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Editors' Introduction

Martin Diamond, the late political theorist, closed a famous essay by reflecting on the "profound distinction" that the essays of *The Federalist* "made between the qualities necessary for Founders and the qualities necessary for the men who come after" (1992, 35). Whereas the act of founding the American constitutional republic had demanded an exceptional exercise in reason, he observed, the conduct of politics thereafter would depend on nothing more exalted than the ordinary play of interest. Diamond's distinction nicely captures the idealized image of constitution making that many scholars still intuitively, and perhaps even uncritically, share. In this view, considerations of stability and justice alike should encourage constitution makers to transcend the particular interests they represent. If they cannot be expected to step behind a Rawlsian veil of ignorance, where they will be uninformed of the social position they will occupy in the new regime, they should at least recall (to borrow a phrase from John Marshall) that it is a constitution they are drafting, not some ordinary piece of legislation. The establishment of a successful constitutional regime thus demands substantial self-restraint; its authors have to expect more of themselves than they do of their successors, the "posterity" for whose benefit framers, in the heroic account, struggle.

A satisfactory political theory of constitutionalism can well agree, with Diamond, on the importance of the initial deliberative processes through which a constitution is adopted. But such a theory can hardly stop there. It also calls for a satisfactory interpretation of constitutional history. That is, it has to ask not only how constitutions are adopted, but also how the norms they embody first gain acceptance and then retain legitimacy amid the political buffetings of those "who come after." Much of that constitutional history can doubtless be written in conventional terms, as a story of the resolution of early disputes, the setting of essential precedents, and the evolution of procedures for adjudicating later controversies. But each of these facets of constitutional theory and history presupposes something

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else: a commitment to constitutionalism as important in itself. How that commitment takes hold can be described as the production of a constitutional *culture*, which may well prove as vital to the stability of a constitutional regime as any of the more familiar factors scholars routinely analyze.

The further we stand in time from the foundation of the particular constitutional regime we are studying, the easier it may be to accept Diamond's sharp distinction between founders and followers. But founders are usually the first to follow themselves. Even when, as in the American case, the very authority of a constitution depends on its having been framed and ratified by bodies specially convened for those purposes alone, constitution makers must assume that they will attempt to exercise power under the document they are framing and/or ratifying. When they do, they face the fundamental challenge that the creation of a constitutional culture must answer. On the one hand, they must feel some obligation to promote the constitutional norms that they have just sought to establish. On the other, to advance the policies they favor, they have strong incentives to treat the constitution instrumentally, typically by stressing the authority of whichever branch or department seems most conducive to their interests or most amenable to their influence.

Among the constitutional founders who wrestled with this dilemma, the best known may well be James Madison – whose contributions to *The Federalist* were, of course, the basis for Martin Diamond's reflections. A brief consideration of Madison's concerns during the decade following the adoption of the federal Constitution will illustrate the general themes that many of the essays in this volume address.

A MADISONIAN PARABLE

In April 1787 Madison described his pet scheme to vest Congress with an unlimited negative on all state laws as "the least possible encroachment on the State jurisdictions" that a new constitution might make. The rejection of this proposal by the federal convention in Philadelphia was one reason why Madison initially believed that the Constitution would "neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts ag[ain]st the state governments."[1] A decade later, however, Madison found himself drafting the Virginia Resolutions, which urged the state legislatures to embark on a campaign to oppose the offensive Alien and Sedition Acts of 1798. Over time, these resolutions, along with the even more militant Kentucky Resolutions drafted by Vice-

[1] Madison to Washington, April 16, 1787, in Rakove 1999, 81; Madison to Jefferson, September 6, 1787, in ibid., 136.

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President Thomas Jefferson, came to be regarded as the locus classicus of exactly the sort of states' rights theories that Madison, the nationalist of 1787, would have rejected out of hand (and did in fact roundly criticize in the years to come). How Madison seemingly moved so far in his thinking within the space of a decade obviously poses a serious question for Madison's biographers. But more than that, it offers a revealing early commentary on the problem of adjusting constitutional intentions and expectations to the messy uncertainty of political life and the lessons of experience.

