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Our Constitutional Commons

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OUR CONSTITUTIONAL COMMONS

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I. INTRODUCTION

We begin with some familiar facts: In 2008, then-presidential candidate Barack Obama argued that the U.S. healthcare system needed a major overhaul.[1] Once elected, President Obama put forward numerous proposals to address the health care challenges he identified. Members of the House of Representatives and the Senate retreated to their respective corners, some in support of the President's plan, others in opposition. Citizens and numerous interest groups took sides as well, informing congressional leaders of their support for or opposition to the proposed law. The legislators succeeded in passing a bill containing some aspects of the President's proposal in addition to a wide range of amendments. With the President's signature, the Patient Protection and Affordable Care Act (known to many as "Obamacare") became law.[2]

While the President held a large signing ceremony flanked by allies in Congress and those in his administration, not everyone was celebrating. Groups of opponents to the legislation brought claims challenging the Act's legal validity. One case, brought by two individual plaintiffs, a business trade organization, and numerous states, ultimately made its way to the U.S. Supreme Court and resulted in the U.S. Supreme Court decision *National Federation of Independent Business v. Sebelius*.[3] Several issues before the Court revolved around the Affordable Care Act's constitutionality. The Court considered whether Congress overstepped the constitutional bounds of its Commerce Clause power[4] as well as its enumerated power to tax.[5] Additionally, the Court considered whether tying Medicaid funds to an expansion of the program amounted to unconstitutional coercion of state governments.[6]

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[1] Paul Kurgman, Op-Ed., *Clinton, Obama, Insurance*, N.Y. TIMES, Feb. 4, 2008, at A23 (describing then-candidate Obama's plan and comparing it with Hillary Clinton's).

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

[3] 132 S. Ct. 2566 (2012).

[4] *Id.* at 2585–91.

[5] *Id.* at 2593–2601.

[6] *Id.* at 2601–07.

Ultimately, the holding of the Court produced some wins and some losses for the Obama Administration and the congressional coalition that passed the Affordable Care Act. While the Court made clear that Congress did not maintain the regulatory authority to implement the individual health care mandate under its enumerated Commerce Clause power,[7] it went on to hold that Congress did maintain the constitutional authority to do so under its power to tax.[8] The Court also found that tying expansion of Medicaid to federal spending in the bill amounted to unconstitutional coercion of the states.[9]

While there are many ways to analyze and relay this familiar tale, consider a new frame through which to view it: as a conflict over the allocation of constitutional resources. During the Affordable Care Act conflict, as with virtually all constitutional conflicts, the push-and-pull for constitutional resources results in a number of outcomes: the distribution of constitutional rights for individuals and corporations, rules of governance, the allocation of governance authority among levels of government, and adjustments in the relationship between the government and its citizens. Within this range of outcomes, we find parties who win and parties who lose in their bids to shape the meaning of constitutional language.

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[7] Chief Justice Roberts stated:

> Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.
>
> . . . .
>
> . . . Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do . . . . [T]he distinction between doing something and doing nothing would not have been lost on the Framers . . . . The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now.

Id. at 2587–89.

[8] *Id.* at 2601; *see also* Tom Scocca, *Obama Wins the Battle, Roberts Wins the War*, SLATE (June 28, 2012, 11:59 AM), http://www.slate.com/articles/news_and_politics/scocca/2012/06/roberts_health_care_opinion_commerce_clause_the_real_reason_the_chief_justice_upheld_obamacare_.html (asserting that the health care ruling was "a pretext" for a "campaign to rewrite Congress' regulatory powers under the Commerce Clause").

[9] *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2606–07.

The Affordable Care Act conflict involved at least two of these categories of constitutional resources. The first and most obvious constitutional resource at stake was the allocation of governance authority between levels of government. More authority for the federal government to dictate individual health care policy meant less authority for the state governments to do so. It is no accident that about half of the states were plaintiffs in *Sebelius*.[10] The second constitutional resource at stake, at least in the political dialogue surrounding the Act, was the distribution of individual constitutional rights. Assumedly, the two individuals who brought suit along with the trade group are plaintiffs because of their concerns about complying with the law. While the constitutional claims made by the parties are directed at the purported limits on Congress's power and the relationship between the federal government and the states, the political outcome of the fight in many respects was the fate of the Act's individual mandate to purchase health insurance.

The Affordable Care Act conflict demonstrates that every assertion of a constitutional right or limitation on that right could be recast as a conflict over constitutional resources. Countless other examples illustrate the point just as well. In the recent case *NLRB v. Noel Canning*, which concerned the President's recess appointment power, the allocation of a different type of constitutional resource was at issue: the reach of one branch of the federal government relative to others.[11] In other words, separation of powers issues can also be recast as involving the allocation of constitutional resources. Similarly, cases like *Burwell v. Hobby Lobby Stores, Inc.*, which addressed whether organizations can opt out of certain provisions of the Affordable Care Act on religious grounds, involved the allocation of individual rights—yet another category of constitutional resources.[12]

Framing these conflicts as competitions over constitutional resources not only helps us understand the drivers of constitutional conflicts better but also helps us more effectively apply the lessons learned from them in the future. Ultimately, these conflicts share stark similarities with the conflicts that arise

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[10] *See id.* at 2580 (noting that twenty-six states eventually joined the suit).
[11] 134 S. Ct. 2550, 2556 (2014).
[12] 134 S. Ct. 2751, 2759 (2014).

regarding other resources—from natural resources to intellectual property. A body of literature on the commons has helped us make sense of why resource conflicts occur in the natural resource and intellectual property contexts, how they may be resolved, and how they may be avoided in the future through better management of resources *before* conflicts arise.[13] This literature is equally applicable to constitutional resources.

Commons scholarship includes two particularly relevant literatures, one related to common good resources[14] and another related to public good resources.[15] Yet the two are interrelated in important ways, and the U.S. Constitution provides perhaps one of the most compelling case studies of this interrelation and how it both contributes to and resolves constitutional conflicts.

Common goods are ones shared by many but that are depletable.[16] Thus, when we engage in rivalry over common goods, more resources for one party means fewer for another.[17] Rivalry over common good resources can and often does give rise to a number of problems: collective action problems for those unable to come together to manage resources properly, free-riding by some parties on the backs of those seeking to manage resources responsibly, over-exploitation of the resource, erosion of and instability within management institutions, and gridlock or rigidity in those institutions, which can in turn paralyze and undermine the effective governance of resources.[18] As

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[13] *See infra* notes 45–71 (surveying the literature on the commons).

[14] Scholars have given commons different labels, including "common-pool resources" (CPRs) and even common property. Margaret A. McKean, *Common Property: What Is it, What Is it Good for, and What Makes it Work?*, *in* PEOPLE AND FORESTS: COMMUNITIES, INSTITUTIONS, AND GOVERNANCE 27, 29–30 (Clark C. Gibson et al. eds., 2000).

[15] *See* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 7–8 (1986) (highlighting the importance of studying "externalities, public goods, and clubs").

[16] Robert O. Keohane & Elinor Ostrom, *Introduction*, *in* LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS 13 (Robert O. Keohane & Elinor Ostrom eds., 1995); C. Ford Runge, *Common Property and Collective Action in Economic Development*, *in* MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY 17, 17 (Daniel W. Bromley ed., 1992) ("[C]ommon property provides a complex system of norms and conventions for regulating individual rights to use a variety of natural resources, including forests, ranges, and water.").

[17] Keohane & Ostrom, *supra* note 16, at 13.

[18] *See* Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 523–27 (2007) (discussing these and other issues implicated by rivalry over common good resources).

demonstrated in this Article, challenges related to the common good dimensions of constitutional conflicts can damage our governance institutions and even the meta-institutional constitutional structure within which they are embedded.[19]

Public goods, in contrast to common goods, are shared by many but are *not* depletable.[20] This body of scholarship has come to incorporate certain forms of knowledge and cultural resources as public goods.[21] Thus, when communities come together to share knowledge or culture with each other openly and freely, they create resources that are themselves public goods. Though there is a debate in the literature about whether making such goods private rather than public encourages or stifles knowledge-driven innovation,[22] there is compelling evidence that in many cases a

[19] *See* discussion *infra* Part IV.C (providing examples of constitutional common good conflicts).

[20] Keohane & Ostrom, *supra* note 16, at 15; *see also* McKean, *supra* note 14, at 27–30 (distinguishing between common pool resources and public goods).

[21] *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY, at xi (1996) ("In market terms, information has significant 'public good' qualities; it is often expensive to create or generate but cheap to copy."); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 18–20 (2003) (discussing how the public good nature of information has helped shape intellectual property rights); DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 7 (2009) ("The idea behind the patent system is simple: invention is a 'public good' because it is expensive to invent but cheap to copy those inventions."). For an interesting critique and summary of this literature that relies on public goods in this context, see generally Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007).

[22] Some voices in favor of finding ways to privatize the benefits associated with public goods can be found in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) and scholarship like that of Rochelle Cooper Dreyfuss. *See Aiken*, 422 U.S. at 156 ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437, 1441 (2010) ("Since knowledge is cumulative, exclusive rights have always had the paradoxical effect of slowing progress in the name of promoting it."). We even see this perspective reflected in the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *see also* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 11 (6th ed., 2012) (noting that "[t]he principal objective of much of intellectual property law is the promotion of new and improved works"). There are those who argue for keeping IP public good resources public. *See, e.g.*, RICHARD M. STALLMAN, FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN 9 (Joshua Gay ed., 2002) (arguing that

non-proprietary approach to pooling knowledge and culture creates public goods of great value.[23] Such is the case with the Constitution, whereby communities come together to pool knowledge and cultural conceptions of governance to create a constitutional resource of which everyone can avail themselves—everyone has a right, for instance, to exercise freedom of religion as understood in the canon of constitutional law, and no one citizen's consumption of religious freedom depletes another citizen's ability to consume the same.

So how do these two literatures interrelate and what does this tell us about the Constitution? As described in detail below, constitutional communities capitalize on the *public good* aspects of the Constitution to pool knowledge and cultural conceptions of good governance and individual rights.[24] The result is, for example, new constitutional conceptions regarding the individual right to exercise religious freedom. These communities then engage in *common good* conflicts with other constitutional communities seeking to have competing conceptions incorporated in the canon of constitutional law.[25] So, to take one example, Hobby Lobby believes that a constitutionally protected right of freedom of religion relieves them of the mandate to provide individual health care for contraceptives.[26] Other constitutional communities disagree, and believe that there is no constitutionally protected right of religious freedom that would absolve Hobby

software "freedom" enables developers to share their improvements with each other more readily, which in turn leads to enhanced innovation); Robert P. Merges, *A New Dynamism in the Public Domain,* 71 U. CHI. L. REV. 183, 184 (2004) ("Because the care and feeding of the public domain is an important goal shared by everyone in the IP system . . . we ought to find ways to encourage this behavior.").

[23] *See* MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 1–21 (2008) (discussing the idea that intellectual property rights are unnecessary and do not in fact encourage innovation); STEVEN WEBER, THE SUCCESS OF OPEN SOURCE 3 (2004) (asserting that "[o]pen source code does not obliterate profit, capitalism, or intellectual property rights").

[24] *See* discussion *infra* Part II.A.

[25] *See* discussion *infra* Part IV.C (noting several types of conflicts, including conflicts in cases applying free speech guarantees).

[26] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014); *see also* Brief for Respondents at i, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899 ("Respondents' sincere religious beliefs prohibit them from covering four out of twenty FDA-approved contraceptives in their self-funded health plan.").

Lobby from complying with the law.[27] In *Burwell*, these communities battled over a common good. The Court ruling in favor of Hobby Lobby[28] allocated to them a constitutional resource—a constitutionally protected right not to be compelled to provide health care coverage that includes contraception. Hobby Lobby's opponents, on the other hand, lost a constitutional resource—the right to compel health care coverage that includes contraception even when those who would be compelled object upon religious grounds. Yet once that common good constitutional resource was allocated by the Court, the resource cycled back to a *public good*—all parties can (presumably) avail themselves of the same right Hobby Lobby has gained, as long as based upon religious grounds, and no one party's doing so detracts from another's ability to do so.[29]

This cycle from public constitutional good to common constitutional good and back to public constitutional good is important because it can tell us a great deal about how the Constitution has been managed, the types of conflicts that have arisen under that management, and how it should be managed going forward to avoid conflicts that could result in damage to our constitutional institutions.

This Article will explore the dimensions of our constitutional commons that take on the attributes of common good resources and those that take on the characteristics of public good resources, and how constitutional communities come together to influence the allocation of each. Part II first provides background and context on how the U.S. Constitution is one of the most compelling case studies to which commons analysis can and should be applied. Part III then provides background on the common good and public good literatures relevant to our thesis. In Part IV, the Article explores how the literature on common goods relates to the allocation of power, rights, and other resources found in the Constitution. Part V looks at how the literature on knowledge and culturally derived public goods and the communities that create

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[27] *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2769 (outlining the principal arguments of the Department of Health and Human Services).

[28] *Id.* at 2759–60.

[29] *See id.* at 2775 (holding that "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act]")

them relates to communities who create and seek to legitimize different interpretations of constitutional text. Part VI draws together these two literatures and discusses how they provide a useful way to construe constitutional history and conflicts. It further provides important new insights into the institutional design of the Constitution and the implications of that design for its operation, quality, and preservation. Part VII concludes the Article.

II. BACKGROUND AND CONTEXT

The United States Constitution is short, but the history of its development from 1787 to the current day is the longest of any written constitution.[30] Its text is seemingly straightforward, but judicial opinions, statements by politicians, and the work of scholars attempting to interpret the Constitution would fill libraries. The Constitution was instituted as a framework for the governance of a handful of rebellious British colonies that had broken away from the English throne, yet it has become a model for nations all across the globe.[31] How this modest document—though revolutionary in its time—became a centerpiece and model of law and governance the world over is nothing short of remarkable.

While the story of the U.S. Constitution has been told through numerous lenses—legal, political, and historical—scholars have neglected to analyze the Constitution through the lens of the commons. This is surprising because political scientists, political economists, and legal scholars, along with scholars from other fields, often rely on the commons to justify why we maintain rules of governance in the first instance.[32] We increasingly see commons

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[30] *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited* 81 U. CHI. L. REV. 1641, 1669 (2014) (noting that the Construction is "the oldest constructional document in the world").

[31] *See* Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism,"* 2000 WISC. L. REV. 597, 614–15 (asserting that the Constitution "is constantly used as an example and anti-model").

[32] Some of the classic literature in these fields includes ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 30–31 (1990) (discussing examples of resource systems, including fisheries, bridges, and water basins); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (coining the phrase "tragedy of the commons" and asserting that "[f]reedom in a commons brings ruin to

scholarship focus on a variety of unconventional resources, resource systems, and communities of resource managers.[33] It is time to rectify the scholarly neglect of how the commons relates to the Constitution and to include it within the growing body of commons scholarship.

While those studying the Constitution have neglected the commons, it turns out that the commons yields important constitutional insights. These insights range from how our constitutional commons has been managed in the past, how it can or should be managed in the future, and what characteristics have allowed it to endure for so long as a reliable, stable foundation of governance. Furthermore, once we have identified the characteristics that keep our constitutional commons healthy and robust, we can undertake a more focused attempt to preserve those attributes that perpetuate the endurance of this most elegant governance document and avoid damage to our unique constitutional resources.

In order to understand the implications of the Constitution as a commons, we need to take a step back and first understand what is meant by *the commons* and how it might apply to the Constitution. Commons scholarship is a broad heading for research related to both common good and public good resources. Common good resources are those with two defining characteristics. First, they are subject to rivalry, meaning the resource is depletable when it is being consumed by a variety of

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all"); ELINOR OSTROM ET AL., RULES, GAMES, AND COMMON-POOL RESOURCES 19–20 (1994) (discerning three central questions that common-pool resources implicate); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986) (surveying instances where a free commons, "accessible to the public at large," has proved beneficial). *See also* Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247, 248–50 (1992) (asserting that addressing the commons problem requires "not just regulation[,] but cooperation with regulation"); Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 242 (2000) (explaining the tragedy of the commons and identifying a trend in recent literature highlighting how "some commons do *not* lead to tragic consequences").

[33] There is a robust literature on unusual commons resources, often called "the new commons." For informative scholarship summarizing this area, see generally Charlotte Hess, Mapping the New Commons (July 1, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356835. *See also* UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 15 (Charlotte Hess & Elinor Ostrom eds., 2007) (discussing knowledge commons).

commons "appropriators."[34] When demand for the resource is high, there is often not enough of the resource to serve all interested parties, creating winners and losers.[35] Second, common good resources are characterized by non-excludability, meaning that no one can be denied access to the resource system—or at least substantial difficulties arise in denying those who want to access the resource system.[36] Public good resources share the element of non-excludability with common good resources,[37] which is why both public and common good resources may be deemed part of a "commons"—everyone has access to them. Public goods, however, tend toward non-rivalry, meaning there is no depletion or very little depletion of the resource as it is consumed by appropriators.[38]

So let us take these in turn, providing a more detailed explanatory background than provided in the Introduction. How do common good resources relate to the Constitution? We argue that there are a large number of appropriators—for example, the Executive, Congress, the Judiciary, the states, and citizenry—attempting to access the constitutional resource system and jockeying to allocate constitutional resources. As noted earlier, constitutional resources can come in a number of forms, whether it be a constitutionally protected right of the citizenry, an allocation of governance authority between branches of government or among levels of government, or some other benefit that can be derived through a particular interpretation of original or amended constitutional text.

