

## LOW STAKES AND CONSTITUTIONAL INTERPRETATION

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*Many of us engage in debates, sometimes intense debates, over the proper method of constitutional interpretation for judges. This Essay offers six reasons to believe that these debates involve low stakes, in the sense that the choice among competing methods will not determine outcomes in a significant number of important cases. These reasons involve mainstream constraints, overlapping results, indeterminate results, intolerable results, interpretation without decision, and inconsequential decisions. After a suitably brief investigation of theoretical and experimental resources on low-stakes decision making, the Essay suggests how debates over constitutional interpretation by judges might proceed if more people become convinced that the stakes are indeed low. Three venues of debate are considered—academia, the judicial appointments process, and judiciaries—along with stakes beyond case outcomes.*

### I. INTRODUCTION

The revolution will not be litigated, just as it will not be televised, and everyone should know that by now.<sup>1</sup> Decades of investigation indicates that judges often work at the margins of social life. When court decisions do implicate key policy choices, they are constrained by forces beyond the control of judges. Internal and external constraints ensure that judicial behavior cannot be explained by any straightforward notion of what individual judges prefer as a matter of policy, whether or not they enjoy tenure and salary protection. Courts are part of a larger, if developing, settlement that allows judicial power in only a fraction of all significant social decisions. For example, earlier this year, the Supreme Court did step in to liberate corporate and union treasuries from a part of campaign finance reg-

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<sup>1</sup> See GIL SCOTT-HERON, *The Revolution Will Not Be Televised*, on *PIECES OF A MAN* (Flying Dutchman Productions 1971). Actually, the revolution might be televised if "television" survives beyond this generation. I put that question aside.

ulation.<sup>2</sup> But last year, the Court had nothing to say about the Chrysler bailout and bankruptcy,<sup>3</sup> years have passed without the Court ordering anyone released from Guantánamo Bay,<sup>4</sup> and no one expects the Court to do much notable work regarding a climate change treaty, military deployments in Afghanistan, tax policy, budget deficits, trade deficits, economic growth, the unemployment rate, and so forth.

If confidence in these observations is greater today than in earlier generations, the basic point is nevertheless not new. Shortly before the Supreme Court bowed to the essential components of the New Deal, Dean Alfange wrote that the Court “has, with but few exceptions, adjusted itself in the long run to the dominant currents of public sentiment.”<sup>5</sup> True, judges have some effect on some people’s lives. The long run can be uncomfortably long. Judicial intervention can conceivably instigate more significant changes over time. And there remains much to discover about the determinants of judicial behavior. Courts adjust themselves to only a subset of all social, economic, and political forces. Case outcomes are far from perfectly predictable, and a fairly accurate model of judicial behavior might not last more than a generation. Things change. But the last seventy years of scholarship on judicial behavior have been, to a significant degree, an extended confirmation of insights like Alfange’s.

These considered impressions ought to raise questions about a longstanding debate: the proper method of constitutional interpre-

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<sup>2</sup> See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 886 (2010) (addressing independent expenditures on mass communications). Lobbying expenditures were never so restricted, the Court upheld the disclosure requirements at issue, and it is not yet clear how excited corporate managers will be to use treasury funds on advertising that takes sides in contested candidate elections. Still, *Citizens United* is evidence that the Court sometimes issues significant decisions at odds with mainstream public opinion, perhaps even if public opposition is predictable before the fact. A useful area of research involves how the Court chooses (narrow) fields in which to march against strong headwinds. But my focus here is more about how often this might happen and associated issues.

<sup>3</sup> See *Indiana State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275, 2276 (2009) (per curiam) (refusing to stay the bankruptcy court’s orders permitting asset sales). The Court did tell other judges to be more quiet about the matter, see *Indiana State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015, 1015 (2009) (vacating the Court of Appeals’s affirmance of the bankruptcy court’s orders and instructing that the appeal be dismissed as moot), and that announcement might be telling.

<sup>4</sup> Compare *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (continuing to maintain federal habeas jurisdiction over detainees), with *Kiyemba v. Obama*, 130 S. Ct. 1235, 1235 (2010) (per curiam) (remanding a case involving the authority of federal courts to order the release of detainees).

<sup>5</sup> DEAN ALFANGE, *THE SUPREME COURT AND THE NATIONAL WILL* 40 (1937). Alfange’s epilogue comments on the then-recently-decided *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). See ALFANGE, *supra* at 237–39.

tation for judges.<sup>6</sup> If more people become convinced that the judicial choice of interpretive method for constitutional issues is actually a low-stakes decision—in the sense that the choice will not determine outcomes in a significant number of important cases—then what will debates over this choice look like? What should they look like? Should they take place at all?

The first part of this Essay collects reasons to believe that this interpretive choice is indeed a matter of low stakes for society. A few of these reasons draw from doubts about the efficacy of judiciaries, or of judicial review, or even of constitutional law writ large. But the conclusion about the stakes for constitutional interpretive choice in judicial decisions does not depend on these broader doubts. The stakes are probably low regardless; larger-scale doubts impose yet another potential ceiling on those stakes. The second part of the essay suggests ways in which the contemporary debate over constitutional interpretation by judges might and should be affected by the perceived stakes for case outcomes. This includes a brief discussion of theory and experimental evidence regarding the effect of stake size on behavior before moving on to debates over interpretive method. Of course, inquiries into constitutional interpretation occur in many venues with many different participants. I will therefore comment on how the stakes vary across these contexts, and why the outcomes in litigated cases are not the only stakes involved.

Before going forward, two points of clarification are in order. First, this Essay concerns a debate happening in a particular time and place. I will speak to the contemporary debate regarding judges in the United States without pretending to offer advice for other systems. Second, assessing the stakes of a decision depends on the observer's values. Although I hope that my analysis is largely insensitive to value commitments, it cannot be fully independent of those commitments. For instance, interpretive choices might allow some people to act with integrity or to achieve progress toward some truth

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6 Here I use the term "interpretation" broadly to include prominent competing methods for judges to gain meaning from legal texts and to make constitutional decisions. See generally Kent Greenawalt, *Constitutional and Statutory Interpretation*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 268–70 (Jules Coleman & Scott Shapiro eds., 2002) (outlining settled and controversial principles of constitutional and statutory interpretation). These methods include conventional contemporary understanding, moral readings, and originalist interpretations of text, as well as common-law constitutionalism, minimalism, Thayerian deference, and representation reinforcement. There are narrower definitions of "interpretation," of course, and I often find them useful. But they would lower the stakes of debates over "interpretive method" even further. See *infra* text accompanying notes 27–33.

that is important to them, even if those choices are not important in another way. My interest is in the social impact of court decisions, which is a concern shared by many. But “the stakes” are partly a function of who makes the assessment, and I do not mean to offer a universal answer to the stakes question.

## II. LOW STAKES FOR INTERPRETIVE CHOICE

Not a few critics have suggested that courts are taking over our lives in the name of the Constitution.<sup>7</sup> This kind of complaint is normal. Any meaningful judicial role in supreme law will prompt intense objection from at least some quarters. Someone is bound to complain whenever a judge privileges certain supposedly fundamental rights, or certain minority interests, or certain forms of reasoning, or certain forms of democracy, or ancient values, or elite values, or politically countercyclical values, or the last generation’s values, or whatever. Our courts can and have served many functions over the years as part of a shifting arrangement of societal forces, and each of those functions has a victim of sorts.

The strong-form complaints are easily exaggerated, however. An extravagant claim of judicial dictatorship might be nothing more than manufactured outrage linked to a few easily consumed judicial decisions with an otherwise selective and passing influence on the world. Whether or not strategically expressed indignation is part of the picture, there are reasons to believe that judicial decisions rarely make serious differences in the course of social life; and that judges cannot resolve all of their constitutional cases, let alone rise above sideshow status, by choosing one of the competing methods for interpreting the Constitution. The social significance of constitutional decisions in the courts might be modest in most instances, and the significance of interpretive method within those decisions is certainly more modest still. These observations would remain true, moreover, even if one of us could snap our fingers and have every judge agree to make level-best efforts to abide by a single method of constitutional interpretation.

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<sup>7</sup> I hesitate to place these books together, but the general message of warning can be found in CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 1–17 (2005), and MARK REED LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* 9–13 (2005). Levin portrays the threat of judicial tyranny as having come to pass.

