Our Constitutional Commons

By Brigham Daniels* and Blake Hudson**

ABSTRACT

Perhaps it goes without saying, but the United States Constitution is remarkable. It is the oldest constitution in continuous use, and due to its success, it has influenced many subsequent drafters of national and subnational constitutions worldwide. As many constitutional scholars have described, the difficulties the drafters of the Constitution faced often seemed insurmountable, and yet they succeeded. From the country's founding up until today, the document has played a crucial role in many of the nation's most important policy debates, resolving some of the most contentious political conflicts in a way that has provided for continued governmental stability and continuity.

While much has been written about the U.S. Constitution, very little, if anything at all, has been said about the ways in which the Constitution shares attributes with the commons. This article examines the Constitution through the lenses developed by scholars for assessing both commons resources and constructed cultural commons communities. These lenses provide a unique perspective on the operation of the U.S. Constitution—and particularly on its strengths and potential weaknesses—while the synergy and interaction between the two lenses provide an important and more holistic understanding of the institutional design of the Constitution.

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* Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

** Associate Professor, LSU Law Center and LSU School of the Coast and Environment, Baton Rouge, Louisiana.

I. INTRODUCTION

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. Its text is seemingly straightforward, but judicial opinions, statements by politicians, and works by 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 throne, yet it has become a model for nations all across the globe. How this modest document became a centerpiece 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 have used the lens of the commons perhaps more than any other field, and scholars across disciplines often rely on the commons to justify why we maintain rules of governance in the first instance. We increasingly see commons scholarship focus on a variety of unconventional resources, resource systems, and communities of resource managers. 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 scholarship focused upon the commons.

While those studying the Constitution have neglected the commons lens, it turns out that using this lens yields important 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 the characteristics that 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 and important governance document.

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 focuses on resources that meet two defining characteristics. First, commons resources are subject to rivalry, meaning the resource is depletable as it is being consumed by a variety of commons "appropriators." Because of this, when demand for the resource is sufficient, there is often not enough of the resource to serve all interested parties, creating winners and losers. Second, commons 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.

How does the idea of the commons then relate to the Constitution? We argue that there are a large number of appropriators—the executive, Congress, the judiciary, the states, and citizenry—attempting to access the constitutional resource system and jockeying to allocate constitutional resources. A constitutional

resource can come in a number of forms, whether it be a constitutionally protected right of the citizenry, a division 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 the 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, pre-*Roe v. Wade* 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 found in the Constitution's Fourteenth Amendment protected a woman's right to an abortion, 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. 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.

In addition to applying traditional commons analysis to the Constitution, this Article also incorporates insights from scholars who have recently shifted away from focusing primarily on how 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. This brand of scholarship, which goes by the moniker "constructed cultural commons," has important implications in discussions surrounding the Constitution. This literature challenges us to look from a new perspective at what may be termed "constitutional constructed cultural commons communities" (but due to a more subdued appreciation of alliteration will be referred to throughout this Article as "constitutional communities"). Examples of such communities 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 pass constitutional amendments, or agents of the executive seeking to enforce the Constitution in particular ways—communities we refer to as Reframers. Unlike the rivalry that pervades the traditional commons dimensions of the Constitution, constitutional communities assist in managing and maintaining the public goods 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 described above, 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. Once the Court allocated the right sought by one of these constitutional communities, no one's use of the right to abort restricts 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 of *Roe v. Wade*).

Indeed, a key contribution of this article is an explication of how the precepts established by traditional commons literature and the newer constructed cultural commons literature 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 commons appropriators in rivalry with a group of commons 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 to an abortion, while other constitutional communities come together to seek a re-appropriation of the abortion right that would not leave it constitutionally protected, but would rather allow individual states to ban abortions. The tussle over the allocation of the right in the first instance is a commons resource 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 re-appropriated 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, we see a constant stream of constitutional communities acting as Reframers attempting to adjust the original constitutional framework—generally through judicial interpretation and sometimes through amendment—in order to secure, nourish, and protect constitutional resources important to them.

