# CONSTITUTIONAL THEORY, CONSTITUTIONAL CULTURE

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ABSTRACT

*Constitutional theorists and other constitutional commentators make heavy use of a paradigm that mistakes certain aspects of our current constitutional decisionmaking process for inherent parts of our constitutional structure and ignores other important aspects of that process entirely. These distortions and elisions raise concerns about the accuracy of much descriptive constitutional commentary and the foundations of more normative and evaluative work. Drawing in part on an emerging literature, this Article proposes a new paradigm for thinking about the process through which we make constitutional law, one that understands that almost all of our institutional arrangements, practices, norms, and habits of thought are nominal, historically contingent, and ever-evolving, and that aims to treat them as a complicated, interlocking "constitutional culture."*

TABLE OF CONTENTS



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## INTRODUCTION

This Article begins with the simple premise that constitutional law does not emerge fully formed from the constitutional text. Nor, despite what many constitutional theorists suggest, does it result from a semi-objective, decontextualized process of "constitutional interpretation."[1] To the contrary, constitutional law is *made* through a process

1 When constitutional scholars and judges talk about the process of making constitutional law, particularly when they talk to non-professional audiences, they default to a language that conceptualizes the judge's role as primarily or exclusively one of "interpreting" texts. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (framing debate about constitutional interpretation as a struggle between interpretive methods); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739

in which claims about the concrete consequences of the text's open-ended commands are filtered through an ever-shifting set of institutional arrangements, historically contingent practices, and habits of thought.[2]

Its simplicity notwithstanding, it is a point worth emphasizing. Despite the forests of trees that have been felled in the name of constitutional theory,[3] legal academics have done a poor job acknowledging, let alone analyzing, many of the specific practices, arrangements, and habits of thought that shape the content of constitutional law in early twenty-first-century America. To be more specific, mainstream constitutional theory treats these core features of contemporary constitutional decisionmaking in two inconsistent and equally unconvincing ways.

On the one hand, constitutional theorists often identify certain of our constitutional practices—such as the distinct educational and professional experiences of federal judges, the existence of multi-member appellate courts who must agree on the text of opinions,

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(1982) ("Adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text . . . ."); *see also* MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS & PERSPECTIVES vii (3d ed. 2007) (referring to the process of making and debating constitutional law as involving the proper "interpretation" of the Constitution in each of first four sentences to preface of otherwise sophisticated textbook on constitutional theory).

2 I am far from the first to make the observation that constitutional law is produced, at least in part, through extra-textual institutions and norms that have developed over time. This approach is a staple of political science literature about the Supreme Court. It is also at the heart of the work of several of the most significant modern constitutional thinkers. *See, e.g.*, JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 1 (2011) (examining how public attitude toward constitutional initiatives affects their legitimacy); RICHARD H. FALLON JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE 1–2 (2d ed. 2013) (discussing constitutional law as a "practice" to signal the many external factors from which constitutional law emerges); SANFORD LEVINSON, CONSTITUTIONAL FAITH 10 (1988) (examining the complex relationship between the Constitution and the American political self-concept); H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 7 (2002) (exploring the evolving interpretation of the Constitution from a historical perspective); Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (examining three major cases from the 2002 Supreme Court term to explore how the values of non-judicial actors affect constitutional law); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1323–25 (2006) (framing constitutional culture as the product of interactions between citizens and officials that concern constitutional meaning). I draw on some aspects of these works and criticize others in Part IV.

3 Many theorists have documented or lamented the extraordinary proliferation of constitutional theory in the last few decades, most succinctly Rebecca Brown. *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 531 (1998) ("Honk if you are tired of constitutional theory.").

and the professional norms that limit the realm of legitimate constitutional arguments—as part of an underlying constitutional "structure."[4] Treating these constitutional practices as aspects of an underlying constitutional "structure" has two related consequences. First, it makes them appear to be permanent, timeless, inherent features of American constitutionalism. Second, it allows scholars to mobilize them in response to common concerns about the open-ended and arguably undemocratic nature of American constitutional decisionmaking.

On the other hand, most constitutional theory largely ignores another set of newer and less glamorous institutional arrangements and practices that share the field with those that comprise this reified constitutional "structure." These practices—for example, the proliferation of amicus briefs, the increased use of law clerks, and the fact that the public usually encounters Supreme Court opinions mediated through other sources—do not escape public or journalistic notice, but they are largely absent from the work of constitutional theorists, including many whose theoretical models are highly dependent on the accuracy of their descriptions of our constitutional practice.

This Article argues that the disparate treatment of these two sets of constitutional practices is unjustifiable. The practices and arrangements that constitutional theorists reify as our constitutional structure and treat as if they are part of our constitutional design are, on closer inspection, nominal, historically-contingent, and ever-changing.[5] At the same time, the newer, less glamorous practices and arrangements that constitutional theorists ignore or relegate to footnotes are demonstrably important in shaping the content of contemporary constitutional law.[6]

In the coming pages, I argue for an alternative approach that treats these two sets of constitutional practices consistently and theorizes about them collectively under the name "constitutional culture." Analytically, my approach posits that our alleged constitutional struc-

4 *See infra* notes 18–23; *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1914 & n.424 (2001) (describing the process of setting roles for state court judges interchangeably as one of "institutional design" and of creating "constitutional structure," and citing to works in a variety of other contexts that use "constitutional structure" in similar ways); Jonathan T. Molot, *Reexaming* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1246–48 (2002) (defending a robust vision of judicial power over statutory interpretation on the grounds that many norms of contemporary judicial practice are part of our "constitutional structure").

5 *See infra* Part I (developing this point in detail).

6 *See infra* Part II (developing this point in detail).

ture and the newer and messier practices ignored by our leading constitutional theorists are but different aspects of the rich body of complicated and historically-contingent practices, institutional arrangements, and habits of thought that define the contemporary American way of constitutional decisionmaking. While other appellations might suffice, and, in fact, are tempting given the frequency with which scholars use the phrase "constitutional culture" for other purposes,[7] identifying these practices, arrangements, and habits of thought as a species of culture has the advantage of emphasizing their most intriguing and analytically significant characteristics—such as the way in which they are ever-changing yet deeply rooted in history and the fact that they are responsive to rational argument and intentional modification but also reflect deep commitments, guttural instincts, and inchoate understandings.

The approach that this Article offers is original in its scope, terminology, and self-consciousness, but it is also grounded in an emerging strand of constitutional law scholarship that emphasizes the importance of cultural context for understanding the process through which particular issues gain salience,[8] the myriad ways in which both legal and non-legal actors have mobilized to affect the course of constitutional history,[9] and the degree to which crucial decisions about the structure of our constitutional decisionmaking process have been (and must be) made with little recourse to the constitutional text.[10] One of the principal aims of this article is to draw attention to this literature, to explore the common assumptions at its core, and to sug-

7 *See infra* notes 156–159 and accompanying text (cataloging these uses).

8 *See, e.g.*, Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 158–60 (2014) (exploring the social and cultural factors that increased the salience of the controversy surrounding *Burwell v. Hobby Lobby Stores, Inc.*); Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 128–29 (2013) (discussing the changes in political and social context that made the Supreme Court decisions in *Brown* and *Windsor* possible).

9 *See, e.g.*, Post, *supra* note 2, at 8 (emphasizing, in an analysis of major cases from the 2002 Supreme Court term, the role of non-judicial actors in shaping constitutional law); Siegel, *supra* note 2, 1323–25 (discussing how constitutional dialogue between citizens and officials protects the democratic legitimacy of the Constitution throughout history).

10 *See generally* POWELL, *supra* note 2 (focusing on the impact that historical context has on the shaping of constitutional doctrine); *see also* Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–28 (2000) (arguing that constitutional case law often departs too far from the vision articulated in the text of the Constitution); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 413 (2007) (characterizing much of constitutional law as "deriv[ing] from legal materials outside the Constitution itself").

gest that we might be seeing the emergence of a newer, more realistic paradigm in American constitutional theory.[11]

In Parts I and II of this Article, I explain and develop my claim that the standard works of modern American constitutional theory deal with the strands of our constitutional culture in an unconvincing and inconsistent way. Part I explores the crucial role that claims about constitutional structure play in the standard explanation and defense of American constitutionalism, and argues that that account is ultimately built on a shaky and ahistorical foundation. Part II then examines some more recent—and more controversial—aspects of our constitutional culture, detailing their development, their importance, the degree to which they have drawn the attention of other audiences, and their limited absorption into constitutional theory.

In the remainder of the Article, I develop an alternative approach. Part III explains the concept of "constitutional culture," defending both my substantive depiction of constitutional decisionmaking and my choice of nomenclature.[12] Part IV then begins the work of charting a new paradigm, discussing and analyzing an emerging body of literature that—in some way or other—resonates with the core insights of this article and then laying out an agenda for further study. Finally, Part V shifts from the descriptive to the normative, offering both preliminary observations and questions for study about the implications of the constitutional theory framework for the health of our system of governance.

Some aspects of this Article—and many of its implications—are controversial. At the heart of the project, however, is an aspiration that all well-meaning scholars and observers presumably share: to understand the world we live in as it is rather than as we hope or fear it to be.[13] As this article will hopefully demonstrate, our ability to the-

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11 *See infra* Part IV (developing this point in detail).

12 In defending my nomenclature, the focus below is on the noun ("culture"). As my colleague Charlotte Garden has helpfully reminded me, the adjective ("constitutional") also requires a few words of explanation. This Article's use of the term "constitutional" is intended both to highlight the central analytic questions it engages (how do we really make constitutional law?) and to locate it within a particular academic community (constitutional theory). That having been said, many of the Article's insights are derived from observations about appellate courts that apply with equal force to statutory and regulatory cases.

13 To talk about starting our analysis from a more realistic place that takes the world "as it is" is not to suggest that we can access the world "as it is" in an objective and unmediated way or to assume that all observers will describe our constitutional culture in identical or even similar terms. Rather, it merely posits the merits of an approach that attempts to catalog more fully our constitutional institutions, practices, and norms; that appreciates

orize about the big questions of constitutional governance—say, the role of the courts, the influence of ordinary citizens, or the relationship between generations—is enhanced by understanding that the path from constitutional text to constitutional consequence passes through constitutional culture.

## I. CONSTITUTIONAL "STRUCTURE"

Many contemporary constitutional theorists—particularly left-of-center theorists intent on defending a robust vision of the judicial role—place heavy reliance on certain of our more well-ingrained constitutional practices, conceptualizing them as part of our constitutional design.[14] In this Part, I sketch out the story that those theorists tell in greater detail and then offer a descriptive critique of their account.[15]

### *A. The Story*

If you have attended law school or read constitutional theory in the last few decades, there is a story with which you are almost certainly familiar. It begins with a sort of confession. "Look," says the professor or theorist, "I am a big fan of the work the Supreme Court has done over the last sixty years expanding freedom and moving us closer to a genuinely equal society, but, if I have to be honest, the counter-majoritarian difficulty[16] has always really nagged at me. At first blush, it just doesn't seem right that the work of advancing freedom and equality should depend on the whims of nine unelected geriatrics." After a brief pause for emphasis or a turning of the page, he or she continues, "Lucky for me—and for you—however, I think that way of looking at the problem is too simple. Let me tell you why."

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their historical trajectories; and that clearheadedly assesses their implications for our constitutional decisionmaking process.

14 *See, e.g.*, LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 5–10 (2004) (describing our inherent constitutional structure as a collaboration between branches of government wherein the judiciary engages in areas of constitutional underenforcement surrounding issues that popular political institutions are better equipped to solve).

15 This Part only treats the normative implications of this critique in passing. I return to that subject more directly in the Parts that follow.

16 *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962) (offering a classic account of the problem); *see also* Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 933 (2001) (cataloging the ubiquity of the issue in constitutional theory).

What follows goes something like this (though there are many variations on a theme): our nation isn't a democracy; it is a constitutional republic committed to the coexistence of democratic decisionmaking and individual rights. Achieving the proper balance between those equally important imperatives is a delicate question of institutional design. No one organ of government or type of official can be trusted to preserve both values; instead we need to design a variety of institutions and staff them in such a way so as to ensure that each reflects different perspectives and expertise. If properly designed, a robust judiciary is one of the institutions that helps achieve the necessary balance. Whether a constitutional republic succeeds in the long run depends on whether we have designed institutions that on a day-to-day basis effectively mediate the tension between self-rule and individual rights.

This claim is usually accompanied by a corollary argument from efficacy, a self-congratulatory assertion that the United States has in fact designed a constitutional structure that threads the needle. Though different theorists stress different factors, again the commonalities outweigh the differences. Thus the argument progresses: our judiciary is structurally independent from political influence. Our judges share distinct educational and professional experiences that differentiate them from other governmental actors and uniquely qualify them to resolve certain types of questions. Most decisions of consequence are made by multi-member courts whose members must agree on their reasoning and spell it out in a publicly available opinion to which they sign their own names. Powerful professional norms limit the realm of legitimate constitutional arguments, creating semi-objective standards that might be mobilized against attempted judicial usurpation. Due to our entrenched constitutional structure, Americans can have their cake (democracy) and eat it too (individual rights).[17]

These basic claims—that balancing the necessary requisites for a constitutional republic presents a complicated problem of institutional design and that the success of the United States in dealing with this problem stems from the existence of a set of well-ingrained constitutional practices that ought to be conceptualized as part of our inherent constitutional structure—are at the heart of the traditional liberal defense of the assertive style of judicial review that has charac-

17 Actually, given how much constitutional scholars like to argue even with those who share their basic assumptions, theorists who adopt this narrative would probably vociferously debate which attribute is the cake and which is the eating.

terized American jurisprudence since the mid-1950s. The claims are made most expressly in the canonical works of Lawrence Sager,[18] but resonate through the scholarship of Cass Sunstein,[19] Ronald Dworkin,[20] Chris Eisgruber,[21] Jim Fleming,[22] Richard Fallon,[23] and many others.

### *B. The Fluidity of "Constitutional Structure"*

This common story is comforting and has the virtue of drawing attention to constitutional practices that tend to enhance the stability of our constitutional order. It also suffers from a serious descriptive flaw: by reading contemporary constitutional practices as part of our inherent constitutional structure rather than as contingent and contested arrangements, it oversells their permanence and ignores the hard work of countless individuals that has gone into—and continues to go into—establishing and maintaining workable constitutional norms.

As a secondary matter, this focus on constitutional structure also distorts our understanding of the substance of contemporary constitutional arrangements and practices, at least around the margins. Thinking and talking in terms of permanent structures requires theorists to abstract their depictions of constitutional practice, describing them in terms that are generally accurate across multiple eras, rather than in more precise ways that might more accurately capture our current process of constitutional decisionmaking. As will be discussed in Part II below, theorists have a particular tendency to ignore

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18 *See, e.g.*, SAGER, *supra* note 14, at 5–10 (conceptualizing the judicial practice of constitutional underenforcement as a component of our inherent constitutional structure).

19 *See, e.g.*, CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 239–43 (2001) (characterizing the role of "democracy's constitution" as facilitating constitutional dialogue among diverse actors and allowing institutions to forge consensus where necessary).

20 *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 355–57, 365–67 (1986) (discussing how the constitutional practice of the United States has fostered stability); *see also id.* at 356 ("The United States is a more just society than it would have been had its consitutional rights been left to the conscience of majoritarian institutions.").

21 *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 2–3, 10–11 (2001) (arguing that the abstract provisions of the Constitution and judicial review should be construed to foster popular constitutional dialogue).

22 *See, e.g.*, JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 3–5 (2006) (describing the "bedrock structures of our constitutional scheme" as "deliberative political and personal self-government").

23 *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 1–2 (2001) (describing American judicial supremacy as developing out of the United States' evolving constitutional culture).

recent developments that alter or complicate traditional methods of constitutional decisionmaking, treating them as aberrational, particularly if they undercut the triumphalist aspect of the comfort narrative described in this Part.

One need only examine the historical record with regard to a handful of the most salient aspects of our so-called constitutional "structure" to understand that even the most familiar of our arrangements and practices are nominal, historically contingent, and still evolving. The remainder of this Part takes on that task.