The course of politics during the first decade of government under the Constitution challenged Madison's initial assumptions in two crucial ways. First, the ongoing foreign policy crises generated by the wars of the French Revolution revealed that the executive posed a far greater danger to the stability of the constitutional order than Madison had calculated. In his original view, the popularly elected House of Representatives was the one institution most likely to "encroach" on the just powers of the other branches; but from 1793 on, Madison increasingly realized that the executive could exploit crises of national security to gain a decided advantage over Congress. Second, and more important, the success of the Federalist Party in gaining control of all three branches of the national government called into question the fundamental premise of the Madisonian federalism of 1787–8: that durable factious majorities would be far less likely to coalesce at the national level of politics than within the smaller compass of the individual states. Once he recognized that a factious party, "whether amounting to a majority or a minority of the whole," had seized control of the government, Madison had no choice but to reconsider his starting positions. Whatever this process of reconsideration indicates about his theoretical consistency, it speaks well for his intellectual honesty – as well as his ongoing concern with securing the authority of the Constitution (rightly interpreted).

It would be easy to explain Madison's problems in the 1790s in primarily political and biographical terms, as the result, say, of his falling under the dark star of Thomas Jefferson, with his Frenchified nonsense; or of a genuine Anglophobia; or of his envy of Alexander Hamilton's success in gaining the ear and confidence of President Washington; or of the continued political strength of Anti-Federalism in his home state of Virginia.[2] Plausible as these explanations might be, none of them will help us to grasp the distinctively constitutional aspects of Madison's trajectory in the 1790s, much less measure their significance for our own understanding of how constitutional regimes take hold even when their

2 For some examples, see McDonald 1974, 68–81; Elkins and McKitrick 1993, 79–92.

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establishment immediately gives way to periods of intense partisan competition. What do Madison's reconsiderations reveal about the process of converting the textual Constitution of 1787 into a working set of practices and understandings?

Let us begin by stating the basic challenge that events posed to Madison's original constitutional theory. That theory rested on at least these crucial positions. First and foremost, the creation of an extended national republic embracing a diversity of interests would secure the essential liberties that Americans cherished by providing the long missing cure for the peculiar propensity of republican government to fall prey to the "mischiefs of faction." Second, "auxiliary precautions" against the abuse of national power could be found in the various modifications of the pure separation of legislative, executive, and judicial power that the Constitution had engineered. Officials in each of the major institutions of national government would have both a jealous stake in protecting their particular functions against the "encroachments" of their rivals, and the means to do so. Third, the most likely sources of impolicy, injustice, and encroachment lay in those institutions that were most susceptible to the fluctuating interests and passions of the people: the national House of Representatives and the state legislatures. If that was the case, it seemed unlikely that the people at large could be expected to protect the landmarks of constitutional government against disequilibrial encroachments. Fourth, and somewhat more synthetically, against these dangers, mere statements of constitutional principle (such as formulaic affirmations of the separation of powers or bills of rights) were only so many "parchment barriers," of marginal use at best if institutions were not designed to channel the real swirling forces of republican politics.

By 1798 nearly all these propositions, except the last, had been tried in the balance and found wanting. The passage of the Alien and Sedition Acts indicated either that the likelihood of a minority tyranny was higher than he had supposed, or that the protection that the extended nature of the republic was supposed to supply against the danger that a factious majority might capture the government was grossly inadequate. With the Federalists firmly in control of all three branches of the national government, the structural, ambition-checking-ambition protections of *Federalist* 51 seemed no more effective. Under these conditions, there seemed no choice but to attempt to mobilize the people not simply to reverse unwise Federalist policies but also to rally around the Constitution itself.[3] If the people were to be mobilized, Madison understood that the

[3] To be sure, this position posed much less of a problem to Jefferson than it did to Madison. In *Federalist* 49 and 50, Madison had gone out of his way to criticize Jefferson's proposals for appealing to the people to correct errors in constitutional interpretation.