## A. *Six Reasons*

### 1. *Mainstream Constraint*

One way or another, judicial decisions usually end up avoiding conflict with mainstream thinking that prevails outside the courthouse. Observers from Robert Dahl and Robert McCloskey through Gerald Rosenberg and Barry Friedman have indicated that judges are more conformists than radicals.<sup>8</sup> The leading illustration is the Supreme Court's flagging resistance to New Deal innovation.

High-profile judicial capitulation should not lead us to overstate the point, of course. There have been streaks of politically countercyclical judging under any fair definition, and sometimes there is no congealed mainstream opinion of any depth to contradict. Perhaps the best example of judicial independence from popular opinion is the Court's extended opposition to prayer in public schools when orchestrated by government officials.<sup>9</sup> And by some standards we are experiencing a politically countercyclical spell right now.<sup>10</sup> Even so, episodes in which judges contradict mainstream opinion are usually like an earlier brand of economic recession: short and shallow. To state the claim modestly yet confidently, there seem to be no examples of the Court using supreme law to oppose any central element of a governing coalition's program for an extended period of time, and certainly not when sources of conventional legal argument (including judicial precedent) plainly pointed the other way. Not even *Dred Scott* broke this pattern. Much of the Warren Court's constitutional work, moreover, policed local or regional outlier policies without contradicting anything approaching a national consensus.<sup>11</sup>

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<sup>8</sup> See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 367–76 (2009); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 225 (1960); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 428–29 (2d ed. 2008); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279–95 (1957); see also Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 501 (2006) (“[T]he Supreme Court tends, in the long run, to cooperate with the vector sum of forces in national politics.”).

<sup>9</sup> See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963). For opinion polling on the question, see Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62 (Nathaniel Persily et al. eds., 2008), finding that a majority of Americans have disapproved of the Court's decision over several decades.

<sup>10</sup> I am writing in advance of the 2010 elections.

<sup>11</sup> See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 34–37, 376, 379–80, 396, 489–94 (2000) (discussing *Brown v. Board of Education*, *Griswold v. Connecticut*,

Explaining why the pattern of court decisions suggests a mainstream constraint is challenging, and so is predicting precisely when that constraint can be overcome.<sup>12</sup> But judicial moderation is consistent with an ineradicably political appointments process. Even if the simple policy preferences of judges explain their decisions, as unreconstructed attitudinalists suggest,<sup>13</sup> the range of judicial preferences is shaped by the appointments process beforehand. Most state judges are elected, and neither ACORN nor Tea Party membership is an established credential for a federal judgeship. Within the federal appointments process, any number of past decisions must be taken as settled by nominees hoping for confirmation. The current list includes not only *Brown*, but also *Griswold* and, not at all ironically, *Marbury*. In addition, at least some judges think strategically and hope to maintain respect for their judgments.<sup>14</sup> Were federal courts to depart from their relatively mainstream tradition, they might suffer reprisals or disregard, as they sometimes have in the past.<sup>15</sup> In view of this reality, judges probably will adopt interpretive methods most likely to produce results that are compatible with a mainstream boundary. To the extent that judges are a product of, confined to, and unable to influence mainstream opinion, their choice of interpretive method is quite inconsequential. Capping the range of results simultaneously caps the stakes of choosing a method to reach those results.

Now, if the Roberts Court announces that the federal government cannot impose a tax on individuals for failing to purchase health insurance,<sup>16</sup> some observers might look past lasting public opposition to

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*Gideon v. Wainwright*, and *Miranda v. Arizona*, and identifying a Southern value set as a principle loser from judicial review in the 1960s).

12 Among the possible explanations for effective exercises of judicial power despite majority opposition (aside from issues on which no real majority coalesces) are: low-intensity opposition from a popular majority; high-intensity support from an elite minority; holdovers in the judiciary from a prior governing coalition who retain some power as part of a new settlement; and competing coalitions attempting to delegate certain issues to the courts to lower the stakes of politics when rotation in office is foreseen. On the latter two possibilities and their limits, see Mark Tushnet, *Political Power and Judicial Power: Some Observations on Their Relation*, 75 *FORDHAM L. REV.* 755, 759–68 (2006).

13 See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86–97 (2002).

14 See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

15 See, e.g., FRIEDMAN, *supra* note 8, at 12–13 (noting “the danger of unaccountable judges with the power to interpret the Constitution,” as well as “defiance of judicial decrees” and attempts to “exercise control over the courts”).

16 A new tax penalty, exceptions, collection restrictions, and congressional findings are located in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242–49 (2010) (to be codified at 42 U.S.C. § 18091). The tax, assuming it is not repealed, will not take effect until 2014.

the legislation and reconsider the practical limits on judicial intervention.<sup>17</sup> But the Court's recent track record is not even that bold. Invalidating flat handgun bans is no evidence of judicial radicalism in the United States.<sup>18</sup> And the Court's decision to stand aside when the Chrysler bankruptcy plan was challenged is a sign that the post-1937 model remains in place. Today the Roberts Court is the most "conservative" institution of the federal government. As a tactical matter, I would rather challenge the federal health care law there than seek repeal in this Congress, for example. Yet the Court's politically countercyclical force to date can only be described as minimal. The general point is that constraint is a nonissue for judges choosing interpretive methods for constitutional cases, certainly over the long haul. Judges are constrained regardless of interpretive method.

Theoretically, judicial opinions might change nonjudicial opinions, and hence correspondence between judicial views and mainstream views does not necessarily mean that judges are constrained. Similarly, policymakers might adjust to the anticipated objections of judges. I see little evidence, however, that judicial decisions convert or deter many people on issues of significance to them. Among other factors, persuasion depends on an audience that listens, that is not otherwise convinced, and that stops struggling when judgments are rendered.<sup>19</sup> But even if judges can influence social life through per-

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<sup>17</sup> A poll from the spring of 2010 showed support for the overall legislation at 32% and disapproval at 53%, most of it strong. See *CBS/New York Times News Poll*, POLLINGREPORT.COM (Mar. 29–Apr. 1, 2010), <http://www.pollingreport.com/health.htm>. A more recent poll had the overall support figure at 40% and opposition at 56%. See *CNN/Opinion Research Corp. Poll*, POLLINGREPORT.COM (Aug. 6–10, 2010), <http://www.pollingreport.com/health.htm>. (reporting 56% opposition to requiring people to have health insurance, but 58% support for requiring insurance companies to cover people with pre-existing conditions). A federal district judge recently denied a motion to dismiss Virginia's claim that the tax penalty is invalid. See *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010) (memorandum opinion). The absence of a mechanism for achieving something close to universal insurance combined with a mandate that insurers cover people with pre-existing conditions is essentially unsustainable. Adverse selection would threaten the insurance industry. So a Supreme Court holding against the tax penalty easily could prompt the unraveling of other central components of the 2010 legislation. This would indeed make for an important judicial decision, whether or not one prefers the result. But the result would not necessarily buck either public opinion or the preferences of political elites.

<sup>18</sup> See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821–22 (2008) (holding that the District of Columbia's ban on handgun possession in the home violated the Second Amendment); Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1043, 1071–72 (2009) (discussing public and congressional opposition to handgun bans).

<sup>19</sup> See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1830 (2005) (collecting studies finding little Court influence on public opinion); Jack Citrin &

suasion or deterrence, doubt would persist that their choice of interpretive method makes a serious difference in those respects.

## 2. *Overlapping Results*

Even assuming judges were unconstrained by any other forces, they would nevertheless reach the same interpretive results regardless of interpretive method for some number of cases. Every plausible methodological candidate for judicial interpretation of the Constitution will spit out the conclusion that the President of the United States must be at least thirty-five years of age according to the Gregorian calendar. To take a few examples, the conventional contemporary meaning of Article II, Section 1, Clause 5 of the Constitution of the United States, as understood by lawyers and everyone else in this country who reads it, incorporates the Gregorian dating conventions; presumably all versions of originalist inquiry will discover that the dating conventions were no different in the late eighteenth century on the eastern seaboard; a common-law constitutionalist or Burkean traditionalist will have no interest in disrupting the wide and long-settled understanding of the age requirement for presidents; and although a contemporary moral reading of the Constitution conceivably can yield more creative outcomes, it is difficult to find anyone who will use that method to go that far. Indeed, a rough test for the propriety of an interpretive method is that the method clearly yields the conventional result. If a presidential candidate aged thirty-four according to today's interpretive and dating conventions were nevertheless declared elected in an otherwise lawful manner, one could doubt both the persistence of those conventions and the likelihood of judicial intervention.