### *1. The Distinctive Background and Training of Judges*

One claim that is often made by those who believe that the United States possesses a constitutional structure primed for success is that we have properly allocated significant decisionmaking (over an appropriate set of issues) to judges, who by their training and experiences are well-suited to resolve those questions.[24] Leaving aside the question of whether judges are in fact well-suited to resolving the kinds of issues they currently adjudicate,[25] there is a kernel of truth to the claim that federal judges share a common background and a common set of experiences. Certainly, all current federal judges are lawyers at least in name, all appear to be law school graduates, and many have followed similar career paths that have shaped among them a collective understanding of the role of the bench and bar that transcends partisan and jurisprudential differences.[26]

Still, the notion that the framers gave the courts a special role because they had a particular vision of the people who would staff the bench belies the historical record. In different periods in American history, Presidents have appointed—and the Senate has readily confirmed—judges and Justices with very different educational back-

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24 For one of the fullest accounts of these arguments, see Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1171–85 (2000) (arguing that in the American constitutional scheme of balanced powers, the judiciary has a comparative advantage in interpreting the law because of the unique background and training of federal judges).

25 *Cf.* RICHARD A. POSNER, REFLECTIONS ON JUDGING 3, 5, 8–9 (2013) (encapsulating author's standing critique of the methods utilized by contemporary judges in resolving cases and questioning the ability of these methods to answer many of the questions they pose); ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 5–6 (2012) (arguing that most of what the Supreme Court does in constitutional cases does not rely on any special expertise).

26 *Cf.* L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 672–75 (2003) (reviewing MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003)) (discussing the sense of collective purpose and superficial camaraderie that the contemporary Supreme Court Justices feel based on their collective professional identity).

grounds, life paths, and skill sets.[27] To the extent that particular eras have established norms as to the proper qualifications for the bench, those norms have been transitory and—even in their heyday—only partially actualized.[28]

Take for example, the Justices of the Supreme Court. One recent study reveals that the 112 Justices who have served on the Court have been drawn from a wide variety of public and private sector positions.[29] In possible tension with the notion that the courts are supposed to embody different virtues and experiences than the other branches, the Justices throughout history have been almost as likely to have had prior experience in the legislative branch as to have had prior judicial service.[30] They have graduated from well-regarded law schools, from less impressive ones, and from no law school at all (even in the decades after formal legal education became the default path to the bar).[31] Some have had effectively no practice experience while others have ranked among the leading lawyers in the nation for many years before their nomination.

In recent decades, we have adopted an almost comically narrow path to the Supreme Court, in which a future Justice needs to attend one of a handful of super-elite schools, rank near the top of his or her class, clerk for a fancy judge or Justice, affiliate him- or herself with one or the other of the major political parties, collect a reasonable but not excessive amount of experience in academia, government service, or if necessary private practice, and serve however briefly on a federal court of appeals.[32] These norms, however, are almost entirely

27 For biographical data on the Justices, see generally LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM (5th ed. 2012).

28 *See, e.g.*, Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833, 835–36 (2009) (describing President Eisenhower's goal of establishing the norm of prior federal judicial service and explaining how it was not fully realized during his Presidency or even during the following five decades).

29 *See* RICHARD SEAMON ET AL., THE SUPREME COURT SOURCEBOOK 21, 22–23 (2013) (discussing the personal and professional backgrounds of Supreme Court Justices throughout history).

30 *See id.* (noting that less than two-thirds of Supreme Court Justices had prior judicial experience while about half had prior legislative experience).

31 The last Justice to lack formal legal education, Stanley Reed, did not leave the bench until 1957. *Id.* at 23.

32 Slight deviations from this path are permissible—for example, Justice Sonia Sotomayor's lack of a clerkship, Justice Elena Kagan's lack of prior judicial service, and Justice Clarence Thomas's failure to distinguish himself academically—but only if the nominee both hits most of the benchmarks and brings to the table other characteristics that cannot be found elsewhere in the candidate pool. As the story of Harriet Miers demonstrates, candidates (or nominees) whose profiles deviate significantly from these norms have a hard time gaining traction in the process, even if they possess other strong indicators of professional success and legal acumen.

the product of the last forty or fifty years. As other scholars have pointed out,[33] President Dwight Eisenhower was the first President even to articulate a preference for judges with prior experience as a federal appeals court judge. His immediate predecessors, and even his first several successors, gave that qualification short shrift, developing alternative profiles or picking eclectically from different pools of candidates.[34] Many of the most important Justices of the twentieth century came to the Court from the political arena, including Senator Hugo Black and Governor Earl Warren. While Justices were more often than not intellectually and professionally distinguished, their credentials were not nearly as elite or as uniform as those of the current Justices; to pick one easy target, Chief Justice Warren Burger was a graduate of the night program at the St. Paul College of Law (now the Hamline Mitchell School of Law).[35]

To the extent that we now assume that Supreme Court nominees will be seasoned Court of Appeals judges and academic Olympians, those are new—and not necessarily stable—norms. Commentators and politicians have frequently critiqued the uniformity of experiences and qualifications possessed by the current Justices,[36] and President Bill Clinton made several attempts to identify and nominate a candidate with more substantial political experience.[37] Further, while Justice Kagan in many ways fits the profile of the other current Justices, it is notable that her appointment put a non-judge back on the bench, just five years after Justice Sandra Day O'Connor's retirement and replacement by Justice Samuel Alito seemingly cemented the

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33 *See* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 44 (2001) (describing President Eisenhower's preference for nominees "from the ranks of the federal courts of appeals and state supreme courts"); Epstein et al., *supra* note 28, at 835 (explaining how President Dwight D. Eisenhower made it clear that he "would use an appeals court appointment as a stepping stone to the Supreme Court").

34 *See* SEAMON ET AL., *supra* note 29, at 24, 26–27 (discussing the nomination processes and selections of Presidents Eisenhower, Kennedy, Johnson, and Nixon).

35 *See Warren E. Burger: 1969–1986*, THE SUPREME COURT HISTORICAL SOCIETY, http://www.supremecourthistory.org/timeline_burger.html (last visited Feb. 24, 2016) (explaining that Justice Burger attended night classes for four years at that school "while working in the accounting department of a life insurance company").

36 *See, e.g.*, Mark Tushnet, *Statement and Testimony, The Senate's Role in the Confirmation Process: Whose Burden?: Hearings Before the Senate Comm. on the Judiciary, Subcommittee on Administrative Oversight and the Courts*, 107th Cong. 1st Sess. 179 (Sept. 4, 2001) (making case for appointment of some Supreme Court Justices with more political experience), *reprinted in* 50 Drake L. Rev. 511, 561 (2002).

37 For one account of President Clinton's flirtations with potential nominees from the political world (most notably Mario Cuomo, George Mitchell, and Bruce Babbitt), see JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 60–73 (2007).

norm of prior federal appellate experience by creating the first Supreme Court completely staffed by former federal appellate judges.

To suggest that the Justices throughout history have shared a particular set of skills and experiences is to ignore too much data. There is simply too much distance between Harry Truman's poker-playing buddies and former Senate colleagues and today's hyper-credentialed careerists, even leaving aside the eclectic cast of characters selected by the vast majority of nineteenth-century Presidents. Even if the Justices had shared a more common pedigree or approach, there would be little reason to think that those commonalities reflect an inherent and intentional part of our constitutional design. To the contrary, American history reflects sharp debates about the proper methods for selecting judges and Justices and the characteristics that mark a successful jurist and constant jockeying to forward and entrench particular views on these matters.[38]

### 2. *Multi-Member Courts, Joint Opinions, and Transparent Reasoning*

Another claim made by those who laud our alleged constitutional structure is that we have checked judicial excess by entrusting important appellate matters to multi-member courts whose members must agree on their reasoning and then transparently lay it out for the public over their own signatures.[39] While it may well be that norms of collegiality and transparency have salutary effects on the tenor (or even the substance) of our constitutional discourse, constitutional theorists tend both to over-estimate the centrality of these norms to our current constitutional practice and to treat them as inherent aspects of our constitutional design.

Once again, history belies their claims. To the contrary, opinion drafting and circulating practices and relationships between the Justices have their own complicated history. To begin with the most obvious point, the claim that the Framers intended to limit the potential

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38 For a succinct discussion of the sharp divisions of opinion on this issue during the Jacksonian era, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 79–90 (3d ed. 2005).

39 *See, e.g.*, Theodore W. Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551, 1551 (2006) ("Judges are constrained, to a greater or lesser extent, by formal 'law,' but their discretion is additionally limited by the collective structures of the federal judiciary and also by the normative expectation that judges give express reasons for their decisions."); *see also* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 648, 654–56 (1995) (arguing that when judges give reasons for their decisions, this commits judges to stand by their holdings). *Cf.* Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 100–02 (1986) (discussing implications of multi-member courts for our central debates about adjudication).

for judicial abuse by requiring Justices to agree on the language and reasoning of their rulings is seriously undercut by the fact that, until several years into the Chief Justiceship of John Marshall, the Justices did not sign a single opinion but instead spoke seriatim, in accordance with longstanding Anglo-American practice.[40] Moreover, most scholars suggest that the shift from seriatim opinions to opinions for the Court was designed to buttress the power of the judiciary, by allowing the Justices to speak with one clear voice, rather than to constrain that power.[41]

The decades since have seen a continuing evolution in the rules and norms as to when a Justice might write and who he or she might speak for. Internal Supreme Court rules and practices now create an intricate set of protocols for determining who will have the first crack at drafting the majority opinion and the primary dissent, if any, in every case; when and how those drafts will circulate to the other Justices; when and how those Justices will respond to the drafts; and how the Court will then proceed to resolve the case. Those rules and protocols are themselves the product of trial, error, and accreted tradition. Moreover, they are supplemented by a series of presumptions, considerations, and habits of thought that shape the Justices' decisions on how to proceed when faced with decisions about whether to request or require changes in the opinions of others, whether to write separately to clarify their views, or whether to register dissent in cases where they are heavily out-voted.[42]

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40 *See* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292–303 (describing the British and early American practice of delivering judgments seriatim). Similarly, the idea that the Justices are required to sign their names to their opinions is at most an imperfectly realized norm, with federal appellate courts deciding many cases by unsigned (and often non-precedential) opinions; the Supreme Court issuing unsigned per curiams in cases deemed too simple for oral argument approximately a half dozen times per term; and the Court resorting to per curiams for opaque reasons in some particularly thorny cases, such as *Bush v. Gore*, 531 U.S. 98 (2000).

41 *See, e.g.*, Henderson, *supra* note 40, at 304–07 (describing the debate between John Marshall and Thomas Jefferson over the switch away from seriatim opinions as a debate about the scope of judicial power, with Jefferson arguing that seriatim opinions are a desirable mechanism for limiting judicial overreaching).

42 On the historical evolution of opinion-writing protocols, see generally John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137 (1999) (detailing the evolution of opinion-writing protocols, from unsettled practices in 1790–1801 through the Marshall period and to current ideas of individual judicial expression). On the decision whether to dissent, see generally Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33 (discussing the advantages, disadvantages, and effects of writing dissenting opinions).

The relationship between the Justices and the degree to which they debate, discuss, and edit the content of opinions has similarly varied over time. Memoirs and historical accounts suggest that the Justices had relatively limited encounters with each other until the Court's building opened in 1935 and perhaps for several years afterwards, as Justices worked at home, alone or in consultation with their law clerk or secretary.[43] Once the Court moved into its own home, the amount of day-to-day interaction increased somewhat, but the Justices continued to do the bulk of their work alone in their offices. Some pairs of Justices may have developed cordial personal relationships that involved frequent interaction, but many other pairs of Justices interacted almost exclusively at the Court's weekly conferences.

Those conferences themselves have evolved over time, from long (and often unproductive) debates about how to resolve cases during the 1950s to relatively short and orderly administrative proceedings in which each Justice speaks once, summarizing his or her views on each matter in two or three sentences.[44] Based on a quick substantive and strategic assessment of those position-statements, the Chief Justice or the senior Justice in the majority assigns the opinion to one Justice. With that assignment comes the ability to shape the Court's holding and rhetoric on dozens of axes left undiscussed at the Conference. In deciding how to shape the initial draft, the Justice works in concert not with an ideologically diverse set of peers but instead with his or her clerks, a team of junior lawyers hierarchically subordinate to the Justice and often chosen, at least in part, for their conformity with his or her ideological predilections.

It is hard to quantify the degree of deference each Justice gives to the author of the majority opinion in shaping the holding. Certainly, even a perfunctory review of the archival record reveals that the Justices routinely sign on to opinions without agreeing with the author on all particulars. To some extent, such an arrangement is inevitable; the Court would grind to a standstill if nine (or even five) diverse and opinionated officials were required to agree on every phrase, prece-

43 *See, e.g.*, THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS at 79 (Del Dickson ed., 2001) ("[I]n 1935 . . . [the Court] moved across the street into the new Supreme Court building. . . . Only George Sutherland and Owen Roberts took chambers in the new building. The rest . . . continued to work at home.").

44 On the evolution of the conference, see WILLIAM H. REHNQUIST, THE SUPREME COURT 254–58 (2d ed. 2001) (comparing the Justices' different styles when presiding over conferences, noting in particular the "taut atmosphere of the Hughes conference," the discussion-based atmosphere of the Stone conference, and the conferences of Warren Burger, which "were somewhere in between").

dent, and argument. As I will describe in Part II below,[45] I believe a strong case can be made that the degree of deference to opinion authors at the Court has grown substantially, to the point that many opinions might better be characterized as the product of a mini-law firm acting with the acquiescence of other similar firms than as the result of detailed deliberation among a multi-member court. One need not accept that characterization, however, to grasp the thrust of this Part, namely, that the relationship between the Justices and the norms of opinion writing are not inherent parts of some underlying constitutional structure but are instead dynamic, historically contingent, and ever-evolving.

### *3. Professional Norms and the Limits of Legitimate Constitutional Argument*

Constitutional theorists and lawyers often mobilize the argument that our constitutional structure constrains judges by holding them to a set of professional norms that limit them to particular types of constitutional arguments and force them to craft their opinions in particular ways.[46] This argument comes in a variety of forms, some softer and some harder. In its harder form, the argument insists that the realm of reachable constitutional conclusions is dramatically reduced by rules and norms that require judges to produce a plausible case for their position in a particular idiom while relying on a relatively narrow set of considerations; in the language common to many appellate judges, sometimes an opinion "just won't write."[47] In its softer forms, this argument from constitutional structure suggests that, while judges might not literally be constrained from reaching any particular constitutional conclusion by the existence of these interpretive norms, the norms serve either to consciously dissuade judges from adopting particular positions in the face of a matrix of traditional legal sources pointing otherwise or to unconsciously cause

45 *See infra* notes 80–91 and accompanying text.

46 *See, e.g.*, Fiss, *supra* note 1, at 744–45 (discussing the degree to which, in all fields of interpretation, specifically including constitutional interpretation, "the freedom of the interpreter is not absolute [but instead] . . . is disciplined by a set of rules that specify the relevance and weight to be assigned to the material").

47 *See, e.g.*, Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 49 (2005) ("Every judge has had the experience of finding that an initial decision just 'won't write,' and thus every judge knows that it is manifestly untrue that reasoning and writing can be separated.")

them to dismiss such positions as implausible during the early stages of their deliberations.[48]

When people talk about the limited set of constitutional arguments that judges can properly mobilize without subjecting themselves to scorn and ridicule, they usually have in mind a fairly stable set of claims, relating primarily to text, history, precedent, and, at least at the margins, consequences. In two influential works published in 1982 and 1991, Professor Philip Bobbitt provided the most famous taxonomy of legitimate constitutional arguments, arguing that there are six legitimate "modalities" of constitutional argument: the historical, textual, structural, doctrinal, ethical, and pragmatic.[49] As he famously explained, "There is no constitutional legal argument outside these modalities. Outside these forms, a proposition about the U.S. Constitution can be a fact, or be elegant, or be amusing or even poetic," but it is not a relevant constitutional argument.[50]

Professor Bobbitt's analysis has been widely influential and his taxonomy has become a ubiquitous fixture in the contemporary constitutional law classroom. While these modalities have proven an invaluable teaching tool, their prevalence and the natural inclination of students to simplify what they learn have led to a belief that the line between legitimate and illegitimate constitutional argument demarcated by Professor Bobbitt represents an inherent part of our constitutional structure or design. Such a conclusion is deeply problematic for two reasons, one of which is central to Bobbitt's own analysis but has largely been forgotten and the other of which poses something of a challenge to his approach.

