enforced fairly, impartially, and non-abusively is directed primarily toward law enforcement agencies, courts of first instance, and to agencies and bodies discharging executive or administrative functions. (One does not, for example, immediately seek recourse from the Supreme Court when one challenges a speeding ticket issued by a municipal police officer.)

5.4 Dispreferring Alternative Views

Contentious constitutionalism runs into a number of competing views, three of which I consider here. The relationship between people and government is not fruitfully conceived of as a principal-agent model, in which the government is notionally constrained in the exertion of its powers by the expectations of the sovereign people acting as a supervisor; nor is it best conceived of as a pattern of legal entrenchment, whereby political actors agree upon certain constraints on public power for the sake of higher-order or deferred public benefits such as stability. The problem with applying principal-agent theory is that it models the relationship between people and government in terms of supervisor and supervisee, in a manner which I argue is ultimately anti-republican and inimical to constitutional democracy. The legal entrenchment model, meanwhile, sees popular sovereignty being put into action through the act of constitutional design and creation, but this is an incomplete account of constitutional self-government. A third view that I consider in this section, which valorizes the idea of constitutional identity (Jacobsohn 2010), holds
that contestation over constitutional values is destabilizing and damaging to citizens’ affective attachments to the constitutional state, but I will argue that this is not the case. Indeed, I conclude this section by noting that contentious constitutionalism is not antithetical to or incompatible with the necessity of the constitutional state as the foundation for democratic politics.

5.4.1 Depoliticization

The first objection to contestatory constitutionalism is that, like popular constitutionalism more generally, it is inimical to the project of constitutional government because of its embrace of frequent constitutional change. In this section I will argue that, whatever deficits in stability or obduracy popular developmentalism may entail, it is not anti-constitutional. We should not confuse the constitutional function of entrenchment with a constitutional value of depoliticization. The entrenchment function of constitutions must be distinguished from the effect such entrenchment can (not that it necessarily must) have in the form of depoliticized discourse with respect to the policy area affected by the entrenchment.

It is a commonplace in American constitutional theory to describe the institutional function performed by political constitutions as “entrenching.” A political constitution entrenches a certain pattern of institutional arrangements, rights guarantees, or formal limits on official power. Many American constitutional theories locate the normative value of constitutions in their entrenching functions. That is, constitutions (i) constrain state authorities in their exercise of official power, (ii) serve as credible commitments with respect to markets, trade, revenue-gathering and public services, and (iii) sustain the rule of law by reinforcing legal continuity. In valorizing these functions of entrenchment, constitutional theories frequently make a virtue of depoliticization, or the removal of certain issues, policy choices, or institutional designs from political debate and the public sphere. In the remainder of this section I will argue that, although entrenchment tout court is a necessary and valuable feature of constitutionalism, depoliticization is not valuable, and should be actively countered through regular and publicly salient contestation.

Constitutional entrenchment is a means, not an end. It is, of course, a necessary end, and in
and of itself it is not imimical to the project of self-rule that is the explicit objective of constitutional democracy:

[T]he democratic role that enables people to ensure control over law is not their creative, law-making role, assuming they have that, but rather an oppositional one...One of [the] best-known expressions [of this idea] is the recurrent emphasis on the need for constitutional guarantees...whereby people can be given power over government. It is unfortunate that, far from being seen as expressive of a notion of democratic control of government (a contestatory model of control), that emphasis is sometimes presented, even by its defenders, as an anti-democratic device that is needed to guard against the control of the people (Pettit 1999, 184).

Holmes (1995) and Eisgruber (2001) are perhaps the best examples of defenders of constitutional guarantees who do not describe such guarantees as anti-democratic. Eisgruber’s argument for judicial review as a necessary element in functioning democracy denies, in fact, that there is a meaningful countermajoritarian tension at play between Court and people. According to one gloss of Eisgruber’s argument, “[i]f [constitutional] precommitments to stable rules of juridical discourse are necessary elements of democratic self-rule [as Eisgruber argues] then the democratic challenge to precommitment disappears. Nothing short of a rejection of democracy itself will suffice to undo the consent that gives the constitutional regime its legitimacy” (Schweber 2007, 185). There is little serious disagreement among different constitutional theories that some degree of entrenchment is required for a political constitution to be worthy of the name; however, the nature and degree of that entrenchment is very much up for debate.

Problems with Depoliticization

The central feature of the depoliticization model of constitutionalism is that it represents an attempt to justify the democracy-inhibiting features of constitutions with reference to their salutary long-term effects for democratic politics. This feature is also the location of the core theoretical
problematic of the entrenchment model: it casts constitutions as constraints upon political activity. (Such constraints can be substantive or procedural—meaning that they can prevent the enactment of legislation on the basis of its content, or on the basis that it violates institutional boundaries.) It is here, in the tension between legal change and legal obduracy, that uncounted reservoirs of ink have been spilled in the past few generations of public law scholarship in various literatures. Rather than attempt to recount arguments that are familiar, let me briefly summarizes the ways in which the contested status of constitutional obduracy relates to the elaboration of a theory of contentious constitutionalism.