When a constitutional resource is distributed, a win for one appropriator results in a loss of that constitutional resource for another. For example, before *Roe v. Wade*,[39] groups fought over the allocation of general rights to personal liberty and the specific implications of women controlling their reproductive rights by maintaining access to abortion. Once the Court ruled that the Due Process Clause of the Constitution's Fourteenth Amendment

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[34] OSTROM, *supra* note 32, at 30.

[35] *Id.*

[36] Blake Hudson, *Commerce in the Commons: A Unified Theory of Natural Capital Regulation Under the Commerce Clause*, 35 HARV. ENVTL. L. REV. 375, 377 (2011).

[37] Keohane & Ostrom, *supra* note 16, at 13.

[38] *Id.*

[39] 410 U.S. 113 (1973).

protected a woman's right to an abortion,[40] winners and losers arose—as evidenced by the intense, nationwide politics on the issue of abortion that we saw at the time, and that we still see today.[41] Those who wanted a constitutionally protected right to an abortion were given that right and were able to graze on the metaphorical constitutional commons, but now to the exclusion of those opposing the allocation of that right. In contrast, those who opposed constitutional protections for the right to abort were denied the right to have the Constitution interpreted in the manner they desired and were left with nothing more than constitutional stubble.[42]

How, then, do public good resources relate to the Constitution? And how do they interact with common good resources to form the complete picture of the constitutional commons? To convey the public good nature of constitutional resources, this Article incorporates insights from scholars who have recently shifted away from focusing primarily on how rivalrous resources are managed (and how appropriators potentially deplete or overuse resources) and rather have focused on how communities may come together to pool knowledge or cultural perspectives to create resources. We argue that the communities described in the Introduction on each side of a constitutional conflict engaged in the creation of constitutional public good resources.[43] Taking a signal from this literature, we can look at groups creating public goods in governance instruments, like constitutions, from a new perspective, and can call them "constitutional commons communities" or just "constitutional communities." Examples include the nation's esteemed Framers at the time the Constitution was created. In addition, we continually find constitutional communities made up of coalitions of citizens and interest groups that come together to litigate constitutional issues, judges interpreting constitutional precepts, legislators seeking to

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[40] *Id.* at 164.

[41] *See, e.g.*, *id.* at 116 (acknowledging "the vigorous opposing views" and "the sensitive and emotional nature of the abortion controversy" in 1973).

[42] *See id.* at 164–65 (establishing a timetable dictating when states could regulate access to abortion).

[43] This brand of scholarship goes by the moniker "constructed cultural commons." *See* Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 657 (2010).

pass constitutional amendments, or agents of the Executive seeking to enforce the Constitution in particular ways—communities we refer to as Reframers. While rivalry between different communities pervades the traditional commons dimensions of the Constitution, constitutional communities also assist in managing and maintaining the public-good dimensions of the Constitution. While these public-good dimensions share the non-excludability element with traditional and new commons resources, they differ in that they are non-rivalrous—one person's use of the resource does not restrict another's use of the same resource. In other words, while different constitutional communities may differ in their preferences and visions of how constitutional resources should be allocated, once a resource is allocated, one constitutional community's use of an allocated resource does not restrict another's use of the same resource.

So, for example, during the abortion conflict culminating in *Roe v. Wade*, constitutional communities came together to pool their collective knowledge on *one side or the other* of the rights-allocation debate, seeking to maintain the right to abort (or not) as a public good constitutional resource available to the citizenry. In contrast, the conflict itself was a conflict over a common good resource, as the decision in *Roe* actually created greater rights for those seeking an individual right to an abortion, and depleted the rights of others who would see abortion rights restricted. This was the common good battle that led to the case. Yet once the Court allocated the right sought by one of these constitutional communities, no one's use of the right to abort restricted another's ability to also access that constitutional right (or resource). A judicial pronouncement allocating a constitutional resource, however, does not end the debate, nor does it extinguish the constitutional communities' interest in continuing to seek their preferred appropriation of particular constitutional resources. The communities often live on and thrive; some may attempt to ensure the maintenance of the constitutional resource as allocated by judicial pronouncement, while other constitutional communities remain resolved to see the right appropriated differently (i.e., seeking an overturning or a strengthening of *Roe*'s protections).

Indeed, a key contribution of this Article is an explication of how the precepts established by both common good and public

good commons literatures are inextricably entwined in the constitutional commons cycle. In this cycle, constitutional communities come together to pool their collective knowledge and cultural ideals to attempt to create public good constitutional resources. At the same time, the collection of constitutional communities pooling knowledge and cultural ideals on *one side* of the constitutional resource appropriation debate are common good appropriators in rivalry with a group of common good appropriators on the other side of the debate.

So, for example, in the context of the right to an abortion, even today constitutional communities come together to maintain the constitutionally protected right, while other constitutional communities come together to seek a reappropriation of the right that would not leave it constitutionally protected, but would rather allow individual states to ban abortions.[44] The conflict over the allocation of the right in the first instance is a common good dimension of the Constitution, but on either side of the debate are constitutional communities seeking to gain (or deny) a public good resource or maintain the integrity of that right once it is allocated (or seek to have the right reappropriated with new winners and losers—i.e., those who would see *Roe v. Wade* overturned). In other words, the Framers of the Constitution set up a system that is *simultaneously rivalrous and non-rivalrous*. Once the Constitution was framed in a way that provided public good constitutional resources, we see a constant stream of constitutional communities acting as Reframers, attempting to adjust the original constitutional framework—generally by rivalry through judicial interpretation or constitutional amendment—in order to secure, nourish, and protect constitutional resources important to them.

The next Part expounds upon the common good and public good literature, setting the stage for the remainder of the Article's explanation of how the U.S. Constitution is situated within these respective literatures.

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[44] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 844–46 (1992) (describing the debate over *Roe* in 1992 and affirming the principles of that case); Tierney Sneed, *What the Battle Over Abortion Will Look Like in 2015*, U.S. NEWS & WORLD REP. (Dec. 31, 2014, 11:36 AM), http://www.usnews.com/news/articles/2014/12/31/what-the-battle-over-abortion-will-look-like-in-2015 (describing state restrictions on abortions).

III. COMMON GOODS AND PUBLIC GOODS

This Part provides a short introduction to major concepts arising from the two branches of the commons literature most relevant to the Constitution. It first gives an introduction to major concepts from the common good literature and then does the same for the knowledge and culturally-derived public good literature.

A. COMMON GOOD RESOURCES AND MANAGEMENT

1. The Resources: Traditional and New. Common good resources share two characteristics. First, when one uses a common good, there are fewer opportunities for others to use it, meaning there is rivalry among users.[45] Second, it is very difficult, if not impossible, to exclude others from using common good resources.[46]

These two defining traits of common good resources—rivalry and non-excludability—often collide in an unfortunate way that puts in motion a free-for-all that Garrett Hardin famously coined *the tragedy of the commons*.[47] Hardin illustrated the tragedy of the commons by introducing a now-famous cautionary tale of hapless cattle herders grazing their cows on an open pasture.[48] This pasture typified common good consumption: the herders' use of the commons was rivalrous because any grass consumed by one herder's cow meant less for other herders; the herders also faced challenges related to non-excludability because any number of herders could bring their cows to the pasture to graze as they pleased.[49] Individual herders who added cows to their herd received a nearly 100% return for each additional cow, while the overgrazing caused by additional cattle was spread among all of

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[45] *See* Keohane & Ostrom, *supra* note 16, at 13–15. Sometimes this trait of the commons is also referred to as depletability, or subtractability.

[46] *See e.g.*, *id.*; Runge, *supra* note 16, at 26 (discussing the central features of common property, including the "[n]eed for enforcement," which arises from the fact that it is impossible to exclude others from the commons); ORAN R. YOUNG, THE INSTITUTIONAL DIMENSIONS OF ENVIRONMENTAL CHANGE: FIT, INTERPLAY, AND SCALE 141 (2002) ("[Common-pool resources] are goods that are nonexcludable in the sense that it is costly, or even impossible, to prevent all members of a group from enjoying their benefits once they are available to any member . . . .").

[47] Hardin, *supra* note 32, at 1243.

[48] *Id.* at 1244.

[49] *Id.*

the herders.[50] As a result, herders invariably found it in their interests to add more cattle even as the pasture became so depleted that overgrazing tragically destroyed it.[51]

In addition to the two defining traits of common good resources, other terminology helps guide commons analysis. The body of resources that make up common goods is known as a "resource system."[52] A resource system is comprised of "resource units," defined as "what individuals appropriate or use from resource systems."[53] The process of withdrawing resource units from a resource system is called "appropriation," and those who withdraw resource units from the system are called "appropriators."[54]

Commons scholars have traditionally studied and applied the commons literature to natural resources, such as fisheries,[55] forests,[56] parks,[57] rivers,[58] and airsheds.[59] In more recent years, commons scholars have focused on additional natural resources such as the polar icecaps,[60] the radio spectrum,[61] and outer space.[62]

The literature on the commons increasingly encompasses a host of other resources as well. The types of common goods found

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[50] *Id.*

[51] *Id.*

[52] Ostrom highlights "fishing grounds, groundwater basins, grazing areas, irrigation canals, bridges, parking garages, mainframe computers, and streams, lakes, oceans, and other bodies of water" as examples of "resource systems." OSTROM, *supra* note 32, at 30.

[53] *Id*.

[54] *Id.* Ostrom gives a variety of examples of appropriators, such as "herders, fishers, irrigators, commuters, and anyone else who appropriates resource units from some type of resource system." *Id.* at 31.

[55] *See, e.g.*, *id.* at 144–46; Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 247–49 (2000).

[56] *See, e.g.*, Clark C. Gibson et al., *Explaining Deforestation: The Role of Local Institutions*, *in* PEOPLE AND FORESTS, *supra* note 14, at 1, 6–7.

[57] *See, e.g.*, Hardin, *supra* note 32, at 1245.

[58] *See, e.g.*, Michael V. McGinnis, *On the Verge of Collapse: The Columbia River System, Wild Salmon and the Northwest Power Planning Council*, 35 NAT. RESOURCES J. 63, 75 (1995).

[59] *See, e.g.*, Tom Tietenberg, *The Tradable Permits Approach to Protecting the Commons: What Have We Learned?*, *in* THE DRAMA OF THE COMMONS 197, 202–03 (Elinor Ostrom et al. eds., 2002); Hardin, *supra* note 32, at 1245.

[60] *See, e.g.*, CHRISTOPHER C. JOYNER, GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL PROTECTION 1–2 (1998).

[61] *See, e.g.*, Daniels, *supra* note 18, at 545–50.

[62] *See, e.g.*, Jennifer A. Purvis, *The Long Arm of the Law? Extraterritorial Application of U.S. Environmental Legislation to Human Activity in Outer Space*, 6 GEO. INT'L ENVTL. L. REV. 455, 457 (1994) (discussing the failure of customary international law to adequately address the problem of space debris).

outside of traditional natural resources are often referred to as "new commons,"[63] and include resources as varied as medical care,[64] prisons,[65] government budgets,[66] email inboxes,[67] federal systems of government,[68] and even presidential primaries.[69] Below, we argue that a variety of resources provided by the Constitution, such as rules allocating governance authority or allocating constitutional rights to the citizenry, should also be considered new commons resources, as evidenced by the many rivalrous conflicts that arise between various non-excludable appropriators on the constitutional commons.[70]

As Hardin's cautionary tale suggests, common good resources, whether traditional or new, almost uniformly require management in order to avoid tragedy.[71] As researchers have delved into commons problems related to resource management, they have discovered a broad spectrum of potential solutions to those problems.

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[63] *See, e.g.*, Hess, *supra* note 33, at 3–4; Brigham Daniels, *Governing the Presidential Nomination Commons*, 84 TUL. L. REV. 899, 907 (2010).

[64] *See* Michael Gochfeld et al., *Medical Care as a Commons*, *in* PROTECTING THE COMMONS 253 (Joanna Burger et al. eds., 2001) (using the commons framework to analyze medical care in the United States).

[65] *See* Talbot "Sandy" D'Alemberte, *A Critique of Roscoe Pound's* Popular Dissatisfaction with the Administration of Justice*: The Missing Discussion of Criminal Law*, 48 S. TEX. L. REV. 969, 979 (2007) ("[J]ails and prisons are paid for by all of society, and those who use disproportionate resources from the commons through numerous prosecutions and long prison terms are taking from the commons.").

[66] *See* Kenneth A. Shepsle, *Overgrazing the Budgetary Commons: Incentive—Compatible Solutions to the Problem of Deficits*, *in* THE ECONOMIC CONSEQUENCES OF GOVERNMENT DEFICITS 211, 211 (Laurence H. Meyer ed., 1983) ("[G]overnmental revenues and debt-financing opportunities, like the proverbial commons, are a common pool.").

[67] *See* Nigel Melville et al., *Unsolicited Commercial E-Mail: Empirical Analysis of a Digital Commons*, 10 INT'L J. ELECTRONIC COM. 143, 144 (2006) (framing "[u]nsolicited commercial email" as a "significant problem of the digital commons").

[68] *See, e.g.*, Blake Hudson, *Federal Constitutions: The Keystone of Nested Commons Governance*, 63 ALA. L. REV. 1007, 1007 (2012) (discerning a "natural capital commons" where "[f]ederal constitutions . . . grant subnational governments virtually exclusive regulatory authority over certain types of natural capital appropriation"); BLAKE HUDSON, CONSTITUTIONS AND THE COMMONS: THE IMPACT OF FEDERAL GOVERNANCE ON LOCAL, NATIONAL, AND GLOBAL RESOURCE MANAGEMENT 3 (2014) (asserting that the commons "theory has yet to be applied to . . . the federal system of government").

[69] *See* Daniels, *supra* note 63, at 907–08 (reasoning that "states compete for influence [in presidential primaries] because it is a finite resource" and that "it is very difficult for a state to exclude other states from trying to gain more influence").

[70] *See infra* Part IV.A.

[71] *See* Hardin, *supra* note 32, at 1244–45 (describing commons problems and management solutions in the context of parks and the atmosphere).

2. Managing Common Goods. Regardless of the form the management system takes, the purpose of managing common good resources is to put some restraints on commons appropriators.[72] The management system might work to reduce consumption of the goods (i.e., rivalry) or to restrict access (i.e., non-excludability).

Hardin highlighted two primary mechanisms to manage common goods and avoid its otherwise likely tragedy: property rights and regulation.[73] Others, led primarily by Elinor Ostrom's Nobel prize-winning work,[74] have argued that herders under the right conditions can manage their own way out of commons tragedies. Regardless of the mechanism utilized, commons literature examines the extent to which institutions created by those who use the commons can help them avoid having the commons "tragically" collapse.

We now turn to a description of public good resources on the commons, and specifically focus on a much newer and important idea that knowledge and cultural information can be pooled to create public good commons resources.

B. PUBLIC GOOD COMMONS COMMUNITIES

Just as the common good scholarship focuses on the challenges presented by the management of depletable resources, the scholarship on knowledge and culturally-derived public good commons[75] (which we will refer to here as the "cultural public good

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[72] *See id.* at 1244 ("Freedom in a commons means ruin to all.").

[73] *Id.* at 1245 (outlining these two options in the context of the regulation of national parks).

[74] OSTROM, *supra* note 32, at 2–18 (describing management solutions to the commons problem and calling the suggestion that the only mechanisms to govern the commons were limited to regulation and property rights "uncritical[ ]"). For a brief introduction to this aspect of the commons literature, see Daniels, *supra* note 18, at 519–20.

[75] These types of public goods were introduced in an article by Madison, Frischmann, and Strandburg, and were referred to as "constructed cultural commons." Madison et al., *supra* note 43, at 657. While the moniker "cultural commons" is certainly catchy, the term *commons* is used in the cultural commons literature in a loose and even metaphorical sense. *Id.* at 673 ("We draw on narrative and metaphorical approaches to legal and sociological questions, specifically by examining the metaphorical dimensions of the information 'environment' and the knowledge 'commons.' "). For those who study the commons, this looseness of language and use of the commons as a metaphor may initially cause some frustration. The commons literature has struggled with people saying commons and meaning different things, and significant efforts within the commons literature have been made to make sure that when somebody is talking about the commons, they mean a particular sort of resource and not something else, like a property right, community, or a

literature") attempts to unravel some of the challenges of building communities that invest in producing cultural, social, and intellectual resources. Instead of fisheries and forests, within this literature we find communities of people ranging from computer programmers to choirs. The heart of this literature seeks to understand how and why these communities arise and sustain themselves in pursuit of creating, pooling, and sharing intellectual and cultural resources.[76] This literature attempts "to identify those features of commons that are more and less significant to the success and failure of a commons enterprise."[77] As a point of clarification, we should also note that some of what is studied in this literature has already made a home in the new commons literature. Consider, for example, what Charlotte Hess has labeled "knowledge commons," which include universities, intellectual property, libraries, and open source software, just to name a few.[78]

There are a few essential differences between the common good and cultural public good commons literatures. First, while the common good literature focuses on the health of the commons, the cultural public good literature focuses on how communities work cooperatively to produce and distribute intellectual and cultural resources.[79]

Second, the two literatures also attempt to solve very different problems. The overarching problem with common goods is the tragedy of the commons, while the primary problem with cultural

governance mechanism. *See* McKean, *supra* note 14, at 30 (noting that "the term *common property* seems to have entered the social science lexicon to refer not to any form of property at all but to its absence"). In fact, it seems that it was for this reason that many within the commons literature have migrated away from the term commons and instead tried to use the term common-pool resource in its place. *Id.*

[76] *See generally* Madison et al., *supra* note 43 (analyzing how participants in these pooling arrangements structure their relationships and interactions).