This aspect of the age requirement for presidents is one of countless points of constitutional law on which a practical consensus holds across competing interpretive methods. They include a president with veto power over legislation, a bicameral federal legislature, two

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Patrick J. Egan, When the Supreme Court Decides, Does the Public Follow? 2-3 (July 5, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=998597> (finding no effect or a small effect on public opinion from learning about the Court's resistance to regulation of abortion, flagburning, and sodomy). *But see* Rosalee A. Clawson, Elizabeth R. Kegler & Eric N. Waltenburg, *The Legitimacy-Confering Authority of the U.S. Supreme Court: An Experimental Design*, 29 AM. POL. RES. 566, 571-72, 580-82 (2001) (testing experimental-subject opinion effects regarding affirmative action and phone rate regulation). The Justices' influence on public opinion probably will not increase if they mouth disagreement with the President at the State of the Union Address, or absent themselves from the event altogether. A more robust communications effort would have to be mounted.



senators per state, congressional elections, a supreme court, state governments along with a federal government, and so on. Plainly there are debatable questions lurking near the undisputed elements of our constitutional system. But equally certain are the presence of rationally indisputable areas of constitutional law subject only to classroom play and similar intellectual frolic. These matters are usually not litigated, of course, which obscures the amount of overlap among competing interpretive methods. But what must be taken as given in constitutional law can affect the course of argument on contestable issues. Participants may reason from unquestionable propositions, and viable interpretive methods must leave those propositions unquestioned. In any event, consensus elements of a constitutional order surely can be important to social life. Quiet, persistent agreement in sprawling fields of constitutional law helps belittle disputes over how judges ought to interpret the Constitution, and constitutional adjudication in general.<sup>20</sup>

### 3. *Indeterminate Results*

At least occasionally, more than one interpretive method will fail to identify a uniquely superior result and will leave open the same set of possibilities. When this is true, the choice between these methods is irrelevant to the case at hand. Notions such as the morally best interpretation, the conventional meaning, the original meaning, respect for judicial precedent, and respect for nonjudicial tradition are fairly abstract concepts. They are sufficiently flexible to permit debate over proper applications in many individual cases. One does not have to be a critic to understand that indeterminacy is a phenomenon in legal interpretation. Some contemporary originalists acknowledge that constitutional “interpretation” will sometimes run out and constitutional “construction” can then begin.<sup>21</sup> In fact, observers from many theoretical camps have portrayed adjudication as encompassing both a preferred decision procedure that can end in indeterminacy, along with a supplemental decision procedure that is deployed to

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<sup>20</sup> *Accord* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING ALTERNATIVES IN LAW, ECONOMICS, AND PUBLIC POLICY 123, 251 (1994) (contending that courts can address only a small fraction of significant policy disputes). I will discuss the related issue of inconsequential court decisions shortly.

<sup>21</sup> *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–23 (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999).

break ties.<sup>22</sup> Resort to such tiebreakers is no surprise within this setting. The gray areas in which interpretive method cannot provide clear answers are more likely to arise in dispute-resolving institutions such as judiciaries, insofar as easy questions are less likely selected for litigation, less likely to survive settlement efforts, and less likely to be appealed.<sup>23</sup>

Indeed, there is cause to believe that such indeterminacy is now hardwired into the methodological options. To qualify as a candidate method for interpreting the Constitution, it seems that the protocol must be fairly abstract. Obviously the method must provide some guidance to count as a method at all. But lists of preferred outcomes for particular constitutional debates are not what real-world proponents of interpretive methods are offering. Part of what it means to offer a method of interpretation is rising above (or maybe just moving alongside) basal struggles over questions of immediate concern, such as who may get married, who may be executed, who is entitled to property, and so on.<sup>24</sup> However informative, a mere list of outcomes is bound to be dismissed as improperly results-oriented or inadequately designed for new issues or some such. I do not imagine that the outer limit on interpretive method is well marked or well reasoned. But the convention of debate in this field indicates that proponents must draft alternatives that are widely applicable to many different problems without stipulating outcomes for all or most foreseeable disputes. Particular results may be illustrative, and they may suggest integrity through flashy bullet-biting. They may not constitute “the method” in its entirety. Whatever the explanation for the tradition, it leaves the good-faith operator of each method with a de-

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<sup>22</sup> See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12 (1921); H.L.A. HART, *THE CONCEPT OF LAW* 135–36 (Peter Cane et al. eds., 2d ed. 1994); Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1729–32 (1988). On this theme, see Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. CHI. L. REV. 1661 (forthcoming 2010).

<sup>23</sup> See, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–5, 17 (1984); Schauer, *supra* note 22, at 1722–27 (discussing theoretical selection effects on appeals); cf. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW. & SOC’Y. REV. 525, 536–43 (1981) (showing a winnowing process from grievance, to claim, to disputed claim, to the use of lawyers and courts). Empirical challenges to the strongest selection-effect theories include Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990).

<sup>24</sup> See Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 613 (2008) (“Constitutional debate may escalate from particular controversies to interpretive method and then to theories of authority without resolving disputes or speaking to live questions.”).

gree of freedom that allows for overlapping results, and thereby lowers the stakes for the choice of method.

#### 4. *Intolerable Results*

Interpreters will not always have the will to reach the results dictated by their announced methods. Certain interpretive conclusions will impress decision makers as intolerable, even though the interpretive method suggesting those conclusions appeared to be appropriate before the fact. Resistance to the logical implications of an interpretive method can be spun as a regrettable lack of principle—a disappointing weakness when the judge realizes that his method permits barbarity while his stomach does not.<sup>25</sup> Yet the reappraisal of method in light of results is also, for some, the mark of enlightened rationality—an occasion for revising the method rather than uncritically marching into outrageous results.<sup>26</sup>

Admirable or not, we should expect judges to jettison their interpretive methods when the results become shocking to them. And we should have this expectation even if the political situation leaves them free to adopt or reject what the judge finds shocking. Blanching at horrifying outcomes is not always a sign of bad faith, moreover, so we need not assume that judges cynically make public commitments to interpretive methods without real effort to follow those commitments behind the scenes. Such false advertising might occur, but it is not necessary for the intolerable-results phenomenon to push down the stakes of interpretive choice. Furthermore, at least some forward-looking judges might take evasive action when presented with certain handcuffing interpretive methods. They might avoid ex ante commitments to any interpretive method that could point toward suicide pacts and regime disintegration. To date, there appears to be little serious empirical investigation into the relationship between announced interpretive methods and voting patterns or case outcomes.<sup>27</sup> Experienced observers should nevertheless be skeptical

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<sup>25</sup> Cf. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.”).

<sup>26</sup> Cf. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 29–33 (Erin Kelly ed., 2001) (discussing reflective equilibrium).

<sup>27</sup> An exceptional effort in this area is Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC’Y REV. 113, 130–32 (2002) (finding that text- or intent-based arguments in party briefs generally do not predict Justices’ voting behavior as well as proxies for judicial ideology). One hurdle to concluding that interpretive methods affect outcomes is the fact that decision makers choose interpretive methods in the first place.

that interpretive methods consistently trump otherwise strongly preferred outcomes.

### 5. *Interpretations Without Decisions*

Many candidate methods of interpretation are not complete methods of decision making. Some proponents are careful to explain that their preferred interpretive methods are designed only to establish the meaning of legal texts and not to issue broader recommendations about, say, adjudication.<sup>28</sup> Now, to the extent that a judge must rely on legal texts to make a decision, an interpretive method is basically unavoidable. But we should not be confused into believing that any version of originalism, for example, or a moral reading of the Constitution comes packaged with a complete set of tools for processing litigated cases and issuing judgments therein. Understanding what a legal text means in the abstract is not enough to close cases in the particular. Far more information and evaluation is required to perform that function. Other decision-making methods are necessary to identify which legal texts are authoritative, to assign weights to valid legal sources, to collect other information about the dispute, to apply legal norms to the dispute in question, and so on. Narrowly defined, then, interpretation is not decision.<sup>29</sup>

Not everyone's definition of "interpretation" is so restrictive. Common usage of the term includes, for instance, the application of legal norms to particular cases, the consideration of judicial precedent regarding meaning, and relevant moral or ethical considerations.<sup>30</sup> Thus, many participants in debates over constitutional interpretation by judges are indeed making suggestions about sound decision making, not simply assigning meaning to a disembodied legal text. Advocates of judicial minimalism<sup>31</sup> and Thayerian deference to legislatures,<sup>32</sup> for example, are intensely interested in justifiable court decisions. At the same time, many of these suggestions are themselves incomplete. Minimalism instructs judges to take one small step without providing them a direction; Thayerian deference

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28 See, e.g., Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823–24 (1997).