There are four reasons why the argument that we should prefer depoliticization over contestation is problematic. First, it is a contested and by no means clear claim that “ordinary” politics will deliver worse outcomes (whatever the standard) than those which are entrenched by a constitutional pattern. Second, the practice of entrenching particular policy goals against easy revision is susceptible to capture by vested interests or elites which can extract benefits from the entrenchment to the detriment of the broader community. Third, the effects of depoliticization are (by design) long-lasting and, definitionally, chosen for because they will be difficult to undo. So much so, in fact, that they can constrain and inhibit future decision-making in ways that were unintended or unexpected by those making the entrenched commitments in the first place; and it does not follow—from the mere fact that settlement was chosen—that revision is never warranted. Finally, depoliticization has the perverse capacity to obscure actual constitutional change behind a veil of formalism. This can be particularly dangerous when significant departures from previous constructions are unratiﬁed either in formal or public terms. This fourth objection is, at this point in my argument, familiar. The persistence of the forms of legality and the familiar shapes of given institutions does not always reveal the actual functioning of those institutions or the actual status of those legal forms as operative public norms.

The other three objections still require some more motivation, however. The third objection is perhaps the most fundamental: it illustrates the gap between the popular constitutionalist im-

²³For an important argument on behalf of this claim, see Waldron (1999). See also Christiano (2002).
pulse to give interpretive weight to popular sentiment and public opinion on the one hand, and the proponent of legal obduracy’s impulse to restrict or inhibit the revision of constitutional commitments on the other. The reason why we should side with the popular constitutionalist and not the depoliticization view here is that making change easier to accomplish is a necessary corrective to the problem of change that happens outside of the amendment process (including previous instances of popularly-driven constitutional change). As I argued in previous chapters, important constitutional changes continue to take place despite the relative disuse of the Article V amendment process. It would be disingenuous and unrealistic to argue that the only available corrective for repairing the accountability and legitimacy gap between currently obtaining popular understandings of constitutional meaning and the actually existing constitutional forms that structure politics today is the amendment process. Enterprising and transformative political coalitions have successfully sidestepped the onerous requirements of Article V, and the success of such “stealth amendment” only increases the burden on the people with respect to resisting, subverting, or even endorsing such amendment-by-another-name.

Dispreferring Depoliticization

Political elites and their associated power networks thus have considerable advantages in the give-and-take with mass publics over the outcomes of constitutional elaboration. This advantage informs the first two objections to the claim that legal obduracy should be preferred over popular constitutionalism: the deep susceptibility of the process of constitutional elaboration to capture by elites, and the contested status of the people’s capacity to engage in the reflection and deliberation that it is supposed ought to inform the project of institutional design. Put succinctly, in the twenty-first the people face huge hurdles in the task of holding their government accountable through the tools of constitutionalism. As to the people’s competence, such objections place a thumb firmly on the scales in favor of elite-driven change through the presupposition popular preferences over different patterns of constitutional design can only be mediated through party structures, well-organized movements, established institutions, and so on.
Ultimately, nothing *necessarily* follows from an increase in the level of contention over constitutional content. There is no inherent value to gradualism—just because it’s a feature of how change happens over time doesn’t mean that it is therefore warranted in all cases. Incrementalism may be valuable, but only instrumentally so; in the cases where it is valuable, it’s only because future entrenchments are to be feared, not because we’re worried about losing the benefits of existing entrenchments.

5.4.2 ( Certain Kinds of) Principal-Agent Models

As I argued in previous chapters, constitutional change is multi-causal, path-dependent, and unpredictable; this is partly the case because the notional actor that drives constitutional change—the sovereign people—does not think with one mind or speak with one voice. Constitutions are compromises, and constitutional compromises are brokered not simply among various framers and drafters, but also among different groupings, tendencies, and coalitions within the body politic. (We have learned through historical experience what Publius refused to infer from previous historical examples: that the sub-organization of political communities around variegated and competing interest groups cannot be written away through institutional design.) Insisting that constitutional elaboration be guided by the idea that constitutional provisions are the deliverances of the considered judgment of the people as a whole is a dangerous proposition.