[77] *Id.* at 660.

[78] Hess, *supra* note 33, at 20–28; *see also* UNDERSTANDING KNOWLEDGE AS A COMMONS, *supra* note 33, at 14–15 (cataloguing several of these knowledge commons).

[79] These distinct approaches inform how we approach the Constitution below in Parts IV and V. When applying commons analysis in Part IV, we focus on the conflicts between appropriators of constitutional resources. In Part V, on the other hand, when applying cultural public good analysis, we focus on how people come together in communities to work for change or to protect the constitutional provision of public goods.

public goods is the successful formation of communities that will produce and sustain cultural resources.[80]

Finally, the role of rivalry plays out very differently. As explained above, by definition, common good resources are rivalrous. While cultural public good communities can create a diversity of goods, including private goods, common goods, and public goods, the goods described to date in the cultural public good literature are most frequently nonrivalrous public goods.[81]

We now move on to discuss the ways in which the U.S. Constitution fits into the respective commons resource and cultural public good literatures.

IV. THE CONSTITUTION AS A COMMON GOOD

In this Part, we discuss how conflicts over the content and meaning of the Constitution can be viewed through the lens of common goods. While it is certainly a novel application of common good theory, it is an important one considering that common good dimensions may be significant contributors to both the

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[80] In Part IV, we discuss how competition for constitutional resources, if unchecked, could tear at the fabric of the United States' ability to govern or could undermine the stability of our governmental institutions, which would no doubt be tragic. In Part V, we explain the ways in which coalitions form to pursue various constitutional changes—or to protect against them—and how the building of such communities conforms to the cultural public good literature. Also, note that at least in some ways the literatures are not entirely dissimilar in their focus. Collective action seems to be at the heart of the constructed cultural commons literature since the main object of our concern is building and sustaining constructed cultural commons communities; Ostrom also highlights the importance of building institutions that cause users of the commons to overcome "temptations to free-ride and shirk." OSTROM, *supra* note 32, at 15.

[81] *See, e.g.*, Madison et al., *supra* note 43, at 666 ("Despite considerable variation and nuance, these activities all can be understood to present a simple core problem: as public goods, the 'output' from these activities—whether described as information, expression, invention, innovation, research, ideas, or otherwise—is naturally nonrivalrous, meaning that consumption of the resource does not deplete the amount available to other users, and nonexcludable, meaning that knowledge resources are not naturally defined by boundaries that permit exclusion of users."). Again, these themes are highlighted below in Parts IV and V. Furthermore, Part V describes how these commons and public goods aspects of the Constitution are inextricably intertwined, as groups come together and rival each other on the constitutional commons in order to create or reallocate public goods constitutional resources—a dynamic which has not only forged our constitutional history but which will influence our governance system going forward. In addition to explaining this connection, Part V introduces a revised version of Elinor Ostrom's Institutional Analysis and Development (IAD) Framework specific to the constitutional context. *See infra* notes 195–97 (summarizing Ostrom's theoretical framework).

Constitution's resilience and its potential weaknesses. Additionally, viewing the U.S. Constitution from this vantage point proves particularly important for the common good literature, since the Constitution may be a prime example of a well-managed commons and long-enduring institution.[82]

In this Part, we first discuss constitutional resources that flow out of the "resource system" that is the Constitution, and how the push and pull over the content and meaning of the Constitution warrants common good analysis. This involves describing the resources at issue and then discussing how the defining traits of common good resources—rivalry and difficulties presented by non-excludability—relate to the Constitution. Next, we provide several illustrations of such conflicts. We end this Part with a discussion of how the tragedy of the commons could apply to constitutional resources.

A. CONSTITUTIONAL COMMON GOOD RESOURCES

When considering the Constitutional Convention of 1787, some speak of the participants with such reverence that perhaps it may seem flippant to characterize them as appropriators of resources.[83] The same could be said about the impressive stream of constitutional cases penned by great jurists. However, as litigants, interest groups, and politicians know well, any time we take actions to create new constitutional language or even interpret existing language, we find conflict. The stakes of these conflicts have to do with the provision of important constitutional resources, such as the creation of citizen rights or the allocation of governance authority among levels of government or between branches of government. During the Convention, appropriation of these resources worked through many rounds of disagreement, and then ultimately agreement on exactly what the constitutional text would be.[84] Since then, appropriation of constitutional

[82] *See* OSTROM, *supra* note 32, at 88–102 (describing "a set of design principles that characterize [certain] long-enduring [common-pool resource] institutions"). This is a point that the authors intend to explore in more depth in future work.

[83] *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–1788, at 467–68 (2010) (commending the Framers and participants at the state ratifying conventions).

[84] *See* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 155 (2009) (discussing disagreement on the "three-fifths" compromise);

resources has come either through amending the Constitution or through judicial interpretation of constitutional text.

While the resources that come from crafting or interpreting constitutional language are diverse and difficult to encapsulate in their entirety, consider some of the landmark judicial opinions that have articulated the meaning of constitutional language, each of which has dimensions fitting within the common good and, as discussed below in Part V, cultural public good frameworks. In each of these conflicts, the direction of the Nation stood in the balance. Cases like *Bush v. Gore*[85] allocated rules governing aspects of the electoral system, while cases such as *Marbury v. Madison*[86] and *Nixon v. United States*[87] proscribed the degree to which one branch of the government has the ability to override the will of another branch. Other cases, like *Brown v. Board of Education*,[88] *National Federation of Independent Business v. Sebelius*,[89] and *Kelo v. New London*,[90] adjusted the relationship between the government and its citizens. Cases like *Wickard v. Filburn*,[91] *McCulloch v. Maryland*,[92] *United States v. Lopez*,[93] and *Pike v. Bruce Church, Inc.*[94] demarked

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MAIER, *supra* note 83, at 35–38 (outlining the disagreements among the delegates and their reservations about the approved text).

[85] 531 U.S. 98, 104 (2000) (holding that "[t]he recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right").

[86] 5 U.S. (1 Cranch) 137, 177 (1803) (establishing judicial review over legislative acts, including the ability of the Court to act as the final arbiter as to the meaning of the Constitution).

[87] 506 U.S. 224, 235–36 (1993) (holding that a Senate impeachment of a United States District Court judge is non-justiciable).

[88] 347 U.S. 483, 493–95 (1954) (holding that the "separate but equal" segregation of children in public education violates the Equal Protection Clause of the Fourteenth Amendment and therefore that state segregation of public schools is impermissible).

[89] 132 S. Ct. 2566, 2600 (2012) (allowing the federal government to proceed with national health care legislation, including a controversial tax placed on individuals who chose not to purchase health insurance).

[90] 545 U.S. 469, 485–90 (2005) (holding that the governmental taking of private property to be given to a private party for economic development qualifies as a constitutionally protected public use).

[91] 317 U.S. 111, 128 (1942) (allowing federal regulation to encompass wheat grown for private consumption).

[92] 17 U.S. (4 Wheat.) 316, 429 (1819) (preventing states from taxing federal institutions).

[93] 514 U.S. 549, 561 (1995) (limiting the power of Congress to regulate school anti-gun policies under the Commerce Clause).

[94] 397 U.S. 137, 145 (1970) (limiting the power of states to regulate commerce when the regulation places an undue burden on interstate commerce).

the relative powers among levels of government. Still, cases like *Roe v. Wade*,[95] *Citizens United v. Federal Election Commission*,[96] and *Miranda v. Arizona*[97] articulated substantial individual rights. Notwithstanding the motivations maintained by those attempting to influence the meaning of constitutional language, these resources are very valuable. Irrespective of what form these resources take, they arise from the creation and interpretation of constitutional language.

We now briefly describe why such resources are in fact common good resources.

1. Constitutional Resources and Rivalry. Constitutional law is replete with rivalry[98]—the very existence of heated competition over the content and meaning of constitutional language suggests the existence of rivalry. Without depletability, there is no need to have winners and losers: everybody could win without impacting other potential appropriators. With rivalry, however, we are left with those able to graze on the constitutional commons and those left with nothing but constitutional stubble. The throngs of protesters that accompany controversial constitutional cases before the Supreme Court, each with their own causes and visions for the country, cannot all go home happy. This is the embodiment of rivalry.

The dimensions of the Constitution that demonstrate rivalry and depletability of constitutional resources track closely the traditional common good resources studied by Ostrom and the new commons resources explored by others.[99] Though public good resources "are not naturally defined by boundaries that permit exclusion of users,"[100] constitutional common good resources consist of citizen rights and rules of governance that are naturally defined and do give rise to rivalry and depletability. For example, when a resource like the appropriation of governance authority

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[95] 410 U.S. 113, 153 (1973) (holding that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

[96] 558 U.S. 310, 342 (2010) (extending First Amendment political speech protection to corporations).

[97] 384 U.S. 436, 444–45 (1966) (requiring police to inform individuals of their Fifth Amendment rights before interrogation begins).

[98] *See supra* notes 34–35 and accompanying text.

[99] *See supra* notes 32–33 and accompanying text (surveying both the classic literature and the new commons literature).

[100] Madison et al., *supra* note 43, at 672.

between levels of government becomes fixed in a constitutional document, or in the body of jurisprudence interpreting that document, it has fixed boundaries: we have fenced off the constitutional pastures and divided them between the states and the federal government,[101] at least to the extent observed in some of the great federalism debates of our time.[102]

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[101] Currently a constitutional debate is ongoing over whether the United States Constitution does indeed divide constitutional regulatory authority between federal and state governments. *See* Blake Hudson, *Reconstituting Land-Use Federalism to Address Transitory and Perpetual Disasters: The Bimodal Federalism Framework*, 2011 BYU L. REV. 1991, 2029. This debate pits "dual" federalists against "dynamic" federalists. *Id.* Theories of dual federalism support the proposition that "the states and the federal government inhabit[ ] mutually exclusive spheres of power." Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 175 (2006). On the other hand, theories of dynamic federalism "reject[ ] any conception of federalism that separates federal and state authority under the dualist notion that the states need a sphere of authority protected from the influence of the federal government" and maintain that "federal and state governments function as alternative centers of power and *any matter* is presumptively within the authority of both the federal and the state governments." *Id.* at 176 (emphasis added). It is unclear that either of these theories alone provides an accurate descriptive picture of the operation of U.S. federalism today. It is true that dynamic federalism is the status quo on many regulatory subject matters, but remnants of dual federalism arguably remain. *Id.* at 175. To illustrate the contours of these debates, consider the examples of the reach of the federal government (as opposed to or in conjunction with state and local governments) to regulate local land use decisions or management of forests on private lands. In these areas the federal and state governments do operate as if there are separate spheres of governance, and whether this is a political or legal state of affairs is up for much debate. Many perceive the federal government as lacking constitutional authority to direct subnational land use planning or direct private forest management activities, and until that authority is politically acted upon, a legal resolution to the constitutional question will remain elusive. *See* Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253, 297 n.4 (2009) ("Since the federal government does not have the constitutional authority to impose direct duties upon states and other subnational entities, federal legislation that impose[s] responsibilities on state and local governments would have to be carefully designed to avoid constitutional limitations." (citation omitted)). Of course, most dynamic federalism scholars are not actually debating the constitutionality of governance at certain levels, but rather observing that, for the most part, there is overlapping authority between the federal and state governments. *See, e.g.*, Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1202 (2008) [hereinafter Ahdieh, *Foreign Affairs, International Law, and the New Federalism*] ("Concurrent federal and state jurisdiction has become the norm across an array of subject-matter areas."). As a result, most federalism scholars in this field do not question the constitutionality of policies but rather query what structure governance mechanisms should take. For examples, see Kathryn M. Doherty & Clarence N. Stone, *Local Practice in Transition: From Government to Governance*, *in* DILEMMAS OF SCALE IN AMERICA'S FEDERAL DEMOCRACY 177–81 (Martha Derthick ed., 1999) (distinguishing between "government" and "governance," and opining on how to improve local governance), BARRY G. RABE, STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY 1–37 (2004), David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 841 (2008) (arguing that state action on climate change "has significant potential to

complement federal policies, and has certain advantages over them"), Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 872 (2006) ("[T]he goal is not to identify the single regulatory actor best suited or most appropriately charged with responsibility for a given entity or subject-matter. Rather, multiple regulators are embraced as having a shared—if both competing and cooperating—place in a more inclusive and all-encompassing regulatory regime."), Ahdieh, *Foreign Affairs, International Law, and the New Federalism*, *supra*, at 1202 (noting that "jurisdictional overlap is evident across the breadth of U.S. law and regulation" and that "emerging state and local voices supplement national power" in foreign affairs), Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 6 (2007) (arguing that jurisdictional overlap "shifts the basic ground rules in regulatory function and design and motivates the creation of more complex regimes of law and regulation"), Joseph W. Dellapenna, *Law in a Shrinking World: The Interaction of Science and Technology with International Law*, 88 KY. L.J. 809, 881 (2000) (concluding that science and technology have changed "the intellectual structures that make up legal thinking in general and international law in particular"), Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does this Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1015 (2006) (noting that with respect to most environmental issues, the federal government plays a greater role than the states, but that the "tables are turned" with regard to climate change), David R. Hodas, *State Law Responses to Global Warming: Is it Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 53 (2003) (noting that policymakers at the federal level during the first Bush Administration tended to "oppose all efforts to control [greenhouse gas] emissions," while "policy initiatives at the state level generally t[ook] the opposite approach" (footnote omitted)), Kaswan, *supra*, at 254 (arguing that "federal action alone" will not suffice to reduce energy consumption and control greenhouse gas emissions), Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39, 41 (2007) ("In responding to climate change, the nation must confront profound institutional questions about the relationship between federal and state regulation, as well as the relationship between democratic processes and the courts."), Barry G. Rabe, *North American Federalism and Climate Change Policy: American State and Canadian Provincial Policy Development*, 14 WIDENER L.J. 121, 128–51 (2004) (noting the emergence of the states in reducing greenhouse gases and discussing challenges to expanding state programs, including "uneven performance" and a "patchwork quilt of standards"), Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1670 (2006) (concluding that American judges simply cannot be prevented from relying on non-United States law because they "are influenced and affected by . . . judgments from abroad"), Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681, 681 (2008) (arguing that "U.S. states, cities, and other sub-national actors (SNAs) in the U.S., as well as abroad, can and should play important long-term roles in climate regulation at both the domestic and global levels, even after strong national and international climate regulatory regimes have been adopted"), Michael P. Vandenbergh et al., *Individual Carbon Emissions: The Low-Hanging Fruit*, 55 UCLA L. REV. 1701, 1701 (2008) (asserting "that prompt and large reductions [in greenhouse gas emissions] can be achieved without relying predominantly on regulatory measures"), Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615, 631 (2009) (discussing the "increased activism at the state and local levels when national governments fail to address critical environmental problems" and reasoning that increased "civil society involvement in environmental governance can serve as an important check on the economic and political influence of polluters"), Robert B. Ahdieh, *When Subnational Meets International: The Politics and Place of Cities, States, and Provinces in the World*, 102 AM. SOC'Y INT'L L. PROC. 339, 339 (2008) (noting

that "resistance to any place for state or local voice—let alone authority—has been quite firm" in the realm of foreign affairs and international law, but recognizing that "this may now be changing").

[102] *See, e.g.*, Randy E. Barnett, *Foreword: Limiting* Raich, 9 LEWIS & CLARK L. REV. 743, 744 (2005) (describing the effect of the Court's recent decision in *Raich* and characterizing the decision as a "setback" on "the value of federalism to protect individual liberty"); Eric R. Claeys, Raich *and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 812–15 (2005) (discussing the Court's division in *Raich*, and particularly the "rivalry between Justices Scalia and Thomas"); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name*: *The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 605 (2001) (noting that *Lopez* and *Morrison* significantly curtailed Congress's Commerce Clause power); Dan L. Gildor, *Preserving the Priceless: A Constitutional Amendment to Empower Congress to Preserve, Protect, and Promote the Environment*, 32 ECOLOGY L.Q. 821, 831–32 (2005) ("Basing the nation's environmental policy on the Commerce Clause . . . is becoming increasingly suspect as courts, following the Supreme Court decision in 1995 in *United States v. Lopez*, have begun to narrow and restrict Congress's ability to regulate local affairs nationally under the Clause." (footnote omitted)); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 38 (2003) (noting that in a 2001 decision, *Solid Waste Agency of Northern Cook County*, the Court "indicat[ed] its interest in closely examining challenged federal regulations for the requisite nexus to *commerce* or *commercial* activities"); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 735–36 (2002) (discussing the *Gibbons v. Ogden* Court's fairly expansive articulation in 1824 of the Commerce Clause power); Bradford C. Mank, *The Murky Future of the Clean Water Act After* SWANCC*: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 844–46 (2003) (discussing how *Lopez* and *Morrison* curtailed the Commerce power, and noting the effect of these decisions on the *SWANCC* decision and subsequent cases); Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 844 (2005) (arguing that *Raich* confined *Lopez* and *Morrison* to their facts); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 178 (1998) (questioning what kind of connection to interstate commerce is required for Congress to protect the habit of an endangered species, such as a fly); Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 364–65 (1997) (predicting how *Lopez* would affect federal environmental laws, including the Clean Water Act and the Endangered Species Act); Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L.Q. 215, 235 (2000) (arguing that *Lopez* "dictates that the federal government should maintain ultimate control of regulating habitat modifications that affect endangered species"); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. 1 (discussing how the *Raich* decision affected federalism and the line of cases following *Lopez* and *Morrison*); Eric Brignac, Recent Development, *The Commerce Clause Justification of Federal Endangered Species Protection:* Gibbs v. Babbitt, 79 N.C. L. REV. 873, 883 (2001) (explaining the Fourth Circuit's conclusion in *Gibbs* "that Congress can constitutionally protect endangered species under the Commerce Clause" and noting the decision's tension with *Lopez* and *Morrison*); Sara D. Van Loh, Note, *The Latest and Greatest Commerce Clause Challenges to the Endangered Species Act:* Rancho Viejo *and* GDF Realty, 31 ECOLOGY L.Q. 459, 461 (2004) (noting that the D.C. and Fifth Circuits, in *Rancho Viejo* and *GDF Realty*, concluded that Congress had "the authority to promulgate

2. Constitutional Resources and Excludability. The second trait of common good resources is that it is difficult to exclude potential appropriators.[103] Within the context of constitutional law, the number of parties eligible to join in the fights over the interpretation of constitutional language is virtually unlimited, as the citizenry and their representative bodies maintain a high degree of access to other branches of government that interpret and shape the constitutional landscape. This is certainly demonstrative of non-excludability. Additionally, some of these fights occur with regard to ratification of amendments. While the threshold to secure amendments is significant,[104] the First Amendment actually secures the right of all the Nation's citizens to advocate for political and legal (constitutional) change.[105] Regarding battles fought in courts across the land, the barriers to entry are quite modest. One can enter the fray with a filing fee and a written complaint, though winning the day with a victorious decision on the merits, if within reach, may cost a good deal more. While some may find great difficulty in accessing the legal system,[106] there is no dearth of constitutional litigation. Ultimately, none of the managers of common goods on the constitutional commons can be excluded from seeking inputs into how it is managed, as the Executive claims constitutional authority through orders and its administrative agencies, Congress legislates pursuant to claimed constitutional authority,

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the Endangered Species Act under the Commerce Clause, even when applied to a species existing entirely within one state").