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"parchment barrier" of the Bill of Rights would have to play the traditional role that he had once been skeptical it could actually fulfill in a republic: providing the people with a standard against which they could judge the excesses of their governors.[4] But with Federalists using the Sedition Act to make war on that "palladium of liberty," the free press, how could the people get a clear view of that standard – unless the state legislatures, the institutions Madison had once been so quick to condemn, could in turn be prevailed upon to protest Federalist misrule? That, of course, was the political strategy to which Madison and Jefferson turned in 1798, drafting the Virginia and Kentucky resolutions that respectively urged the other state legislatures to mount an effective political opposition or even to impede the operation of the protested acts.

That strategy had not been manufactured from whole constitutional cloth, however. Madison had in fact anticipated it, at least in academic terms, in *Federalist* 46. There he had argued that "ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse a common cause. A correspondence would be opened. Plans of resistance would be concerted." In 1788 Madison had clearly imagined that the states might indeed provide an effective recourse to the abuse of national power – though then he had doubted whether such a recourse would prove necessary. Now events suggested that he had been even more prescient than he had realized at the time. But even here, his proto–states' rights position was found wanting. For the other states – generally dominated by Federalists, too – did not rise to the occasion. They spurned the Virginia-Kentucky invitation, leaving the fate of the constitutional republic to ride on the outcome of the election of 1800. In response to the rebuff of the other states, Madison drafted the so-called Report of 1800, defending the original resolutions, and suggesting that the states, in "their sovereign capacity" as the original parties to the federal compact, could never renounce their authority "to decide in the last resort, whether the compact made by them be violated."[5] Whatever the fair meaning of these remarks, they and the original resolutions they defended acquired a life of their own, providing John C. Calhoun with a foundation for his doctrine of nullification.[6]

Madison's trajectory after 1787 is replete with the ironies, unintended consequences, and agonizing reappraisals that make constitutional history

[4] Madison to Jefferson, October 17, 1788, in Rakove 1999, 418.
[5] Report of 1800, in Rakove 1999, 608–63.
[6] For Madison's repudiation of Calhoun's doctrine of nullification, see Madison, "Notes on Nullification, 1835–36," in Hunt 1900–10, 9:573–607.

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so inherently interesting a subject – but which also illustrate why the birth pangs of a constitution involve more than the labor of delivering it into the political world. At the outset, Madison had hoped that the unavoidable ambiguities in the meaning of the Constitution would be "liquidated" gradually as the new government plotted its initial course and set key precedents. But history, in its cunning, made that process more difficult and divisive than he anticipated. In part this was because interpretive questions proved more difficult and divisive than he had foreseen, even allowing for his disappointment over the plan as adopted. But it was also because political events did not stand still while constitutional procedures were ascertained and tested. Had political controversies been confined to issues like the assumption of state debts and the establishment of a national bank, it is possible that Madison's original hope for constitutional gradualism would have been fulfilled. But the French Revolution created a host of more pressing questions, rich with symbolic possibilities and ideological overtones, that reopened earlier disputes with a new urgency. Federalists and Democratic-Republicans quickly came to regard each other as partisans of foreign powers and the dangerous ideologies they represented. Under such circumstances, not only was any effort to create stable norms of constitutional interpretation bound to be deeply politicized; the defense of one view of the Constitution or another could easily become a mere instrumentality of political conflict.

The striking aspect of this first decade of constitutionalized politics and politicized constitutionalism, however, is that it did not destroy the underlying American inclination to idealize the authoritative stature of the Constitution. By contrast, in revolutionary France a very different attitude toward the authority of constitutions prevailed. With the American example(s) before them, the members of the National Assembly also ventured to "fix" a constitution for their new republic. But that effort repeatedly failed, because the imperatives of the revolutionary emphasis on the ongoing sovereignty of the national will always prevailed over the prudential desire to establish a durable institutional framework of government.[7] However sharply the former American revolutionaries divided over the interpretation of their Constitution, and however much these divisions might have sparked speculation about its durability, the fundamental American concept of a constitution as an extraordinarily authoritative instrument of government remained unshaken.

That fact, taken by itself, may well identify one crucial component of what it means to establish a constitutional culture (at least on the American model). But that in turn should not disguise or relegate the importance of another facet of constitutionalism. In the abstract, a con-

[7] Baker 1990, 252–305.