First, as Professor Bobbitt himself stresses, the particular claims that resonate in our constitutional culture are the product of historical evolution, the result of rhetorical trial-and-error among the particular listening communities that have dominated American constitutional discourse.[51] They succeed because they resonate and gain their legitimacy from their potency. One can imagine other constitu-

48 *See, e.g.*, Schauer, *supra* note 39, at 651–52 (talking about the complicated and limited but still real ways in which requirements that judges give particular kinds of reasons for their decisions "constrain" their future behavior).

49 PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (listing these "six modalities of constitutional argument"); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 5–8 (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE].

50 BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 49, at 22.

51 *See* BOBBITT, CONSTITUTIONAL FATE, *supra* note 49, at 6 (explaining that arguments that are not part of our "legal grammar" may hold sway in other societies, and concluding that "[t]his suggests that arguments are conventions [that] could be different, but that then we would be different").

tional systems in which other modes of argument are treated as legitimate or dispositive (and indeed such systems have and do exist) and one can imagine paths that this nation might have taken that would have created a different constitutional vocabulary. That these modalities hold sway currently is a description of the world we have created; it is neither a normative statement that they are the "best" or "right" kinds of argument nor an assertion that they are part of our inherent constitutional structure.

Second, the boundaries between legitimate and illegitimate constitutional argument are not nearly as fixed as Professor Bobbitt suggests. What he offers is at best a snapshot of our constitutional culture at a particular moment in time; even then it is arguably an oversimplification. Our constitutional history is a tale of contestation among competing interpretive visions, many of which have sharply challenged the legitimacy of or argued for the primacy of particular interpretive modalities.

Two recent examples—one macro and one micro—underscore both the intentionality and the ongoing nature of this interpretive contestation. Since the late 1970s or early 1980s, advocates of the claim that originalist arguments (what Bobbitt would call "the historical modality") ought to trump all other modalities of constitutional argument have been on the offensive.[52] As scholars such as Jamal Greene have demonstrated,[53] the campaign for a hierarchical method of constitutional interpretation that prioritizes originalist argument is not something that simply happened, but is instead the result of a conscious political project designed to reshape our judicial culture in

52 *See* James E. Ryan, *Does it Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1623–24 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005)) ("For the last fifteen years or so, Justice Antonin Scalia and his sympathizers within and outside the academy have dominated discussion and debate over how best to interpret the Constitution.").

53 *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 678 (2009) ("The originalist project begun in the 1970s aimed in large measure to restore power to prosecutors and state legislatures."); *see also* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 2–3 (2008) ("While their particular grievances differed, the conservative coalition was drawn together by . . . a unified call for 'strict constructionism' and 'judicial restraint.'"); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 546–48 (2006) (explaining that originalism is a "powerful vehicle for conservative mobilization," which was active with critics of the Warren Court and bolstered by activists during the Reagan Presidency). *Cf.* Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009) (describing the parallel process of selling the American public on norms about the proper judicial role).

particular ways. While this project has not completely succeeded, it has certainly influenced the frequency with which the Justices resort to different kinds of arguments, the weight they give them, and the way in which their opinions are received by various communities outside the Court.

On a smaller scale, occasional shrill battles have broken out over the last two decades over whether and when it is appropriate for American courts to cite to the opinions of foreign courts.[54] While they get dressed up in all sorts of rhetoric, these debates are ultimately nothing more than particularly explicit skirmishes over whether specific types of constitutional arguments—arguments from foreign precedents—will enter into /remain in our constitutional vocabulary. As foreign courts have gained prominence in areas in which American courts are used to being world leaders, such as individual rights, and as globalization has shrunken the world and reduced the importance of international borders for many economic and cultural pursuits, Americans have engaged with the question whether our constitutional culture will treat the argument that "the plaintiff should win the case because the European Court of Human Rights decided a similar case that way" as a constitutionally relevant factor or as a "poetic" non sequitor.[55] Nothing in our Constitution or in our history or in the writings of Phil Bobbitt requires a particular answer to that question.

### 4. *The Structural Political Independence of Our Judiciary*

Those who speak in terms of constitutional structure often make much of the degree of independence our courts have from the political process—stressing the wisdom of a system in which judges have life tenure, are appointed through a process designed to weed out overt partisanship, and are protected by strong norms against jurisdiction-stripping, court-packing, and hair-trigger impeachment.[56]

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54 *See, e.g.*, Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 838–83 (2005) (reviewing the history of such citations at the peak of one such battle).

55 *Cf.* BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 49, at 22 (noting that arguments that do not fit one of the six modalities may, among other virtues, be "poetic," but that they are not constitutionally relevant).

56 *See, e.g.*, William H. Rehnquist, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 274 (1996) (describing "an independent judiciary" as "one of the crown jewels of our system of government today"). For the most thorough treatment of the early evolution of these ideas and their corresponding institutional arrangements, see SCOTT DOUGLAS GERBER, A

And there is, of course, some degree of truth to their description. Indeed, it is uncontestable that the framers intended the judiciary to have some degree of independence from the other branches and wrote particular protections into the constitutional document itself—most notably life tenure and a prohibition on the diminution of judicial salaries[57]—to enhance the likelihood that the courts might maintain some such independence.[58] But, as recent scholarship has reminded us,[59] the degree of that independence and the nature of the influences the courts need protection from were not resolved by the constitutional text but have instead been matters of fierce constitutional contestation.

As Dean Larry Kramer among others has explained,[60] a framing generation versed in classical republicanism and emerging from a conflict with an imperious crown was deeply concerned about the potential for corruption inherent in a system where the judges tasked with evaluating and interpreting legislative and executive action are dependent on the other branches for reappointment or remuneration. As deep as this concern ran, it was a bounded concern. While a zealous protection of the personal and professional independence of the judiciary is compatible with a broader independence from partisan politics, it in no way requires such an arrangement.

Perhaps the greatest virtue of Dean Kramer's controversial work in this area is that it reminds us that a variety of different norms regarding the political independence of the judiciary are compatible with our Constitution's text and drafting history. The particular set of norms that currently prevail, some more entrenched than others, include the aforementioned prohibitions on court-packing, jurisdiction-stripping, and partisan impeachment, as well as more general

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DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787 (2011).

57 U.S. CONST. art. III, § 1.

58 On this point, the canonical cite is to THE FEDERALIST NO. 78 (Alexander Hamilton); *see generally* GERBER, *supra* note 56.

59 The most provocative work along these lines is that of Larry Kramer (at times with John Ferejohn). *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7–8 (2004); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1038 (2002); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 6 (2001) [hereinafter Kramer, *We the Court*].

60 *See supra* note 59; *see generally* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999) (breaking down our understanding of "judicial independence" into component parts, historicizing each, and attempting to determine whether there is a core understanding of judicial independence that is inherent in or generally accepted within our constitutional culture).

limitations on partisan political activity by current judges and on attempts by the executive to influence judicial decisionmaking on pending or anticipated matters. While the adoption of those norms—and their imperfect actualization—have created a particular constitutional culture that tells a particular story about the kind of government we have and want to have, we might have chosen a different path and told a different story. For example, as Dean Kramer suggests,[61] we might have pursued, consistent with our constitutional text, a series of norms that acknowledge the potent political power embedded in our system of judicial review and conceptualized Congress's many powers (to set the Supreme Court's terms,[62] to structure the lower federal courts,[63] to adjust the courts' jurisdiction,[64] to decide on the size of the Court's membership,[65] and even to impeach judges and Justices[66]) as explicit tools designed to counterbalance that power.

And, in fact, the process by which we have arrived at a relatively broad understanding of the Court's structural independence from politics has been far from smooth. During the first years of the Republic, political leaders—many of them leading figures deeply involved in the drafting and ratification of the Constitution—impeached judges for partisan reasons,[67] delayed a term of the Supreme Court for over a year to postpone the Court's consideration of two politically charged cases,[68] and dismantled our first appellate court system (without providing compensation to the displaced judges) rather than let appointees of the prior administration serve.[69] Throughout the nineteenth century, Congress routinely adjusted the size of the Court, often with an eye to maximizing the appointments of friendly justices or minimizing the appointments of unfriendly

61 *See generally* Kramer, *We the Court*, *supra* note 59.

62 U.S. CONST. art. III, § 1. *See also infra* note 68 and accompanying text (discussing most famous use of that power).

63 U.S CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

64 U.S. CONST. art. III, § 2.

65 U.S. CONST. art. III, § 1.

66 U.S. CONST. art. I, §3.

67 *See* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 69–108 (1971) (detailing the successful impeachment of Judge John Pickering and the nearly successful impeachment of Justice Samuel Chase).

68 *Id.* at 59–60. The delayed cases became, of course, *Marbury v. Madison*, 5 U.S. 137 (1803) and *Stuart v. Laird*, 5 U.S. 299 (1803).

69 *See* ELLIS, *supra* note 67, at 36–52; *see also Stuart*, 5 U.S. at 301–02 (upholding repeal of provisions of Judiciary Act of 1800 related to circuit courts, at least with regard to challenges brought by litigants).

ones.[70] Even to this day, legislators routinely submit bills seeking to strip the federal courts of jurisdiction over hot-button political issues and scholars continue to debate the constitutionality of such bills.[71] If impeachment for employing dubious constitutional methodology and expansion of the Court to add immediate representation for newly formed super-majorities are currently off the table, they are so only as the contingent result of a series of battles fought and decisions made over the last 200-plus years.[72] And there is no guarantee that they will always remain so.

Attitudes as to the degree to which nominees and jurists ought to be independent from—or in the alternative to represent—particular ideological and political forces are also deeply, historically contingent and hotly- contested. In different eras of our history, different Presidents have taken the prior political service and implicit ideological convictions of potential judges into account to differing degrees, as have Senators.[73] Similarly, in different eras, important political and interest groups have had differing expectations about the degree to which judicial appointees might be expected to reflect their interests and worldviews.[74] Though my major point here is the malleability and historical contingency of these practices, it is worth noting that the current era is, measured against historical standards, marked by a high degree of partisanship by all of these actors during the nomination and confirmation stage, particularly when it comes to lower court judges.[75]

## II. NEWER, LESS GLAMOROUS CONSTITUTIONAL PRACTICES

Even a cursory study of contemporary American constitutional decisionmaking shows that the reified constitutional "structure" discussed above shares the field with newer, less glamorous, and less frequently commented upon institutional arrangements and practices

70 *See* F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 647, 664–71 (2009) (discussing this history).

71 For a classic account of the ubiquity of such attempts, now thirty years old but still true in all essentials, see Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896–97 (1984).

72 For one succinct summary of the story that emphasizes its contingency, see Barry Friedman, *"Things Forgotten" in the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 748–52 (1998).

73 *See generally* SEAMON ET AL., *supra* note 29, at 24–28 (discussing the "evolving process" of selecting justices for the Supreme Court).

74 *See id.*

75 *See infra* notes 133–141 and accompanying text (developing this point and illustrating some of its consequences).

that are, nevertheless, often quite important in shaping the tenor of our constitutional discourse and the substance of our constitutional law. This Part will develop that claim by exploring several clusters of contemporary constitutional practice that receive limited attention from constitutional theorists, including (1) the role of law clerks, the limited substantive interaction between the Justices, and the current opinion-drafting model; (2) the rise of amicus briefs and the increasingly complicated use of them by litigants, interest groups, and others; (3) the fact that the public usually encounters Supreme Court opinions mediated through other sources; and (4) the development of an increasingly partisan nomination and confirmation process for lower court judges and the proliferation of ideologically organized spaces to develop ideas and campaign for reforms.[76]

Before I begin, however, a few caveats are in order. First, I make no claim that these practices and institutional arrangements are, either individually or as a set, as important as the ones described in the previous Part; nor, however, do I claim otherwise. I believe that it is demonstrable that these aspects of our constitutional culture have serious consequences for the content of our constitutional law, but I have neither a mechanism for nor a desire to measure the relative importance of each piece of the cultural puzzle.

Second, I make no claim that the practices and arrangements described in this Part are firmly entrenched. As I argued above, the vast majority of our constitutional practices and arrangements are nominal, historically contingent, and ever-evolving. Presumably, that is true in spades for practices that are newer, less noticed, or less integrated into our prevailing constitutional narratives.

Finally, I do not mean to suggest that these practices have escaped attention. To the contrary, journalists, bloggers, and popular commentators have written a great deal about each of these subjects, to the point perhaps of exaggerating or over-sensationalizing some of them.[77] Political scientists have also paid substantial attention to

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76 This list—like the list of practices discussed in Part I above—is illustrative, rather than exhaustive. This Part might, just as easily, have discussed the press of the Supreme Court's calendar, or the re-birth of a specialized, elite Supreme Court bar, or a half dozen other aspects of contemporary constitutional decisionmaking.

77 *See, e.g.*, EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT (1998) (offering another famed insider account of the Court, this one by a former clerk, that emphasizes both the power of clerks and the partisan tensions allegedly dividing both the Justices and their clerks); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979) (offering an account of life inside the Supreme Court that accords substantial, perhaps exaggerated, power to

many of them, writing about them independently and working them into some of their broader models of judicial behavior.[78] Finally, traditional legal scholars have written fine work about some of them, particularly the rise of amicus briefs, though such work has usually been descriptive or narrowly prescriptive without engaging the broader constitutional theory literature.[79]

### *A. The Role of Law Clerks and the Current Opinion-Drafting Model*

Supreme Court Justices now work surrounded by at least four law clerks, most of whom are recent or very recent graduates of elite law schools selected from among many equally compelling candidates through a process that emphasizes references and résumé triggers.[80] While every Justice maintains a different relationship with his or her clerks, it is safe to say that all the Justices discuss with their clerks the cert-worthiness of potential cases, the merits of granted cases, and the substance of both their own opinions and those of the other Justices, often at great frequency and in great detail. In every chambers, law clerks participate in the drafting of opinions; by most reports, they take the lead role in producing the first draft in the majority of chambers.[81] In most chambers, they offer the Justices direct advice

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clerks); Adam Liptak, *The Polarized Court*, N.Y. TIMES, May 11, 2014, at SR1, SR6 (discussing increased politicization and ideological polarization in the federal courts).

78 *See, e.g.*, PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING (2008) (analyzing and explaining the influence of interest group amicus curiae activity on Supreme Court decisionmaking); TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006).

79 *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749–50 (2000) (documenting the marked increase in amicus curiae participation in Supreme Court cases and finding that amicus briefs influence the outcome of cases to the extent they import valuable new information); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 33–35, 72 (2004) (detailing the interview responses of former Supreme Court clerks as to the usefulness and influence of amicus briefs); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 675, 710–11 (2008) (analyzing the role of amicus briefs in modern federal litigation and concluding that the lack of procedural mechanisms limiting amicus brief filings harm judicial efficiency).

80 For a list of the clerks for October Term 2014 and some of the early hires for October Term 2015, annotated with some of the relevant résumé triggers, see David Lat, *Supreme Court Clerk Hiring Watch: Looking Ahead to October Term 2015*, ABOVE THE LAW (June 27, 2014, 10:08 AM), http://abovethelaw.com/2014/06/supreme-court-clerk-hiring-watch-looking-ahead-to-october-term-2015/.

81 *See* ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 200–36 (2006) (describing the differing opinion-writing processes in Supreme Court Justices' chambers and arguing that in re-

on how to rule and what to say and, in some instances, they are allowed to, or even instructed to, debate the Justice when they disagree. They also serve as an intellectual and cultural bridge to the Justices, bringing new ideas or concerns into the chambers from the academy, from the other courts on which they previously clerked, and from the broader culture.[82]

Though Justice Horace Gray hired the first legally trained assistant at the Court in 1882,[83] their proliferation has been relatively slow. Congress first agreed to pay for clerks (one per Justice) in 1922 and the number of clerks per Justice was only two for most of the twentieth century.[84] It was only during the last quarter of that century that Congress, in rapid succession, authorized a third, then a fourth clerk for each Justice and a fifth for the Chief Justice.[85] During the same time that the Justices found themselves surrounded by a growing number of young lawyers of their own choosing, they also—perhaps coincidentally—found themselves in shorter conferences (and, by some accounts, in fewer informal conversations) with their peers.[86]

The overall effect of these changes is to re-center the Justices' intellectual life around their chambers. On a day-to-day basis, the Justices engage in most of their intellectual exchanges and do most of their productive work as the vastly senior member of a small team of lawyers rather than as part of a peer group. The other lawyers in the group are dependent upon the Justice for their entrée to power and for the career enhancement it will provide and, in most cases, lack significant legal and life experience, creating profound power dynamics in their intellectual exchanges. Moreover, clerks are more often than not selected through a process that emphasizes—or at least values—intellectual and political congruity with the Justice whom they serve, raising the possibility of an ideological echo chamber in which some ideas are not sufficiently vetted.[87]

When a Justice is assigned an opinion or choses to write separately in a case, the dynamics of the chambers influence the shape and sub-

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cent years, Justices have ceded greater responsibility to clerks in the actual drafting of opinions).