There is much to be said for placing constitutional elaboration within the frame of the principal-agent model. The model captures an important aspect of the relationship between institutional actors—namely, that authorizing or empowering actors (principals) wish to constrain the behavior of authorized or empowered actors (agents) who in turn wish to maximize their autonomy within their domain of action. Refinement and exploration of the principal-agent model has yielded significant explanatory and predictive results in the study of bureaucracy, executive branch agency politics, and other domains of strategic institutional behavior. The extended analogy of applying the logic of the principal-agent relationship to constitutional theory is a mis-application of the model, however, since the purported principal and agent in such a case lack
certain features of “traditional” political principals and agents. Additionally, a principal-agent picture of constitutional politics, rather than electoral politics per se, obscures important aspects of constitutional politics in a way that is troublingly anti-republican.

In a constitutional state, “people” and “government” are not entities which exist in a context that the principal-agent model is easily mapped on to. It would be nonsensical to represent a political community and its governmental institutions as enjoying wholly separate or separable existences; rather, the existence of each presupposes the existence of the other. This chapter is not the proper place in which to articulate an adequate theory of the deep structure of state and society; but it is important to (briefly) note that society and state persist through symbiosis. Political institutions are practical necessities for dealing with the collective action problems that any large community encounters. The pursuit of politics is a brute fact of social life. For similar reasons, the principal-agent analogy is anti-republican. It conceives of the relationship between people and their government as fundamentally antagonistic, and their interactions are undertaken in a context of mutual distrust. I do not mean to suggest that there are no bases for distrusting governmental decisions on our behalf, or that it never makes sense to adopt an skeptical stance towards the statements and actions of state officers or elected officials. There is even, I will concede, a certain visceral appeal in characterizing policy debates or even disputes over constitutional interpretation in Manichean terms, such as: yeomen–vs.–aristocrats, or sans-culottes–vs.–ancien régime, and so forth. But for so long as we believe that we are governed under republican institutions, and aim to instantiate the principles of representative government in our politics, then we have to acknowledge that no such sharp distinction can be made between a state and a political community. We can affirm the constitutional durability of our institutions without making the (impossible) demand that the individuals comprising the government somehow avoid tampering with them whatsoever while in office.

Principal-agent are useful for modeling relationships between firms and investors, different firms at different points in the production stream, or actors within government; but they are not always appropriate to the relationship between people and their representatives under the
circumstances of normal politics, even if they do provide insights into the reasons why a people might wish to live under a constitution in the first place.

5.4.3 Constitutional Identity

There is a further objection to a contentious constitutional culture that must be considered: namely, that broadening the scope of constitutional contestation undermines the project of constitutional government by diminishing the Constitution’s authority. Call this the objection from constitutional integrity. To understand the objection, it is necessary to sketch a working definition of the notion of ‘constitutional integrity’: I take the term to stand for the following claim: namely, that in order for the constitutional order to persist, the constitution must in some significant sense transcend political contestation and be an object of loyalty and affirmation by the members of that political community. I use the term “integrity” here to refer to the integrity of the constitutional order as a whole. The concept derives from the intuition that, if the Constitution’s absence is unrecognized, then those norms (statutes, rules of administration, doctrines, etc.) which derive their validity from the Constitution will also become “de-authorized.” Thus, the integrity of the constitutional order depends in part on the ultimate authority of the Constitution itself.

The requirements of constitutional integrity can be strengthened or relaxed in various ways. For example, we might require the uncritical affective affirmation of the constitution by the members of the political community. Conversely, we might permit a great deal of criticism of the con-

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²⁴“The Constitution’s authority” is of course a loaded phrase, one that is freighted with the standard unpackable concepts that inhabit constitutional theory—“what is a constitution? Is it written or unwritten?” etc.—but while I will try to be clear about the concepts that I am using and responding to in the paper below. Exactly what legal authority is, and what distinguishes that form of authority from other forms, remains a (perhaps essentially) contested concept in the philosophy of law (Marmor 2011, 59–83).

²⁵This may sound superficially similar to Kelsen’s notion of the Grundnorm, a basic norm undergirding the validity of all posterior norms simply by virtue of its assumption. Kelsen—or at least this reading of his “pure theory” of law—runs into serious difficulties, not the least of which is the objection that Grundnormen never acquire their validity simply through transcendental supposition. Kelsen essentially leaves the reasons why we might endorse (or not endorse) a basic norm off the table; I don’t mean to impute the same argument to someone who advances the objection from constitutional integrity, given that there are a variety of external reasons why it might be salutary, valuable, or necessary to uphold the integrity of the constitutional order. As I argue below, the objection (to popular constitutionalism) from constitutional integrity fails not because constitutional integrity is unrealizable but because popular constitutionalism turns out not to threaten constitutional integrity.
stitution while still insisting on its specialness—some special quality or feature that sets it apart from “mere” political artifacts like statutes, judicial rulings, administrative rules, and so on. (We can also quibble over the number of loyal citizens—should everyone feel an affective bond to the constitution, or simply most citizens, or what?) The nature of the constitution’s transcendence is also malleable. The constitutional theorist can argue that the constitution is insulated from political contestation because it is difficult to amend or is judicially enforced against legislative encroachment; but it is also possible to argue that the constitution is culturally distinct from other political constructs, in that it is an object of special veneration or was the product of a special time or a special set of minds. And so on.