29 See generally Samaha, *supra* note 24, at 633–34, 675–77 (discussing interpretation, information, and decision).

30 See Greenawalt, *supra* note 6, at 268–70.

31 See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 17, 21 (1999).

32 See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* ch. 8 (2006).

instructs judges to police only clear constitutional violations without providing a method for distinguishing clear from unclear violations. Even common-law constitutionalism<sup>33</sup> and eclectic pragmatism,<sup>34</sup> which are more comprehensive methods or attitudes for judicial decision making, include important flexibilities. The constitutional pragmatist must choose goals before she can “do what works” to achieve them, and a common-law constitutionalist must choose normative commitments if she will test tradition against contemporary reason. In all of these cases, a residual gap exists between method and decision. This decreases the significance of interpretive choice, and more so for the less ambitious theories of interpretation.

### 6. *Inconsequential Decisions*

There is then the more general phenomenon of unimportance in constitutional cases. A subset of judicial decisions regarding constitutional law is, as far as anyone can really tell, inconsequential. This is not to say that judicial resolution is unneeded within this subset of issues, only that we cannot ascertain with reasonable confidence which resolution is better, and regardless which plausible definition of “better” that we use. Some constitutional cases are not demonstrably significant much beyond their impact on the parties thereto; other cases present options that are difficult to rank order in terms of societal desirability. Consider the Supreme Court’s declaration in *INS v. Chadha*<sup>35</sup> that legislative vetoes from Congress are unconstitutional.<sup>36</sup> Not only did this practice survive the Court’s judgment, but I have found no solid evidence that real-world policy changed, let alone improved.<sup>37</sup> We might say the same about larger-scale design questions such as the choice between unicameralism and bicameralism, or presidential and parliamentary systems.

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<sup>33</sup> See e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 572, 577–85 (2001); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 904–05, 928–35 (1996).

<sup>34</sup> See e.g., DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* 35–84 (2009); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 240–65 (1999).

<sup>35</sup> 462 U.S. 919 (1983).

<sup>36</sup> See *id.* at 958–59.

<sup>37</sup> See, e.g., LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* 225 (1988); cf. Jessica Korn, *Improving the Policymaking Process by Protecting the Separation of Powers: Chadha & the Legislative Vetoes in Education Statutes*, 26 *POLITY* 677, 677–80, 687–96 (1994) (finding no clear change in policy or power regarding education, but claiming that Congress stabilized certain funding decisions, took responsibility for them, and initiated negotiated rulemaking).

Surely some constitutional choices matter. Among the best known observations on this score is Amartya Sen's regarding famine as a product of political failure.<sup>38</sup> It also might be true that democracies outperform authoritarian regimes in spreading high-quality calories to especially poor people.<sup>39</sup> Food is important. Yet all too often we do not know enough about institutional design, future states of the world, or the appropriate ranking of normative goals in a diverse and complex society to confidently predict or judge the effects of constitutional choices, including any special impact of judicial intervention. Selection effects in litigation tend to exacerbate such uncertainty, to the extent that courts are working on arguably significant constitutional problems.<sup>40</sup>

To a degree, this uncertainty is itself unimportant. A kind of arbitrariness or randomness in decision making is acceptable in some decision situations, such as when people with similar interests attempt to solve coordination problems. The precise default date for Congress's annual initial meeting is a trivial question compared to the problems with not establishing any date at all.<sup>41</sup> In this domain, however, choice of interpretive method is unimportant as well. Any determinative method will do. The broader observation is that judges' choices of interpretive method can and often will be unimportant even if the given constitutional question is crucial, but an unimportant constitutional question certainly makes for an unimportant interpretive choice. Only some constitutional issues are truly important

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38 See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 51–52, 178–88 (1999) (claiming that, at least since World War II, no famine has occurred in a multiparty democracy with elections and a free media); see also ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT* 228 (2000) (finding life expectancy is longer in democracies, across national per capita income bands); Thomas D. Zweifel & Patricio Navia, *Democracy, Dictatorship, and Infant Mortality*, 11 J. DEMOCRACY 99, 99 (2000) (asserting democracies have lower infant mortality rates at every level of per capita GDP). But see Michael Ross, *Is Democracy Good for the Poor?*, 50 AM. J. POL. SCI. 860, 860, 863–68, 871–72 (2006) (finding, with more countries in the data set and some imputed values, that democracies spend more money on public services but “democracy has little or no effect on infant and child mortality rates”).

39 See Lisa Blaydes & Mark Andreas Kayser, *Counting Calories: Democracy and Distribution in the Developing World* 11–12, 16–18, 26–27 (Aug. 28, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1521472> (using food production and export/import data to compare countries at similar growth rates, although also finding that semi-democratic regimes perform as well as democracies in terms of estimated total average daily calorie consumption). The authors recognize the imperfect nature of their proxy for food consumption.

40 Cf. Frederick Schauer, *The Supreme Court 2005 Term, Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 9, 49 (2006) (arguing that most Supreme Court cases deal with non-salient, even if sometimes influential, policies).

41 See U.S. CONST. amend. XX, § 2. At least for those who want Congress to continue meeting. There might be reasonable disagreement on that question.

to society, only some of those issues will be litigated, and only some of those cases will turn on the choice of interpretive method.

Finally, all of the above analysis was conducted as if all judges would adopt the same interpretive method for all constitutional cases. This assumption inflates the stakes of methodological debate compared to a situation in which methodological diversity will persist and the mix of methods can only change modestly in the short run.<sup>42</sup> The latter situation is our reality. Judges do not appear willing to even attempt to agree on a singular and meaningfully constraining interpretive method for constitutional cases. Nor is some other institution in a position to impose any such method on them. Asking politely is not likely to have much impact.<sup>43</sup> Judges will continue to exhibit differences in interpretive method for the foreseeable future.

### B. *Low Stakes, Not No Stakes*

The foregoing reasons to minimize the significance of constitutional interpretive method in the courts suggest that people of all ideological persuasions have relatively little to fear—or hope for—when it comes to judicial review. Judges might attempt to desegregate some public schools, but they will not chase Caucasian students across all borders. Judges might retain jurisdiction over Guantánamo Bay, but they will not order the immediate release of all detainees. Judges are eliminating the handful of existing local handgun bans,<sup>44</sup> but they will not liberate people they do not trust to possess weapons that are not normal.<sup>45</sup> Judges might use supreme and non-supreme law to protect businesses from certain legal claims,<sup>46</sup> but they will not

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<sup>42</sup> This increased-stakes effect of aggregating judicial choices is true not only in Left/Right ideological terms, but also in terms of decision costs. Some interpretive methods (e.g., crude textualism with crude tiebreakers for close cases) might be substantially cheaper to operate than other methods (e.g., purpose-driven inquiries supplemented by legislative history and predicted consequences), even with the selection effects of litigation.

<sup>43</sup> See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 10 (1998) (observing that “judges, with only a few exceptions, are put off by [normative] constitutional theory” propounded by academics).

<sup>44</sup> See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821–22 (2008) (declaring invalid the District’s prohibition on handgun possession in the home); see also *McDonald v. Chicago*, 130 S. Ct. 3020, 3026 (2010) (plurality opinion) (holding that Second Amendment rights, whatever they are, are enforceable against state and local action through the Due Process Clause of the Fourteenth Amendment).

<sup>45</sup> See *Heller*, 128 S. Ct. at 2816–17 (gratuitously providing a non-exhaustive list of presumptively valid firearms regulations).

<sup>46</sup> See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (involving preemption); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (involving pleading rules); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (involving punitive damages); *Lorillard Tobac-*

seriously interfere with the administration's efforts to revive the economic system. Bailouts, stimulus packages, paper money, and the Federal Reserve Board are safe.

On the other hand, this interpretive choice is a low-stakes decision, not a zero-stakes decision. External and internal constraints leave some areas for judicial discretion. Different interpretive methods are sometimes outcome-determinative and divergent. The outcome will sometimes be of interest to people beyond parties to a lawsuit, and the interests of the parties themselves count for something. Moreover, a judge cannot work without an interpretive method. Legal texts are neither self-explanatory nor self-enforcing. They are inanimate. Like anyone else, a judge needs a way to understand the meaning of relevant legal sources. Correct (or more persuasive) answers are better than incorrect (or less persuasive) answers, even if error costs are low.