82 For the most thorough academic treatments of the role of law clerks, see generally PEPPERS, *supra* note 78; WARD & WEIDEN, *supra* note 81.

83 *See* PEPPERS, *supra* note 78, at 3.

84 *See* Martha Swann, *Clerks of the Justices*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 159, 159–60 (Kermit L. Hall et al. eds., 1992).

85 *See id.* For a fuller narration of these events, see generally PEPPERS, *supra* note 78.

86 *See supra* notes 43–45 and accompanying text.

87 *See* Adam Liptak, *A Sign of Court's Polarization: Choice of Clerks*, N.Y. TIMES, Sept. 7, 2010, at A1, A16.

stance of the opinion. Whether a Justice writes the first draft him or herself or entrusts that task to a clerk, the process of drafting an opinion almost always involves the iterative exchange of drafts and the ritual give and take between author and editor that sometimes leads to careful and polished prose but at other times leads to work that looks as if it has been drafted by a committee.[88] As Justices and their teams of junior lawyers work collaboratively to finish work under tight deadlines, to persuade other Justices, and to answer criticisms levied by other opinions, the opinion-producing process often comes to resemble a competition between small law firms seeking to impress and outdo other similar firms, rather than a process of collaborative decisionmaking between nine ideologically diverse peers.

These dynamics are reinforced by factors about the current opinion-drafting culture of the Court that have little or nothing to do with the prevalence of law clerks. As the Justices' conferences have shifted from the elaborate debates and posturing speeches of yore to a forum for the efficient exchange of short position statements, the amount left open after conference has increased.[89] To a great extent this is by design, as the Justices trust each other to resolve open questions in an evenhanded way and believe that the opinion circulation process serves as a check on over-reaching. By spending very little time in consultation and farming the Court's work out to small law firms to take the first cut at the complicated doctrinal and drafting issues raised by each case, the Court hopes to operate more efficiently and expeditiously.

The dynamics discussed in this subpart play out differently in different cases. Sometimes, though assuredly not as often as they think, clerks make decisions about the language or the methodology of an opinion or the scope of its claims that reflect nothing other than their own preferences or their blind guess at the Conference's preferences. At other times, Justices disagree with their clerks about the outcome of a case or communicate ineffectively with them, producing an opinion that is schizophrenic or incoherent.[90] Sometimes, Jus-

88 *See, e.g.*, POSNER, *supra* note 25, at 238–55 (critiquing the practice of delegating the task of writing first drafts to law clerks on both substantive and stylistic grounds).

89 *See supra* notes 43–45 and accompanying text.

90 To take one high profile example, ever since the Supreme Court handed down its decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986) and holding that the Due Process Clause of the Fourteenth Amendment prohibits states from criminalizing private consensual sexual conduct between same-sex adults, persistent rumors have circulated that the lack of analytic clarity in the opinion results, in part, from the fact that Justice Kennedy was "writing against" the clerk with whom he was

tices, egged on by ideologically sympathetic clerks or tempted by the opportunity afforded by the Court's opinion-assigning model, push their claims further than they might otherwise or strategically use their assignments to stir "bread crumbs" or drop "time bombs" into their opinions in order to set the stage for future cases.[91] At other times, the lack of an opportunity to develop a pre-drafting consensus on the details of a case's outcome results in a vague, under-theorized, or ambiguous opinion.

What is important for the purposes of this Article is not the particular ways in which contemporary arrangements and practices relating to clerks, conferences, and opinion-writing shape the content of the Court's opinions, but rather that they do. Or more specifically, that they do and that constitutional theory largely fails to recognize this fact. When constitutional theory talks about constitutional meaning, it often focuses on a decontextualized process of constitutional interpretation and construction in which abstracted judges think abstractly about what the Constitution means and how to implement its commands. When constitutional theorists do bring constitutional practice into the conversation, their frame remains narrow, looking at big picture features of our constitutional order that might be treated as part of the underlying constitutional design. Rarely, however, do they stoop down to see just how much of the content of constitutional opinions is shaped by the messy day-to-day reality of power dynamics, time pressure, and incentives created by the Court's current staffing and opinion-assigning protocols.

### *B. The Role of Amicus Briefs*

In recent decades, the number of amicus briefs filed in the Supreme Court has exploded as litigants and interest groups have become increasingly sophisticated about the possible uses and benefits of such briefs.[92] It is now common practice for litigants and their counsel to strategize about the kinds of amicus briefs that might be helpful to their side and to solicit or coordinate with other lawyers

working, who disagreed with the outcome. *Cf.* TOOBIN, *supra* note 37, at 189 (noting that three of Justice Kennedy's four clerks that term were "conservatives").

91 *See, e.g.*, Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 780–81 (2012) (describing various methods by which Supreme Court Justices and clerks lay the groundwork for future changes in precedent without overtly changing the law in the instant case).

92 *See* Simard, *supra* note 79, at 677–79 (noting that the volume of amicus briefs at the Supreme Court increased by 800% between 1965 and 1999).

and sympathetic interest groups to provide them.[93] In addition, a growing number of interest groups, organizations, and corporations independently monitor the Court's docket, seeking to identify cases in which they might want to offer their perspective or note their preferences.[94]

As other scholars have cataloged, amici are motivated by a diverse set of goals.[95] Some have particular information they want to bring before the Court, in order to aid them in their decision or lead them to a particular result.[96] Similarly, some have legal arguments that have been or are likely to be ignored by the parties to which they would like to draw the Court's attention.[97] Others would like to steer the Court away from or towards particular doctrinal formulations or language out of concern for the implications those words might have on later cases.[98]

Some have less substantive goals. Perhaps the single most common reason for filing an amicus brief is to let the Court know how or how strongly particular constituencies feel about a pending case, or, as it is more colloquially put, to "weigh in" on the case.[99] Groups and individuals often see the filing of amicus briefs as an opportunity to demonstrate their influence or their engagement to their members, their peers, or the broader public. Amicus campaigns can serve as ad hoc organizing drives, as fundraising drives for public interest groups and trade organizations, and as an opportunity to cement alliances and relationships between organizations or academics.[100]

Empirical scholarship and anecdotal observation of the Court's work both suggest that amicus briefs, in the aggregate, have a small but discernable impact on the outcome of the Court's cases.[101] Be-

93 *See* Paul M. Smith, *The Sometimes Troubled Relationship Between Court and Their "Friends,"* 24 LITIG. 24, 24–25 (1998) (discussing the growing prevalence of amicus briefs and the Supreme Court's efforts to guard against abuse).

94 *See, e.g.*, SEAMON ET AL., *supra* note 29, at 380 n.3 (discussing recent efforts of the Chamber of Commerce and other "conservative" groups to increase their amicus participation in response to a perception that "liberal" groups have been more active in doing so).

95 For a good summary of the most common reasons why amici participate in litigation, see Simard, *supra* note 79, at 680–84; *see also* REAGAN WM. SIMPSON & MARY R. VASALY, THE AMICUS BRIEF: HOW TO BE A GOOD FRIEND OF THE COURT 24–25 (2d ed. 2004) (offering a similar list of reasons).

96 *See* Simard, *supra* note 79, at 680–84.

97 *See id.*

98 *See infra* notes 107–108 and accompanying text (discussing one such case).

99 *See* SIMPSON & VASALY, *supra* note 95, at 21–22.

100 *See* Robert S. Chang, *The Fred T. Korematsu Center for Law and Equality and Its Vision for Social Change*, 7 STAN. J. C.R. & C.L. 197, 200–01 (2011) (explaining the organizing potential of amicus campaigns).

101 *See, e.g.*, Kearney & Merrill, *supra* note 79, at 749–50.

yond that, however, the proliferation of amicus briefs changes the dynamic of constitutional decisionmaking in crucial but underappreciated ways. To begin with, the rise of amicus briefs and the increasingly sophisticated use of them by parties and interest groups fundamentally change the nature of the information before the Justices and their clerks. Historically, judges have operated in something of a bubble about the potential consequences and likely public reaction to their decisions, a fact that has been considered at various times both a virtue and a vice. Increasingly, however, modern Justices have before them an impressive legislative record: detailing crucial scientific, social scientific, historical, and economic background; offering assessments of the practical consequences of potential rulings; announcing the official position of crucial constituencies on the pending matter; and providing a window into how the public at large might react to different potential rulings.[102]

At times, we can see clear evidence of the influence of this information. For example, in the important University of Michigan affirmative action cases decided in 2003,[103] the Court expressly discussed and seemed heavily influenced by a series of amicus briefs by military leaders, powerful corporate interests, and other members of the elite emphasizing the practical importance of affirmative action for the smooth functioning of contemporary American institutions and the productivity of the American economy.[104] Similarly, in *Lawrence v. Texas*,[105] the Court borrowed heavily from an amicus brief filed by a group of historians, adopting a narrative of the history of the regulation of same-sex sexual activity that was in sharp contrast to the account offered by the Court in *Bowers v. Hardwick* and using the alleged faultiness of *Bowers*' account as a reason to overrule that decision.[106] To take a slightly subtler example, in *Troxel v. Granville*,[107] a

102 Recent scholarship has raised troubling questions about the accuracy of much of the information contained in amicus briefs. *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1758, 1761 (2014). These developments only further underscore the need for honest and contextual exploration of the institutions and practices of constitutional decisionmaking to ensure that constitutional theory is not built on a house of sand.

103 Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

104 *See, e.g.*, Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amicus Curiae in Support of Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02-241); Brief for 65 Leading American Businesses as Amici Curiae in Support of Respondents, at 1–4, *Grutter*, 539 U.S. 306 (No. 02-241).

105 Lawrence v. Texas, 539 U.S. 558, 567–68, 570, 574–75 (2003).

106 *See* Brief of Professors of History George Chauncey et al. as Amicus Curiae in Support of Petitioners, at 2–4, 6–7, *Lawrence*, 539 U.S. 558 (No. 02-102).

107 530 U.S. 57 (2000).

case involving the constitutionality of a grandparents' visitation statute, the Court issued an uncommonly unsatisfying split decision with little predictive value, likely in part because the Justices were paralyzed by a set of concerned amicus briefs by advocacy groups (notably including gay and lesbian rights organizations) warning about the potential unintended consequences of a broad holding in the case.[108]

These examples are important for what they say about the process of contemporary constitutional decisionmaking. Justices and clerks are pressed for time and genuinely concerned about getting the underlying facts right and designing workable and not wildly unpopular solutions to the problems posed by their cases. They find prepackaged narratives and arguments sitting on their desks, clearly labeled to make their social and political stakes clear. Those briefs are bound to influence them and to make their way into the Court's opinions either directly (through a cut and paste or paraphrase) or indirectly (through their influence on the thought processes of these consumers). Even when clerks and Justices have determined the result in their cases and reached resolution of the crucial doctrinal issues without resort to amicus briefs, they have before them a wish list of policy positions and specific concerns offered by various groups, some of whom they have natural affinity towards. It is tempting—and far from nefarious—to take into account those concerns by clarifying a doctrinal formulation, reserving an issue, or inserting or deleting an empirical point.

The abstract picture that constitutional theory draws of constitutional judging rarely—if ever—accounts for contemporary institutional practices and arrangements related to amicus briefing. The failure to do so is a notable omission, as these practices and arrangements shade the very nature of the judicial endeavor, eroding the already over-stated line between judicial and legislative competencies and virtues. Judges—or at least Supreme Court Justices—now have before them a much fuller and more legislative-looking[109] record than they have had in previous generations. Their decisionmaking process provides them with opportunities and incentives to utilize this record. And their finished work product has come more to resemble legisla-

108 *See id.* at 59, 63, 73 (striking down a statute on narrow grounds in a plurality opinion accompanied by two separate opinions concurring in the judgment on different grounds and three separate dissenting opinions); Brief of Lamda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders as Amicus Curiae in Support of Respondent at 3–5, *Troxel*, 530 U.S. 57 (No. 99-138) (advocating extreme caution).

109 Whether a "record" compiled largely from amicus briefs is even as accurate as a legislative record is an open question, particularly in light of the evidence uncovered by Allison Orr Larsen. *See* Larsen, *supra* note 102, at 1759–61.

tion, with different passages meeting the wishes of different constituencies and the opinions giving rise to identifiable winners and losers beyond the litigants in the case. Normative discussions of the scope of the judicial power or the nature of the judicial role that fail to take into account these transformations in our underlying constitutional practice are, of necessity, incomplete.

### *C. The Mediation of Supreme Court Opinions*

Up until this point, this Part has focused on practices, institutional arrangements, and norms that influence the content of Supreme Court opinions. However, as discussed briefly above[110] and more fully below,[111] Supreme Court opinions are not in and of themselves constitutional law. They are no more and no less than a crucial intermediate stage in the process by which we get from the Constitution's written text to concrete consequences for individuals and for the broader society. Practices, arrangements, norms, and habits of thought that influence how we process and interpret court opinions and how we implement or fail to implement their commands are every bit as essential to our constitutional culture as those that influence the opinion crafting process.

One feature of contemporary constitutional decisionmaking that is rarely acknowledged and almost never analyzed is the fact that most people do not experience Supreme Court opinions directly but instead encounter their content as mediated through other sources, be it dueling press conferences on the steps of the Court, talking heads on television, press releases issued by politicians and interest groups, journalistic accounts, or blog posts.[112] Members of the public form their account of what each opinion says, what its implications are, and how they should feel about it not by parsing the text, but by responding to summaries, analyses, and snippets organized and presented by mediating sources.

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110 *See supra* text accompanying notes 1–2.

111 *See infra* Part V.A.

112 The general public has likely never consumed Supreme Court opinions in an unmediated way. However, the dynamics of such mediation have changed in a world characterized by partisan news channels, real time blog coverage, and news campaigns coordinated by litigants. In recent high profile cases like *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015) (raising a statutory challenge that might have gutted a major health care law), the months leading up to oral argument saw the extension of such methods into the pre-argument phase, with press releases, blog posts, op-eds, and tweets shaping the case for public consumption.

This phenomena might be dismissed as an interesting (or disturbing) side-show but for two things: the central role that perception of an opinion plays in its enforcement, judicial implementation, and legislative response, and the feed-back loop through which knowledge of that fact in turn influences the shape and content of Supreme Court writings. Beginning with the first point, it has long been understood by sophisticated litigants and social movement attorneys that achieving constitutional change through litigation requires not only Supreme Court victories but also the creation of social conditions that encourage or compel lower court judges, elected officials, and members of the general public to understand those decisions broadly, accept them as binding, and enforce them vigorously.[113] To that end, organizations and individuals keenly interested in Supreme Court decisions have, for at least three-quarters of a century, worked to control public perception of the content, implications, and wisdom of those decisions.[114] In recent years, such practices have become more widespread, as the proliferation of social media, cable television, and online information sources have expanded the opportunity to create narratives and offer targeted assessments of court opinions. They have also become more institutionalized, as media sources have come to expect dueling press conferences on the court steps and prompt press releases from trade groups and advocacy organizations after oral arguments and the issuing of opinions in important cases.

Recent experience in high profile cases underscores this history. In *Grutter v. Bollinger*,[115] one of the two Michigan affirmative action cases, dissenting Justices and opponents of affirmative action, abetted by a sloppy set of initial press reports,[116] created a public perception that Justice O'Connor's opinion contains an explicit sunset provision making affirmative action unconstitutional in twenty-five years rather than, as is more likely, a prediction that such preferences "will no

113 The most thorough literature on this point involves the civil rights movement and, in particular, the challenge to segregated schools and facilities in the South. *See, e.g.*, MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 175–76, 183 (2d ed. 2004). For a sophisticated recent take on these issues, see Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2742–45 (2014).

114 *See, e.g.*, TUSHNET, *supra* note 113, at 175–76, 183.

115 *See* Grutter v. Bollinger, 539 U.S. 306, 346–49 (2003) (Scalia, J., dissenting); *id.* at 378–79 (Rehnquist, C.J., dissenting); *id.* at 387–88, 395 (Kennedy, J., dissenting).