The stakes are thus quite high: if the objection from constitutional integrity is true, then popular constitutionalism could potentially undermine the normative appeal and practical authority of the currently prevailing political regime in the U.S. After all, popular constitutionalism rejects the authority of individual institutions to interpret or declare the meaning of specific constitutional provisions; and it militates in favor of the easily mutability of constitutional institutions and for the permeability of institutional boundaries. If such theoretical commitments conduce to a breakdown in or failure of constitutional integrity, then popular constitutionalism should be rejected in favor of an alternative theory of the conduct of constitutional politics. Ultimately, however, the objection from constitutional integrity fails, and popular constitutionalism is left standing as a potentially viable theory. The objection falters for two reasons: it is internally incoherent, and it necessarily commits the objector to unwelcome normative claims. Those reasons are interrelated, and I summarize them here before considering their implications below.

The first, structural failure of such an objection is that it is question-begging. Constitutional identification is only a morally attractive project insofar as the constitution being identified with is worthy of the loyalty or affective attachment given to it. Anthropologically speaking, there’s no reason that a morally dubious constitution can’t command the loyalty of its citizens. History is after all full of examples of political communities expressing affective attachments to repressive, inefficient, or just plain inadequate regimes. Such attachment can be genuine, or pragmatic, or
an expression of national sentiment not easily decoupled from loyalty to existing institutions, and so on (Kuran 1997). But the mere fact of affective attachment is not dispositive with respect to the question of whether or not the constitution is in fact morally praiseworthy or salutary in some important way. And if in fact it turns out the constitution is not something which, upon consideration, is worthy of loyalty, then the principle of constitutional integrity cannot, by itself, make the constitution worthy of affective attachment. And if the constitution is not worthy of loyalty on its own sake, and loyalty to it for the sake of loyalty cannot conduce to its moral acceptability, then continued attachment to the constitution becomes morally problematic, if not quite blameworthy.

Another source of concern is the notion that loyalty to an unworthy constitution may commit the loyal citizen to dubious or suspect normative propositions. American constitutional discourse is replete with the utterance of such propositions: viz., that the Framers were blessed with unusual gifts of intelligence, fortitude, or vision; that the messy political compromise that produced the federal Constitution explicitly and firmly foresaw the eventual abolition of slavery (thereby excusing the constitutional validity of slavery); that the exclusion of women and minorities from participation in popular sovereignty does not vitiate the democratic credentials of the constitution we in the present have inherited from the past; or that the moral urgency of the genocide of native peoples up through the nineteenth century—and their continued marginalization past that point—is diminished because of the impressive or salutary qualities of the polity that has displaced them. Uncritical loyalty to the constitution would require an ever-expanding litany of exceptions, epicycles, and explanations to deal with the long list of moral imperfections associated with the American constitutional order and its historical development.

It is at this point in the dialectic that the proponent of constitutional integrity can make a few different moves in order to avoid unsavory moral commitments. Loyalty can be pared down into more acceptable dimensions—“constitutional patriotism,” or other forms of “affect [that are] safe for democracy” (Markell 2000, Hayward 2007). The characteristic shared by these varying conceptions of critical loyalty is Senator Schurz’s principle: briefly, that we can be loyal to something
that is (morally) flawed now in the hope that it can be made (morally) better in the future.²⁶ The hope underlying such theoretical moves is that a form of loyalty which somehow does not entail unsavory commitments can be achieved. I will describe such theories generically as “constitutional patriotisms.” If “patriotism” is love of country, then let “constitutional patriotism” be the love of one’s constitution, or perhaps love of one’s constitutional order—the difference being that loving one’s constitution is less morally problematic than loving an “imagined community” like country, kith, or kin (Anderson 2006). Why it should be so necessary to achieve such a “pure” or unburdened form of loyalty is a question well worth asking.²⁷ There is a pervasive assumption in the literature on constitutional loyalty that it is not only desirable but also possible to love one’s country in a morally unblameworthy way (Viroli 1997). Rarely mooted is the alternative view that co-citizen partiality is, in fact, morally problematic through and through, although this is a position that receives a great deal of attention from other perspectives.