This article will explore the dimensions of our constitutional commons that take on the attributes of commons resources and those that take on the characteristics of constructed cultural commons communities and the public goods they create. It will do so by providing background in Part II on the commons and the constructed cultural commons literatures. In Part III, the article explores how the literature on the commons relates to the allocation of power, rights, and other resources found in the Constitution. Part IV looks at how the literature on constructed cultural commons communities relates to those who create and seek to legitimize different interpretations of constitutional text. Part V draws together these two literatures and discusses how they provide a useful way to construe constitutional history and conflicts, and further provides important new insights into the institutional design of the Constitution and the implications of that design for its operation. Part VI concludes the article.

II. COMMONS AND CONSTRUCTED CULTURAL COMMONS

This Part provides a short introduction to major concepts arising from the two branches of literature, analyzed below to examine the Constitution. It first focuses on providing an introduction to major concepts from the commons and then goes on to do the same for the constructed cultural commons.

A. Commons Resources and Management

1. The Resources: Traditional and New

Commons resources share two characteristics. First, when one uses a commons there are fewer opportunities for others to use the commons, meaning there is rivalry among users.[1] Second, it is very difficult, if not impossible, to exclude others from using commons resources.[2]

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[1] *See* Robert O. Keohane & Elinor Ostrom, *Introduction in* LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS 13–15 (Robert O. Keohane & Elinor Ostrom eds., 1995). Sometimes this trait of the commons is also referred to as depletablility, or subtractabilty.

[2] *See* Ostrom, Making the Commons Work 30 (); Oran Young, The Institution Dimensions of Environmental Change 140 (2002).

These two defining traits of commons 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*.[3] 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.[4] This pasture typified a commons: 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. 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 the herders. 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.

In addition to the two defining traits of commons resources, other terminology helps guide commons analysis. The body of resources that make up the commons is known as a "resource system."[5] A resource system is comprised of "resource units," defined as "what individuals appropriate or use from resource systems."[6] 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."[7]

Commons scholars have traditionally studied and applied the commons literature to natural resources. While scholars continually add to the list of resources identified as commons, commons scholarship focuses mainly on resources like fisheries,[8] forests,[9] parks,[10] rivers,[11] and airsheds.[12] In more recent years, we have seen

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[3] *See* Hardin, The Tragedy of the Commons.

[4] Id.

[5] Ostrom highlights fishing grounds, groundwater basins, grazing areas, irrigation canals, bridges, parking garages, mainframe computers, streams, lakes, oceans, and other bodies of water as examples of "resource systems." ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 30 (1990).

[6] *Id*.

[7] *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.

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this application to additional natural resources such as the polar icecaps,[13] the radio spectrum,[14] and outer space.[15]

The literature on the commons increasingly encompasses a host of other resources as well. The types of commons found outside of traditional natural resources are often referred to as "new commons,"[16] and include resources as varied as medical care,[17] court dockets,[18] prisons,[19] government budgets,[20] silence,[21] email inboxes,[22] federal systems of government,[23] and even presidential primaries.[24] 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.[25]

As Hardin's cautionary tale suggests, the nature of commons resources, whether traditional or new, almost uniformly require management in order to avoid tragedy.[26] As researchers have delved into commons problems related to resource management, they have discovered a broad spectrum of potential solutions to commons problems.

2. Managing the Commons

Regardless of the form the management system takes, the purpose of managing the commons is to put some restraints on commons appropriators. The management system might work to reduce consumption of the commons (i.e., rivalry) or to restrict access (i.e., non-excludability).

Hardin highlighted two primary mechanisms to manage the commons and avoid its otherwise likely tragedy: property rights and regulation.[27] Others, led primarily by Ostrom's work,[28] have argued

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[17] Michael Gochfeld, Joanna Burger, & Bernard D. Goldstein, *Medical Care as a Commons*, *in* PROTECTING THE COMMONS 253 (Joanna Burger et al. eds., 2001).

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[23] Blake Hudson, Federal Constitutions: The Keystone of Nested Commons Governance, 63 ALA. L. REV. (forthcoming 2012).

[24] Brigham Daniels, Managing the Presidential Primary Commons, 84 TUL. L. REV. 889, 907 (2011).

[25] See *infra* Part ___.

[26] Hardin, *supra* note ___, at ___.