116 On the spectrum of possible readings of Justice O'Connor's arguments, see Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in* Grutter, 67 OHIO ST. L.J. 83, 85–86, 143 (2006).

longer be necessary" at that time.[117] In *Kelo v. City of New London*[118] and *Ledbetter v. Goodyear Tire & Rubber Co.*,[119] opponents of the decisions both inside and outside the Court created contestable narratives about the Court's opinions that galvanized opposition and inspired legislative reforms to ameliorate the impact of the decisions.[120] Perhaps most disturbingly, in the years after *Lawrence v. Texas*,[121] opponents of the decision (and of gay rights more generally) took advantage of ambiguities in Justice Kennedy's majority opinion and his failure to respond to Justice Scalia's characterization of the opinion to convince lower court judges to read the decision in an exceedingly narrow manner, ignoring many of the central ideas and language in the opinion and stripping it of much precedential weight.[122]

As these examples illustrate, successful attempts to shape popular narratives about Supreme Court decisions are often abetted or even inspired by dissenting Justices who construct narratives, use imagery, and offer loaded characterizations of majority opinions in order to affect the public perception, implementation, and long-term viability of the Court's rulings. Justices know full well how to turn up the rhetoric or shift the imagery in order to draw popular and press attention and often do so to great effect.[123] Nor are majority authors immune from this desire to influence the reception of the Court's decisions, making crucial narrative and rhetorical decisions or decid-

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117 *Compare Grutter*, 539 U.S. at 343 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." (citations omitted)), *with id.* at 364, 376 & n.13 (Thomas, J., concurring in part and dissenting in part) (describing Court's opinion as "holding" that affirmative action "will be unconstitutional in 25 years").

118 Kelo v. City of New London, 545 U.S. 469, 472, 489 (2005) (holding that "the city's proposed disposition of [petitioners'] property qualifies as a 'public use' within the meaning of the Takings Clause").

119 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007) (holding that the after effects of past discrimination do not create new filing deadlines for EEOC claims and that claims made after the deadline are untimely).

120 *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 29 U.S.C. §§ 626, 633a, 794a, 42 U.S.C. §§ 2000e-5, e-16 (2014)); *see also* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2101–02 (2009) (describing the legislative response to *Kelo*).

121 539 U.S. at 558, 562–63.

122 *See* Joseph Landau, *Misjudged: What* Lawrence *Hasn't Wrought*, THE NEW REPUBLIC (Feb. 16, 2004), https://newrepublic.com/article/67372/misjudged (discussing early cases reading *Lawrence* narrowly). *Cf. supra* note 90 (discussing one possible explanation for the confusing and contradictory language in the *Lawrence* opinion).

123 *See* Andrew Siegel, *Justice Stevens and the Seattle Schools Case: A Case Study on the Role of Righteous Anger in Constitutional Discourse*, 43 U.C. DAVIS L. REV. 927, 933–37 (2010).

ing what sources to cite with eyes towards a broader audience.[124] Though Justices have always engaged in these tactics—witness Chief Justice John Marshall's careful construction of the opinion in *Marbury v. Madison*[125] or Chief Justice Earl Warren's conscious decision to streamline the opinion in *Brown v. Board of Education*[126]—changes in our contemporary constitutional culture have subtly shifted judges' incentives and, perhaps, their practices. At least as an impressionistic matter, the contemporary Court seems more aware of the fact that the broader audience they are writing for is not, at least directly, the general public, but instead a diverse set of opinion-makers (including journalists, bloggers, advocates, and academics) who will in turn translate their opinions for broader public consumption.

### *D. Increasingly Partisan Lower Court Nomination Battles, the Growth of the Internet, and Growing Strategic Sophistication*

Perhaps no single episode better demonstrates the danger that constitutional theory faces when it ignores evolutions in our constitutional decisionmaking culture than the failure of mainstream constitutional scholars to take seriously the argument that the individual health care mandate contained in the Patient Protection and Affordable Care Act[127] exceeded Congress's Article I powers.[128] In the first weeks after the challenge was announced, it was difficult to find a mainstream constitutional scholar who gave the claim even the remotest chance of succeeding; one law school famously announced that they could not have a debate on the matter because they could

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124 *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 700–09 (1976) (describing the process by which Chief Justice Warren put together a majority opinion in *Brown v. Board of Education*).

125 5 U.S. 137 (1803).

126 347 U.S. 483, 495 (1954).

127 Pub. L. 111-148, 124 Stat. 119 (2010).

128 Academic speculation as to why legal scholars failed to appreciate the courts' receptivity to the challenge is a growth industry. For some recent takes on the matter, see Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331, 1333 (2013) (arguing law professors did not understand shifting federalism doctrine); *see generally* David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL L. REV. 805 (blaming a confluence of factors including law professors' lack of practice experience, the fact that law professors live in an ideologically narrow echo chamber, the fact that law professors think in grand theories, bad luck exacerbated by a small sample size of cases, and an intentional desire to affect the result by making "predictions"); J. Mark Ramseyer, *Biases that Bind: Professor Hyman and the University*, 2014 U. ILL. L. REV. 1229 (blaming ideological bias).

not find anyone to argue the other side.[129] While a cadre of scholars (who will be discussed below) ultimately emerged to argue strenuously for the unconstitutionality of the mandate, the vast majority of constitutional law professors continued to dismiss the challenge as implausible or even frivolous. When lower courts began to split fairly evenly in their rulings on the matter, mainstream constitutional scholars only partially processed the results, still half expecting the Supreme Court to overwhelmingly reject the claim. When the Court issued its ruling[130]—finding that the mandate did in fact exceed Congress's Commerce Clause power and only upholding it as a valid exercise of the Taxing Clause power by one vote after a last-minute change-of-heart by the Chief Justice[131]—the majority of so-called experts were left with egg on their (our) faces.

Those in the media, the academy, and the broader political community who had argued for or predicted the Court's embrace of the challenge properly tried to call the rest of us to account for the failure of our so-called expertise. Central to their critique was the argument that a liberal-leaning constitutional professorate either willfully distorted the underlying constitutional law (paying insufficient attention to recent decisions more rigorously policing Congress's assertion of power) or unconsciously confused their own constitutional and political views with those of the Court.[132]

The methodology of this Article suggests another reading, however. The constitutional academy did not so much misread the existing constitutional law as misread our evolving constitutional culture. Several significant trends in the institutions and norms governing our constitutional decisionmaking—none of which have even been acknowledged by, let alone absorbed into, modern constitutional theory—created the social conditions in which this challenge could flourish.

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129 *See* Zachary Roth, *Debate Planners Can't Find Anyone to Argue that Health Reform Is Unconstitutional*, TALKING POINTS MEMO (Mar. 31, 2010, 2:09 PM), http://tpmmuckraker.talkingpointsmemo.com/2010/03/debate_planners_cant_find_anyone_to_argue_that_hea.php (reporting on an event at the University of Washington); *see also* Zaid Jilani, *College Debate Organizers Unable to Find Any Law Professors to Argue Health Reform Is Unconstitutional*, THINK PROGRESS (Mar. 31, 2010, 12:16 PM), http://thinkprogress.org/2010/03/31/college-debatehealth/ (same).

130 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct 2566, 2586–87 (2012).

131 *See, e.g.*, Rachel Weiner, *CBS News: John Roberts Changed His Mind on Health-Care Mandate*, WASH. POST (July 2, 2012), https://www.washingtonpost.com/blogs/the-fix/post/cbs-news-john-roberts-changed-his-mind-on-health-care-mandate/2012/07/02/gJQA52JRIW_blog.html.

132 *See supra* note 128.

First among these is the increasingly partisan process for selecting and confirming lower federal court judges. As recently as four decades ago, norms and institutional arrangements existed that worked to depoliticize appointments to federal appellate and district court judgeships. Presidents relied more on Senators and other elected officials to identify potential nominees (particularly for the District Court), Senators of opposing parties from the same state worked more closely together to negotiate appropriate candidates, Presidents placed greater emphasis on rewarding loyalists and contributors than on ensuring ideological purity when selecting candidates for the bench, and Senators were, in turn, less likely to oppose nominees for ideological reasons.[133] These norms and institutional arrangements have not entirely disappeared but they have receded and been joined by countervailing arrangements and expectations that push in the other direction. In particular, the White House has taken a much more active role in identifying first appellate court nominees (during the 1980s) and then district court nominees (more recently); constituent groups have become more aware of the ramifications of lower court appointments and more insistent that candidates share their jurisprudential and/or political values; and the White House and Senate have adapted their behavior to more explicitly consider a candidate's projected jurisprudential path when determining who to appoint and confirm.[134]

Press coverage of the courts has both reflected and exacerbated the increasingly partisan tenor of appellate court nomination politics by, for example, consistently referencing the President who appointed the participating judges when reporting on lower court rulings.[135] Though many judges (and occasionally academics) decry those references as reductionist,[136] they convey short-hand information that the

133 On the evolution of the judicial appointment and confirmation process for lower court judges, see LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 3 (2005); NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 17 (2005) (explaining how interest groups and political activists mobilize to influence nominations); Michael A. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 249–79 (2012) (describing older practices and explaining the reasons for their decline).

134 *See generally* EPSTEIN & SEGAL, *supra* note 133; SCHERER, *supra* note 133.

135 *See, e.g.*, Erik Eckholm, *One Court, Three Judges and Four States with Gay Marriage Cases*, N.Y. TIMES, Aug. 7, 2014, at A15 (referencing which President appointed each judge when reviewing oral arguments before the Sixth Circuit on the constitutionality of state bans on same-sex marriage).

136 *See, e.g.*, Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC 99, 122 n.114 (2012) (expressing a

reporters and the general public consider relevant in assessing contemporary judicial output. Nor is it only individual judges who become identified with particular sides of the political spectrum; over the last few decades, depictions of the Ninth Circuit as a horde of out-of-control leftists and the Fourth Circuit as a pack of constitutional Neanderthals have seeped into the public consciousness through the comments of talking heads, the repeated urging of bloggers, and the occasional long journalistic profile.[137]

Though the weight of this effect is a matter of conjecture, the increased focus on the particular partisan orientation of lower courts and their members influences the manner in which Justices, other federal judges, and clerks receive their work. As partisan considerations play an increasingly strong role in the selection of judges and as popular understanding of the process becomes increasingly fixated on this aspect, participants in the legal culture increasingly see themselves as belonging to one team or another. Once one—either consciously or unconsciously—identifies allies and opponents in the federal judiciary, cognitive biases kick in according greater or lesser weight to the work of some judges or courts. Empiricists have demonstrated that these effects play out in complicated and different ways in different courts, but they nearly uniformly acknowledge their existence.[138] At the most basic level, the effect of this sense of partisan team membership can be seen in the Supreme Court's extraordinary tendency to summarily reverse or grant cert to review decisions of the Ninth Circuit (and to a lesser extent a few other Circuits) on matters that the Court would not normally consider cert-worthy.[139]

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desire to "debunk" the choice of "most mainstream media commentators" to refer to judges this way and to use the party of the appointing President as a "metric" of the judge's ideology).

137 *See, e.g.*, Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES. MAG., Mar. 9, 2003 (long and controversial cover-story profiling Fourth Circuit as extremely reactionary); THE NINTH CIRCUIT WATCH, http://www.the9thcircuitwatch.com/recent.htm (last visited Aug. 21, 2014) (reporting exclusively on the "incomprehensible" decisions of the Ninth Circuit). Appointments over the last decade have made Sontag's description of the Fourth Circuit outdated, to the extent it was ever accurate. News accounts now routinely categorize the Fifth Circuit as the nation's most reactionary appellate court. *See, e.g.*, Mark Curriden, *Meet the Chief Judge of the Nation's Most Divisive, Controversial and Conservative Appeals Court*, ABA J. (Feb. 1, 2014), http://www.abajournal.com/magazine/article/meet_the_chief_judge_of_the_nations_most_divisive_controversial/.

138 *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (identifying partisan effects, exploring issues on which they are more salient, and explaining how the makeup of a panel affects the level of partisanship).

139 *See generally* Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341 (2006) (discussing possible sources of the relatively high reversal rate of the Ninth Cir-

The increased partisanship of the lower courts likely played a significant role in the course of the litigation over the individual mandate. When lower court judges faced the constitutional arguments in the case, they approached them as individuals who, in most cases, had been appointed through a partisan-tinged confirmation process and who lived in a culture in which judicial politics was increasingly portrayed in ideological terms. They, in turn, were faced by a case that had been coded as partisan every step of the way. From both a policy and an electoral standpoint, the stakes of the case were extremely high for both political parties. The lawyers in the case were closely associated with particular sides of the political spectrum, as were the academics, strategists, and organizations working to shape the arguments.[140] When faced with legally defensible arguments on either side of the issue, it is unsurprising that the original judges deciding these cases lined up along strictly partisan lines. Once that dynamic was created, it in turn increased the partisan signaling to judges hearing later iterations of the case. By the time the case came to the Supreme Court, the Justices received a case that, despite a few late-developing anomalies at the appellate level,[141] was thoroughly coded as presenting a close issue that was likely to break on partisan grounds.

These dynamics may well have been for naught if it was not for other recent evolutions in our constitutional culture that provided space to nurture plausible legal arguments that the mandate was unconstitutional. As some very insightful recent scholarship has explained, the legal campaign was nurtured by an overlapping network of conservative and libertarian think tanks, legal organizations, and social networks that brought advocates, academics, and policy scholars together to brainstorm about ways to translate their instincts that the mandate was federal over-reaching into potentially persuasive legal arguments to that effect.[142] The campaign relied heavily on the

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cuit, including an ideological explanation for the reversal rate); *cf.* Dan Horn, *6th Circuit on Losing Streak in Supreme Court Cases*, USA TODAY (Feb. 20, 2011, 1:34 AM), http://usatoday30.usatoday.com/news/nation/2011-02-20-circuit-court_N.htm.

140 *See, e.g.*, Kevin Sack, *Lawyer Opposing Health Care Law is Familiar Face to Justices*, N.Y. TIMES, Oct. 27, 2011, at A1 (explaining that Paul Clement, the lawyer litigating the case for the challengers, was a former Solicitor General under President George W. Bush whose "caseload reads like the Republican Party platform").

141 *See, e.g.*, Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) (Silberman, J.) (voting to uphold minimal essential coverage provisions of the Affordable Care Act); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 558 (6th Cir. 2011) (Sutton, J., concurring) (same).

142 *See, e.g.*, JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 220–27 (2013); Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012),

opportunities that electronic communications, and particularly blogging, provided to develop arguments in real time and obtain rapid feedback from the appropriate communities. While many more traditional constitutional scholars from the left, center, and even the right laughed off the challenge as a "normatively vacuous precedent slalom,"[143] interpretive entrepreneurs such as Randy Barnett developed both a narrative (that the mandate was an "unprecedented" exercise of federal power) and a set of doctrinal arguments designed to mobilize public opposition to the legislation and to convince those Justices that were already sympathetic that they might plausibly reach their desired conclusions.[144]

Much more can be said about this episode, but, for the purposes of this part, the central point is clear: the emergence of new norms, technologies, arrangements, and relationships have the potential to shift the landscape of constitutional litigation, both altering the universe of possible constitutional rulings and shifting the probabilities of different results within that universe. Constitutional lawyers and theorists who do not take into account shifts in the norms, practices, and arrangements that constitute our constitutional culture—or worse yet do not make space in their theories for an account of constitutional culture—are likely to prospectively misjudge and retrospectively misunderstand the constitutional law that our evolving culture produces.

Like many of the descriptive points in this article, this one comes with a normative corollary: as constitutional institutions and norms are in constant flux, one must be careful not to judge the actions of contemporary constitutional actors by anachronistic standards. Many of the leading figures in constitutional law have looked askance at the behavior of the academics and lawyers who strategized against the health care mandate using unconventional methods and persevered

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http://www.theatlantic.com/national/archive/2012/06/from off the wall to on the wall how the mandate challenge went mainstream/258040/. *Cf.* RANDY E. BARNETT ET AL., A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE (2013) (collecting blog posts developing and popularizing claims of the law's challengers). It should be noted that the effort to use legal tools to overturn or declaw the health care law did not end with the *NFIB* decision. *See* King v. Burwell, 135 S. Ct. 2480, 2485 (2015) (rejecting a statutory challenge to a key provision of the act); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014) (requiring the provision to some corporations of religious exemptions from the statute's mandate).