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stitution should operate to constrain the costs of political conflict by fostering fundamental confidence in its institutions and procedures. But until its meaning is itself settled, and a satisfactory set of precedents established, disagreements about a constitution may do as much to exacerbate controversy as to restrain it. In the context of the 1790s, the tendency of each party to view its antagonists as advocates of Anglo-monarchical or Gallo-Jacobin principles raised the potential costs of constitutional disagreement by suggesting that their positions, if adopted, would subvert the Constitution's true meaning. In 1793 and again in 1796, the absence of an underlying consensus about the constitutional allocation of national security powers added a fresh dimension or layer of conflict to the existing disagreements over policy. Far from dispelling suspicion about the rival motives of the opposing parties, constitutional disagreement, or simple uncertainty, operated to inflame suspicions and raise the stakes of conflict.

Yet even amid the presumed "paranoia" of the 1790s, with insidious motives being ascribed all around, both Federalists and Republicans opted to seek advantage not through a strategy of exit but rather by exploiting potential opportunities within the Constitution itself. Both parties quickly discovered a strong incentive to convert the untested mechanisms of presidential election into an occasion for political innovation. In 1787 no one had expected the presidency to emerge as the crucial focus for national political competition, but by 1796, and even more so by 1800, it was evident that control of the executive was essential to control of the government. If one purpose of the Constitution was to advance a process of national integration, the invention of successive electoral games to capture the presidency was an essential ingredient in fashioning a constitutional culture. With some qualification, the same claim can be made for the defensive strategies that both parties had to pursue in their bleaker moments: Republicans by turning to the state legislatures in 1798, Federalists by packing an expanded federal judiciary in 1801. American constitutionalism does not require one set of political actors to be consistent in favoring one forum of decision over another; indeed it should benefit from circumstances that force political competitors to exchange strategies, so long as they remain committed to finding the constitutional niche that will best protect their interests.

The original American experience, and James Madison's trajectory within it, thus illustrate why constitutionalism can never be described as a mere matter of founding, no matter how wise the founders or how principled their deliberations. The acceptance of a constitutional text which must be in its nature incomplete or open-ended requires the development of interpretative canons that are themselves likely to reflect political, historical, and cultural factors as much as legalistic methods of textual analysis. These features of constitutionalism underscore the fragility of

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any nation's constitution, however it is represented textually, by revealing how its interpretation lies hostage to future fluctuations in meanings and shared understandings. In the United States, interpretative disputes did not, of course, end with the Civil War. Indeed, battles over constitutional interpretation have resulted in other critical "moments" of constitutional change: Reconstruction, the New Deal, the "rights revolution" of the midtwentieth century. As Bruce Ackerman has noted, only a few of the changes we associate with these "moments" have left textual marks on the Constitution, and these textual changes underdescribe the changes that occurred. More often, more profoundly, what changed is how the Constitution was understood. This circumstance is not peculiar to the United States and alerts us to the necessity of understanding constitutionalism or constitutional politics as an ongoing and continuous process. This is not to say beginnings are unimportant. But they are only beginnings.

The contributors to this volume analyze and discuss various aspects of the ongoing process of constitutional democracy. Before outlining the concerns of the respective chapters, however, we first attempt to clarify some basic ideas that we think are central to any understanding of constitutional government and, in particular, constitutional democracy. These basic ideas compose a common conceptual framework which is more or less taken for granted by the contributors. Our clarification does not pretend to settle all important questions pertaining to constitutional democracy. Rather, it is intended to promote further thinking, including critical assessment of the contributors' arguments.

SOME BASIC IDEAS

Constitutionalism as a Social Process of Interpretation

Constitutionalism, in practice, is largely a process of interpretation conducted within a community whose members share political power and jointly seek to determine what a constitution permits or requires in specific instances. But interpretation of what? And by whom? It is much too narrow a view, we think, to identify constitutional interpretation with the exegesis of one or more documents by courts, although that is certainly an important aspect in many countries. The place of some founding document within a political system is itself fixed by prior or background conventions or understandings and does not flow from any properties of a piece of parchment. By the same token, constitutionalism does not require a commitment to a particular methodology of textual construction. As American practice amply illustrates, a variety of interpretative strategies can flourish within a single constitutional system, helping to

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generate the constrained level of conflict that maintains the vitality of the constitutional commitment itself. Constitutionalists may, without self-contradiction, adopt either literalist or open-ended modes of textual construction. We think it is important to understand the interpretation of constitutional *texts* as only one part, and perhaps not always the most significant part, of constitutionalism.