[27] Hardin, *supra* note ___, at 314.

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.

Before turning to the extent to which aspects of the Constitution take on the characteristics of commons resources, we first consider a much newer but still important related idea that goes by the moniker of "constructed cultural commons."

B. Constructed Cultural Commons Communities

Just as traditional and new commons scholarship focuses on the similar challenges presented by the management of similar resources, the scholarship on constructed cultural commons (introduced in a well-received article by Madison, Frischmann, and Strandburg)[29] 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 cultural communities arise and sustain themselves in pursuit of creating, pooling, and sharing intellectual and cultural resources.[30] This literature attempts "to identify those features of the [cultural] commons that are more and less significant to the success and failure of a commons enterprise."[31]

While the moniker cultural commons is certainly catchy, the term *commons* is used in the cultural commons literature in a loose and even a metaphorical sense.[32] How do constructed cultural commons

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[28] OSTROM, GOVERNING THE COMMONS, at 2-18. (Emphatically rejecting Hardin's notion that the only pathways open to the commons summed up by Leviathan, property, and tragedy and calling the he widely accepted view that this was correct "uncritical"). For a brief introduction to this aspect of the commons literature see Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515.

[29] Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010).

[30] Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010).

[31] Madison, Frischmann & Strandburg, *supra* note 1, at 660.

[32] Madison, Frischmann & Strandburg, at 674 ("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

differ from commons resources? This is a particularly sticky question because some of what is studied in the constructed cultural commons literature has already made a home in the new commons literature. Consider, for example, what Charlotte Hess has labeled "knowledge commons," which include, among other things, universities, intellectual property, libraries, and open source software, just to name a few.[33]

There are a few essential differences between the commons and cultural commons literatures. First, while the commons literature focuses on the health of the commons, the constructed cultural commons literature focuses on how communities work cooperatively to produce and distribute intellectual and cultural resources.[34] These focuses inform how we approach the Constitution below in Parts III and IV, so that when applying commons analysis in Part III, we focus on the conflicts between appropriators of constitutional resources. In Part IV, on the other hand, when applying constructed cultural commons analysis, we focus on how people come together in communities to work for change or to protect the constitutional status quo, as the case may be.

Second, the two literatures also attempt to solve very different problems. The overarching problem in the commons is the tragedy of the commons while the main problem in the constructed cultural commons is forming communities that will produce and sustain cultural resources. In Part III, 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 IV, we explain the ways in which coalitions form to pursue various constitutional changes—or to protect against them—and how the

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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 governance mechanism. Margaret A. McKean, *Common Property, in* PEOPLE AND FORESTS: COMMUNITIES, INSTITUTIONS AND GOVERNANCE , *supra* note ___9, at 27, 30. In fact, it seems that it was for this reasons 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.*

[33] Charlotte Hess. Mapping the New Commons ____ (June 19, 2008), presented at "Governing Shared Resources: Connecting Local Experience to Global Challenges;" the 12th Biennial Conference of the International Association for the Study of the Commons, University of Gloucestershire, Cheltenham, England, July 14-18, 2008. *See also*, UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 15 (Charlotte Hess & Elinor Ostrom eds., 2007).

[34] This is not to say that cultural commons resources are not important. It is one piece of evidence—and often highly valuable evidence—of a constructed cultural commons' benefits or costs.

building of such communities conforms to the constructed cultural commons literature. "[35]

Finally, the role of rivalry plays out very differently. By definition, commons resources are rivalrous.[36] While constructed cultural commons communities can create a diversity of goods, including private goods, commons resources, and public goods, the goods at play in the constructed cultural commons literature are most frequently non-rivalrous public goods.[37] Again, these themes are highlighted below in Parts III and IV. Furthermore, in Part V, we bring together these very different dynamics at play within different dimensions of the constitutional commons and discuss how they not only relate to each other, but how they actually interact and synergize to be a major driver not only within our constitutional history but also our governance system going forward.