Furthermore, concluding that the stakes are low arrives with complications. Among them is the decision to plug in a value set for determining what counts as important, as well as a way to compare the influence of interpretive method with other determinants of judicial decisions. Cases such as *Chadha* might turn out to be unimportant to nearly everyone in retrospect, but a highly diverse population will experience persistent disagreement and idiosyncratic priorities. For some people, reaching the correct interpretation of a legal text might be their highest calling, regardless of any other consequence. In addition, collecting likely influences on constitutional judgments does not by itself establish the insignificance of interpretive method. The appointments process, the ideological composition of the judiciary, the threat of retaliation from other institutions, the inability of interpretive choice to dictate unique and differing results, the limited impact of some constitutional decisions, and other factors reviewed above do not eliminate the potential impact of interpretive method. There probably are more precise ways to measure the relative significance of interpretive choice. The combination of arguments offered above, however, should be enough to establish, at a minimum, that it is reasonable to seriously doubt the importance of interpretive choice in driving outcomes for a sizable number of constitutional cases important to social life.

To be clear, this is not a recommendation that everyone discard constitutional litigation in general or methodological debate in par-

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co Co. v. Reilly, 533 U.S. 525 (2001) (involving commercial advertising); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (involving expert testimony).



particular. Nonjudicial institutions are often ineffectual on their own, too. Think about Congress and Iraq war policy, or traffic police and double parking. The revolution probably will not happen at all. For more modest projects, constitutional litigation will sometimes be a party's best hope. And judges' choice of interpretive method, which is influenced by outsiders through the appointments process if not elsewhere, can have at least modest effects on modest projects. For these reasons, one side to a controversy should not automatically and unilaterally disarm themselves of the constitutional litigation option or of opportunities to influence the character of our judiciaries. These efforts can be part of a formidable array of tactics aimed at multiple institutions, both public and private.

Finally, judicial decisions and the choice of interpretive method for constitutional cases are important beyond the realm of particular results in court. Judicial decisions can start broader discussions about the content of supreme law. In addition, a judge's chosen interpretive method can tell us something about how that judge perceives her role in society or, more narrowly, what she believes is a legitimate way to present that role. Significant for my purposes, selecting an interpretive brand may be seen as an association with a set of results that are favored or disfavored by large numbers of observers. This has implications for the judicial appointments process and other public relations issues, a point to which I will return in the pages that follow.

So someone ought to keep thinking about interpretive method. But the open questions include "who, how many, and how much?" And the possible answers include "not me, not many, and not much."

### III. IMPLICATIONS FOR DECISIONS AND DEBATES

Below, I offer thoughts on low-stakes decisions and debates. Apparently, there is no canonical work on the subject, which might not be surprising given what one can say off the cuff about the significance of low-stakes decision making. Actually, a critic might think that the subject is too trivial to be worth the words written below. But we face countless low-stakes decisions throughout our lives. A little guidance on how people do or should approach them all probably adds up to a worthwhile contribution. And I promise that the discussion will remain concise and relatively superficial.

A. *Low Stakes, Generally Speaking*

1. *Lower Decision Costs Expended, Higher Error Rates Tolerated*

The armchair logic of decision costs is a good place to begin. Decision making is itself costly, even when the decision is correct without doubt. This is self-evident from everyone's experience with group decisions. A sound architecture for rational decision making will take into account decision costs (and benefits) along with error costs (and correctness benefits). Because decisions always come with decision costs, decision makers have reason to be frugal in designing their decision procedures, despite a higher risk of error.<sup>47</sup>

These are obvious points, but they indicate a basic lesson for identifiably low-stakes decisions. If the range of possible outcomes from a decision is narrow and includes only insignificant results—ranging from mildly pleasant to a little annoying—then the decision maker can afford to be relatively less careful, even careless, in reaching a conclusion. There is no sense in throwing research, thought, discussion, and other resources into a decision that will not make much difference to anyone anyway. We should expect rational people to reduce decision costs and the degree of care taken when they perceive low stakes, and we might recommend that people behave in just this way. We should also expect more errors, somehow defined.

Consistent with these expectations, some experiments show that performance-based rewards incentivize participants to increase effort and accuracy. For instance, paid subjects might observe more carefully and thereby enhance their ability to recall information.<sup>48</sup> We can think of increasing financial incentives as increasing the stakes for good as opposed to poor performance. It should be noted, however, that financial-incentive effects are situation-sensitive. Incentives are sometimes ineffective and can backfire.<sup>49</sup> Increased incentives might have no effect when participants are already intrinsically motivated to perform at a certain level, or when the task is so easy or so difficult that participant effort levels become sticky. Worsening performance can result when participants become overly excited by the pressure of high stakes, or when they over-think decision problems. In one study, subjects who were paid a little money to accurately pre-

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<sup>47</sup> See generally Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 604, 616 (2006).

<sup>48</sup> See Colin F. Camerer & Robin N. Hogarth, *The Effects of Financial Incentives in Experiments: A Review and Capital-Labor-Production Framework*, 19 J. RISK & UNCERTAINTY 7, 8, 14, 16, tbl.1 (1999).

<sup>49</sup> See *id.* at 8, 19–23, 34–36.

dict which students would receive honors more often departed from a simple formula that was known to be correct 70% of the time. Those subjects performed a bit worse than the formula would have.<sup>50</sup>

### 2. *Higher Settlement Rates, When the Decision Makers Must Interact*

A related prediction involves compromise. We should expect more of it when people facing the same question must interact with each other and each perceive that not much turns on the answer. In these situations, the participants can save each other the costs of additional debate by conceding certain points and splitting other differences. This is a familiar thought from investigations into the selection effects of litigation. Simple models of settlement indicate that settlement chances are higher when the costs of litigating increase relative to the stakes perceived by the parties, and that asymmetric stakes increase the chance of one party wanting to litigate rather than settle.<sup>51</sup> Whether or not disputants usually follow these rationalist models of behavior, the idea is plainly attractive as a normative matter. Relatively cheap capitulation can be better than expensive contestation.

### 3. *Perhaps More Frequent Risk-Taking and Greater Trust*

The next observation comes from a growing set of experimental studies on the effect of stake size. Testing external validity is often the motivation behind these experiments: no-effect findings are a relief for many experimenters, whose other results may leave doubts that subjects take laboratory games seriously when the potential payoffs are measly. Hypothetical or nominal payoffs are the most many experimenters can afford to offer. But if stake size does not affect behavior, then cheap experiments might be adequate. Regardless of the correct position on the external validity controversy, we are interested in evidence of how people behave relative to stake size.

Some notable studies find that lower stakes are associated with lower levels of risk aversion, or at least greater variance in risk aver-

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50 See Hal R. Arkes, Robyn M. Dawes & Caryn Christensen, *Factors Influencing the Use of a Decision Rule in a Probabilistic Task*, 37 *ORG. BEHAV. & HUMAN DECISION PROCESSES* 93, 107–08 (1986); see also Robert H. Ashton, *Pressure and Performance in Accounting Decision Settings: Paradoxical Effects of Incentives, Feedback, and Justification*, 28 *J. ACCOUNT. RES.* 148, 148–49, 157–61 (1990) (finding that incentives, feedback, and justification requirements led to lower average accuracy and higher variance in predicting Moody's bond ratings when subjects competing against each other for prizes were given an optional formula).

51 See, e.g., Priest & Klein, *supra* note 23, at 4–5.

sion levels. In an early experiment, farmers in India were given money to play a series of lotteries run by the experimenters.<sup>52</sup> As the potential payouts increased, the least risk-averse contingents shrank. For instance, more than 18% of the sample preferred an even-chances gamble of gaining either nothing or gaining 4 rupees over other even-chances gambles with less variance and higher low payouts, but that fraction fell to under 2% when the largest spread was instead either nothing or 200 rupees.<sup>53</sup> A more contemporary study offered Georgia State students gambles for payouts ranging from pennies to over \$300. The experimenters came to similar conclusions. The fraction of participants taking the relatively safe gambles (that is, gambles with higher floors and lower ceilings) increased as the potential payouts increased.<sup>54</sup>

Other experiments study behavior in more social settings. One recent effort associates lower stakes with higher levels of trust or willingness to cooperate. Residents of rural Bangladesh were given various sums of money and the choice to send some part of it to a stranger-recipient; any amount sent would be tripled before it reached the recipient, and then the recipient was given the choice to send some part of that amount back to the sender. Senders consistently sent positive amounts, but they sent a larger fraction of the money when they were given less to send: 55% of the total was sent on average when the stakes were relatively low, compared to 46% when the stakes were medium and only 38% when high.<sup>55</sup> We might say that the risk-taking findings are similar to the trust-elevating findings. Both behaviors involve chance-taking in a sense, and both might logically be related to low stakes. Another explanation involves a desire for drama

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52 See Hans P. Binswanger, *Attitudes Toward Risk: Experimental Measurement in Rural India*, 62 AM. J. AGRIC. ECON. 395, 396–400, 406 (1980).