[103] *See supra* notes 46, 49 and accompanying text.

[104] *See* U.S. CONST. art. V (requiring that legislatures or conventions in three fourths of the states ratify proposed amendments).

[105] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[106] *See, e.g.*, Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL'Y 1, 2 (2001) ("It remains true, however, that the poor, and even the middle class, encounter financial impediments to a day in court. They do not enjoy the secure access available to those with full purses or political muscle."); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 (1990) (noting that "over eighty percent of the legal needs of the poor and working poor currently are unmet in the United States"); Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 83 (2013) (noting the essential role of pro bono services in the American legal system).

courts interpret the Constitution, and individual citizens sue to gain constitutional rights.[107]

B. FRAMERS AND REFRAMERS AS CONSTITUTIONAL RESOURCE APPROPRIATORS

Historically, appropriation of constitutional resources has occurred in two primary ways. The first deals with the trajectory set for the Constitution at the time of America's founding. Those who crafted and molded the Constitution that we still see largely intact today became known in common parlance as Framers. These are the individual citizens, representatives of state governments, and other interested entities who came together at the Constitutional Convention and during debates over the Bill of Rights to set the textual framework in place—a framework that has subsequently been molded and shaped by direct textual changes in the form of constitutional amendments. The Framers' constitutional text is the original fountain from which constitutional power, rights, regulatory authority, or any other constitutional resources have historically flowed. Those who we call Reframers have subsequently come along to directly amend the constitutional text to change the shape and nature of constitutional resources.

Yet, as constitutional lawyers, judges, and scholars would be quick to add, what the constitutional text explicitly states does not always resolve—or perhaps hardly ever resolves—the exact meaning of constitutional provisions. As a result, Reframers have also played a key role in shaping and molding constitutional understandings through constitutional interpretation by courts or constitutional action by legislatures or the Executive. These Reframers are lawyers, litigants, commentators, signatories of amici briefs, legislators, members of the Executive and the Judiciary, and others who influence constitutional litigation and its outcome, shaping and expanding upon the original text, providing for either new constitutional resources or new interpretations about the appropriation of existing constitutional resources. As is clearly illustrated by the varied interpretations of

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[107] *But see supra* note 106 and accompanying text (acknowledging the difficulties that individual litigants in particular might face in bringing constitutional challenges).

constitutional text, such as interpretations of the Commerce Clause[108] or the Due Process Clause,[109] this can be very fertile ground for those wanting to graze on the constitutional commons.

C. EXAMPLES OF CONSTITUTIONAL COMMON GOOD CONFLICTS

Consider the following two examples to illustrate how conflicts over the Constitution's meaning look through the lens of common goods.

First, consider the Fifth Amendment of the U.S. Constitution, which provides simultaneously a governance resource and an individual right of the citizenry, stating "nor shall private property be taken for public use, without just compensation."[110] What do

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[108] For instance, the Commerce Clause has gone through four different eras. It began with *Gibbons v. Ogden*, where the Supreme Court held that Congress had the power to regulate commerce. 22 U.S. (9 Wheat.) 1, 193–95 (1824). In the next stage, from 1890–1937, the Supreme Court narrowed the scope of Congress's regulatory power under the Commerce Clause. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 162 (4th ed. 2013); *see also* United States v. E.C. Knight Co., 156 U.S. 1, 13–14 (1895) (defining commerce as one stage of business, separate and distinct from earlier phases, effectively neutering broad-based regulation); Shreveport Rate Cases, 234 U.S. 342, 353–54 (1914) (holding that Congress could set intrastate railroad rates); A.L.A Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (declaring a federal law unconstitutional based on an insufficient effect on interstate commerce). Quickly after *Schechter*, the Supreme Court changed tack and began allowing for more expansive Commerce Clause regulation by Congress. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (upholding the National Labor Relations Act as constitutional); United States v. Darby, 312 U.S. 100, 125 (1941) (finding the Fair Labor Standards Act constitutional); Wickard v. Filburn, 317 U.S. 111, 130–31 (1942) (finding the Agricultural Adjustment Act constitutional). Lastly, in more recent cases, the Supreme Court has once again narrowed the ability of Congress to regulate under the Commerce Clause. *See* United States v. Lopez, 514 U.S. 549, 567–68 (1995) (holding that the Gun Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority); United States v. Morrison, 529 U.S. 598 617–19 (2000) (holding that 42 U.S.C. § 13981 could not be upheld under the Commerce Clause).

[109] The Due Process Clause has expanded in recent decades with readings that find substantive due process rights for both family autonomy and reproductive autonomy. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that statutes that prevent marriage solely on the basis of race violate the Due Process Clause); Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that parental unfitness must be established individually and cannot be presumed based on the marriage status of a father); Moore v. City of East Cleveland, 431 U.S. 494, 499–500 (1977) (holding that a housing ordinance which did not allow a woman and her son along with her two grandchildren to live in a single family home violated the Due Process Clause); Roe v. Wade, 410 U.S. 113, 162–64 (1973) (finding that state abortion laws that only allow for life-saving procedures and that do not take into account the mother's stage of pregnancy violate Due Process); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 895–901 (1992) (striking down provisions of the Pennsylvania Abortion Act of 1982 because they violated the Due Process Clause).

[110] U.S. CONST. amend. V.

those key terms—property, public use, taken, and just compensation—mean? No matter how we draw the boundaries and define the ambiguities, we see conflict, the outcome of which creates winners and losers. If a court rules that a government action is a taking, then the losers are those who must compensate (governments) and the winners are those who will be compensated (property owners). On the other hand, winners and losers are reversed if the court rules that the government action is not a taking. This division of winners and losers is the essence of rivalry over common goods. Additionally, there is very little stopping any number of potential litigants from arguing that this part of the Constitution protects their property from one sort of government action or another, which is the mechanism by which non-excludability rears its head.

While we have a host of cases to choose from to make this point, consider the case brought by Jean Loretto, the owner of a five-story apartment building in New York City.[111] Ms. Loretto objected to a state regulation that gave private cable companies the right to maintain access to private properties, like her apartment, in order to attach cable boxes and wires for television service.[112] Importantly, the regulation did not require cable companies to compensate property owners more than a nominal fee of one dollar if property owners did not voluntarily grant permission to cable companies to use their property.[113] Ultimately, Ms. Loretto's case ended up in the Supreme Court, and the Court read the word "taken" to include any regulation that facilitates a permanent physical occupation of another's land, no matter how slight.[114]

Ms. Loretto's case adjusted the constitutional landscape and became an important component of its structure today.[115] It provides a common good resource stream that creates future winners and losers (meaning governments who will be forced to

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[111] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

[112] *Id.* at 422–24.

[113] *Id.* at 423–24.

[114] *Id.* at 434–35.

[115] *See, e.g.*, Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185, 1188 (1997) ("The modern paradigm case of permanent physical takings is the 1982 Supreme Court decision in *Loretto v. Teleprompter Manhattan CATV Corp.*").

compensate and private property owners who will be compensated). The constitutional resource also provides an incentive for potential litigants to modify their behavior: state governments may think twice about facilitating a physical invasion of someone's property because they now know compensation will be owed. In this way, the Constitution bears a resemblance to Ostrom's natural resource common goods,[116] where instead of allocating the right of irrigators to access waters from a river, we see an allocation of governance responsibilities and fundamental rights.

Second, the First Amendment of the Constitution guarantees that Congress will not make any law "abridging the freedom of speech."[117] The Fourteenth Amendment of the Constitution causes this restraint to apply equally to state governments.[118] The meaning of "freedom of speech" of course creates winners and losers, regardless of how it is construed. Those whom governments seek to silence will either be muzzled or allowed to express themselves, and those who would constrain another's speech will prevail or not. These clear demarcations of winners and losers suggest that rivalry abounds. While there are many free speech cases to draw upon, consider as an example the case of Gregory Lee Johnson who received a citation for violating Texas state law because he demonstrated outside the 1984 Republican National Convention in Dallas by dousing an American flag in kerosene and burning it.[119] The case of *Texas v. Johnson* made its way to the Supreme Court, and in a 5–4 decision, the Court decided that the First Amendment's protection of freedom of speech reached far enough to protect Mr. Johnson's behavior.[120] The Court allocated a constitutional common good resource. Of course, since those similarly situated to Mr. Johnson can avail themselves of court protection of their constitutional right, this interpretation also created a public good since the new and valuable constitutional resource is available to any who desire to

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[116] Ostrom referred to these "common goods" as "common-pool resources" or "CPRs." OSTROM, *supra* note 32, at 30.

[117] U.S. CONST. amend. I.

[118] Texas v. Johnson, 491 U.S. 397, 415 n.10 (1989).

[119] *Id.* at 399.

[120] *Id.*

take advantage of it.[121] The case also sets a limit on the types of actions governments can take when facing offensive protest messages—a metaphorical fence on the constitutional commons.

D. TRAGEDY OF THE CONSTITUTIONAL COMMONS

If the Constitution produces streams of common good resources as the language of the Constitution is interpreted or altered, a question immediately arises as to what a tragedy of the commons would look like in the constitutional context. Indeed, as is the case with a wide range of resources, a central problem of having valued, limited resources open for any and all to take is that a free-for-all might erupt.[122] This free-for-all is frequently referred to as the tragedy of the commons.[123]

We briefly address how a tragedy of constitutional commons resources can lead to serious degradation or even eventual destruction of constitutional resources. This Part attempts to detail a few of these potential tragedies, though they have largely been avoided due to the Constitution's status as a well-managed commons or long-enduring institution. Even so, it remains useful to identify where our constitutional order is vulnerable so that its management can be better understood and strengthened, and so vulnerabilities can be remedied.

We see the tragedy of the commons play out in at least three potential ways when it comes to constitutional resources. First, the most predictable way for tragedy to manifest is in the form of erosion of governance, or the loss of credibility in governance institutions, as individual political appropriators seek to maximize their personal benefit. While a coup d'état would be the most extreme and obvious example of this, the United States has never suffered through such an episode. Yet, a number of *constitutional crises* occurring during our nation's history can be fashioned as

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[121] Because the exercise of the right at issue (i.e., burning a flag as a form of government protest) is non-rivalrous (i.e., one person exercising the right does not preclude others from doing the same), the Court's decision also has a public good dimension. This is a point that we focus on in detail in Part V. In Part VI, we discuss how the commons and public good dimensions of constitutional resources interrelate.

[122] *See supra* notes 47–48 and accompanying text (documenting Hardin's account of this problem).

[123] *See supra* notes 47–48 and accompanying text (documenting Hardin's account of this problem).

symptoms of constitutional tragedies of the commons. Such crises occur because of acute and unresolved disputes over the allocation of constitutional resources, such as disputes between branches of government (FDR's attempt to pack the Court[124]), disputes between levels of government (the secession of Southern States or states' refusals to enforce federal civil rights laws[125]), disputes between the government and the electorate (*Bush v. Gore*[126]), or disputes between the government and individuals (the Whiskey Rebellion[127]).

While these seminal moments in U.S. history provide obvious examples, smaller crises are numerous and are also important. We find a modern example of this potential for erosion of governance in the ongoing debate over Supreme Court recusal standards.[128] A number of sitting Justices have been publicly criticized for sitting before cases in which they may have a vested personal interest.[129] This has given rise to concerns that faith in the institution of the Supreme Court may erode. As Justice John Paul Stevens said in the highly visible setting of his dissent in

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[124] *See, e.g.*, Michael Ariens, *A Thrice-Told Tale or Felix the Cat*, 107 HARV. L. REV. 620, 622 (1994).

[125] *See, e.g.*, Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 812 n.353 (2013) (noting the refusal of southern states "to comply with relevant provisions of the 1957, 1960 and 1964 Civil Rights Acts").

[126] *See supra* note 85 and accompanying text.

[127] *See, e.g.*, Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883, 894–97 (2006) (describing the events of the revolt).

[128] *See, e.g.*, Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1544 (2012) (summarizing the two major views in the debate over recusal); Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 965 (arguing that "recusal [is becoming] more and more important to minimize the judicial bias created in the course of judicial elections").

[129] *See* Letter from 138 Law Professors to the House and Senate Judiciary Comms., Changing Ethical and Recusal Rules for Supreme Court Justices (Mar. 17, 2011), *available at* http://www.afj.org/wp-content/uploads/2013/09/judicial_ethics_sign_on_letter.pdf (calling for enforceable recusal rules for Supreme Court Justices); Nan Aron, *An Ethics Code for the High Court*, WASH. POST, Mar. 14, 2011, at A19 (criticizing Supreme Court Justices for appearing at political events and advocating for a higher conduct standard); Nina Totenberg, *Bill Puts Ethics Spotlight on Supreme Court Justices*, NPR (Aug. 17, 2011, 12:01 AM), http://www.npr.org/2011/08/17/139646573/bill-puts-ethics-spotlight-on-supreme-court-justices (providing examples of occasions when Justices have been urged to recuse themselves from cases); Mike McIntire, *The Justice and the Magnate*, N.Y. TIMES, June 19, 2011, at A1 (describing the ethical issues posed by Justice Thomas's relationship with Harlan Crow); Op-Ed, *The Justices' Junkets*, WASH. POST, Feb. 21, 2011, at A14 (suggesting how Justices might avoid the appearance of impropriety).

Bush v. Gore, "[i]t is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."[130] The dispute over recusals presents risks that could lead to the loss of institutional credibility. For example, if the Court were to take up the recusal question and decide that it had the sole authority to set its own recusal standards, it could create a public relations mess as it might appear that the fox is merely guarding the henhouse. On the other hand, if the Court fails to stake out that ground, it facilitates uncertainty and also presents the prospect of the Court incrementally losing the public's faith each time the Court faces questions of recusal. Additionally, the public's faith in Congress may erode if the public perceives that Congress did not sufficiently act as a "check and balance" and make attempts to reign in members of the Court who the public views as abusing recusal practices. Of course, each time a member of Congress attempted to do so, this might also result in a loss of public respect for the Court. Thus, both branches have credibility at stake, depending on how the constitutional resource is allocated.

Another way this can play out is that the government may lose its credibility due to inconsistent shifts in how constitutional resources are allocated. Shifts that are seen as too rapid, numerous, or flippant in light of the importance of the resource,[131] open the door to arguments about government legitimacy. For example, the Court's clarifying in *Kelo* that Fifth Amendment precedent had long ago transformed "public use" into "public purpose"[132] was quite a jolt to a number of constitutional commoners, from private property advocates—committed to stringent checks on the government's ability to appropriate private property for public uses—to environmental justice advocates, concerned that "public purpose" would be used by local

[130] Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting); *see also* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.").

[131] *See generally* Kelo v. City of New London, 545 U.S. 469, 489–90 (2005) (holding that proposed condemnations of private property constituted "public use").

[132] *Id.* at 480.

governments to displace minority communities.[133] Though states had been able to appropriate property in this manner for quite some time, the Court's involvement in making clear the allocation of this constitutional resource caused a significant backlash, as evidenced by the forty-one states (at least) that subsequently passed laws restricting the government's ability to appropriate private property under the circumstances of *Kelo*.[134] Regardless of whether or not the Court was simply applying precedent, its credibility was called into question by a number of other constitutional commoners.

These credibility concerns can even be witnessed on micro-scales of constitutional law, as individual Supreme Court Justices have been increasingly criticized for being inconsistent in their legal analysis as constitutional commons appropriators jockey for constitutional interpretations over time. This, in turn, affects the credibility of the entire Court in the aggregate. Consider Justice Scalia's legal analysis in *Lopez* and *Morrison* and its arguable irreconcilability with his analysis in *Gonzales v. Raich*, which can be characterized as Justice Scalia not wanting expansive federal power in the gun control and domestic violence contexts, but supporting it in the context of regulating drug use.[135]

We might also see erosion in the form of parties willing to trade institutional credibility for political points. It is quite common that we not only see political differences expressed during

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[133] *Five Years After* Kelo*: The Sweeping Backlash Against One of the Supreme Court's Most-Despised Decisions*, INSTITUTION FOR JUSTICE, http://www.ij.org/five-years-after-kelo-the-sweeping-backlash-against-one-of-the-Supreme-Courts-most-despised-decisions (last visited Mar. 31, 2015) ("In the five years since [*Kelo*], there has been an unprecedented backlash . . . .").