One possible explanation for the prevalence of affect in constitutional theory is cognitive dissonance. It is discomfiting and even painful to contemplate the notion that one’s compatriots have committed genocide (or even mere workaday atrocities), and a common move to defend against this discomfort is to rationalize or explain it away. Stark jurisprudential example of resisting dissonant conclusions can be found in the Supreme Court’s articulation of the “discovery doctrine” with respect to tribal sovereignty and the dispossession of Indian land in the early history of the republic.²⁸ A form of constitutional loyalty that is forward—rather than backward-looking can seem particularly tempting in this regard as it appears to offer the possibility of “redemption” (Balkin 2011a). But “redemptive” views—let me use the term for those theories which make space for affect that is forward rather than backward looking—cease, more or less, to be really patriotic.

²⁶“My country, right or wrong; if right, to be kept right; and if wrong, to be set right.” Carl Schurz, remarks in the U.S. Senate, 29 February 1872.

²⁷For example, many German critics of the project of appropriating the Habermasian conception of Verfassungspatriotismus for American ends (Michelman 1999) point out that it was only intended for a particular end: the liberalization of national sentiment in post–Nazi Germany. Muzzling the jaws of German nationalism in that way does not necessarily mean that its claws can be drawn as well; Verfassungspatriotismus is not the same thing as cosmopolitan Europhilia, nor is a German constitutional patriot—if there is one to be found—necessarily a model citizen of an ideally just state.

²⁸See, e.g., Johnson’s Lessee v. M’Intosh, 21 U.S. 543 (1823); see also Pommersheim (2009), and Williams (2005b).
Patriotism, constitutional or otherwise, cannot easily imagine a morally compromised or unredeemable past.²⁹ It might be best to say that patriotism is a deeply flawed but hardly avoidable feature of political identity-formation and -reproduction (Macedo 2011).

Perhaps because their proponents are aware of the rhetorical purchase of patriotic tropes, theories of “constitutional redemption” (Balkin 2011a) (e.g. Balkin 2011) or ‘constitutional patriotism,’ (Michelman 1998) do not explicitly disavow or efface patriotism as such. But it is important to note that patriotism, as I have outlined it—basically, that it acts as a defeasor in a moral calculus in which the conflict between competing commitments must somehow be resolved—is not a sufficient condition for the successful functioning of a constitutional order. By itself, patriotism cannot sustain the conceptual structure of patriotism requires the delineation of individuals into enemies and compatriots, in-groups and out-groups. It demands loyalty to certain truths, objects, or fetishes, whether or not they actually warrant such loyalty, simply because being a good patriot means being loyal to the object of affective attachment. And the long-term consequences of patriotic culture can be negative and destructive, since the pursuit of prestige and the maintenance of loyalty are seldom accomplished without violence and coercion.

So, patriotism must be modified, or supplemented: What the maintenance of a constitutional order actually requires is solidarity, not (simply or solely) loyalty. Solidarity is a desideratum of the kind of constitutional culture I have been arguing for. Such a culture is, inter alia, characterized by the shared understanding and expectation that political disagreement, and ultimately political decision-making, will be conducted through the institutions, values and norms that comprise the constitutional order. Such a constitutional culture is not an instance of patriotism but of solidarity: citizens’ mutual recognition that political problems must be solved collectively, as well as recognition of their anterior commitment to solved them in a particular way—in this case, through constitutional means. Such constitutional solidarity, or a shared commitment to constitutional self-government, is not coterminous with patriotism. Instead, a constitutional culture in

²⁹"In nationalist thought there are facts which are both true and untrue, known and unknown. A known fact may be so unbearable that it is habitually pushed aside...Every nationalist is haunted by the belief that the past can be altered” (Orwell 1945). Orwell clearly understood the concept of cognitive dissonance avant la lettre.
which citizens avow their responsibility to deliberate about contentious issues, to cabin disagree-
ment within institutional boundaries but also to acknowledge the bare fact of such disagreement,
is in fact incompatible with the idea of patriotism. Any conception of patriotism requires that
some debates be suppressed, some disagreements be effaced, and that some kind of consensus or
“common ground” be honored even at the risk of factual or moral contradiction.

At this point it may be objected that the sketch of a well-formed constitutional order in the
preceding paragraph is all very well and good, but that the actual state of constitutional culture
in the U.S. today is suffused with patriotic fervor and, in particular, an approving chorus of voices
singing the praises of our morally beneficent Constitution and its promise of securing for us an
ever more perfect union. True indeed—American political culture does seem to embody a robust
form of constitutional patriotism, rather than constitutional solidarity. But the brute fact of pro-
found patriotism in the contemporary U.S. does little to establish its normative status, or to affect
the validity of the argument for constitutional solidarity as an alternative. If anything, the persis-
tence of patriotic feeling in our politics is a tribute to the degree to which we are uncomfortable
with the fact that our polity is riven with disagreement. But why would it be necessary or indeed
conscionable to elevate that discomfort to the status of a moral principle? To put it another way:

Devotion to a free constitution for is own sake is not patriotism; it has no use for
enemies; it hates having them; and when patriotism must be mixed in with such
devotion to give it strength, then we can be sure that the devotion is grossly imperfect
(Kateb 2006, 12).