53 See *id.* at 399 tbl. 3 (showing fractions choosing the “Neutral to Negative” gamble for the first 0.5 rupee game and for the 50 rupee game); *id.* at 396–97 & tbl.1 (explaining the stakes and spreads).

54 See Charles A. Holt & Susan K. Laury, *Risk Aversion and Incentive Effects*, 92 AM. ECON. REV. 1644, 1647, 1653–54 (2002) (finding increasing relative risk aversion and decreasing absolute risk aversion as real stakes rise, and stressing different results when subjects are presented merely hypothetical choices without actual money payoffs).

55 See Olof Johansson-Stenman, Minhaj Mahmud & Peter Martinsson, *Does Stake Size Matter in Trust Games?*, 88 ECON. LETTERS 365, 367–68 & tbls.1 & 2 (2005) (noting that amount sent also increases with income). The highest sum given to senders was 4.8% of per capita GNI. See *id.* at 366; see also Connel Fullenkamp, Rafael Tenorio & Robert Battalio, *Assessing Individual Risk Attitudes Using Field Data from Lottery Games*, 85 REV. ECON. & STATS. 218, 219, 224–26 (2003) (studying television game show contestant behavior and finding increasing risk aversion as stakes rise, but also that the most rational players are comparatively more likely to take large gambles).

or avoidance of monotony. Perhaps these phenomena help explain more erratic decision patterns when stakes are low.<sup>56</sup>

To be clear, not every experiment concludes that stakes matter. Several find no significant difference in player behavior when stakes are varied in certain types of dictator games, ultimatum games, and public goods games.<sup>57</sup> At least in these settings, players are not appreciably changing their willingness to share surpluses or contribute to mutually beneficial projects when the maximum payoffs change. Furthermore, we can imagine situations in which high stakes prompt the participants to pull together and collaborate in the best interests of all. If each participant thinks of him or herself as a member of the same team, rather than strangers or competitors, we should expect higher levels of sharing, trust, and cooperation for their common good.<sup>58</sup> Nevertheless, we can draw overall impressions from the experimental studies, and be on the lookout for riskier, more trusting, and perhaps more generous behavior when stakes are low, especially in otherwise competitive or adversarial settings.

#### 4. *Perhaps Less Capable Participants, When People May Select High or Low Stakes*

A fourth and final observation will not be flattering to those who plan to continue writing about methods of constitutional interpretation, but there is logic behind it. The idea is that high-stakes games will attract relatively sophisticated, intelligent, and resourceful participants. Low-stakes games presumably will attract the opposite set. It

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<sup>56</sup> See Camerer & Hogarth, *supra* note 48, at 24.

<sup>57</sup> See, e.g., Martin G. Kocher, Peter Martinsson & Martine Visser, *Does Stake Size Matter for Cooperation and Punishment?*, 99 *ECON. LETTERS* 508, 510–11 (2008) (public goods games with South African high school students) (finding no significant effect of stakes on mean or variance in contributions); see also Jeffrey Carpenter, Eric Verhoogen & Stephen Burks, *The Effect of Stakes in Distribution Experiments*, 86 *ECON. LETTERS* 393, 394–96 (2005) (ultimatum and dictator games with Middlebury College students) (finding no significant effect of stakes from \$10 to \$100 on average offers or allocations, although allocations fell as income rose and siblings increased). *But cf.* Steven D. Levitt & John A. List, *What Do Laboratory Experiments Measuring Social Preferences Reveal About the Real World?*, 21 *J. ECON. PERSP.* 153, 164–65 (2007) (acknowledging mixed results for the theory that financial concerns will increase compared to morality concerns as stakes rise); Robert Slonim & Alvin E. Roth, *Learning in High Stakes Ultimatum Games: An Experiment in the Slovak Republic*, 66 *ECONOMETRICA* 569, 589–91 (1998) (finding a high-stakes effect emerging as players gained experience).

<sup>58</sup> I have been told by Albie Sachs that the South African Constitutional Court operated this way in its early years after the fall of Apartheid. Apparently, judges on the Court worked collaboratively even when there was disagreement, understanding that the stakes surrounding foundational judgments were relatively high.

could be that participating in a high-stakes interactive setting is known to be a costlier endeavor warranting greater investment in the decisions and greater amounts of insurance for bad outcomes. To the extent that high-stakes games are perceived as not only risky but also resource intensive, those with the resources will participate more often than others.

On the other hand, the games that a person chooses to play might depend on her expectations about what everyone else will choose, and those expectations might not be easily predicted. In addition, some people are overly confident or overly modest about their own abilities, and some people prefer the challenge of attempting to punch above their weight while others are happy to dominate lesser lights. To the extent that playing a high-stakes game fosters a reputation for sophistication, moreover, even unsophisticated players might join for status, respect, or signaling purposes. Hence there need not be a strong correlation between participant ability and stakes.

Unfortunately, past practice in experimental research often had the experimenters selecting participants for games with particular stakes instead of allowing participants to opt in or out. We know less than we should about how people decide whether to participate in low- or high-stakes games.

We can nonetheless make a few reasonably intelligent generalizations about low-stakes behavior—many of them descriptive or positive, some tinged with normative recommendation. Substantial evidence indicates that low-stakes decisions are associated with low levels of effort and more errors, which is defensible from a modern rationalist perspective. Within social settings, many people will be more willing to settle their differences and to take risks and trust each other somewhat more often when the stakes are low. And within dynamic settings that allow for selection in and out, it is possible that relatively less sophisticated and less resourceful people will stick to low-stakes situations while others will migrate to higher-stakes controversies.

### *B. Debates over Interpretive Method*

What then might be said about ongoing debates over the proper method of constitutional interpretation for the courts? It is possible, albeit tricky, to offer strong global recommendations.

The first suggestion is that worry over judicial constraint should not fuel the debates. One of the traditional motivations for vetting methods of interpretation for constitutional cases is the fear that the absence of method means the beginning of judicial dictatorship, or at

least judicial usurpation of policy territory more appropriately assigned to other institutions. If they will not sign on to a particular method, the argument runs, they will be free to dominate the rest of us in ways that we would rather avoid.

The problem for this argument is that judges are already seriously constrained before they begin to think about interpretive method, and those who do adopt something recognizable as interpretive method are not demonstrably constrained to the extent envisioned by the proponents of such constraints. Even if every judge determined to “do justice as I see fit,” unbridled by a coherent interpretive method, the judiciary would remain constrained by internal and external forces—beginning with the appointments process and ending with feasibility limits on courts’ ability to influence social, economic, and political systems of which they are one small part. Again, this is not to say that judges can decide cases without an interpretive method, however implicit or parsimonious. It is to say that worry about judicial constraint need not greatly increase the urgency of judges choosing sides.<sup>59</sup>

A related recommendation is that the temperature of these debates ought to be turned down, perhaps to absolute zero. If the relevant stakes involve court decisions in constitutional cases, and if important constitutional cases are not importantly influenced by interpretive method, then those interested in societal well-being probably should want resources devoted to more pressing matters. Strenuous and costly investigations should be avoided if the outcome cannot make much difference. Participants in the field of constitutional interpretive method might then relax, enjoy each other’s company, consider a compromise, and experiment with creative or even arguably outrageous solutions to methodological questions. Indeed, many potential participants should stay out of the field or exit if they are currently laboring in it, taking into consideration their other options, of course.

True, if potential participants think or act this way, the quality of work on interpretive method will be shoddier and less disciplined by the efforts of the most capable minds. We might not see another work on the order of Ely’s *Democracy and Distrust* or Bickel’s *The Least*

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<sup>59</sup> An even worse version of the constraint argument is that the need for constraint indicates that judges ought to adopt a particular interpretive method, such as some version of originalism. Every method of interpretation and decision making presents constraints. A need for judicial constraint is not an especially productive way of choosing among methods. See ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 156 n.31 (2d ed. 2005) (noting that judges could objectively constrain themselves by flipping coins).