[134] Edward J. López et al., *Pass a Law, Any Law, Fast!: State Legislative Responses to the* Kelo *Backlash*, 5 REV. L. & ECON. 101, 102 (2009); *see also* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2115 n.63 (2009) (putting the number at around forty-three).

[135] *Compare* United States v. Morrison, 529 U.S. 598, 613 (2000) (invalidating, in an opinion by then-Chief Justice Rehnquist, the Violence Against Women Act by finding that sex-based assaults were not "economic activity"), *and* United States v. Lopez, 514 U.S. 549, 551, 565 (1995) (invalidating, in another opinion by then-Chief Justice Rehnquist, the Gun-Free School Zones Act because the possession of firearms near schools did not have a "substantial effect" on interstate commerce), *with* Gonzales v. Raich, 545 U.S. 1, 26 (2005) (upholding the Controlled Substances Act by finding that "the production, distribution, and consumption" of drugs has "an established, and lucrative, interstate market"). *See also* Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 508 (2006) (arguing "that the *Raich* decision is misguided on both textual and structural grounds").

constitutional conflicts, but also that each political argument has the potential to digress into claims on both sides of abuse of power, overreach, and similar arguments that reduce the stature of our institutions. Much of modern-day political rancor has devolved to the point that criticisms of a particular actor or particular act are spun as rebukes of the institutions themselves. We might hear phrases like "politicians in robes," "the do-nothing Congress," or "the Dictator in Chief" thrown around with frequency.[136] In the modern twenty-four hour news cycle where entire news networks are arguably devoted to spinning conflicts a particular way, and where snap judgments on the part of the public in support or in opposition to one side of a conflict are encouraged, constitutional conflicts might more frequently lend themselves to these tactics. Consider a few examples of many that we might list: Bush's indefinite detention of enemy combatants pursuant to executive War Powers was framed by many as an unlawful expansion of executive power,[137] as has been, more recently, Obama's promise to institute a greater degree of gun control through executive orders[138] or his attempt to grant of amnesty to millions of

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[136] *See, e.g.*, Adam Liptak, *'Politicians in Robes'? Not Exactly, But . . .*, N.Y. TIMES (Nov. 26, 2012), http://www.nytimes.com/2012/11/27/us/judges-rulings-follow-partisan-lines.html?_r=0 (discussing the effect of judges' partisan affiliations in a Sixth Circuit affirmative action decision); Editorial, *Do-Nothing Congress II: It's Not a Compliment*, L.A. TIMES (Dec. 26, 2013), http://articles.latimes.com/2013/dec/26/opinion/la-ed-congress-worst-ever-20131226 ("Unless something changes dramatically in the second half of the 113th Congress, it will be the least productive in modern memory."); Sher Zieve, *Dictator-in-Chief Obama and US Congress Collaborating to Destroy USA?*, RENEW AM. (Aug. 23, 2011), http://www.renewamerica.com/columns/zieve/110823 ("We are now living in a dictatorial Police State that is completely lawless—save the laws Obama and his DOJ are making up on the spot as they so choose.").

[137] *See, e.g.*, FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 142–43 (2007) (opining that the Bush Administration's assertion that the President could detain a person indefinitely by designating him an enemy combatant was unsupported by precedent and gave the President unlimited and unreviewable power); LOUIS FISHER, PRESIDENTIAL WAR POWER (3d ed. 2013) (discussing criticisms of the legal advice Bush received regarding his war powers, and focusing on the alleged misapplication of a World War II case); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 70–71 (2008) (same); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 76 (2007) (stating that the September 11th attacks "provided an enormous opportunity to expand presidential power," and that "the Bush-Cheney legal team aggressively seized the opening").

[138] *See, e.g.*, Jeff Barnard, *Rural Lawmen Take on Obama: Say Gun Control Is Illegal*, COM. APPEAL (Jan. 17, 2013, 11:28 PM), http://www.commercialappeal.com/news/rural-lawmen-take-on-obama (providing accounts of local law enforcement officials who disagree with President Obama's proposed ban on new assault weapons and large-capacity magazines).

immigrants.[139] States viewed Congress as overreaching in attempting to regulate guns near schools in *Lopez* and violence against women in *Morrison*. The U.S. Supreme Court has been characterized as grabbing power for those with political ideology in line with the majority opinion in *Citizens United*.[140] In each case, swift and organized attacks were made against the institutions that sit at the foundation of government and at the heart of the Constitution, arguably for the purpose of shifting the political state of affairs in the other direction.

The second way the tragedy of the commons may manifest in the context of constitutional resources is by creating government instability, or even the mere appearance of instability. Specifically, if too much rivalry over rights occurs, and jurisprudence shifts with the wind, this can lead to citizens feeling unsettled in their expectations of rights. Though it did not devolve into a dire tragedy of instability, an example of the potential for instability might be found in the constitutional shift from the *Lochner* era,[141] during which the Court invalidated as unconstitutional a number of federal and state statutes aimed at protecting the rights of workers, to the post-1937 era where the Court upheld the very same regulatory provisions as constitutional.[142] Though the same constitutional issues were

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[139] Don Thompson, *California Sheriff Criticizes Obama on Immigration*, WASH. TIMES (Nov. 20, 2014), http://www.washingtontimes.com/news/2014/nov/20/California-shariff-critic izes-oba ma-on-immigration; Pema Levy, Republicans *Say Obama's Immigration Actions Are Making You Less Safe. So Why Are Cops All For Them?*, MOTHER JONES (Feb. 4, 2015, 7:15 AM), http://www.motherjones.com/politics/2015/02/obama-executive-action-immigration-public-safety; *Impeachment lite*, THE ECONOMIST (Feb. 21, 2015), http://www.economist.com/news/united-states/21644174-republicans-are-resorting-dangerous-tactics-express-thei r-dislike.

[140] *See, e.g.*, James Warren, *Richard Posner Bashes Supreme Court's Citizens United Ruling*, THE DAILY BEAST (July 14, 2012), http://www.thedailybeast.com/articles/2012/07/14/richard-posner-bashes-supreme-court-s-citizens-united-ruling.html (quoting Posner as saying that "[o]ur political system is pervasively corrupt due to our Supreme Court taking away campaign-contribution restrictions on the basis of the First Amendment").

[141] Lochner v. New York, 198 U.S. 45, 153 (1905) (finding a labor regulation to be an interference with the right to contract); *see also* Adair v. United States, 208 U.S. 161, 168–69, 180 (1908) (striking down federal legislation prohibiting railroad companies from demanding that a worker not join a labor union as a condition for employment); Coppage v. Kansas, 236 U.S. 1, 6, 26 (1915) (striking down state legislation prohibiting companies from demanding workers not join a labor union as a condition of employment); Adams v. Tanner, 244 U.S. 590, 591, 596–97 (1917) (striking down state legislation preventing privately owned employment agencies from assessing fees for their services).

[142] The *Lochner* era ended with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386, 400 (1937) (upholding a state law that required a minimum wage for women and expressly

before the Court, what was once unconstitutional was suddenly understood as constitutional. A continuance of these types of shifts in the authority of government and rights of citizens will cause instability, not only in the expectations of governments regarding their own powers to govern, but also the expectations of citizens regarding their own constitutional rights. Similarly, if the U.S. Supreme Court upholds a congressional mandate that every citizen must purchase health care, and a subsequent court overturns that ruling, and a subsequent court reinstates that ruling and so on and so forth, then the constitutional common good resource is over-appropriated, disrupting the system and ultimately damaging the interests of commons managers. What is "constitutional" becomes a subjective assessment by whoever happens to be in the seat of authority, rather than a firm standard to which Congress, the Executive, the Judiciary, and the citizenry must adhere. A variety of similar scenarios might arise whereby rivalry over the shape of governance structure or the allocation of proprietary rights by any of the constitutional commons managers results in degradation to the democratic constitutional resource.

The third manifestation of the tragedy of the commons occurs when too many rivalrous users enter the commons and the resulting fragmentation leads to gridlock. The constant conflict over the allocation of constitutional resources can lead to nothing being done at all. Similar to the early days of radio, with so many talking, "nobody could be heard,"[143] and when factions become so disparate it may be impossible to run a government at all—which is arguably the case in our current federal government as evidenced by recurring events like the recent government shutdown.[144] To be clear, gridlock itself is often political in nature

overruling *Adkins v. Children's Hospital*). *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 145–46, 154 (1938) (upholding governmental regulation of filled milk); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486, 491 (1955) (upholding a state law prohibiting "optician[s] from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist"); Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 527–28, 537 (1949) (upholding a state right to work law).

[143] Nat'l Broad. Co. v. United States, 319 U.S. 190, 212 (1943).

[144] *See* White House Office of Press Sec'y, Remarks by the President on the Affordable Care Act and the Government Shutdown (Oct. 1, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/10/01/remarks-president-affordable-care-act-and-government-shutdown ("What's weighing on the economy is not the Affordable Care Act, but the constant series of crises and the unwillingness to pass a reasonable budget by a faction of the Republican Party."); Gail Russell Chaddock, *Government Shutdown: Why Boehner Doesn't Overrule Tea*

rather than constitutional, yet motivating the commoners on either side of the gridlock are fundamental beliefs they hold about the role of our Constitution.

For example, the nation is seemingly paralyzed on the issue of gun control.[145] In *Heller* the U.S. Supreme Court spoke to the constitutional question, holding that the "right to bear arms" includes the right to own an individual gun for protection in one's home.[146] Yet those on the extremes of the debate (like the National Rifle Association), vehemently oppose even the lightest forms of government regulation (such as universal background checks).[147] The NRA does so out of their view that the right to bear arms guaranteed in the Constitution should be free of government interference—despite the fact that the U.S. Supreme Court has said the Second Amendment right is "not unlimited" and has provided a list of presumptively lawful gun control regulatory measures.[148] The reach of these limits is so far uncertain, but they could make up what some would construe as a slippery slope that could eventually trample the constitutional

Party Faction, CHRISTIAN SCI. MONITOR (Oct. 4, 2013), http://www.csmonitor.com/USA/DC-Decoder/2013/1004/Government-shutdown-Why-Boehner-doesn-t-overrule-te a-party-faction (arguing that the skewed congressional districts of some tea party members prolonged the government shutdown).

[145] *See, e.g.*, Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 479 (2004) (noting the vehement disagreement between the two sides of the gun control debate).

[146] District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

[147] *Statement from Chris W. Cox, NRA-ILA Executive Director, Regarding Inaccurate NBC Story Alleging that NRA Won't Oppose Background Check Bill*, NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION (Mar. 12, 2013), http://www.nraila.org/articles/20130312/statement-from-chris-w-cox-nra-ila-executive-director-regarding-inaccurate-nbc-story-alleging-that-nra-wont-oppose-background-check-bill.aspx ("The NRA opposes criminalizing private firearms transfers between law-abiding individuals, and therefore opposes an expansion of the background check system.").

[148] *Heller*, 554 U.S. at 626. The Court noted that

> nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626–27.

right.[149] On the other extreme of the debate are those who fundamentally believe that the Constitution does not provide an individual right to bear arms, notwithstanding the Supreme Court's ruling in *Heller*, and at the least allows significant government oversight and limitation of that right.[150] Yet there are so many factions on each side and in between jockeying for their position that from a political perspective very little can be accomplished, and at present we end up having hardly any "governance" of gun ownership at all.[151] Factions are afraid to give up any constitutional ground at all for fear that the entire constitutional right may be taken away, and thus we get gridlock.

Another example of gridlock is the inability of the 112th Congress to pass formerly routine provisions like those related to the debt ceiling, and the political posturing that pitches the issue of spending cuts and the issue of tax increases in a mutually exclusive tone.[152] While the balance of spending cuts and tax increases is a political question and not a constitutional question per se, it finds its roots, in part, in the constitutional worldview of constitutional commoners—those who believe the Constitution provides for an expansive government and those who believe it was intended to facilitate limited governance. While in the 1970s Congress was able to come together in a bipartisan manner to pass a number of important environmental statutes,[153] small government factions today are contributing to gridlock by calling for abolishment of the Environmental Protection Agency while big government factions are calling for more federal regulation of

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[149] *See* Dennis A. Henigan, *The* Heller *Paradox*, 56 UCLA L. REV. 1171, 1205 (2009) (describing the prevalence of the slippery slope argument in the gun control debate after *Heller*).

[150] *See id.* at 1209 (arguing that in *Heller* the "Court defied constitutional text and history to create a new private right to be armed").

[151] *See generally* Erica Goode & Cheryl Gay Stolberg, *Legal Curbs Said to Hamper A.T.F. in Gun Inquiries*, N.Y. TIMES, Dec. 26, 2012, at A1 (arguing that the ATF is unable to do its job as a result of "politically driven laws that make its job harder and [because of] the ferocity of the debate over gun regulation").

[152] *See generally* Jackie Calmes, *As a Debt Battle Looms, Some See No Option But to Raise Taxes*, N.Y. TIMES, May 19, 2012, at A12 (stating that President Obama would never again agree to a "plan to reduce annual deficits with spending cuts and no tax increases," and explaining the positions staked out by the President and House Speaker John Boehner).

[153] *See* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 623–25 (2006) (listing the numerous environmental laws Congress passed during the 1970s, including the Clean Air Act).

domestic carbon.[154] These countervailing constitutional worldviews on the proper size of government continue to push each side farther apart, with the result that neither side is likely to get what it wants. This is the essence of gridlock. While the Framers of the Constitution designed it to facilitate slow, deliberate changes in constitutional processes and governance,[155] the tactics we see, like stalling, subversion, and spin trumping deliberate governance, are symptoms of the tragedy of the constitutional commons.

We now move on to discuss dimensions of the Constitution that take on characteristics of public good resources.

V. THE CONSTITUTION AS A PUBLIC GOOD

As discussed in Part IV, the history of the Constitution has been defined by rivalry over the resources it provides, creating winners and losers as citizens, states, Congress, U.S. presidents, and the Judiciary jockey for position and control of resources on the constitutional commons. This is undoubtedly an important dimension of the Constitution. Yet, we find another dimension of the Constitution that is useful in explaining not only why we see political players jockeying for influence over the text and interpretation of the Constitution, but also why we find communities springing up, persisting, and organizing around a shared vision of the form constitutional governance ought to take. Such collaborative and energized group efforts stand in stark contrast to the typical world of common goods, where temptations to "free-ride and shirk" are seemingly ever present.[156] This Part leads us to a discussion that is at the heart of the scholarship on cultural public goods and the communities that come together to pool knowledge and expertise in an effort to create and maintain public goods. Of course, our particular focus is how this scholarship relates to the Constitution.

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[154] *Id.* at 629–31 (describing "[t]he lack of congressional engagement in modern environmental legislation" and lamenting that "[m]any pressing environmental issues have not been addressed").

[155] Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1108–11 (arguing that the Framers intended a temperate, deliberate lawmaking system, but not a gridlocked one).

[156] *See* OSTROM, *supra* note 32, at 15.

A. CONSTITUTIONAL COMMUNITIES AND PUBLIC GOODS

Building off of the scholarship of Professors Michael Madison, Brett Frischmann, and Katherine Strandburg, we turn to the topic of public goods resources and the *communities* that arise and come together to pool knowledge in an attempt to create resources valuable to society.[157]

Certainly, it is easy to argue that the origin of constitutional text and its meaning came about by a group effort. How else would one even go about describing the Constitutional Convention if not by discussing the delegation laboring through that sweltering summer in Philadelphia?[158] It is hard to argue that constitutional meaning arises from anything other than the debates of a multitude of constitutional commoners, and is most often articulated by the shared voices of those within the various branches of government. So, while at first glance the text and meaning of the Constitution may be an unusual example of a cultural public good resource, it does not seem entirely unanticipated by the literature.[159]

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[157] A few years ago, these three scholars initiated a conversation about how the work of Ostrom and other commons scholars related to exploring "the construction of commons in the cultural environment." Madison et al., *supra* note 43, at 657. Their focus related to what they termed "constructed cultural commons," which "refers to environments for developing and distributing cultural and scientific knowledge through institutions that support pooling and sharing that knowledge in a managed way, much as a natural resource commons refers to the type of managed sharing environment for natural resources." *Id.* at 659. Because the goods at issue in this Part are non-rivalrous, we use the term public good resources rather than constructed cultural commons. Evident in Madison et al.'s scholarship is their primary focus on communities that develop intellectual property, broadly defined. For example, topics at the core of their analysis are communities that come together to create things such as open-source software, community-driven content found on websites like Wikipedia, and pooled recipes that together make up a cookbook. *Id.* at 660–63. Yet there are other types of communities that might fall under this theoretical construct that come together for cultural purposes other than pooling *scientific* knowledge or creating intellectual property. Not surprisingly, our particular interest relates to groups that come together to shape our understanding of the Constitution.

[158] *See* William K. Stevens, *Behind the Scenes in 1787: Secrecy in the Heat*, N.Y. TIMES (May 25, 1987), http://www.nytimes.com/1987/05/25/us/behind-the-scenes-in-187-secrecy-in-the-heat.html (providing context for the Convention's meetings in Philadelphia and noting that the summer weather "was the worst in nearly 40 years").