Constitutionalism must be understood as involving historical and cultural interpretation, as well as textual exegesis, in that the meaning of a constitutional text depends on the context to which it is to be applied. For example, when deciding whether campaign spending is like political speech, courts need to consider actual campaign practices themselves, as well as public beliefs and expectations about these practices. It is not that texts are unimportant. Everyone would agree that texts can constrain plausible interpretation. Words, if they are to retain any useful social purpose, cannot mean just anything we say. But how they constrain depends, intrinsically, on how their meanings are construed in practical circumstances.

Constitutionalism must also be understood as involving political theorizing. Even if no one actually recognizes campaign spending as speech, it is necessary to understand how it functions within the electoral regime. If campaign spending generally conveys information, and if its regulation prevents some people's views from entering public debate – if, in effect, it operates like speech in unrecognized ways – that is surely a (defeasible) reason for courts to treat it like speech. Which regulations on spending or contributions should stand or fall should, moreover, consider the purposes that the First Amendment is supposed to serve (itself a deeply controversial matter). Perhaps even more controversially, the constitutionality of regulations might also depend on a consideration of their consequences for the political system more generally. Brutally put, a campaign regulation might be constitutionally justified in terms of its desirable effects on the political system.

Thus, constitutionalism has both backward- and forward-looking elements. It looks backward in that it necessarily involves historical and cultural interpretation to construe the force of constitutional texts (whether they are thought to enhance or limit governmental authority). It looks forward in considering the effects of proposed laws on the functioning of our political system and public life. The backward-looking element is sometimes considered the province of justification and legality, whereas the forward-looking aspect is seen as the domain of the practical and useful.

Constitutional systems differ greatly in how they divide constitutional from ordinary law. Systems with written constitutions often rely on procedural tests that identify as constitutional norms those which have entered the text according to accepted higher-order rules of

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ratification and amendment. But such a formal test cannot be necessary. Constitutional norms can be "implied" or can arise interpretatively. Moreover, the higher-order rules that govern constitutional development are themselves in need of interpretation. Procedural tests are probably not sufficient either. Again, the American example contains numerous procedurally legitimate clauses that seem without normative force, at least as they are currently understood. For these reasons, the determination of constitutional norms seems unavoidably to involve substantive judgment and interpretation within the interstices of the formal rules. The text and the formal procedures for changing it are a starting point for this effort. They may constrain it but they are not the end of it. We think of the discourse by which such determinations are made as that of constitutional theory.

Constitutional Governments and Cultures

Any particular form of constitutionalism makes reference (at least implicitly) to a constitutional political system or government, a constitutional culture, and a constitutional theory. We shall define a *constitutional political system* as a two-level system of political norms and rules such that the higher-level elements (called "constitutional") are supposed to be superior in legal and/or moral force to the lower-level elements (called "ordinary"); and such that the "constitutional" norms and rules place binding legal and/or moral limits on the scope of authority granted to any group of government officials (including legislators, administrators, and judges) to create "ordinary" norms and rules (including statutes, regulations, and orders) or to settle the meaning of "constitutional" ones when conflicts arise. This basic idea of a constitutional government is complex and requires further elaboration. But it is distinct from any idea of the constitution as a mere blueprint of how power is actually allocated among existing institutions. The actual allocation of power in a society may deviate significantly from the allocation prescribed by the higher-level norms and rules composing the constitution as we understand it.

A *constitutional culture* is a web of interpretative norms, canons, and practices which most members of a particular community accept and employ (at least implicitly) to identify and maintain a two-level system of the appropriate sort. We might speak of various cultures (or levels of culture) correlating to different communities within society, including a highly sophisticated culture associated with judges and other members of the legal profession as well as a perhaps cruder popular culture associated with the community at large. In any case, the line between constitutional culture and constitutional government will not always (or perhaps even often) be sharp. The concept of culture is the more encompassing of the

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