*Dangerous Branch*, or with the brevity and insight of Dahl's *Decision-Making in a Democracy* or Cardozo's *The Nature of the Judicial Process*. Whichever past works should be on the list of foundational contributions, they might well be adequate to our needs for the foreseeable future. Perhaps the field of constitutional interpretation has already suffered from a diversion of high-quality mental and other resources to other projects. (I will not say that my work in the field proves otherwise.) Whether it has begun already or not, some diversion seems sensible.

In fact, a series of affiliated subjects might rightly attract a refugee from the field. First of all, there is the question of best methods for constitutional decision making in courts, which is often broader than the determination of interpretive method, along with the even more inclusive question about proper methods of judicial decision making full stop. Judicial decisions regarding sub-supreme law could be where the real action is, where judges have significant day-to-day impact on a large number of low-salience "cold-button" issues, despite the theoretical possibilities of legislative response. On the same track are questions regarding models of judicial behavior. Whether descriptively or normatively, the general goals and functions of courts in our society and over time could be better specified and explained. For instance, appointed judges obviously serve a politically counter-cyclical function on certain occasions and for certain issues. Many of us believe that this function is usually modest and more likely when other political forces are not fully united, but we might better understand precisely when and within which policy domains it is most likely to occur. Investigators are still pinpointing forces internal and external to legal institutions that produce law's character. With respect to the recent past, we already can do better than refer to "the hidden voices of the zeitgeist,"<sup>60</sup> but there is considerable room for progress.

These are broad suggestions, and they are quite crude. More detail is needed to go further in normative or positive directions, because understanding the implications of stake size requires understanding the details of a particular decision situation or debate. The specific situation will affect whether and which participants perceive the stakes as low or high, whether and which participants are sensitive to stake size, and whether and which participants have reason to change their practices. One needs to know what kind of game (if any) participants believe that they are playing. When it comes to the

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60 LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* 42 (2002) (describing influences on nineteenth-century judges, which is a particularly challenging task).



method of constitutional interpretation by judges, there are a variety of discussions taking place. In the closing paragraphs, I will simplify matters and present a few comments on academics, politicians, and judges who might engage in these discussions.

### 1. *Academics as Low-Stakes Specialists*

The foregoing might indicate that scholars ought to exit the field en masse. Indeed, there is a valid concern about overexertion here. For instance, and in my opinion, a troubling conceptual turn has occurred in one part of the debate over constitutional interpretation by judges. More than one academic has declared that interpretation just is one thing or another, and that those who fail to engage in the specified practice cannot claim to be interpreting anything.<sup>61</sup> In its worst form, this line of analysis is a taunt playing on a rough public consensus that judges may “interpret” but not “make” law. If someone could control the definition of interpretation, they might claim victory in the debates over proper judicial behavior. But no real victory will be achieved in this way. Different scholars define interpretation differently, the relevant concepts are sometimes complicated moving targets, and it is not yet evident that anyone has changed their position on how judges should interpret legal texts based on these conceptual arguments. Esoteric academic debates of this character seem to be heading nowhere, and to be proceeding without cognizance of the limited potential impact of any interpretive protocol in the judiciary. At a minimum, concerned onlookers should hope that scholars who remain in the field will understand the realistic constraints on judicial outcomes when they devise and recommend interpretive methods for that institution.<sup>62</sup>

Other events might be signs of sensitivity to low stakes among academics, however. A notable development is Jack Balkin’s announcement that he is an originalist.<sup>63</sup> More than one explanation for this

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<sup>61</sup> See, e.g., Lawson, *supra* note 28, at 1823–24; Lawrence B. Solum, *Semantic Originalism* 3–4 (Ill. Pub. Law & Legal Theory Research Papers Series, No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244> (looking for original public meaning); see also Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1112, 1114 (2008) (asserting that finding authorial intention is interpretation, but that the concept lacks guidance for how to ascertain it).

<sup>62</sup> Of course criticisms like this are not restricted to constitutional interpretation. One might say that academics are habitually engaged in low-stakes inquiries, at least the ones who follow their fancy and lack an implementation strategy for their ideas.

<sup>63</sup> See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) (“In this essay I offer an argument for the right to abortion based on the *original meaning* of the constitutional text . . .”).

development can be spun out, and I cannot speak authoritatively on the subject. But one possible account of Balkin's public conversion is that he understood that choosing an interpretive method for the Constitution is a matter of little significance to issue outcomes. Whether or not he was in a conciliatory, trusting, and generous state of mind at the time, his adoption of the originalist brand has had no perceptible influence on the results he would reach in particular cases. Balkin has attempted to show that one can support judicially enforceable abortion rights after declaring allegiance to originalism writ large,<sup>64</sup> that the New Deal regulatory and welfare state is consistent with the Constitution's original meaning,<sup>65</sup> and that contemporary civil rights legislation comports with the original meaning of the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>66</sup> Indeed Balkin claims that his version of originalism is compatible with living constitutionalism, and at least one other scholar has suggested a kind of détente using the device of constitutional construction.<sup>67</sup>

Balkin's adoption of originalism illustrated the flexibility underneath the label, and for all we know he intended to push the originalist school toward indeterminacy and meaninglessness. No one is able to exclude Balkin from the club. If other self-proclaimed originalists try to purge him for finding that the Constitution includes an abortion right or for some other result on a contested issue of supreme law, they risk losing their claim to a bona fide constitutional method in the first place.<sup>68</sup> And if he stays on the list, membership might not even signal much about the ex ante commitments to particular results of those who select into the club. A decision to argue in originalist terms does say something, perhaps about the acceptable rhetoric of constitutional debate in the twenty-first century United States; Balkin's announcement might be taken as a concession on this score. But the decision says less than it might insofar as originalists can be pro-choice or not, accepting of health insurance mandates or not, or convinced that the regulation of private discrimination is constitutional or not. Thus interpretive theorists in the academy may be crit-

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64 *See id.*

65 *See* Jack M. Balkin, *Commerce* 4–5 (Yale Law Sch., Pub. Law Working Paper No. 206, 2010), available at <http://ssrn.com/abstract=1553002>.

66 *See* Jack M. Balkin, *The Reconstruction Power* 5–6 (Yale Law Sch., Pub. Law Working Paper No. 207, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1558749](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1558749).

67 *See* Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 934 (2009). There is no settled method for constitutional construction, nor agreement on which institutions should perform it.

68 *See supra* text accompanying note 24.

icized for overkill and, at the same time, there are grounds for believing that their attention is changing at the margins.

Before leaving this subtopic, however, I want to show support for a measure of academic preoccupation with constitutional interpretation. Exploration of ideas by a group of scholars unmoved by the perceived stakes for the rest of society can be part of a healthy system. A society dedicated to self-criticism and progress should preserve spaces for unrealistic dreaming. Much of what makes judicial interpretation of the Constitution a low-stakes matter involves feasibility constraints that one can imagine becoming weaker. Academics have the luxury of considering such eventualities. Indeed it might be useful to have such thinking taking place in advance of any constitutional crisis that could be solved through sensible and sophisticated interpretive techniques developed outside the halls of ordinary politics. In addition, sometimes “more is more,” despite the inability to fully achieve an objective. An interpretive method might accomplish some good if some decision makers follow the method only some of the time.

Finally, academia is arguably the best location for individuals to exert shockingly high levels of effort investigating creative solutions to problems considered unimportant by others. This is true even apart from any soothing effect on the intellectual class (a low-minded if practical goal) and from any objective good that uninhibited intellectual inquiry can achieve (a high-minded if controversial goal). There is additional social value from the exercise. Following whim, a single academic can help solve low-stakes problems faced repeatedly by many other people. On this basis we can appreciate the treatise writer, who might catch a sneer from colleagues at prestigious law schools, as well as the implausible suggestions of half-cocked high theorists. Consider recent claims that interpreters should ask what the text meant to “a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world,”<sup>69</sup> or that a dramatically more amateurish version of originalism can be justified as a politically correct substitute for randomization in certain closely contested cases.<sup>70</sup> The outrageousness or relative insignificance of academic arguments is, I hope, not an effective condemnation. In any event, a dedicated scholar might be making his or her

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<sup>69</sup> Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002).

<sup>70</sup> See Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1354–64 (2008).

best contribution by grappling with a question generally thought to have no immediate value to societal well-being.