[159] Viewed through the lens that Madison et al. provide for such communities, one could easily argue that the Framers were engaged in a collective intellectual pursuit designed to develop cultural institutions to manage and organize society and its myriad of natural and human capital resources. Constitutional Reframers still are engaged in that pursuit. *See supra* Part IV.B. Indeed, Madison et al. describe their framework as "relevant to property law, in particular, and social ordering, more generally." Madison et al., *supra* note 43, at

In studying a cultural public good, one of the most relevant lines of analysis is the makeup of the community seeking to create it.[160] Members of constitutional communities pool their collective knowledge and experience in hopes of shaping and managing constitutional resources. The most dominant constitutional community actors include the three branches of government, the states, interest groups, and the citizenry in general. These actors shape the rules for access to constitutional resources and determine the constitutional conflicts that receive attention.[161]

Constitutional communities pool collective knowledge with a view toward the allocation and maintenance of a wide range of governance rights and obligations. In other words, constitutional communities may be working together in a non-rivalrous way to "defeat" the social ordering and rights preferences sought by opposing, rivalrous constitutional communities.[162] In this way, constitutional communities can come together to facilitate the common good attributes of the Constitution, as one community's success leads to another's loss.[163] This, of course, is one of the core ambitions in drafting a Constitution in the first place—to provide

664. While the Constitution does not fit into the core of the model developed by Madison et al., it fits into the broader set of communities that the authors hoped would be studied using their analytical lens. *See id.* at 708–09.

[160] Madison et al., *supra* note 43, at 689.

[161] Most typically, cultural public good scholarship keys on communities focused on building intellectual resources. Constitutional communities are quite different in their focus. For example, a typical IP-focused community works to produce IP resources in a collaborative way that disregards the mechanisms typically relied upon by those in the competitive market or made available through government regulation. *See, e.g.*, *id.* at 661 (describing open source software as "maintained by a volunteer collaborative of individual programmers"). Madison et al. argue,

> [a]t the core of IP law, as traditionally conceived, is the right to exclude, without which it is assumed that some producers would abandon their efforts for fear of free riding (unlicensed sharing) by competitors. Without exclusion, competition facilitated by sharing would undermine incentives to invest in the production, development and/or dissemination of some resources in the first place.

Id. at 667 (footnote omitted).

The cultural public good literature questions this assumption and focuses on communities that can come together to create public good intellectual and cultural resources and, more particularly, communities that are willing to create those resources without claiming proprietary rights or private market values in them (or at least not claiming as many of them). *See id.* at 708 (asserting that "pools of information resources . . . serv[e] as alternatives to purely private rights of exclusion").

[162] This point is elaborated upon in greater detail below. *See infra* Part VI.A.*2.a*.

[163] Common good resources are described in Part III.

a stable and law abiding society with both certainty regarding the nature of rights and the ability to reallocate those rights to meet societal needs.

Ultimately, a firm allocation of rights and rules of governance that constitutional communities may work toward is indispensable to creating a stable society and the rules of social ordering upon which society depends. Rights—such as the right to vote or not, the right to have an abortion or not, or the right to be subject to an individual health care mandate or not—are each firm allocations of rights and obligations. These rights and obligations may be allocated directly by the text of the Constitution itself, as in the case of voting,[164] or rather by the Judiciary through constitutional interpretation, as in the case of abortion (under the fundamental right of privacy)[165] and health care mandates (under the power to tax).[166] Once these rights are distributed via constitutional law, social ordering arises whereby the right or obligation (i.e., the constitutional resource) has been allocated from the constitutional commons, and at which point it becomes available to various community actors to utilize without depleting the constitutional resource base.[167]

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[164] *See* U.S. CONST. amend. XV.

[165] *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

[166] *See* Nat'l Fed'n of Ind. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012).

[167] Note that while much of our thinking on public good resources has been shaped by the work of Madison et al., application of their scholarship has some limits because it was primarily written with a very different set of problems in mind—those arising out of the IP context in particular. For example, the three scholars argue that government intervention may be misplaced in the traditional view of IP law. Madison et al., *supra* note 43, at 665 ("We suspect that over time the constructed cultural commons framework will yield a far larger and richer set of commons cases in the cultural context than one might discover by focusing only on patent law or scientific research or software development. We anticipate that social ordering both depends on and generates a wide variety of formal and informal institutional arrangements, and that the logical and normative priority assigned to proprietary rights and government intervention may turn out to be misplaced."). In contrast, government intervention is often the very goal sought by constitutional communities. These communities seek to provide a higher level construct in which the government operates and resolves disputes between citizens, between levels of government, and between citizens and the government—largely through the allocation of proprietary authority and rights. While it seems to fall outside of the thrust of Madison et al.'s scholarship, it is in fact at least arguable that this aspect of the Constitution is perhaps the most profound type of constructed cultural commons because it establishes the framework that provides all three of the primary natural resource commons solutions—government regulation, privatization, and Ostrom's successful collective action model. *See* OSTROM, *supra* note 32, at 12–18 (outlining these solutions). Each of these is subsumed under the constructed cultural commons that is the Constitution. In other words, private property

B. CONSTITUTIONAL PUBLIC GOOD RESOURCES

When discussing communities that work to create public goods, Professors Madison, Frischmann, and Strandburg note that the set of resources being pooled is crucial to determining the nature and motivation of the communities that come together to create them.[168] Constitutional communities come together to pool knowledge regarding the allocation of citizens' rights and rules of governance which structure the relationships among the branches of government, between the government and its citizens, and among levels of government.

So how do the constitutional communities highlighted create public goods in the constitutional context? The answer is found in the actions that might be taken by a variety of constitutional commoners. Congress, for example, comes together to establish constitutionally validated laws of which all citizens can avail themselves without detracting from the rights of other citizens to do so. The Executive administers and enforces the laws of Congress, ensuring that one citizen's consumption of a constitutional resource does not diminish another's consumption of the same or other constitutional resources. The Judiciary interprets the constitutionality of legislative, executive, state, and citizen actions in order to preserve constitutional public goods. States exercise police powers and may come together to either challenge or cooperate with the federal government in its exercise of powers providing constitutional public goods to the citizenry. The citizenry, in turn, may bring legal action through the judicial system, exert political influence to shape the work of Congress and the Executive, and attempt to amend the Constitution through legal (i.e., constitutional) processes in order to ensure that the constitutional rights they maintain remain in a state of non-rivalry.[169]

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rights, the governments that set rules and allocate rights, and even the citizens with freedom to operate under Ostrom's model all operate under the auspices of our written and interpreted Constitution.

[168] Madison et al. indicate that one should assess the goals or objectives constructed cultural commons communities maintain. Madison et al., *supra* note 43, at 689; *see also id.* at 691 ("[I]t is important to identify the particular problem or problems that a given commons is constructed to address.").

[169] This stands in contrast to the way that Madison et al. characterize the IP communities that garner most of their attention. So in the IP context, communities come together to

So, for example, the resources that constitutional communities come together to create, alter, and promote may be: property rights (as in the case of the Fifth amendment);[170] civil rights and liberties (as with the right to privacy and abortion);[171] allocation of governance rules and authority between levels of government (as with the Commerce Clause),[172] between branches of government (as with the executive veto),[173] and between the government and

create IP knowledge resources that are available to all, and one person's creation or "ownership" of those knowledge resources does not limit another's ability to contribute his own, nor does one's use of that knowledge resource detract from—or rival—another's use. *See, e.g.*, Madison et al, *supra* note 43, at 691 ("A copyrighted work or patented invention can be "used" simultaneously by many people while it is part of a commons without diminishing its availability for others.").

[170] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that the Takings Clause of the Fifth Amendment requires compensation for "minor but permanent physical occupation[s] of an owner's property"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 394–95 (1922) (holding that a statute that annulled a contract allowing a coal company to mine the plaintiffs' land took the company's property without due process of law); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (concluding that "the application of New York City's Landmarks Law," where the plaintiff owner failed to receive approval for construction of an office building over Grand Central Terminal, did not constitute "a 'taking' of appellants' property"); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."); Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001) ("[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306, 342 (2002) (declining to apply a bright-line rule in determining whether a taking occurred when a planning agency imposed a moratorium on development to devise "a comprehensive land-use plan"); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231–32 (1984) (holding that the Public Use Clause of the Fifth Amendment does not prohibit a state "from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple"); Kelo v. City of New London, 545 U.S. 469, 472, 490 (2005) (finding that the city's exercise of eminent domain power to acquire private property from unwilling owners for use in development of a development project qualified as a public use within the meaning of the Takings Clause).

[171] *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (overturning a Connecticut law criminalizing birth control because the Due Process Clause included marital privacy); Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that there is a right to privacy, and concluding that this encompasses a right to have an abortion, based on substantive due process); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992) (upholding the right to an abortion, with some limits).

[172] *See supra* note 108 and accompanying text.

[173] *See* Clinton v. City of New York, 524 U.S. 417, 421 (1998) (striking down the line-item veto as a violation of the Presentment Clause).

its citizens (as in the right of freedom of religion);[174] and rules of judicial remedy to allow enforcement of those rights and rules (such as the right to due process).[175] Each of these are public goods, because governmental or citizen consumption of the constitutional right or rule does not deplete the availability of the right or rule for others to consume: that is the very nature of constitutional judicial precedent. These resources remain public goods despite the fact that commons resource battles had to take place to achieve their allocation.[176] But once a Fifth Amendment right to just compensation is established,[177] for example, no one person's exercise of that right reduces the availability of that property right for another. No one corporation's consumption of the First Amendment right to be considered a "person"[178] reduces another corporation's ability to do so. No one state's consumption of freedom from federal government interference in the regulation of guns near schools[179] reduces another state's consumption of that resource. The list could go on, describing the public good rights and governance rules created by constitutional communities that come together to pool knowledge and experience to affect

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[174] *See* Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (holding that religious beliefs cannot protect an individual from criminal statutes); Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (holding that a licensing system for religious solicitations violated the Free Exercise and Free Speech Clauses of the First Amendment); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (holding that strict scrutiny was the appropriate test to determine whether laws burdening religion were valid); Employment Div. v. Smith, 494 U.S. 872, 875, 882 (1990) (upholding a state law criminalizing the use of peyote, despite respondents' contention that it was solely for religious use).

[175] See *supra* note 109 and accompanying text on the Due Process Clause as it relates to so called "fundamental rights." Due process has also been extended to economic substantive due process. *See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955) (holding in part that the "day is gone" when the Supreme Court strikes down state laws which regulate business).

[176] This point is further developed below. *See infra* Part VI.A.*4*.

[177] *See, e.g.*, Chicago Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 250 (1897) (measuring just compensation "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future"); United States v. Miller, 317 U.S. 369, 376 (1943) ("On the other hand, if the taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken."); United States v. 564.54 Acres of Land, 441 U.S. 506, 516–17 (1979) (refusing to pay replacement value for condemned land and instead relying on fair-market value).

[178] *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010) (upholding a corporation's right to engage in political speech).

[179] *See* United States v. Lopez, 514 U.S. 549, 565 (1995) (rejecting arguments extending the Commerce Clause to the statute at issue).

amendment procedures, litigation, executive orders or agency regulations, and judicial opinions.

C. FRAMERS AND REFRAMERS AS CONSTITUTIONAL COMMUNITIES

As with constitutional common good resources, we can view the Framers through the lens of cultural public goods communities. Specifically, the historical communities that came together to pool knowledge and experience to draft the Constitution took part in what is perhaps one of the most important and celebrated intellectual endeavors of all time, at least in the governance context. These communities came together to decide how best to allocate rights and rules of governance, to decide what constitutional public goods resources should be made available to the citizenry and which ones should not. They had conflicts and the document was far from perfect—it included, for example, the continuance of slavery and denied the right to vote to many classes of people (e.g., women, non-whites, and non-land owners).[180] While the Constitution and Bill of Rights were not perfect, they did provide a way for the document to change as progress would demand. Enter the Reframers.

Reframers are communities that arose later to mold and shape the Constitution through both direct textual changes in the form of constitutional amendments, as well as through constitutional interpretation by courts or constitutional action by legislatures or the Executive. Reframer communities have come together to provide new constitutional resources and new interpretations about the appropriation of existing constitutional resources or to ward off such changes. Thus a variety of constitutional public goods have been created over time—freedom was given to slaves,[181]

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[180] The continuance of slavery was made infamous through the so called "Three-Fifths compromise" found in U.S. CONST. art. I, § 2 cl. 3. Although there was no specific constitutional prohibition denying the right to vote to women, non-whites, and non-land owners, it took specific constitutional amendments to grant voting rights to women and non-whites. *See id.* amend. XIV, § 1 (granting all citizens the privileges of citizenship); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

[181] *Id.* amend. XIII.

the right to vote was given to both minorities and women,[182] and the original system of checks and balances remains for the most part untouched.

Ultimately, Framers came together, and Reframers continue to come together, to resolve constitutional rights and governance conflicts.[183] Constitutional communities seek to achieve collective action and coordination and to overcome transaction costs in order to create constitutional goods in an area of conflict.[184] Identifying such areas of conflict is not particularly difficult in the natural resource context, since the common-pool nature of the resources gives rise to readily identifiable and well-recognized problems of overconsumption and tragic over-appropriation.[185] In the same way, a variety of problems can be identified regarding the commons dimensions of the Constitution, because congressional, executive, judicial, and citizenry jockeying in a rivalrous manner over non-excludable constitutional resources can potentially lead to erosion or instability of government, loss of checks and balances or government credibility, or governance gridlock and stagnation.[186]

Yet the problems that constitutional communities seek to address are oftentimes more subtle than the glaring problems

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[182] *Id.* amends. XV, XIX.

[183] Madison et al. indicate that one should assess the goals or objectives constructed cultural commons communities maintain. Madison et al., *supra* note 43, at 691.

[184] As Madison et al. argued,

> [t]he various problems that cultural commons institutions solve are not merely, or even primarily, problems of overuse. The problems addressed by cultural commons include the production of intellectual goods to be shared, the overcoming of transaction costs leading to bargaining breakdown among different actors interested in exploiting the intellectual resource, the production of commonly useful platforms for further creativity, and so forth.

Id. Indeed, Madison et al. note that "we can distinguish among different types of cultural commons based on their core purposes. Some such commons arise as solutions to collective action, coordination, or transactions cost problems . . . ." *Id.*

[185] Madison et al. state:

> In the natural resource context, this question does not often come to the fore because common-pool resources are defined by the problem of subtractability or rivalrousness (e.g., removing lobsters from the pool results in fewer lobsters for everyone else) and the risk that a common-pool resource will be exhausted by uncoordinated self-interested activity (e.g., unmanaged harvesting may jeopardize the sustainability of the lobster population).

Id.

[186] *See supra* Part IV.D (describing these features of the tragedy of the constitutional commons).

potentially created by constitutional common good conflicts. Constitutional communities may simply feel that constitutional rights or rules of governance are misallocated, and so they come together to engage other constitutional communities in a common good battle over the allocation of those rights or rules of governance. This may not give rise to governmental erosion, instability, or lack of credibility, but may rather serve the valuable purpose of allocating constitutional resources in a more fair and just way or in a way more in keeping with modern society.

Perhaps more importantly, constitutional communities aim to go above and beyond the initial conflicts over the allocation of constitutional common good resources by *maintaining* and *improving upon* the public goods attributes of constitutional rights and rules of governance. Constitutional communities pool collective knowledge to ensure that constitutional public goods remain available to the U.S. citizenry and that transaction costs are reduced for those seeking to access constitutional resources. They may even engage in efforts to create new constitutional rights or rules of governance not yet provided for by the Constitution. This creation of public goods resources may very well involve jockeying over the common good dimensions of the Constitution,[187] but there is no doubt that the creation and maintenance of public good constitutional resources is a primary objective of constitutional communities.

D. CHALLENGES RELATED TO PUBLIC GOOD CONSTITUTIONAL RESOURCES

Just as common good resources may give rise to tragedies of over-appropriation of constitutional resources, resulting in governance instability, gridlock, erosion, and loss of credibility, so too do constitutional communities attempting to create public good rights and governance rules give rise to potential problems. The primary way this plays out is that when a constitutional community proves successful, we risk the aggregation of too much power in the hands of one constitutional community relative to

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[187] *See supra* Part IV.A (listing major Supreme Court cases involving such jockeying); *infra* Part VI.A.*4* (noting that when a common good conflict is resolved, a public good constitutional resource is created).

another. In this way, the constitutional commons may not only give rise to overconsumption of the constitutional resource,[188] but might also fail to adequately facilitate reframing efforts by other constitutional communities, whether it be the Executive, the Legislature, the Judiciary, other levels of government, or perhaps most likely, the citizenry. Madison, Frischmann, and Strandburg argue that "[i]n the cultural environment, the tragedy of the commons that Hardin described may refer not to an undersupply of a resource prompted by overconsumption but instead to an undersupply prompted by the failure of the private market to aggregate user or consumer preferences for certain fundamental or 'infrastructural' resources."[189]

In the constitutional commons there might be an undersupply of rights provisions prompted by the failure of constitutional communities (courts, the Executive, the Legislature, or citizens) to provide the resource. For example, even in the presence of constitutional provisions providing civil rights in 1868,[190] Supreme Court judicial interpretations mandating civil rights in 1954,[191] and acts of Congress doing the same in 1964,[192] the Constitution standing alone continually failed to provide civil rights protections to certain segments of the citizenry, and particularly African Americans. One constitutional community—those who opposed civil rights protections for African Americans—had such a stranglehold on the resource, that reallocation of the resource and appropriation of it to other constitutional communities (African American communities and their supporters) became impossible for yet other constitutional communities (courts and Congress). Ultimately, a majoritarian white constitutional community caused an undersupply of the civil right resource to African Americans and did so by effectively ignoring the attempts to re-appropriate the resource by the courts and Congress.