Contestatory constitutionalism does not threaten or undermine the project of constitutional
self-government; nor is it a stalking horse for more anarchic conceptions of public life or a cel-
ebration of political violence. Contestation, or the manifestation of political disagreement and
the articulation of counter-claims to governmental decisions and policies, is not simply political
violence. A contestatory constitutional culture presupposes an adequately functioning constitu-
tional democracy; contentious politics cannot occur in a political vacuum. Some kind of constitu-
tional order is a necessary vehicle for the pursuit of the common good and the resolution of
foundational collective action problems. Contentious constitutional politics does not undermine the constitutional project even as it calls for more debate over constitutional meaning, values, and institutions, and for more rapidity and frequency with respect to constitutional change.
Conclusion: Reclaiming Constituent Power

The Constitution presents itself as the summation and the fulfillment of popular sovereignty in the United States, but a text cannot legitimate itself. We ought not to take the text at its word without added justification, especially when the practical upshot of textual supremacy is judicial supremacy under a Supreme Court that will tolerate no rival interpreters. A constitutional order predicated on popular sovereignty ought for that very reason to be the product of constituent power. However, I have argued in the preceding chapters that the case for the Constitution’s authority as an expression of Americans’ constituent power is dubious. The fact of its adoption in the past is not a sufficient warrant for regarding it as authoritative in the present. The operational constitutional order which has developed since the late eighteenth century has not always been ratified or deliberated upon in the same way as the original Constitution itself (though given the low level of inclusiveness of the original deliberations, this is by no means unambiguously bad). The difficulties and pathologies that have attended to constitutional politics serve to alienate the people governed by the constitutional people from the exercise and fulfillment of their constituent power. And the stamp of constituent power is difficult to discern in many of the most important constitutional developments, ones holding a great deal of consequentiality for the ways in which political decisions get made, policies are implemented, and services administered.

I have not argued for the wholesale rejection of the Constitution. Not only is that an utterly unlikely political prospect, it is also by no means a solution—not even necessarily the start of one—to the problems I describe. The constitutional text and the (competing and often contradictory) narratives about the past and future of the United States are the main registers in which Amer-
icans speak when they discuss foundational questions in politics. I accept, in other words, that
the constitutional culture we have is one with a given trajectory of historical development, and it
cannot be so easily dislodged or discarded. It should, though, be altered and improved. Constitu-
tional culture in the U.S. is too preoccupied with moments, decisions, and limits. The enactment
of the Constitution is believed to be enduring, even though political conditions and relations are
constantly changing. The reliance on Supreme Court decisions to articulate constitutional princi-
pies for us, and to revisit and revise them in a process that is clumsy at best, locks us into certain
discourses about rights and limits, rather than discussions about power and history.¹ In this way
we are alienated from our own capacity for constituent power. A focus on constitutional limits
encourages an antagonistic view of the state vis a vis the people and conceives of liberty in hy-
perindividualistic terms, discouraging the use of public power to overcome the collective action
problems that confront a modern, postindustrial political economy. An eighteenth-century docu-
ment can only provide limited guidance in confronting twenty-first century problems, and it has
no claim on us that we must feel bound by.

The constant invocation of the authority of the framers is no substitute for confronting the
political conditions that actually obtain in the present. The reflex of consulting the thoughts and
writings of people who could not anticipate the configuration and disposition of political, eco-
nomic, and social forces shaping the contemporary field of collective decision-making will not
make those decisions any easier to make. Ultimately it is the people themselves who give the
Constitution meaning and endow it with authority to any degree. It is their exercise of con-
stituent power that makes the constitutional project possible, and that same constituent power
may be used to consider, renew, or replace constitutional forms, whether or not they are antici-
pated by the Constitution’s original framers or the institutions claiming its support. But we are
in the curious historical position wherein such statements sound utopian or radical. Against this
conception of democracy are ranged the various views that assign greater normative weight to

¹The Supreme Court’s decisions in Grutter and Gratz, which evicted questions of racial justice, solidarity, and
equality from the precincts of constitutional morality in favor of a neoliberal educational philosophy in which a
minimum level of “diversity” is a good to be consumed by (white) students, are perfect examples of this phenomenon.
the enacted Constitution rather than the effective constitution. Though often in conflict among themselves, these views have fairly effectively sidelined the popular constitutionalist perspective in constitutional theory.