## 2. *Politicians Appointing Judges*

The positive and normative picture is quite different once we move away from the academy. Outsiders do have difficulty measuring the seriousness with which politicians and associated interest groups take the question of interpretive method in constitutional cases. But my impression is that particular results are much more important to these actors than the choice of interpretive method, especially when the method in question is the least bit abstract. We can know little about the behind-the-scenes vetting process for judges within the executive branch, or the negotiations among senators, interest groups, and the White House. The public debate over federal judicial nominees, however, often has little to do with confrontations over interpretive method. Recent confirmation struggles included plenty of discussion about particular cases or lines of doctrine, the possibility of super-precedents, and nominee character, background, and temperament. Full scale sparring over living constitutionalism or some version of originalism is usually absent.

This is not always true. Many critics of the Warren Court (which seems to include the early Burger Court) packaged their objections under the heading “Original Intent,” and Attorney General Edwin Meese adopted that label as an organizing idea for evaluating the Court and nominees thereto.<sup>71</sup> In addition, the confirmation process for Robert Bork’s nomination to the Supreme Court ultimately helped to generate some debate on interpretive method. But even the Bork hearings were not dominated by anything as theoretical as proper methods of constitutional interpretation. At least equally important were questions about particular decisions, particular issues, particular doctrines, as well as Bork’s ideology and temperament.<sup>72</sup> Politicians, interest groups, and others wanted to know where Bork stood on key issues that many considered settled or that otherwise threatened one group or another. To the extent that identification with an interpretive method can be translated into a nominee’s

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<sup>71</sup> See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 555–56 (2006); Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599, 603–13 (2004).

<sup>72</sup> See generally ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 220–27, 347–51 (1989) (noting the salience of particular civil rights and privacy norms, along with a broader struggle over the Reagan administration’s legal agenda).

stance on such issues, because such method has already been affiliated with a particular set of results, method choices will attract some attention. It is difficult to avoid the feeling that much of the debate over constitutional interpretation during our lifetime has been animated by the participants' positions on *Roe v. Wade*. This is not, however, evidence that participants in the nomination and confirmation process care about interpretive method for reasons other than predictive power. And more recent confirmation proceedings display even less care for a nominee's supposed method of interpreting the Constitution. To put it mildly, Sonia Sotomayor was not required to deliver an illuminating disquisition on the matter.<sup>73</sup> Nor was Elena Kagan's repeated statement, "It's law all the way down,"<sup>74</sup> especially informative.

This is understandable. Appointing officials are not boxed into answering low-stakes questions regarding interpretive method, and they have good reason to shift their attention elsewhere. The nomination and confirmation of judges involve practical considerations regarding who should staff the judiciary. These processes depend on reliable information about the likely performance of potential judges, including whether a candidate might use the office so as to threaten the foremost interests of the officials involved and their constituencies. Again, court decisions in general, and constitutional judicial review in particular, can affect the rest of social life, and their modern mainstream judgments usually are not openly repudiated by other officials. Wild-eyed, corrupt, slothful, or even patsy judges could threaten the basic settlement on the magnitude of federal judicial

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<sup>73</sup> See, e.g., *Sotomayor Hearings: The Complete Transcript, Part 1*, L.A. TIMES, July 14, 2009, at 5, available at <http://latimesblogs.latimes.com/washington/2009/07/sonia-sotomayor-hearing-transcript.html> ("[I]n every case that I render, I first decide what the law requires under the facts before me, and then what I do is explain to litigants why the law requires a result.").

<sup>74</sup> She offered more than that, of course. See, e.g., *Sen. Patrick J. Leahy Holds a Hearing on the Elena Kagan Nomination: Hearing Before the S. Comm. On the Judiciary*, 111th Cong. 101 (2010) (statement of Elena Kagan, Nominee to the Supreme Court) ("I think that judges are always constrained by the law. . . . [S]ometimes the text speaks clearly and then they're constrained by the text alone. Where the text doesn't speak clearly, they look to other sources of law. They look to original intent, they look to continuing history and traditions. They look to precedent and the principles embodied in those precedent. But they're always constrained by the law. It's law all the way down."); see *id.* at 23 ("[I]n general, judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a kind of case-by-case thing. . . . And I would look at this very practically and very pragmatically. . . ."); see also *Sen. Patrick J. Leahy Holds a Hearing on the Elena Kagan Nomination Before the S. Comm. on the Judiciary*, 111th Cong. 102 (2010) (statement of Elena Kagan, Nominee to the Supreme Court) ("It's not personal views. It's not moral views. It's not political views. It's law all the way down.").

power in the United States. But by now it should be understandable when an official charged with vetting potential judges shows little interest in using a candidate's professed interpretive method to separate good from bad judges, except as a proxy for a likely pattern of results conventionally associated with that method. Even then, nominating and appointing officials can reasonably believe that the most extreme results will not come to pass, and should have little faith that interpretive method on its own will help predict results not already identified as the product of the method. These officials are not scholars, and we should neither expect nor hope that they expend as much effort playing with the concepts and toying with the possibilities for interpretive methods.

### 3. *Judges Deciding Cases*

In some ways, judicial dealings with interpretive method are more like the politics of the appointments process and less like a symposium of constitutional theorists. For all that we can tell from judicial opinions, many judges skate by without stopping to make serious commitments to one interpretive method over another. As I have said, at least an implicit interpretive method is necessary to decide cases in which a legal text is relevant, but this does not mean that judges must ponder, let alone negotiate over, the proper method. Most of them seem to do no such thing. In fact, because certain methods of constitutional interpretation are still associated with particular patterns of results in controversial policy areas, choosing among these interpretive options will almost invariably affiliate that judge with those particular commitments. For many judges, this will show the observing public more ideological rigidity than they actually have or wish to display.

There are notable exceptions. Justice Scalia contributed to a fairly famous volume on statutory and constitutional interpretation,<sup>75</sup> and he is no stranger to the lecture circuit. Justice Breyer recently followed up with a short book<sup>76</sup> and public appearances of his own. But these two Justices are among the outliers. Nor does it seem unfair to observe that they are both former academics. There is not a widespread expectation that each judge will stake out a comprehensive

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<sup>75</sup> See generally Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3 (Amy Gutmann ed., 1997).

<sup>76</sup> See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

position on interpretive method, and the few judges who attempt to do so are outnumbered by their more casual colleagues. For every Brennan, there must be twenty O'Connors. At least some of those twenty must believe that interpretive method is not especially outcome-determinative in cases that matter to judges, and that the limited time in which they have to close live cases affecting the lives of real parties is better directed toward other tasks. The irreducible obligations of a dispute-resolving job should produce sympathy for any failure on the part of sitting judges to treat the methodological questions surrounding legal interpretation with intellectual rigor.

Now, the foregoing does risk miscalculating the true stakes involved for judges. Judges do face charges of lawlessness, especially when they play with supreme law. If a method of analysis is not formally announced, and if the results produce intense opposition on the part of some, as many decisions will, then the displeased will challenge not only the results but also the legitimacy of the process. People will question whether those judges are really doing law. A fairly predictable pattern of results probably will not be adequate to eliminate these complaints; it has not done so in the past. One might come to believe that adopting a (perhaps any) method of interpretation is a necessity for judges, whether or not they believe that their decisions will be dictated by that choice.

My final observation is to return to the starting point, which is mainstream politics. Judges, even judges appointed for life, are members of the government and a political regime. They are a product of that system. And so in many situations, judges can effectively trust that system to have placed them in a position where they are unlikely to fail. In other words, the fact of sitting on the bench is an indication that the gavel will be wielded in politically acceptable ways. If there was not much clamor for dedications to interpretive method during the appointments process, there is some basis for believing that post-judgment complaints of lawlessness are more about the judgment than the method. All of this is obviously too simplistic. Often there are long temporal gaps between appointment and controversy, and judicial stature is threatened by a perception of arbitrariness. But if the best of our efforts to understand the constrained judicial role in society are close to correct, then the true threats lie elsewhere.

#### CONCLUSION

Low-stakes decisions might not be worth much of our time, but determining which decisions are in fact low-stakes can be worth sig-

nificant effort. My sense is that this is the case for constitutional judicial review. It probably is worth investigating and reinvestigating the influence of judiciaries (if any) on the rest of social life when they wield supreme law, along with the influence of announced interpretive method (if any) on those judicial decisions. If these influences are normally modest, as much good work on the subject indicates, then we can look to other resources for guidance on how debates surrounding constitutional judicial review might and should proceed. Given that the analysis in Part II was rather brief, I must acknowledge the real possibility of error regarding the implications of low stakes for debates over interpretive method. But this is an extended Essay, not an article. And when it comes to the question of how best to debate interpretive method, perhaps we do not have much to lose.