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[188] *See supra* Part IV (framing the Constitution as a common good and discussing, *inter alia*, the rivalrous nature of constitutional resources and the difficulty in excluding potential appropriators).

[189] Madison et al., *supra* note 43, at 697.

[190] U.S. CONST. amend. XIV.

[191] *See* Brown v. Board of Ed., 347 U.S. 483, 495 (1954) (holding that "in the field of public education the doctrine of 'separate but equal' has no place").

[192] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000a–2000h (2012)).

As alluded to in this discussion, the primary reason that constitutional communities seeking to create public good rights and rules of governance can prove problematic is because the consequences of their actions reverberate through the common good dimensions of constitutional resources, where winning and losing often amounts to a zero-sum game. In the next Part, we meld the discussion of common good and public good dimensions of constitutional resources to provide a more complete and complex picture of the Constitution.

VI. OUR CONSTITUTIONAL COMMONS AND THE CYCLE OF CONSTITUTIONAL RESOURCE CREATION AND APPROPRIATION

Constitutional resources are complex. As discussed in Part IV, some dimensions of constitutional resources fit the mold of traditional common good resources, and the commons literature provides some important insights regarding these resources. An important lesson of that analysis is that through efforts to create and modify constitutional resources, we often find a throng of rivalrous resource appropriators that have every incentive to appropriate as many constitutional resources as possible. Under certain circumstances, these resources, like all common good resources, may tend toward the tragedy of the commons. In this context, a tragedy of the commons can lead to diminishing institutions, the health of which is critical to maintaining the rule of law and governance continuity.

Part V provided a very different picture of constitutional resources and the communities that attempt to create them. Using insights from the cultural public goods literature, Part V examined the collaborative work of constitutional communities in the advocacy for, and provision and maintenance of, constitutional resources. Within that conversation, we discussed the ways in which constitutional communities emerge and sustain themselves as they work collaboratively to create and maintain these goods.

In this Part, the Article weaves together insights from these literatures to provide a more holistic understanding of constitutional resources. As demonstrated below, constitutional communities come together and engage in traditional common good rivalry with other constitutional communities in an attempt

to create public good constitutional resources. In this way the traditional commons dimension of the Constitution is inextricably intertwined with the cultural public good dimension. We call this multidimensional structure within which constitutional resources are embedded the "Constitutional Commons."

While our thinking on this more holistic picture of the Constitutional Commons is still quite preliminary, what emerges most clearly is how these different dimensions of the Constitutional Commons interact with one another to create a cyclical pattern of constitutional change and continuity.

A. THE THEORETICAL GROUNDING—OSTROM'S IAD FRAMEWORK

Elinor Ostrom, in her book *Understanding Institutional Diversity*, observes that "whenever interdependent individuals are thought to be acting in an organized fashion, several layers of universal components create the structure that affects their behavior and the outcomes they achieve."[193] Ostrom provided what she termed an "Institutional Analysis and Development," or, "IAD,"[194] framework for analyzing these situations, as depicted in FIGURE 1, below. IAD framework analysis focuses on a particular "action arena," which itself consists of "participants" and "action situation[s]" that "interact as they are affected by exogenous variables . . . and produce outcomes that in turn affect the participants and the action situation."[195] As described in this section, Ostrom's IAD theoretical framework quite precisely describes the cycle within which constitutional communities (as participants) engage in rivalrous action situations with other constitutional communities to produce outcomes that in turn affect each constitutional community's future interactions on the constitutional commons.[196]

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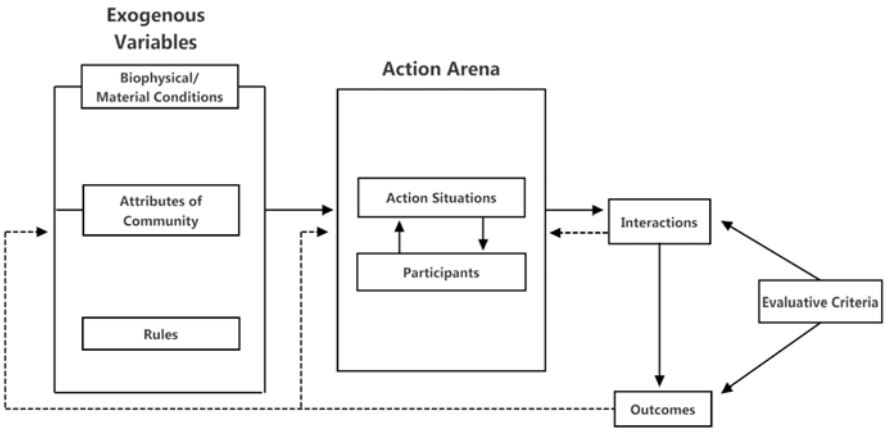
[193] ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 6 (2005).
[194] *Id.*
[195] *Id.* at 13.
[196] FIGURE 1 is an adapted version of Ostrom's graphic. *See id.* at 15.

FIGURE 1



The participants in an action arena may be clear enough—individuals jockeying for access to resources, for example—while an action situation "refers to the social space where participants with diverse preferences interact, exchange goods and services, solve problems, dominate one another, or fight (among the many things that individuals do in action arenas)."[197] Ostrom includes as exogenous variables the rules participants use to order relationships,[198] the biophysical or material conditions that action arenas act upon, and the attributes of the community within which an action arena is placed.[199]

After exogenous variables feed into the action arena, and also feed into the arena's concomitant interactions between action situations and participants, "[e]valuative criteria" may be "used to judge the performance of the system by examining the patterns of interactions and outcomes."[200] These outcomes "feed back onto the participants and the situation and may transform both over time [and] may also slowly affect some of the exogenous variables."[201] So, if these outcomes are positive, the feedback on the participants

[197] *Id.* at 14.

[198] These rules may traditionally be considered regulations, instructions, precepts, or principles. *Id.* at 16–17. Ostrom uses the term rules in the regulation sense, explaining that they may be "thought of as the set of instructions for creating an action situation in a particular environment." *Id.* at 17.

[199] *Id.* at 15.

[200] *Id.* at 13.

[201] *Id.* at 13–14.

may encourage them to pursue sustaining the status quo in an even more dedicated manner, while negative outcomes may cause participants to restructure the action arena or seek to change some of the exogenous variables.

While some who study the workings of institutions may be concerned primarily with the action arena upon which the exogenous variables operate, others may be concerned with specific exogenous variables. For example, "[e]nvironmentalists tend to focus on various ways that physical and biological systems interact and create opportunities or constraints on the situations human beings face."[202]

In order to provide some context for Ostrom's framework, consider an environmental example, since much of the work that has employed the framework is environmental in nature. We start with exogenous variables. Imagine the habitat of an endangered species—the biophysical/material condition at issue. There might be many attributes of a community that could affect that habitat—for example, whether the property is privately or rather government-owned. Also, while there are certainly a large number of relevant rules at issue, the procedures for listing and the substantive protection of the species under the federal Endangered Species Act (ESA) would come into play.[203] Turning to the action arena, we might find participants in the form of groups that either actively support or oppose listing the species under the ESA. These groups might interact in various action situations to either achieve species protection under the ESA or perhaps to have it thwarted. If participants are successful in having the species listed through the actions taken, then this outcome may feed back into and reinforce the exogenous variables that led to that outcome, meaning that participants supporting the listing are likely to seek to maintain the rules related to procedures for listing and substantive protection of the species whose habitat is thus situated. The species' viability may improve over time. In the same way, participants opposing listing might allow feedback from the negative outcome (species listing) to spur efforts to change the rules related to procedures for listing and substantive protection of

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[202] *Id.* at 16.

[203] *See generally* 16 U.S.C. § 1533(1) (2012) (specifying the procedure by which the Secretary of the Interior may list a species as endangered or threatened).

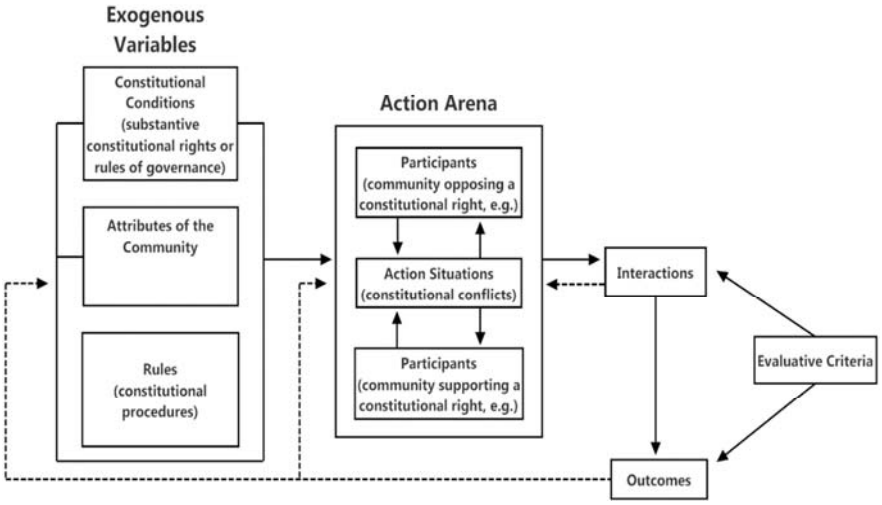
species whose habitat is situated in the same manner as that in question. Evaluative criteria might be used by either set of participants to examine these patterns of interactions and outcomes in order to assess if and how the rules related to the community and the biophysical conditions should be maintained or perhaps changed in order to better manage the endangered species resource.

This straightforward example from the biophysical world (or from the world of traditional common goods) might be just the type of scenario Ostrom envisioned, providing an analysis of how groups of individuals achieve particular outcomes for resource management within the institution in which they operate, and how those outcomes result in feedback that influences future resource management. But we also might slightly modify Ostrom's IAD framework to get a more precise conception of the constitutional commons and the communities that operate upon it. Consider the modification as represented in FIGURE 2 below. Paraphrasing Ostrom, the participants on the constitutional commons are no doubt acting in an organized fashion to facilitate their chosen form of governance, and so we should be able to identify "universal components" that create the structure affecting the behavior and outcomes achieved by constitutional commoners.[204] The action arena in our example is the space in which the conflict over constitutional resources takes place. We might consider the participants in the action arena the constitutional communities that arise on either side of a constitutional conflict and that engage in action situations to affect an outcome, such as a particular provision of a constitutional right or the creation of a rule of governance.[205]

[204] OSTROM, *supra* note 193, at 6.

[205] See *id.* at 15 for original figure.

FIGURE 2



B. EXOGENOUS VARIABLES WITHIN THE CONSTITUTIONAL COMMONS

Affecting the participants and their interactions in the action arena are at least three exogenous variables: (1) the attributes of the constitutional community; (2) the rules that guide how constitutional communities interact within the action arena; and (3) the constitutional conditions that affect the constitutional community's operation, which we can describe as the substantive constitutional rights or rules of governance that the community seeks to shape.[206] Here, we describe each in turn.[207]

1. Attributes of Constitutional Communities. At the outset, we note that in discussing constitutional communities, these communities take two forms that morph into one another depending on the task at hand. When we think about communities in isolation from each other, as the IAD framework suggests we should when considering exogenous variables, the task at hand is the creation of public goods. The rivalrous

[206] *See id.* (outlining these three factors).

[207] Also, as we move into this discussion, we note at times it is difficult to talk about elements of the framework in isolation. When the conversation needs to shift in order to facilitate understanding of the framework or the interrelationships of its different aspects (e.g., the connection between attributes of a community as an exogenous variable and communities engaged in action arenas), we try to be clear.

enterprise of these communities battling with other communities does not really take shape until we enter the framework's action arena, at which point the common good attributes of these communities arise.

The lack of rivalry in pursuing a joint enterprise is quite important. Whereas we typically would expect a successful community to restrict its membership to avoid overconsumption of a common good resource, with a public good resource there is no need to worry about overconsumption (because public goods are not depleted).[208] In other words, the rules by which constitutional communities operate are quite different from the rules utilized by communities surrounding traditional common good resources, which are designed to manage depletable resources and prevent tragic overconsumption. Generally speaking, openness of such communities is considered a good thing both theoretically and practically for those trying to further the constitutional cause.[209] There is strength in numbers in creating public good resources, not weakness, because these are "naturally shareable without a risk of congestion or overconsumption."[210] The only real risk is if those within a constitutional community have different visions of what constitutional resource the community ought to be pursuing, because this could push the community into the constitutional action arena where we see constitutional conflicts splinter communities in a rivalrous world of winners and losers. Yet in that circumstance, the worst we might see is two distinct constitutional communities arising out of the action arena—each individually maintaining an openness that allows others to join their respective cause in attempting to create public good constitutional resources.

To be clear, there may be certain practical limitations on the ability of citizens, for example, to access and form constitutional communities. Indeed, access to such communities "varies according to the costs of surmounting barriers (in terms of money, conditions, or other restrictions) to exploitation."[211] In other

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[208] *See supra* note 20 and accompanying text (noting that while public goods are shared by many, they are not depletable).

[209] Madison et al. indicate that one should assess the goals or objectives constructed cultural commons communities maintain. Madison et al., *supra* note 43, at 691.

[210] *Id.* at 694.

[211] *Id.* at 695.

words, just because groups have an incentive to grow and to pursue the allocation of a constitutional resource, that incentive does not eliminate the reality that we live in a world characterized by transaction costs.[212] For example, it very well may be the case that the limitations imposed upon those living in poverty and seeking to hire a lawyer to push a constitutional case are prohibitive.[213] The same may be true for those seeking to overcome collective action problems to coordinate their constitutional preferences. And yet, this is the very role of many constitutional communities—to overcome transaction costs associated with access to constitutional resources and pool knowledge and experience in a way that benefits underprivileged citizens. These communities not only provide underprivileged citizens with access to the public goods constitutional resources themselves (i.e., the ability to exercise the right to vote), but also give them a voice in the common good rivalry that creates the public good resource in the first instance (i.e., the ability to bring a claim that the constitutional right to vote is being mismanaged in some way, such as in the case of modern voter fraud "regulation" controversies[214]).

So without trying to ignore the significant practical barriers that might often stand in the way, it is quite remarkable how open the Constitution is as a matter of institutional design. This begins with the First Amendment's protections of speech, press, assembly, and religion.[215] In many ways, the tools that the Constitution provides to reallocate rights, obligations, and governance authority are intended to be open to all citizens, branches of government, and levels of government. Reframers participate in constitutional communities through a number of mediums that facilitate the "openness" of the constitutional commons.

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[212] *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (reasoning that transaction costs "present many transactions that would [otherwise] be carried out").

[213] *See supra* note 106 and accompanying text (discussing access to the legal justice system for the poor).

[214] *See, e.g.*, Juan Williams, *GOP's Fictional Voter Fraud Charges Aim to Keep Democrats from Voting*, FOX NEWS (Aug. 3, 2012), http://www.foxnews.com/opinion/2012/08/03/gop-fictional-voter-fraud-charges-aim-to-keeping-democrats-from-voting/ (arguing that there is a lack of documented voter fraud and that this invalidates the basis for photo ID laws).

[215] U.S. CONST. amend. I.

This openness, of course, spills over into the world of common goods as well. Citizens enter into, participate in, and contribute to constitutional communities in many ways, ranging from showing up at the voting booth and bringing citizen-suits to lobbying their elected officials and participating in public processes geared toward steering the directions of executive agency actions. Of course, the very groups that work together in making public good constitutional resources that are available to all citizens must do so by initially, or repeatedly, entering the fray and using those tools to engage in common good conflicts with other constitutional communities seeking to reframe the text and interpretation of the Constitution.

We see the same dynamics within government itself. Members of Congress capitalize on the openness of constitutional communities by legislating with like-minded members of Congress. Members of the Judiciary come together on either the majority or minority side of cases involving constitutional questions. Constitutional communities consisting of executive agencies often take on the characteristics of the constitutional worldview of the Executive who appoints the agency heads, and these communities of course can be displaced by a different, and perhaps opposing, set of constitutional communities upon the arrival of the next President.

2. Rules Guiding Constitutional Communities. Second in our exogenous variables category are the rules that guide how constitutional communities interact within the action arena.[216] We can think of these as the constitutional procedures that must be followed by citizens, courts, legislatures, the Executive, and states in order to seek access to the constitutional commons and shape the resources it provides. These rules might also implicate the overarching constitutional philosophy of a particular community. For example, these rules put into play questions like whether the U.S. Constitution is a "living document" that adjusts social ordering as society changes and new needs arise, as put forth by some constitutional communities,[217] or whether it is instead

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[216] OSTROM, *supra* note 193, at 16–17.

[217] *See, e.g.*, PETER IRONS, BRENNAN VS. REHNQUIST: THE BATTLE FOR THE CONSTITUTION 38 (1994) (quoting Justice Brennan's assertion that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the

beholden to an originalist understanding so as to preserve social ordering based upon the Framers' conceptions of governance.[218] Of course, constitutional communities are key to shaping this debate, coming together to pool their knowledge and resources and to access the Constitution in order to shape its continued construction as either living and malleable in the hands of new constitutional communities or static based upon the intent of the Framers and limited to subsequent Reframer textual amendments.