It bears repeating that written constitutionalism has not always worked to the benefit of democracy. The Constitution was designed to frustrate popular demands—such as debt cancellation and other forms of economic relief—and to inhibit institutional innovation. In these respects, at least, it has succeeded—but at the cost of the preservation of chattel slavery for decades, a ruinous civil war, and the accretion of power and initiative in an executive branch that serves poorly as the only nationally representative institution. Where the Constitution has succeeded most is in staying on the shelf well past its sell-by date. The U.S. Constitution is by any reasonable standard the most obdurate in the world. Contestatory constitutionalism offers a means by which Americans may undertake constitutional change in spite of the Constitution itself.

Alternative forms of change are forlorn hopes at best. Amendment is an increasingly unlikely possibility and unworkable solution to the blurred lines of accountability between ongoing constitutional change and Americans as a collective sovereign. The barriers to amendment erected by Article V of the Constitution have served to frustrate attempts at constitutional change to an astonishing extent, and it is increasingly dubious that such barriers serve to save democracy.

On the importance of class conflict over questions of the new federal government’s role in finance and the economy more generally see Hogeland (2012), who provides a detailed view of the economic conditions that impinged on the framers and subsequent political elites, and argues that the view that prevailed at Philadelphia was one of suspicion directed at mass publics and solicitousness toward the interests of finance and mercantile capital. See also Beard (1913) for a rather dismal take on Madison’s motivations in advocating the antimajoritarian aspects of the Constitution. But see Amar for a more optimistic view (Amar 2005, 17, 43, 64–69); also Edling (2003), who argues that the Federalists sought the sufficient centralization of government power that would enable the polity to amass wealth and field a military powerful enough to have an independent scope of action in world affairs, and Roche (1961), who argues against muckraking interpretations of the founding in favor of a more banal one: compromise over sectional differences in the pursuit of political union.

It should be remembered that Madison himself was quite frank about the underpinnings of the Constitution’s antimajoritarian provisions:

“In a general vein,” he observed, “I see no reason why the rights of property which chiefly bears the burden of Government & is so much an object of Legislation should not be respected as well as personal rights in the choice of Rulers.”…From being a right attributable to all citizens, property was now increasingly regarded as an interest deserving protection against the envious and unjust designs of the less fortunate (Rakove 1996, 41).
from itself (Sager 2004, Schwartzberg 2007, Levinson 2008). Entrenchment is one thing; obduracy another. The historical pattern of development in American constitutional politics has been for constitutional forms to endure and be modified (if at all) from within the constitutional framework by competing actors seeking to expand the power, autonomy, or efficacy of the institutions they inhabit. Stacking the Article V amendment procedure requirements on top of this tendency toward obduracy and self-preservation makes constitutional amendment a vanishingly unlikely occurrence; and the proposal of specific amendments has in the late twentieth and early twenty-first centuries been confined to a kind of performative politics.

The deck is stacked against the people in the game of constitutional politics. Elected officials are, of course, representatives and discharge their duties in the service of government of and for the people, to the best of their abilities and character (even if their endowments of these qualities often leave much to be desired). There is little sense or seriousness in asserting that the U.S. government is some kind of alien entity imposing itself upon an unwilling populace. But those same officials, in addition to being representatives, are inhabitants of institutions, roles, and ideological coalitions. The political stability produced by the inter-office and inter-branch rivalry envisioned by the authors of *The Federalist* may have produced dividends for the American people in terms of a reasonably reliable rule of law and an economic environment of stabilized expectations, but it has also rendered the path to structural reform difficult to envision and even harder to achieve. The constitutional order encourages stasis, rewards self-interest (at the individual, state, and regional levels) over the maintenance of the commons and the management of public goods, and encourages the reproduction of a political culture that all too easily silences minorities and narrows the horizons of possibility in identifying and solving problems that require political solutions.

Distressingly, the history of constitutional reform in the U.S. has often been closely tied with crisis and failure. The political stability engendered by constitutional obduracy has not always kept pace with economic, social, or cultural developments. Some of the key gains for democratic flourishing—something which, presumably, constitutional government is meant to help us as a
people accomplish—have come at the cost of constitutional conflict, or, at dire moments, constitutional failure. Whether one regards it as a failure of constitutionalism or as a failure of political consociation, the abolition of slavery and the extension of the franchise—indeed of citizenship and membership in the polity—to (male) black Americans was only possible through the constitutional irruptions of the antebellum crises and ultimately the outright constitutional failure precipitated by Southern secession. Desegregation and the structural (rather than formal) integration of the descendants of slaves into the American political community was itself deferred for decades, in the face of the recalcitrance of the Supreme Court (e.g., in the *Slaughter-house Cases*), the Democratic Party, and many individual Americans. Constitutional crises or showdowns have also been the prerequisites for many foundational reforms in American national politics, from the era around the Civil War to school desegregation in the mid-twentieth century (Dudziak 2000). The outcomes of these showdowns—when they have resulted in changes in institutions, powers, or rights—are often driven by high-level political actors and do not have clear lines of accountability to mass publics. Thus, constant constitutional change, coupled with an increasingly distantly or intermittently engaged public, has led to a legitimation gap in American constitutionalism. This gap forms the second and deeper motivation for the dissertation. How can the people exert meaningful control and supervision over the elaboration of the Constitution that enacts and sustains their political system, if major changes are occurring below the radar that Article V provides them?