143 Rick Hills, *Healthcare and Federalism: Should Courts Strictly Scrutinize Federal Regulation of Medical Services?*, PRAWFSBLAWG (Aug. 14, 2011, 11:39 AM), http://prawfsblawg.blogs.com/prawfsblawg/2011/08/healthcare-and-federalism-should-courts-strictly-scrutinize-federal-regulation-of-medical-services-.html.

144 *See generally* BLACKMAN, *supra* note 142.

in their advocacy in the face of a strong professional consensus that the proper reading of the existing caselaw defeated their challenge (or at the behavior of the judges who accepted their novel arguments).[145] In offering such a critique, however, they have largely relied upon ideas about the role of judges, the nature of constitutional litigation, and the structure of doctrine that—while characteristic of a particular era and perhaps even broadly resonant with the American experience—are neither timeless nor uncontested. Scholars can—and should—engage in a productive debate about the desirability of the kinds of cultural changes described in this subpart, but they must strive to understand and debate them on their own terms rather than rejecting them as inconsistent with an underlying constitutional structure that is at best ephemeral.

## III. CONSTITUTIONAL CULTURE

Thus far, this Article has offered two substantial criticisms of the manner in which contemporary constitutional theory takes account of constitutional practice. In Part I, I voiced skepticism about theorists' assumption that some of our most familiar constitutional practices and arrangements reflect a permanent or inherent constitutional "structure"; arguing to the contrary, I demonstrated that many such features are instead the product of nominal factors, historical contingencies, and express contestation that continues to this day.[146] In Part II, I expressed parallel concern about the degree to which constitutional theory ignores or underplays the importance of newer, messier, or more controversial constitutional practices and arrangements and demonstrated that many such features do, in fact, play a substantial role in the process of making constitutional law.[147]

This Part moves from criticism to construction, offering a framework through which constitutional theorists and constitutional commentators more generally might study, analyze, and critique contemporary constitutional arrangements, practices, and norms. Its starting point is the belief that there is little to analytically or conceptually dis-

145 For characteristically harsh criticism, see, for example, Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Healthcare Law*, N.Y. TIMES (Mar. 26, 2012), http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html (quoting one leading academic as saying that Randy Barnett has "gotten an amazing amount of attention for an argument that he created out of whole cloth" and that "[u]nder existing case law this is a very easy case; this is obviously constitutional").

146 *See generally supra* Part I.

147 *See generally supra* Part II.

tinguish the practices, arrangements, and norms discussed in Part I from those discussed in Part II; in both instances, the features I discuss are crucially important yet historically contingent attributes of our current constitutional decisionmaking regime that might beneficially be theorized together. In its simplest form, my framework suggests that we ought to think of all of these features—whether old or new, ingrained or tentative, salutary or troubling—as attributes of a "constitutional culture."

In Part III.A, I give content to that term, explaining the ideas that I want to invoke with this particular construction. In Part III.B, I then defend my particular nomenclature, explaining both how my use of the term "constitutional culture" differs from the meaning intended by other scholars who have used a similar construction and why—prior claimants notwithstanding—I prefer this terminology to other plausible alternatives. Finally, in Part III.C, I offer a conceptual map of the many different kinds of constitutional practices that might helpfully be brought under the umbrella of "constitutional culture."

### *A. Substance and Themes*

"Constitutional culture" is the black box through which the Constitution's words are transformed into concrete consequences. It is an interlocking system of practices, institutional arrangements, norms, and habits of thought that determine what questions we ask, what arguments we credit, how we process disputes, and how we resolve those disputes. It is, by definition, vast and slippery.

To study constitutional decisionmaking through the lens of constitutional culture is, for all practical purposes, to commit oneself to a series of assumptions about the ways in which those features develop and interact. First, the very notion of constitutional culture suggests that the arrangements governing constitutional decisionmaking at any one time are time- and place-specific. As the first two Parts of this Article have mapped out, our constitutional norms and practices are ever in flux, adapting and changing to better reflect the preferences, expectations, hopes, and fears of a people who are themselves ever-adapting.[148] Accurate answers to questions about how we make constitutional law are definitionally time-limited.

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148 This Article intentionally brackets many of the difficult interpretive questions raised by the concept of "culture" including: (1) how intentional the process of cultural adaptation is; (2) whether culture is largely reflective of elite values and preferences or meaningfully takes into account the interests and preferences of the broader society; and (3) whether cultural forms are primarily reflective of underlying economic structures or are

That characteristic notwithstanding, the content of our constitutional culture is deeply historicized in at least two ways. First, the particular arrangements and norms that exist are the result of particular historical incidents, movements, decisions, and adaptations. We can—and, in fact, often do—explain the evolution of our modern structures with references to their triggering events or the broader cultural movements that advocated their adoption.[149] Constitutional culture is nominal, in the sense that it exists in its particular form at any given moment because of the particular course that history has taken and would be at least a little bit different—and in many cases greatly different—in any of the millions of alternate worlds that might have existed.

Second, many of the features of our constitutional culture are deeply entrenched, in some cases so rooted in our history that alternatives cease to be visible or are visible only around the margins. The fact that institutional arrangements, practices, and habits of thought are contingent and evolutionary does not mean that they are at any given moment perceived as malleable or as subjects of explicit normative debate. To the contrary, the fact that our constitutional institutions and practices are the result of a process of historical adaptation often facilitates the illusion that they are permanent, either because they fit so tightly with the values and assumptions of the current generation or because they seem they product of hard-earned wisdom.[150]

To think of constitutional institutions, practices, and norms as a species of culture also highlights the degree to which they are subject to rational arguments for their modification but also reflective of deeper, more guttural, more inchoate commitments. We can and do recognize and debate specific proposals to improve on the ways in

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meaningfully independent from them. While both macro- and micro-level answers to these questions are crucial to many of the projects laid out in Parts IV and V below, they are tangential to this Article's critique.

149 For example, we see many of the features of our current judicial culture, such as the relatively aggressive remedial role of the judge and the legitimacy of impact litigation strategies, as products of mid-twentieth-century civil rights litigation. We similarly point to the experiences of the New Deal era to explain both the necessity of protecting the formal independence of the courts and the importance of developing doctrinal structures that can serve the needs of the modern polity.

150 For example, our unwillingness to countenance politically-motivated judicial impeachments is seen as a lesson learned during the Jeffersonian era, while our resistance to alterations in the size of the Court (once a common tactic) is seen as a lesson learned during the New Deal's "Court Packing" crisis. On the former, see ELLIS, *supra note* 67 at 67–109; on the latter, see JEFF SHESHOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 59 (2010).

which our constitutional decisionmaking process operates, by, for example, changing our norms as to the proper training for judges,[151] limiting the use of amicus briefs,[152] or altering our interpretive algorithm to privilege particular modalities of constitutional argument.[153] Yet, we do not do so in a vacuum; rather, we come to such discussions motivated by a set of values and a series of instinctual assumptions about what is important, what is possible, and how the world really works. These deeper commitments—our worldview—shape the vocabulary we use, the arguments we credit, and the issues we perceive or ignore.

Further, the notion of a constitutional culture emphasizes the interrelationships between our ideational structures and our more concrete institutional arrangements. Just as cultural history serves as a bridge between intellectual and social history,[154] so too can the analysis of constitutional culture serve as a bridge between doctrinal and institutionalist accounts of our constitutional evolution. The constitutional culture construct in part achieves this objective by identifying both doctrinal tests and interpretive strategies (on the one hand) and court calendars and law clerk staffing practices (on the other) as cultural products. In addition, it further breaks down the dichotomy by focusing our attention on the way in which inchoate assumptions and undertheorized attitudes influence our receptivity to both particular doctrinal formulations and particular institutional arrangements.

Finally, focusing on our constitutional decisionmaking process as a system of culture frees us up to discuss both revered and newfangled practices and norms in similar ways and in conjunction with each other. Just as cultural historians engage with both haughty high culture and gritty pop culture subjects,[155] mining both for insights and often drawing connections between them, so too must scholars of a constitutional culture. If our goal is to understand both how and why constitutional law is made in this particular time and place, we ought

151 *See, e.g.*, EPSTEIN & SEGAL, *supra* note 133, at 17 (discussing efforts to impose prior judicial service as a qualification for Supreme Court appointment and assessing its consequences, both intended and unintended).

152 *See* Smith, *supra* note 93, at 24 (discussing reforms that imposed some limits on amicus briefs at the Supreme Court and substantial limits at the Seventh Circuit).

153 *See supra* notes 52–53 and accompanying text (discussing the effort to reform constitutional decisionmaking to privilege originalist arguments).

154 For an introduction to the themes and varied objects of cultural history, see generally PETER BURKE, WHAT IS CULTURAL HISTORY (2d ed. 2008).

155 For an explanation of why cultural history is a methodology equally adept at dealing with a wide variety of cultural forms, see generally ALESSANDRO ARCANGELI, CULTURAL HISTORY: A CONCISE INTRODUCTION (2012).

to interrogate the various institutions, practices, norms, and habits of thought that we encounter, assessing both the symbolic and the practical importance of each, without regard to their tenure or their perceived moral valence.

### *B. The Nomenclature*

"Constitutional culture" is a fairly common term in the legal academic literature, appearing well over a thousand times in widely available articles.[156] Despite—or perhaps because of—the frequency with which it is invoked, the phrase does not possess a single consistent or even primary meaning. One substantial strand of articles that utilizes the term uses it to refer to constitutional ideas and movements occurring outside the courts, setting up a dichotomy between "constitutional law" and "constitutional culture."[157] A second significant set of articles, primarily but not exclusively in the international and comparative law context, uses "constitutional culture" to refer to the institutional and attitudinal pre-conditions necessary for a constitutional democracy to thrive.[158] Still others use the phrase more haphazardly to refer generally to ideas about the Constitution or to trends in constitutional jurisprudence.[159]

As the above section illustrates, I use the term somewhat differently than most of these authors. To begin with, my notion of constitutional culture is meant to be precise, referencing a large but specific set of concrete things rather than an undifferentiated zeitgeist or a set of ideas about the Constitution that are insufficiently concrete to be classified as constitutional argument. Moreover, my focus is on the elements of the constitutional system rather than the cultural prerequisites for implementing one. Finally, my conception of "constitutional culture" is not limited to the habits of thought and institu-

156 A search of the Westlaw "JLR" database conducted on August 21, 2014 reveals 1,661 articles that use the exact term "constitutional culture."

157 *See, e.g.*, Post, *supra* note 2; Siegel, *supra* note 2.

158 *See, e.g.*, JOHN FEREJOHN ET AL., CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE (2001); John Liolos, *Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring*, 36 B.C. INT'L & COMP. L. REV. 219 (2013); *cf.* ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989) (discussing, from a highly critical perspective, the consequences of living in a culture that is attuned to and comfortable with an assertive judiciary).

159 *See, e.g.*, James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 849, 891 (2014) ("Few rights are more sacrosanct in our constitutional culture than the individual right to keep and bear arms."); Joseph Landau, *Presidential Constitutionalism and Civil Rights*, 55 WM. & MARY L. REV. 1719, 1736 (2014) (using the term "constitutional culture" to refer to shifting "norms of liberty and equality").

tional responses of actors outside the judicial system, but is instead drawn broadly enough to also encompass the habits of thought and institutional arrangements that shape the behavior of those inside the judicial system.

Despite the marked contestation for the name "constitutional culture," there are many reasons to believe that it remains the best term to describe the historically contingent set of institutions, practices, and habits of thought through which constitutional law is made. To begin with, treating these institutions and norms as a form of culture allows those tasked with mapping out or theorizing about them to tap into the rich social science literature on "culture," particularly the work of historians, anthropologists, and literary theorists.[160] While I do not propose that constitutional theory adopt the framework of any particular social scientist or take any particular position on the various inter-disciplinary debates about the nature and evolution of cultural forms,[161] my understanding of the centrality of culture and of its defining characteristics draws heavily on a lifetime of reading in a variety of disciplines, each of which provides guidance in unpacking the complicated sets of arrangements, institutions, and norms that shape our process of contemporary constitutional decisionmaking.

Second, the term "culture" best captures the dualisms described above and those dualisms are in turn the key defining features of our constitutional decisionmaking institutions. As detailed in the first two Parts of this Article, every significant feature in our system for making constitutional law is (1) contingent and evolving yet deeply grounded in our history; (2) the subject of some level of intellectual debate yet also reflective of more inchoate commitments and assumptions; and (3) grounded in a network of other arrangements and norms that is complicated and mutually reinforcing. Almost any other terminology one might propose—including expressly all the other formulations I have occasionally drifted into while composing this article—shirks some crucial aspect. To take the simplest example, the decision of constitutional theorists to describe many of these attributes as our constitutional "structure" has led to an overemphasis on their stability and permanence of some of our arrangements and the disregarding of those arrangements that do not meet a certain threshold on that axis. Similarly, an attempt to characterize the

160 I resist the temptation to identify any of the many historians and social scientists who have theorized about "culture" for fear of taking sides unnecessarily in the complicated theoretical and critical debates surrounding "culture." *Cf. supra* note 148 (identifying and bracketing several such issues).

161 For some such issues, see *supra* note 148.

broad field of constitutional culture in terms of constitutional "institutions" or "practices" deemphasizes the crucial aspects of the culture that are ideational rather than structural. The notion of a constitutional "process" or "decisionmaking process" suggests a level of formality, orderliness, consistency, and intentionality that does not accurately reflect the messy reality of our daily constitutional life. And none of these alterative locutions accurately capture the degree to which our constitutional arrangements, practices, and norms reflect fundamental truths about who we—at this given moment—are as a people.

### *C. The Content of Constitutional Culture: A Conceptual Map*

As defined above, our constitutional culture is the set of institutional arrangements, practices, norms, habits of thought, and other miscellaneous features that determine how we get from the Constitution's words to concrete consequences.[162] These features can be productively sorted into several categories based on their timing and location.[163]

- *Features that determine the makeup of the courts and their personnel:* One set of influential arrangements and norms involve the design of the courts and the choices of how to populate them. This category of cultural features include the size of the Supreme Court; the existence, size, and location of the lower federal courts; the rules and norms that govern who will be appointed and confirmed to the bench; the decision whether to employ other legal professionals (such as law clerks or staff attorneys) and the mechanisms used for selecting them.
- *Features that determine what issues will be presented for judicial review and how they will be framed:* Another set of influential norms and practices involve the distilling of unrest into concrete constitutional claims and the shaping of such claims for judicial review. This category includes norms and habits of thought about the courts' proper relationship to other branches and about the kinds of disputes appropriately resolved through constitutional litigation; rules and professional practices that set the cost of and determine the ease of raising particular claims before the courts; institutional arrangements and technological developments that make it easier or harder for individuals or groups to develop and test new and

162 *See supra* Part III.A.

163 This rough conceptual map is meant to demonstrate the breadth of practices, norms, arrangements, and ideational structures that might profitably be theorized under the rubric of constitutional culture, while also offering some provisional analytic categories that might facilitate the process of breaking down and analyzing this broad subject. It is not meant to offer either a complete catalog of the features of our constitutional culture or a definitive taxonomy of the categories into which one might want to sort these features.

creative constitutional arguments; and doctrinal structures and habits of thought that channel constitutional thinking down particular paths.

- *Features that determine how the courts will process and resolve these issues*: A third—and particularly broad—category of influential cultural features involves the processing of disputes by the judiciary and the determination and production of some sort of judicial response. This category includes norms, practices, and arrangements for briefing and arguing cases; rules, practices, and norms for determining whether, when, and how courts will produce written opinions in those cases; norms and habits of thought that shape opinion authors' perception of their options and choices among those options; and institutional and political arrangements that shape judges' receptivity to different categories of claims, arguments, and litigants.
- *Features that determine how those outside the courts will process and react to judicial decisions (or will act independently in the pursuit of constitutional norms)*: The fourth major category of significant features of our constitutional culture encompasses those that involve extra-judicial interpretation, implementation, and resistance to judicial decisions. This category involves the mechanisms through which relevant constituencies and the population at large become aware of the content of judicial decisions, the nature and prevalence of other institutional actors with the ability to shape popular understanding of such decisions, and the norms and arrangements that determine both whether other political and social actors feel compelled to follow or to resist judicial decisions and their ability to successfully do so.[164] It also includes a sub- or parallel-category that involves the existence of norms and arrangements that determine the frequency which and the manners in which individuals and groups pursue their constitutionally-motivated goals in extra-judicial settings.[165]

## IV. TOWARDS A NEW PARADIGM?

In the prior Parts, I have argued that constitutional theory often treats constitutional practice in misleading and unhelpful ways[166] and that our collective theoretical enterprise might be enhanced by developing and deploying a theoretically rich concept of constitutional culture.[167] In this Part, I emphasize the collective aspect of this project, first by offering examples of the kinds of scholarly studies that

164 These dynamics garnered extensive attention in the two years between the Supreme Court's decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) as a full panoply of engaged public actors (including lawyers, state courts, federal courts, interest groups, and citizens) participated in a multi-faceted dialogue and contest over the meaning of the Supreme Court's decision in *Windsor* for same-sex marriage rights.