Relatedly, what rules do constitutional communities use in an action arena to provide resources? Constitutional resources—the allocation of rights, rules of governance, and facilitation of stable social ordering—are provisioned through legal mechanisms, such as congressional statutes, executive orders and regulations, judicial interpretations, and citizen access to all three of those branches of government. Each of these managers plays a role in defining resource boundaries and the provision of constitutional resources.

We next ask, what rules govern who joins the community or who "participat[es] in decision making about how the resources will be produced and managed"?[219] The governance mechanisms that the Constitution provides for participating in the creation and maintenance of constitutional resources are fairly robust, making accessible to virtually any citizen a right to engage in a constitutional community with inputs into the constitutional system. The Constitution does establish rules regarding who may

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adaptability of its great principles to cope with current problems and current needs"); Bernard Schwartz, *"Brennan vs. Rehnquist"—Mirror Images in Constitutional Construction,* 19 OKLA. CITY U. L. REV. 213, 239 (1994) ("The outstanding feature of Justice Brennan's 'living' constitution is its plastic nature.").

[218] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990) (arguing that "[o]nly [originalism] is consonant with the design of the American Republic"); JOHN HART ELY, DEMOCRACY AND DISTRUST 1–2 (1980) (defining interpretivism by reference to "its insistence that the work of the political branches is to be invalidated only in accord with an inference [that] is fairly discoverable in the Constitution"); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 10 (1982) ("[T]he Court [often] reaches decision by interpreting—deciphering—the textual provision (or the aspect of governmental structure) that is the embodiment of the determinative value judgment."); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 22 (1988) ("According to the originalism theory, judges 'should confine themselves to enforcing norms that are stated or clearly implied in the written Constitution.' " (quoting ELY, *supra*, at 1)).

[219] Madison et al., *supra* note 43, at 703.

participate in Congress, courts, and the Executive Branch (through age requirements, for example),[220] how the Constitution may be amended,[221] and when individuals can exercise rights to enter court or the voting booth[222] to shape the constitutional commons. Yet it also seeks to ensure that every citizen maintains the ability to access and shape the constitutional commons at some point in time if the prerequisites are met.

3. Constitutional Conditions. The third, and perhaps most important, exogenous variable relates to the constitutional conditions that affect the constitutional community's operation. The Constitution is an old document, and the conditions that serve as the backdrop to constitutional conflicts, such as the state of judicial precedents and constitutional amendments, change as history marches on. Constitutional conditions at any one point in time describe the substantive constitutional rights or rules of governance existing at that time. It is these conditions that constitutional communities seek to shape. In thinking about what constitutes the relevant constitutional conditions, we might also frame this as a question—what is the current status of a constitutional right or rule of governance that a constitutional community is seeking to either perpetuate or to change?

The reason constitutional conditions might be the most important exogenous variable is that they have quite a different effect on the action arena than do the biophysical/material conditions in Ostrom's framework. There are constraints within the biophysical/material world that limit to a degree how the commoners can interact within an action arena, the types of outcomes they can achieve, and how those outcomes provide feedback that influences their future management of the commons. For example, commoners within the global environment only have so much fossil fuel, so many minerals, so much natural capital and other resources to manage in an action arena—at least within a limited range that accounts for technological advances or other improvements in management that "extend" the life or

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[220] *See, e.g.*, U.S. CONST. art. II, § 1, cl. 4 (setting age requirement at thirty-five for presidency); *id.* art. I, § 2, cl. 2 (setting age requirement at twenty-five for the House of Representatives); *id.* art. I, § 3, cl. 3 (setting age requirement for the Senate at thirty years).

[221] *Id.* art. V.

[222] *See id.* amend. XXVI (setting voting age at eighteen).

productivity of a biophysical resource. Take the example of the ESA presented earlier.[223] The rules established for management of endangered species resources are necessarily constrained biophysically, a fact that sets in stone the impact that this particular exogenous variable will have on action arenas and outcomes which then feed back into the management process.

Constitutional conditions are not so limited, much like other cultural public goods, such as IP regimes. Constitutional resources, just like other intellectual pursuits, are unbounded and infinite, and thus the outcomes achieved by constitutional commoners are also never bounded. This provides an important feedback incentive that keeps constitutional commoners both engaged in the management of resources and innovative in the creation of resources. Contrast this with the world of natural resources, such as the options facing fossil fuel producers. Those resources are bounded by the ultimate finiteness of fossil fuels, whereas the world of constitutional governance is only limited to the extent of constitutional commoners' ability to divine new ways of structuring constitutional law.

C. ACTION ARENA

As represented in FIGURE 2,[224] each of these exogenous variables feed into the constitutional action arena as rival constitutional communities participate in action situations that we call constitutional conflicts, which again might arise over a particular provision of a constitutional right or the creation of a rule of governance. The interactions and outcomes that arise out of the action arena can then be analyzed with evaluative criteria that tell us how well constitutional resources are being appropriated. In other words, we must look to "[p]atterns and [o]utcomes [e]manating from a [p]articular [a]ction [a]rena" and "[s]olutions and [b]enefits," and constitutional communities "should be assessed not only in light of [their] ostensible purposes but also in light of [their] consequences."[225] We may see effective and stable governance and a long-enduring commons institution,

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[223] *See supra* note 203 and accompanying text.

[224] *See supra* note 205.

[225] Madison et al., *supra* note 43, at 704–05 (emphasis omitted).

or we may see evidence of the challenges posed by the tragedy of the commons, such as governance instability, erosion, and loss of credibility.[226] We also might see challenges relating to public goods, such as a skewed balance of power.[227]

Still, on the whole the Constitution proves to be fairly effective in allowing constitutional communities to create and maintain constitutional resources, establishing a stable interaction between constitutional communities (legislatures, courts, the Executive, and the citizenry) and common good resources (rights, rules of governance, and social ordering). In other words, the Constitution is a relatively successfully managed commons supported by successful communities focused on shaping and maintaining public good constitutional resources through commons rivalry with other communities. The Constitution produces an increasingly refined allocation of rights and presumably more stable social ordering, though there are certainly cases that some constitutional communities would argue have resulted in less stable social ordering through, for instance, an undermining of the democratic process (such as in the case of *Citizens United*).[228] The outcomes that are achieved through constitutional conflicts between constitutional communities seeking to create public goods constitutional resources are particularly important since, as alluded to, the outcomes may feed back into and reinforce each constitutional community's desire to maintain the resource as allocated or incentivize (or disincentivize) the losing party to continue to fight and engage in the action arena.

D. HOW THE CONSTITUTIONAL COMMONS PLAYS OUT IN THE IAD FRAMEWORK

Let us look once again to our earlier ESA example to see FIGURE 2 play out fully in the constitutional context, and outside of the pure biophysical context in which Ostrom's initial framework operates. Consider parties challenging a specific application of the ESA as beyond the scope of authority granted to the federal government under the Commerce Clause, as may be

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[226] See *supra* Part IV.D for a discussion of this phenomenon.

[227] *See supra* notes 188–89 and accompanying text.

[228] *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010) (concluding that Congress cannot limit corporate independent expenditures).

the case with Chief Justice Roberts's "hapless toad."[229] One group of constitutional communities may come together to pool knowledge and intellectual resources to have a certain species listing declared unconstitutional and beyond the federal government's Commerce Clause authority, and may engage in an action arena with another group of constitutional communities seeking to uphold a species listing as constitutional. The exogenous variables that feed into the action arena during this constitutional conflict are the constitutional conditions presented (a challenged exercise of federal power over endangered species), the attributes of each community seeking to engage in the action arena, and the rules (or constitutional procedures) utilized by each community as they engage with each other in the action arena. The action arena is itself the place where the common good dimensions of the Constitution play out, as two communities rival over the constitutional resource that is federal authority (or perhaps private landowner action free of federal interference) over endangered species. A gain for one community is a direct loss for another.

Yet once the case is resolved, say, in favor of the community seeking a declaration that federal authority in this particular application of the ESA is unconstitutional, then they succeed in shaping the constitutional landscape by providing and maintaining a public good constitutional resource—no similarly situated private property owners or state governments that avail themselves of the right to manage their property despite the presence of this species, free of federal government interference, inhibit other similarly situated entities from also doing so. This is the public good dimension of the Constitution that arises once a constitutional conflict is resolved (at least for the time being). This outcome, in turn, may feed back into both the action arena and the exogenous variables to motivate the constitutional community that won to continue to fight similar battles against claims of federal authority over endangered species, while the outcome may cause the losing constitutional community to regroup and change its

[229] *See, e.g.*, Richard J. Lazarus, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 VA. ENVTL. L.J. 231, 231–33 (2005) (discussing controversy of and quoting from Chief Justice Roberts's opinion in *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting)).

attributes, the rules it utilizes, or its interactions in the action arena (such as its litigation strategy) to have federal authority validated in similar circumstances in the future.

E. HISTORICAL IMPORT OF THE IMPLICATIONS OF THE CONSTITUTIONAL COMMONS CYCLE AND IAD FRAMEWORK

As we know from constitutional history, at the Constitutional Convention of 1787 some—but not all—of the delegates wanted something more from the meetings than a mere revision of the Articles of Confederation.[230] They wanted a Constitution that was more capable of unifying the fragmented jurisdictions and citizenry that made up the disaffected colonies.[231] Even before the Convention began, and certainly during the Convention, different coalitions of delegates worked collaboratively to sustain the effort and shape the text that ultimately became our Constitution.[232] It seems a textbook example of the collaborative communities examined in the cultural public goods literature. What we see emerge then are framing coalitions, and it was these coalitions that were participants in the IAD action arena.

The history of our Constitution also highlights that very few of the decisions made at the Constitutional Convention were easy. In fact, much of the delegates' time was spent trying to overcome what seemed at the time to be intractable conflicts.[233] When we think about the give-and-take, the tireless negotiations, and the concessions made and won, our constitutional history is seen much more clearly through the lens of common goods. Where we find debate, the driver of debate is, perhaps uniformly, the fact that the Constitution facilitates a rivalrous world of winners and losers. At the Convention, sometimes disputes presented different stakes for

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[230] *See* BEEMAN, *supra* note 84, at 88 (detailing Virginia Governor Edmund Randolph's plan "to scrap the Articles altogether for a truly 'national' government").

[231] *See id.* at 129, 134 (discussing James Wilson's concerns over the need for energy, unity, and direction for the new government, which a stronger Executive would establish).

[232] *See generally* DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION (2007) (describing in detail the Convention and its participants); BEEMAN, *supra* note 84 (same).

[233] *See, e.g.*, BEEMAN, *supra* note 84, at 106–09 (noting the "explosive issues" involved in the construction of Congress and explaining that this "most important branch of the new government [became] a source of contention").

big states versus small states.[234] At other times, disputes arose between northern states and southern states jockeying for certain constitutional resources they believed would give them a governance advantage.[235] And in even other instances, the deliberations are best understood as disputes surrounding the delegates' preferences regarding the balance of power between state and federal governments, among the branches of the federal government, or even between state or federal governments and the citizenry.[236] The divisiveness of the debates was so pronounced that the fact that the delegates ultimately arrived at a successful compromise has caused some to label the Convention the "Miracle at Philadelphia."[237] This clash of framing coalitions taking place in the action arena of the Constitutional Convention results in what may be termed "framing fights."

Similar stories could be told about the debates surrounding the ratification of the Constitution, the passage of the Bill of Rights, or, in fact, any of the other amendments to the Constitution. We see time and time again communities coming together to advocate for various constitutional resources. These efforts, regardless of the form they take, whether published as *The Federalist*[238] or aired as political issue ads on television, present similar interactions: constitutional communities working collaboratively together attempting to create advocacy blocks (i.e., building framing coalitions) and then employing these blocks within conflicts surrounding the text of our Constitution (i.e., framing, or reframing, fights).

Once we have text, the rights, power, and other resources created by constitutional text almost always take on public good attributes. One person's exercise of their Fifth Amendment right

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[234] *See id.* at 55 (explaining that the larger states preferred proportional representation to equal representation since the former would favor those states' larger populations).

[235] *See id.* at 155 (noting the resistance of a Massachusetts delegate, Elbridge Gerry, to the "three-fifths compromise," which was based on his belief that the Southern States should not be able to include slaves in the population for representation purposes since those states treated the slaves like property).

[236] *See, e.g.*, *id.* at 113 (summarizing Gerry's continuing thoughts regarding concentrating power in a central government).

[237] *See* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787 ix (1966) (noting that James Madison and George Washington both used this phrase in describing the Convention).

[238] *See generally* THE FEDERALIST (Jacob E. Cooke ed., 1982).

to remain silent does not hamper that of another, nor does one's exercise of freedom of speech diminish that of another, making these rights take on qualities of public goods resources.

As any student of constitutional law understands, however, the meaning of constitutional text is often ambiguous, and this ambiguity becomes the basis for future conflicts as litigants, legislators, or branches of government compete in a rivalrous manner over constitutional resources. Constitutional litigation attempting to clarify constitutional text, particularly within the Supreme Court and appellate courts to a lesser extent, often mirrors this cycle. This cycle begins with coalitions attempting to prepare materials to advocate for one reading of the Constitution or another. This initial building of *reframing* coalitions is best understood through the cultural public good lens, and its genesis really arises out of the exogenous variables that shape a constitutional community before it engages upon an action arena. These materials, however, are often eventually used in attempts to influence courts or the court of public opinion to understand the Constitution as having a particular meaning. Whatever courts decide (even if they opt not to decide), they are in a world of rivalrous conflicts that produces winners and losers. These are what we consider reframing fights. Similar to the creation of constitutional text, the determination that the text has one meaning or another leads to the reallocation of constitutional resources. And, these resources almost always take on public good attributes.

Whether constitutional resources came through the Framers or through subsequent amendment or interpretation battles over constitutional text, this common good dimension of these resources lives on—and often drives constitutional communities to pool resources. After all, the fact that the resource is non-rivalrous proves all the more frustrating to those dissatisfied, or even vehemently opposed, to the constitutional resource allocation in the first instance. This frustration may cause some constitutional communities to emerge from the ashes of defeat and live on in preparation for the next battle—no matter how unlikely a reallocation of constitutional resources may be (consider communities who claim it is unconstitutional to require payment

of taxes).[239] The provision of constitutional resources may cause even other constitutional communities to band together for the first time with the hopes of advocating for change. And for those members of constitutional communities who consider themselves winners of constitutional resources, not only do they seek to maintain the public goods attributes of the resource allocated, but they are often inspired to carry on to defend the spoils they have gained and perhaps to organize in hopes of appropriating even more constitutional resources.

So, the cycle of framing/reframing coalitions engaging in framing/reframing fights to affect constitutional resources lives on. The incentives at work provide a useful snapshot of our constitutional history and presumably of the trajectory of our constitutional future. Even if one does not buy into the idea that the Constitution is a living document, ongoing efforts are needed to hold it in stasis. So, regardless of the viewpoint constitutional communities embrace, Jefferson's observation that "vigilance is the price of liberty" rings true just as much in the era of the Framers as it does today for the Reframers.[240]

VII. CONCLUSION

Surprisingly, understanding how common good and public good dimensions of constitutional rights and rules of governance play out in the cycle provided by Ostrom's IAD framework provides a powerful set of lenses through which to view constitutional law and politics. The lessons of the traditional common good and public good literatures are vital to our understanding of the provision, redistribution, and maintenance of valuable constitutional resources—resources on which the very foundation of our democracy rests. Within these literatures, we see tensions that have been with the United States since its founding.

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[239] For instance, some groups have argued that paying taxes constitutes slavery. Lonsdale v. Egger, 525 F. Supp. 610, 612 (N.D. Tex. 1981); United States v. Roberts, 425 F. Supp. 1281, 1282 (D. Del. 1977); Beltran v. Cohen, 303 F. Supp. 889, 891 (N.D. Cal. 1969). For a more comprehensive discussion of this topic, see Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 GONZ. L. REV. 291, 310 (1996–1997).

[240] DICTIONARY OF QUOTATIONS 386 (Bergen Evans ed., 1968).

On one hand, we see that it is through cooperation that reframing coalitions arise and are maintained. For those who value constitutional protections, powers, rights, and other constitutional resources, Benjamin Franklin's wisdom serves us well: "[w]e must indeed all hang together, or, most assuredly, we shall all hang separately."[241] While the force of his embedded pun has faded, it is this spirit that serves as a thread that has bound the United States together and sustained its Constitution for centuries.

On the other hand, we see that what drives the communities together can often be self-interested and rooted in conflict as to the form that constitutional resources will take. With this in mind, George Washington's concern about factions, articulated in his celebrated Farewell Address,[242] still resonate, perhaps now more than ever.

The literature reveals an unyielding paradox embedded within the Republic: even as we find the threat that pits us against each other in some dimensions of the Constitutional Commons, we also find the thread that unyieldingly tugs at our constitutional fabric and binds our democracy together.

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[241] Benjamin Franklin, *Remark to John Hancock, at the Signing of the Declaration of Independence, 4 July 1776*, *in* THE CONCISE OXFORD DICTIONARY OF QUOTATIONS 102, 102 (2d ed. 1981).

[242] George Washington, *Farewell Address*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1902, at 218–20 (James D. Richardson ed., 1904). For example, Washington warned against the "spirit" of party that

> is inseparable from our nature, having its root in the strongest passions of the human mind. It exists under different shapes in all governments, more or less stifled, controlled, or repressed; but in those of the popular form it is seen in its greatest rankness and is truly their worst enemy.

Id. at 218; *see also Washington's Farewell Address 1796*, THE AVALON PROJECT, YALE LAW SCHOOL LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/18th_century/washing.asp (last visited Apr. 6, 2015).