This gap is a legitimation gap: a problem of political justification. However, it is unlike the “classical” (as in frequently recurring) legitimation and justification problems in democratic theory. (For example, how can we bootstrap into a legitimate state? What are the moral or epistemic standards that should be appealed to in justifying democratic rule? When, if ever, do citizens who controvert state policies de-legitimize the democratic state? And so on.) This problem appears more tractable; if it is possible for the people to amend the Constitution (formally or otherwise), then it ought to be possible for the people to overcome the collective action problems that confront such momentous political changes as altering the foundational structure of a community’s
political system. And yet, as I have gestured at above and will argue for below, this is a difficult task—more so than the framers of Article V would have imagined (not that that’s particularly relevant). The people’s input into the processes of constitutional change is getting harder and harder to detect. Call this the problem of constitutional submersion—the elaboration of constitutional meaning through non-traditional channels means that important changes are “submerged” or hidden from view if the text or even Supreme Court decisions are taken as the only canonical guides to meaning.³

The Constitution claims to instantiate a regime of consensual government and to render the government subordinate to the will of the people. But practical experience has shown that the constitutional order has often frustrated attempts at inclusive self-government and routinely frustrates attempts to formally reconsider the social bases for public power. Contestatory constitutionalism does not itself promise a means for diminishing this legitimacy gap between the Constitution’s claims and our constitutional practice, but it provides a way for Americans to attempt to express their constituent power and use it to revise and repair the institutions which constitute and constrain their public (and private) lives. It cannot be the case that the only choice we have in politics is between the ballot or the bullet. In between the aggregation of votes and desperate confrontation between contending groups we find contestation, and it is here that we must seize and re-make our Constitution. Such contestation will be resisted by entrenched institutional and ideological opponents, particularly those who are not in fact fully committed to the project of democratic politics more generally. The most pervasive criticism of contestatory constitutionalist movements would most likely come in the form of appeals to order, institutional continuity, and certainty; but democracy’s potential and appeal can in part be found in the capacity of ordinary and repeated acts of contestation and solidarity to transcend such barriers in the pursuit of the common good.⁴

³This is similar to the problem of the “submerged state” described by Mettler (2011) with respect to the decentralized and institutionally fragmented American welfare state.

⁴“Democracy...is not based on any nature of things nor guaranteed by any institutional form...It is only entrusted to the constancy of its specific acts. This can provoke fear, and so hatred, among those are used to exercising the magisterium of thought. But among those who know how to share with anybody and everybody the equal power of intelligence, it can conversely inspire courage, and hence joy” (Rancière 2009, 97).
The idea of contestatory constitutionalism that I have defended in this dissertation entails the rejection of constitutional form in order to explore and give rise to new constitutional possibilities. If we value the Constitution for its ability to secure the blessings of democracy, we would do well to consider to what extent it has succeeded, and to what extent it has failed—and if necessary, we should consider altering it. The original Constitution was created through a complex series of acts of constituent power that involved different sections, interests, and classes, and were by no means univocal. It was only through a series of radical breaches—a revolutionary war, a failed experiment in decentralized national government, and an extralegal and ultimately successful attempt to consolidate the national government under a new constitution—that the political order we recognize today came into being. And even that order could not contain the centripetal forces set in motion by the compromises—some more rotten than others—implicit in the original Constitution, erupting in a war that cost the country more blood and treasure than any other. Not even that war could resolve the questions of citizenship, exclusion, and marginalization that were not and are not yet fully answered. The framers’ exercise of constituent power did not secure the equal rights or dignity of women (or indeed any who were not cis-gendered heterosexual men), did not prevent the United States from pursuing wars of territorial aggrandizement or dictating policy to other countries, or furnish any guidance to resolve normative disputes over abortion, the role of religion in public life, or the merits of an increasingly pervasive surveillance state and unrelentingly punitive correctional apparatus. The Constitution is freighted with a frequently dubious and sometimes undemocratic history. Accepting or rejecting that history is the choice we get to make in the present; the choices of those who came before us should not constrain us if and when we decide they were the wrong choices. The decisions affecting the way we live must be ours to make, and it is within our power to make them.
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