165 On these issues, see *infra* Part IV.B; *see also* LEVINSON, *supra* note 2, at 129 (emphasizing the importance of such settings).

166 *See supra* Parts I–II (discussing the tension between constitutional theory and practice).

167 *See supra* Part III (arguing for an increased role for constitutional culture in developing theory).

might forward our collective understanding of constitutional culture and then by highlighting and engaging a diverse set of contemporary works that utilize methodologies or probe questions in tune with the constitutional culture approach.

### *A. An Intellectual Agenda*

One can imagine a wide variety of works that might contribute to our understanding of the dynamics of our contemporary constitutional culture. Much of that work is descriptive. At the macro-level, we would benefit greatly from book-length studies that map our constitutional culture or significant aspects of it (such as Supreme Court decisionmaking) in thick and nuanced ways, utilizing the tools of anthropology and cultural history. Such studies might be expressly historical, focusing on change over time, or more directly presentist, preferring instead to draw layered portraits of contemporary institutions. At their heart, however, such projects would seek to be fairly comprehensive (cataloging the various norms, arrangements, practices, and habits of thought that shape and channel the making of contemporary constitutional law) and would pay attention to the subtle connections between the various features (mapping out not just which ones exist but the ways in which they reinforce and undermine each other and their shared intellectual and cultural roots).

On the micro-level, one can imagine a variety of descriptive projects that study particular institutional arrangements (such as the rise of amicus briefing, changes in opinion-writing protocols, or changing norms about the proper credentials for federal judges) as evolving cultural forms, analyzing both the reasons why they emerged at this particular time and their influence on and implications for the substance of our constitutional decisionmaking. One might also define projects that take particular cases, issues, or themes and treat them as "episodes" in constitutional culture, unpacking the various institutional arrangements, norms, and features that directed the course of the case, defined the parameters of our interaction with the issue, or explained the prominence of the theme. One might imagine thorough works from this perspective exploring the *Lawrence*,[168] *Kelo*,[169] or

168 Lawrence v. Texas, 539 U.S. 558 (2003). *Cf.* DALE CARPENTER, FLANGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012) (offering a thorough account of this case that offers insights into how constitutional culture affected the course of case, though only in passing).

169 Kelo v. City of New London, 545 U.S. 469 (2005).

Health Care cases;[170] our post-9/11 engagement with the Constitution and terror; or the Supreme Court's modern aversion to litigation.[171] Such works would inform in their own right and serve as case studies of modern constitutional decisionmaking.

The constitutional culture perspective also suggests an evaluative and normative agenda. In particular, it would behoove us to see works of constitutional theory that adopt the insights of this article, developing frameworks that acknowledge the contingent and evolving nature of our institutions and norms and that integrate into their analysis more recent developments such as the rise of law clerks, the changing role of amicus briefs, and the increased prominence of talking heads and press releases for the public consumption of Supreme Court opinions. Such works would evaluate our system of constitutional decisionmaking in a clear-headed way, focusing on how constitutional law is made in the real world today, rather than in some ideal world or in a world abstracted from our broader historical experience. It is likely that scholars approaching our constitutional culture from different perspectives might reach vastly different normative and evaluative conclusions. For example, one might imagine a relatively scathing critique of contemporary constitutional decisionmaking focused on the ways in which the rise of the Internet, increased partisanship, the growing influence of law clerks, and pervasive mediating of constitutional content through talking heads degrade the features that justified a pronounced judicial role in the first place. Alternatively, one might imagine an equally impassioned defense of our contemporary constitutional culture that portrayed our institutions and practices evolving to become more representative and participatory, in ways that undercut the standard countermajoritarian critique.

### *B. An Emerging Literature*

While I am staking out an intellectual agenda with an eye towards future work, there is already a developing literature that shares common influences and insights with the constitutional theory project. At the macro-level, one might look at the work of Barry Friedman,

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170 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). *Cf.* BLACKMAN, *supra* note 142 (offering a provocative account of this case well-attuned to some crucial aspects of constitutional culture).

171 *Cf.* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1107 (2006) (making a doctrinal case for this theme and explaining it as a cultural phenomenon, but only superficially probing the cultural factors that shaped and channeled it).

who has repeatedly encouraged constitutional theorists to take into account the lessons of positive political theory;[172] Richard Fallon, who has offered an account of constitutional decisionmaking that pays particular attention to the institutions and norms through which judges make their decisions;[173] or of the various theorists who have spoken in defense of a more explicitly political judiciary.[174] On a more micro-level, Josh Blackman's book about the healthcare cases focuses attention on many of the recent cultural innovations that shaped the course of the case,[175] while other scholars have written persuasive and nuanced accounts of particular constitutional practices and institutions, such as the evolving role of amicus briefs,[176] the influence of law clerks,[177] or the reemergence of a specialized Supreme Court bar.[178] Moreover, on a less tangible level, the constitutional culture perspective shares a spirit with the critical project of scholars such as Derrick Bell who challenged the efforts of constitutional scholars to portray constitutional interpretation as an abstract intellectual exercise rather than as a site for political contestation, cultural adaptation, and even the exercise of raw power.[179]

As one constitutional scholar recently noted in the *Harvard Law Review*, recent years have—as a general matter—seen a proliferation of academic works highlighting the degree to which constitutional

172 *See, e.g.*, Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004).

173 *See, e.g.*, FALLON, *supra* note 2; FALLON, *supra* note 23 (arguing that shaping constitutional doctrines requires the Supreme Court to make practical judgments without singular regard to the Constitution's orginal meaning).

174 *See, e.g.*, TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999).

175 BLACKMAN, *supra* note 142.

176 *See, e.g.*, Kearney & Merrill, *supra* note 79, at 747 (discussing the evolving role and varied perspectives of third party amicus filings).

177 *See, e.g.*, PEPPERS, *supra* note 78 (examining the utilization of Supreme Court law clerks and their potential influence on Supreme Court decision-making).

178 *See, e.g.*, Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008) (arguing that although today's Supreme Court bar is less significant than in years past, there has been a strong increase in the number and influence of today's Supreme Court litigators).

179 *See, e.g.*, Derrick Bell, *Essay—Constitutional Conflicts: The Perils and Rewards of Pioneering in the Law School Classroom*, 21 SEATTLE U. L. REV. 1039, 1043 (1998) ("The singular and key understanding at which I would hope every student arrives is that rather than a revered relic bequeathed by the Founding Fathers, to be kept under glass and occasionally dusted, the Constitution is a living document, one locus of battle over the shape of our society, where differing visions of what should be, compete to become what is, and what will be.").

developments reflect broader cultural forces.[180] These works[181] take different forms, adopt different methodologies, and forward diverse normative agendas, but they share a common conviction that the process of making constitutional law is deeply enmeshed in the particular cultural currents of a given time and place.[182]

The intellectual forces nourishing this cultural turn are remarkably diverse. Many of the scholars who write about constitutional law in these terms are historically-trained and thus temperamentally and professionally inclined to identify cultural connections and to appreciate the nominal and contingent aspects of constitutional evolution.[183] Quite a few draw explicit inspiration from the work of Derrick Bell and other early critical race scholars who conceptualized constitutional law as a site for political contestation and contingent experimentation.[184] Others have been pushed in this direction by an appreciation for the lessons of positive political theory and a concomitant concern about the descriptive inaccuracies sustained by constitutional theory's unwillingness to engage that literature.[185]

Modern events have also spurred the trend to think about constitutional law in contingent and cultural terms. Some of the most interesting and creative contemporary thinking about the dynamics of constitutional lawmaking has emerged from scholarly projects de-

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180 *See* Horwitz, *supra* note 8, at 157 ("A great deal of recent constitutional scholarship has examined the relationship between social and legal change, and between social movements and courts.").

181 *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (examining the ways in which longstanding constitutional principles and practices often call each other's authority into question); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); William N. Eskridge, Jr., *Some Effects of Identity Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (arguing that most twentieth-century changes in the jurisprudence of individual rights were the result of widespread social movements); Guinier & Torres, *supra* note 113 (arguing that the social movements of the civil rights era were sources of law); Horwitz, *supra* note 8; Klarman, *supra* note 8 (arguing that social and cultural factors made possible the landmark cases concerning racial and marriage equality); Post, *supra* note 2 (noting the Supreme Court's deference to liberal political attitudes in 2002).

182 Though to many this observation might appear almost obvious or even tautological, this Article has suggested that it remains in tension with a central strand of modern constitutional theory that has taken as its object a relatively rigid and abstracted vision of constitutional practice.

183 *See, e.g.*, Brown-Nagin, *supra* note 181; Klarman, *supra* note 8; Post, *supra* note 2.

184 *See, e.g.*, Brown-Nagin, *supra* note 181, at 1471 (borrowing from Derrick Bell's work to discuss affirmative action in university admissions); Guinier & Torres, *supra* note 113, at 2748 (citing to Derrick Bell's argument that culture influenced affirmative action jurisprudence).

185 *See, e.g.*, Friedman, *supra* note 172 (discussing the close relationship between the law, American culture, and politics).

signed to explain the rapid pace of constitutional change in areas such as same-sex marriage,[186] religious liberty,[187] the scope of Congress's powers,[188] and the Second Amendment.[189] In a similar but less dramatic vein, our culture's increased attention to the details of Supreme Court practice and deliberation have played a central role in nourishing the kind of thick and careful descriptions of particular constitutional practices referenced above.[190]

The central focus that originalism has served in shaping our constitutional debates has also played an under-appreciated and somewhat ironic role in encouraging scholarship mapping out the contours of our constitutional culture. As an ability to understand and mobilize arguments about historical practice and constitutional design have come to be a *sine qua non* for participation in modern debates about both constitutional theory and substantive constitutional law,[191] scholars of all ideological stripes have become more adept at exploring our constitutional institutions, understanding the constitutional practices and assumptions that characterized different eras, and identifying the dynamics and levers that have propelled constitutional change. Across the political spectrum, scholars steeped in these methods and replete with the knowledge that they have accumulated, have produced important work filling in crucial details about our constitutional practices and historically contingent traditions.[192]

Finally, on a more personal level, few, if any, have done more to forward academic awareness of the complicated relationships between cultural forces, constitutional practice, and constitutional doctrine than the linked quartet of Sandy Levinson, Jack Balkin, Robert Post, and Reva Siegel.[193] In decades of books and articles too numer-

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186 *See, e.g.*, Klarman, *supra* note 8.

187 *See, e.g.*, Horwitz, *supra* note 8 (commenting on the strong relationship between the social and political factors that influenced statutory interpretation in *Burwell v. Hobby Lobby Stores, Inc.*).

188 *See, e.g.*, BLACKMAN, *supra* note 142.

189 *See, e.g.*, Greene, *supra* note 53.

190 *See, e.g.*, PEPPERS, *supra* note 78 (discussing the rising interest in law clerks); Kearney & Merrill, *supra* note 79 (evaluating the increased role of amicus briefs); Lazarus, *supra* note 178 (discussing the reemergence of a Supreme Court bar).

191 *See, e.g.*, Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L & POL'Y REV. 325, 325 n.3 (2009) (collecting sources arguing that all sides in recent debates have been conversant in originalist arguments).

192 For such works by critics of originalism, see, for example, POWELL, *supra* note 2, at 6–7; Greene, *supra* note 53, at 661. For such works by scholars more sympathetic to originalism, see, for example, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 521–23 (2003); Young, *supra* note 10, at 410.

193 Some might include in this group Akhil Reed Amar, whose prolific and original projects often, though not always, show the influence of their work. *See, e.g.*, Amar, *supra* note 10,

ous and complicated to unpack here,[194] they have explored the contours of these overlapping forces,[195] asked crucial questions about what techniques have worked for mobilizing constitutional values in the pursuit of equality and justice,[196] and pointedly criticized central aspects of our constitutional design.[197] Through their prolific exploration of these questions and their frequent participation in seminars, mentoring activities, and co-written projects with other scholars, they have been instrumental in opening a second front in the never-ending scholarly struggle to understand our Constitution, one much more in line with the perspective of this project.[198]

### C. *Moving Beyond the Existing Literature*

The works discussed above share similarities in assumptions and approach to the constitutional culture framework proposed in this article, but, with rare exceptions,[199] limit their insights to particular incidents or contexts, rather than attempting to offer broad insights into the process of constitutional decisonmaking. Even those that at-

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at 27–28 (offering an account of constitutional decisionmaking emphasizing the role of choices steeped in culture, personality, and contingency).

194 For some of their leading works, see *supra* note 2.

195 *See, e.g.*, Balkin & Siegel, *supra* note 181, at 929 (arguing that political contestation can alter people's understanding of constitutional principles); Post, *supra* note 2, at 8 (arguing that constitutional law both shapes and is shaped by the beliefs and values of nonjudicial actors); Siegel, *supra* note 2, at 1324 (discussing the interactions between citizens and officials that inspire constitutional change); Post & Siegel, *supra* note 53, at 549–50 (exploring the historical processes that have shaped constitutional law).

196 *See, e.g.*, BALKIN, supra note 2, at 4–5 (claiming that a narrative of redemption rather than one of consistently achieving greater equality and justice provides a more accurate history of the American nation); Post, *supra* note 2, at 81–83 (explaining that courts must take into consideration changing cultural notions of equality); Siegel, *supra* note 2, at 1327 (analyzing the impact of mobilized citizens and social movements on constitutional law).

197 *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 6 (2006) ("I believe that it is increasingly difficult to construct a theory of democratic constitutionalism, *applying our own twenty-first century norms*, that vindicates the Constitution under which we are goverened today.").

198 For an insightful discussion of their collective project, in terms consistent with the project of this Article, see Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 877 (2013) (reviewing JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011)) (discussing Balkin's scholarship on social movements and the role of courts in shaping constitutional law).

199 *See, e.g.*, POWELL, *supra* note 2, at 2–3 (noting that when people think of the Constitution, they think of the political practice of courts rather than the document itself); Post, *supra* note 2, at 8 (exploring the ways in which the Constitution is and is not independent from the beliefs of nonjudicial actors); Siegel, *supra* note 2, at 1324–25 (resisting the separation between lawmaking and interpretation in order to focus on constitutional change shaped by interactions between citizens and officials).

tempt to draw broader lessons from their analysis often fail to appreciate the degree to which their approach offers a fundamental challenge to mainstream constitutional theory, particularly when aggregated with the insights of like-minded scholars. To the extent that these books and articles represent manifestations of a new paradigm in constitutional law and theory, it is a paradigm that has yet to be fully acknowledged, let alone fully theorized.

Moreover, to the extent that the current literature on constitutional culture and constitutional practice either explicitly or implicitly stakes out a theoretical model of constitutional decisionmaking, there are departures as well as similarities from the approach suggested by this Article. First, as mentioned above[200] and discussed in more detail below,[201] the primary focus of such works is on how events, ideas, and movements from the broader culture influence the work product of courts, at times coupled with a reciprocal interest in how the courts' decisions in turn affect the broader culture.[202] This Article suggests a perspective that understands both the nature of "constitutional culture" and the process of constitutional decisionmaking more broadly. As will be fleshed out more fully below,[203] the constitutional culture approach sketched out in these pages very explicitly treats questions about how we staff the courts and structure its work as aspects of culture that cannot meaningfully be disentangled from other cultural forms. Further, this Article takes a broader view of the aspiration of constitutional theory, positing an approach that asks questions and seeks answers about the concrete consequences of constitutional text and thought rather than about the doctrinal and decisional law that we craft in the name of the Constitution.

Second, some of the very best works on how history, politics, and culture have shaped our constitutional practices artificially truncate their time horizons, giving rise to the misperception that we have

200 *See supra* text accompanying notes 157–159.

201 *See infra* Part V.B.

202 *See, e.g.*, Balkin & Siegel, *supra* note 181, at 928–29 (considering how political contestation affects the way people think about constitutional principles and how principles that were once accepted become controversial when applied to new situations); Eskridge, *supra* note 181, at 2064 (arguing that twentieth-century changes in the constitutional protection of individual rights were the result of social movements); Post, *supra* note 2, at 8 (exploring the relationship between constitutional law and culture); Siegel, *supra* note 2, at 1324 (examining the interaction between citizens and officials that effectuate constitutional change).

203 *See infra* Part V.A–B.

evolved into a stable constitutional structure.[204] While appreciating the contingency of our practices, institutional arrangements, and habits of thought, such studies, either intentionally or unintentionally, lapse into some of the flaws of mainstream constitutional theory: over-emphasizing the stability of our current constitutional culture, minimizing or ignoring newer constitutional practices, sacrificing nuanced portraits of our practices and institutions at a particular time for flattened portraits generally true over broader time periods, and letting in wisps of Whigish glee at how well things have turned out.[205] While often extraordinarily successful on their own terms, these works ultimately stem from a project different from—and only partially compatible with—that of this Article.

## V. THEMES AND OBSERVATIONS

Though the primary purposes of this Article are to critique the existing ways in which constitutional theory deals with constitutional practice and to offer an alternative framework for doing so, along the way I have, by necessity, developed a variety of substantive observations and hypotheses about both constitutional theory and constitutional culture. This Part concludes the Article by sketching out some of these observations and some related themes.

### *A. The Bizarre Fetishization of the Judicial Opinion*

Most constitutional scholarship—whether theoretical, descriptive, or predictive—is intensely focused on the judicial opinion. At some level, this fascination with what judges say is understandable as judicial opinions are the prime text in the law school classroom, the prime method of communication for federal judges, and the most easily accessible primary source in constitutional analysis. Still, on even modest reflection, constitutional analysis that focuses on the process by which the document's words are translated into judicial opinions is incomplete. Constitutional opinions are a tool—albeit almost certainly the single most crucial tool—for transmitting constitutional ideas and encouraging particular constitutional consequences, but they are only a tool.

To talk about the process of constitutional decisionmaking as the process through which judicial opinions are produced is to mistake a

204 For a classic example, see POWELL, *supra* note 2, at 7 (arguing that constitutional law is a "coherent tradition" that is best understood when viewed through a historical lens).

205 For discussion of these flaws, see *supra* Part I.

means for an end or a stage of the process for the process itself. To get a full picture of how constitutional law becomes an effective force in people's lives, with concrete consequences for their well-being, requires studying not only what the courts say, but also how those words are transmitted, understood, manipulated, evaded, and enforced. Judicial rulings at times have significant consequences even when issued without opinions, have limited consequences despite sweeping accompanying opinions, or have consequences drastically different than one might project from even the most careful reading of the opinions.

The constitutional culture perspective pushes back against constitutional scholarship's overwhelming tendency to fetishize the opinion. If the norms and practices of opinion writing are simply one set of nominal, contingent, and evolving features that comprise our constitutional culture, then there is no real analytically sound reason to focus exclusively on the document they produce while ignoring the parallel features that govern its absorption and implementation. Moreover, the characterization of constitutional decisionmaking as a system of culture highlights the degree to which constitutional law is not an abstract intellectual enterprise but is instead a field in which human beings engage with and against each other to achieve concrete objectives, to shape the contours of their lives, and to develop systems that explain and derive meaning from those lives.[206]

### *B. The Artificial Bifurcation of "Constitutional Law" and "Constitutional Culture"*

On a related note, my approach leads me to question the belief—explicit in some constitutional scholarship[207] and implicit in most—that "constitutional law" and "constitutional culture" are separate and discrete things. As discussed above,[208] many theorists who utilize the term "constitutional culture" use the term to represent ideas about the Constitution and institutional arrangements related to constitutional issues that exist outside the courts. In Part III, I explained why my terminology differed from theirs. Here, I want to emphasize that

206 The arguments in this Part owe a great deal to the pathbreaking scholarship of Sandy Levinson, whose provocative writings were among the first to take seriously the idea that constitutional law emerges from a process of perpetual contestation in which no single body ever has definitive control over constitutional meaning. *See, e.g.*, LEVINSON, *supra* note 2, at 29.

207 *See, e.g.*, Post, *supra* note 2, at 8 (providing different definitions for constitutional law and culture).

208 *See supra* note 157 and accompanying text.

my analytical perspective also raises concerns about the substance of their account.

According to such scholars, what happens within the courts is, by definition, not "culture." It may be influenced by culture or reflect culture, but it is not itself culture. It is something else that goes by the authoritative name of "law."

While there is nothing objectively wrong with such a conclusion—as it is true by the definitional terms set by these authors—it paints a misleading picture. First, it contributes to and reinforces the fetishization of the judicial opinion, both by failing to acknowledge that the opinion itself is a cultural document and by failing to appreciate that it is produced by a series of internal court norms and practices that behave like cultural forms. Second, by treating what goes on at the courts as a matter of law-making rather than culture, it reinforces the notion that the arrangement, practices, norms, and habits of thought that influence judges most directly are permanent or semi-permanent structures rather than evolving and contingent ones. Third, perhaps unintentionally, it reinforces a vision of the constitutional courts as a citadel that is under constant pressure from outside forces, rather than as part of the broader society.

Here my concerns follow those of some legal and cultural historians who object to the construction of those who purport to study "law and society" preferring instead a construction, such as "law in society," in order to emphacize that that law is a part of society, not just something that is influenced by society.[209] Similarly, my analysis pushes me to prefer a description of constitutional decisionmaking that—in both terminology and substance—acknowledges that what goes on in and comes out of the courts is not just influenced by our culture but is itself culture.

### *C. Underscoring the Importance of "Off the Books" Constitutional Decisions*

The constitutional culture perspective also emphasizes the importance of the work of scholars who recognize that many of the important decisions we make regarding whether and how to enforce constitutional norms have very little to do with the words of the Constitution or even with the kinds of non-textual considerations that tend to be expressly considered in judicial opinions. On the margins,

209 *See, e.g.*, William N. Eskridge, Jr., *Willard Hurst, Master of the Legal Process*, 1997 WISC. L. REV. 1181, 1183, 1186–87 (noting that Willard Hurst called his famous early legal history materials "Law in Society" and discussing what that distinction meant for Hurst, and now means for his intellectual descendants).

this is a non-controversial position. Scholars such as Lawrence Sager and Sandy Levinson have long reminded us that constitutional values often produce constitutional consequences through mechanisms other than judicial decisions,[210] while Akhil Amar, David Strauss, and others have demonstrated how constitutional decisionmaking frequently operates via norms and practices that have little to do with textual interpretation.[211]

More recently, a wide variety of scholars with very different substantive interests and ideological orientations have dug deeper, illustrating the degree to which both judicial and non-judicial consideration of constitutional meaning turns on considerations and formulations that are deeply embedded in our constitutional culture, despite their lack of specific mention in the constitutional text, and in many cases despite their invisibility in constitutional cases. Here I think of works as diverse as Ted White's intellectual and cultural histories of doctrinal forms;[212] Ernie Young's discussion of the "extracanonical" Constitution;[213] Tommy Crocker's extended interrogation of how and why "necessity" worked its way into our constitutional conversation;[214] and the bulk of Caleb Nelson's work unpacking historical expectations about the ways in which judges ought to interpret words, construe statutes, and exercise their duties.[215]

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210 *See, e.g.*, LEVINSON, *supra* note 2, at 191 (describing the Constitution as a linguistic system that "has helped to generate a uniquely American form of political rhetoric that allows one to grapple with every important political issue imaginable"); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978) (arguing that government officials attempt to avoid unconstitutional conduct according to their own conceptions of constitutional norms at the margins where the courts cannot enforce such norms due to lack of institutional competence and propriety).

211 *See, e.g.*, Amar, *supra* note 10, at 56 ("In [several important issues], the Constitution, honestly read, provides an attractive regime that the Court ignored for decades or more, and that today's Court sometimes still fails to honor."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHIC. L. REV. 877, 929 (1996) (asserting that the most important principles emerging from recent constitutional common law lack strong roots to the text of the Constitution).

212 *See, e.g.*, G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1 (2005) (describing emergence of modern tiers of scrutiny and contrasting this approach with earlier paradigms).

213 Young, *supra* note 10, at 415.

214 THOMAS P. CROCKER, OVERCOMING NECESSITY: EMERGENCY, CONSTRAINT, AND THE MEANING OF AMERICAN CONSTITUTIONALISM (forthcoming 2016).

215 Nelson, *supra* note 192, at 522 ("The [Constitution's] early interpreters—including not just the courts, but also legislatures, executive officials, the state ratifying conventions, and members of the public at large—helped both to narrow the range of accepted interpretive approaches and to settle discrete questions about particular provisions."); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 568 (2006) ("[C]ourts articulating rules of federal common law do not assert such freewheeling discretion as is of-

The constitutional culture perspective highlights the similarities between these works and puts them in a broader theoretical frame. Each of these works explores interpretive norms, habits of thought, or other intellectual structures that shape the ways in which we conceptualize and implement our fundamental law. These structures are features of our constitutional system with histories, trajectories, and connections to other salient cultural fields. They assert motive power, shaping both the content of opinions and the specific constraints and opportunities imposed on or guaranteed to the people in the name of the Constitution.

### *D. A "Living" Constitutional Culture Rather than a "Living Constitution"*

The constitutional culture perspective also helps to explain one of the great puzzles of constitutional interpretation, what Ernie Young calls "the great puzzle" of constitutional change.[216] Put simply, given the fact that the Constitution is itself a static document, why is the content of constitutional law always changing and why does the prospect of such change sit so well with the vast majority of constitutional observers?[217] The prevailing metaphor posits a "living Constitution" that evolves in response to the desires, needs, hopes, and fears of a changing population.[218] The problem, of course, is that the object that is allegedly "living" or "evolving" is a written document with a specific history and a largely stable text, not an organism or even a

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ten supposed; general law significantly constrains, and often entirely defines, the substance of the rules of decision that they apply."); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 662 (2013) ("[C]ourts sometimes go on to conclude that Congress enacted the statute against the backdrop supplied by widely accepted principles of unwritten law and that the statute should be understood as implicitly adopting those principles.") .

216 Young, *supra* note 10, at 455.

217 Professor Young's answer to this question focuses on the fact that much of the change in our institutions of government and in our understanding of the basic norms of government and individual rights have come through or been reinforced by statutory and regulatory developments that he argues are part of the "noncanonical" constitution. *See id.* at 454–57 (proposing a functional approach that recognizes the role of political institutions for which the Framers "left room" to explain change in American constitutionalism). While that observation is no doubt true and extremely helpful in understanding how both constitutional law and constitutional culture have evolved, it is incomplete, as it provides no mechanism for explaining (and thus implicitly condemns) constitutional developments that have been instantiated through shifts in our understanding of the "canonical" Constitution.

218 For a full and rich exploration of the metaphor and its discontents, see Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319, 1324 (2008) ("The living Constitution was born, it was nurtured as it developed into maturity, and it continues to grow with society." (internal quotation marks omitted)).

complex social system that might profitably be analogized to a living organism. The failure of the governing metaphor to fit with its purported object not only provokes discomfort but also provides ammunition to those who challenge the validity of methodologies that embrace an evolutionary Constitution. Put more bluntly, the metaphor's lack of descriptive plausibility undercuts its normative appeal.

These problems are largely avoided—and greater descriptive accuracy is likely achieved—if we recognize that we do not have a "living Constitution," but instead a "living constitutional culture." Our constitutional culture is not a static document, but a complex system that has a history, passes through a life cycle, is constantly evolving, and responds directly to various kinds of stimuli. When talking about a "living constitutional culture" we are still in the realm of metaphor, but it is a more plausible and comfortable metaphor.

Shifting our focus from a living Constitution to a living constitutional culture also allows us to understand why evolving constitutional law is not a choice but an inevitability. To reiterate the point that began this Article, constitutional law does not emerge fully formed from the constitutional text but is made through a process that filters the text through concrete institutions, practices, and habits of thought. We know from experiences that those elements are constantly evolving, but, even if we did not have that empirical data, we could assume as much. To the extent that people have freedom to formulate institutions and define norms, different groups of people will make different choices. On the flip side, to the extent that the process of adopting practices, norms, and intellectual structures is less than fully conscious, these cultural elements are similarly time- and place-dependent, as the influences that shape them are not stable but ever-evolving.

One needs to be careful, however. To argue that constitutional law is, by necessity, always evolving is not to argue that judges necessarily should adopt consciously evolutionary interpretive methods. One might, for example, believe that a certain amount of doctrinal adaptation to current cultural norms is inevitable, but that it behooves us to minimize this effect[219] or that judges are not the proper

219 *See, e.g.*, Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 702–05 (2009) (analyzing with nuance some of the reasons judges might strive to faithfully apply the law in an objective or static way, notwithstanding their position as subjective modern individuals with particular policy preferences).

actors to effectuate this adaptation.[220] Judges who believe either of those things might consciously choose to adopt a methodology, such as one of the various forms of originalism, that constrains their ability to consciously account for the values and preferences of the current generation, and may even make a plausible argument that other judges should be required to adopt such a methodology.[221]

### *E. Constitutional Law as Democratic Governance*

As discussed several times above, an approach to constitutional theory that requires us to survey the various institutions, practices, norms, and habits of thought through which constitutional law is made keeps butting up against places in our constitutional culture where individuals and interests have opportunities to shape constitutional outcomes. Our current constitutional culture has, for example, developed norms that increasingly evaluate potential judges based on predictions about the substance of their constitutional jurisprudence.[222] We have developed institutions and technologies that make it easier for interest groups and ideological allies to nurture politically motivated challenges to legislation.[223] We have encouraged broad amicus participation at the Supreme Court level, in part in order to give the Court information about the preferences and interests of various constituencies.[224] And we have delegated much of the work of informing the public about the content and consequences of Supreme Court rulings to interests groups, political organizations, bloggers, and an increasingly ideologically polarized media.[225]

As I discussed in Part IV above, one can reach different conclusions about the normative implications of these cultural evolutions.[226]

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220 For one among many articles dealing with these issues of institutional competence, see William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 666–67 (1982) (examining Justice Frankfurter's jurisprudential recognition of judicial institutional incompentence, which "derived from the political question doctrine, sounding in questions of separation of powers and the superior competence of the political branches to make certain determinations").

221 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) ("The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values—so that as applied, even as applied in the best of faith, originalism will (as the historical record shows) end up as something of a compromise.").

222 *See supra* Part II.D.

223 *See supra* Part II.D.

224 *See supra* Part II.B.

225 *See supra* Part II.C.

226 *See supra* text accompanying note 191.

Nevertheless, they are hard to ignore. Whether one's project is normative, evaluative, or merely descriptive, its accuracy and utility depends on taking seriously the many ways in which our current constitutional culture creates participatory norms that turn constitutional decisionmaking into a form of democratic governance.

## CONCLUSION

As the first two Parts of this Article have hopefully demonstrated, constitutional theorists and other constitutional commentators make heavy use of a paradigm that mistakes certain aspects of our current constitutional decision-making process for inherent parts of our constitutional structure and ignores other important aspects of that process entirely. These distortions and elisions raise concerns about the accuracy of much descriptive constitutional commentary and the foundations of more normative and evaluative work. Drawing in part on an emerging literature, this Article proposes a new paradigm for thinking about the process through which we make constitutional law, one that understands that almost all of our institutional arrangements, practices, norms, and habits of thought are nominal, historically-contingent, and ever-evolving, and that aims to treat them as a complicated, interlocking constitutional culture.

The final two Parts of the Article are, intentionally, something of a tease, offering glimpses of the descriptive clarity and analytic insight that might be gleaned from sustained scholarly endeavors along the path that I chart. I have no illusion that all those who explore our rich constitutional culture from this perspective will agree with either my description of its features or the lessons that I have drawn. Indeed, even when it comes to my own work, those characterizations and observations are contingent and subject to substantial modification as I pursue the intellectual agenda sketched out in this Article. That, again, is by design. This Article is motivated by a simple critique, but that critique, like many critiques, leads not to a simple solution but instead to a substantial intellectual undertaking.