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

III. THE CONSTITUTION AS A COMMONS

In this Part, we discuss how the conflicts over the content and meaning of the Constitution can be viewed through the lens of the commons. While it is certainly a novel application of the idea of the commons, it may prove to be an important one, especially considering that it may be a significant factor in contributing to the Constitution's resilience. Additionally, as will be explored in the companion piece to this article, studying the U.S. Constitution through this lens may also prove particularly important for the commons literature, since the Constitution may be a prime example of a well-managed commons and long-enduring institution.

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

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[35] 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 3 at 12.

[36] See supra note ___ and accompanying text.

[37] Cite Madison, et al. ("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 non-rivalrous, meaning that consumption of the resource does not deplete the amount available to other users, and non-excludable, meaning that knowledge resources are not naturally defined by boundaries that permit exclusion of users.").

commons analysis. This involves describing the resources at issue and then discussing how the defining traits of commons resources—rivalry and difficulties presented by non-excludability—relate to the Constitution. Next, and in order to move from the theory to application, we then provide several illustrations of such conflicts. With theory and several illustrations as a backdrop, we move on and discuss how the tragedy of the commons could apply to constitutional resources.

To give the reader a frame of reference, in Part IV we will discuss how dimensions of the Constitution could alternatively fit into the mold of a constructed cultural commons. In Part V, we will discuss how the commons and constructed cultural commons frameworks harmonize together to help us understand more fully the creation and maintenance of constitutional protections. But, first we discuss how constitutional resources relate to the commons.

A. Constitutional Commons Resources

When we think about the Constitutional Convention of 1787, we often speak of the participants with such reverence that perhaps it seems flippant to characterize them as appropriators of resources. 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 came through agreement on exactly what the constitutional text would be. Since then, appropriation of constitutional resources comes through amending the Constitution or through judicial interpretation of constitutional meaning.

While the sorts of resources that come from crafting or interpreting constitutional language is 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 commons and, as discussed below in Part IV, constructed cultural commons frameworks. In each of these conflicts, the direction of the Nation stood in the balance. Cases like *Bush v. Gore*[38] have allocated rules governing aspects of the electoral system, while cases such as

[38] Bush v. Gore, 531 U.S. 98 , 104 (2000) (upholding the decision of the Florida Secretary of State to stop counting contested ballots).

Marbury v. Madison[39] and *Nixon v. United States*,[40] have 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*,[41] *National Federation of Independent Business v. Sebelius*,[42] and *Kelo v. New London*,[43] adjusted the relationship between the government and its citizens. Cases like *Wickard v. Filburn*,[44] *McCulloch v. Maryland*,[45] *United States v. Lopez*,[46] and *Pike v. Bruce Church, Inc.*[47] demarked the relative powers among levels of government. Still, cases like *Roe v. Wade*,[48] *Citizens United v. Federal Election Commission*,[49] and *Miranda v. Arizona*[50] articulated substantial individual rights. Regardless of the motivations maintained by those attempting to influence the meaning of constitutional language, these resources are very valuable. Regardless, however, of what form these resources take, they arise from the creation and interpretation of constitutional language.

We now briefly turn to describe why such resources are in fact commons resources.

1. Constitutional Resources and Rivalry

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[39] Marbury v. Madison, 5 U.S. 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).

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

[41] Brown v. Board of Education, 347 U.S. 483, 493–495 (1954) (holding that the separate but equal segregation of children in public education violates the Due Process Clause of the Fourteenth Amendment and therefore that state segregation of public schools was impressible).

[42] [Nat'l Fed'n of Bus. v. Sebelius, 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 purchase health insurance).

[43] Kelo v. New London, 545 U.S. 469, 485–487 (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).

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

[45] McCullcoh v. Maryland 17 U.S. 316, 429 (1819) (preventing states from taxing federal institutions).

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

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

[48] Roe v. Wade, 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").

[49] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 900 (2010) (extending First Amendment political speech protection to corporations).

[50] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (requiring police to inform individuals of their Fifth amendment rights before interrogation begins).

The first defining trait of a commons is rivalry.[51] Constitutional law is replete with rivalry—the very existence of heated competition over the content and meaning of constitutional language suggests rivalry. Put another way, we have winners and losers: those able to continue grazing 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 commons resources studied by Ostrom and the new commons resources explored by others. Though public good resources "are by their nature naturally non-rivalrous and non-excludable, meaning that [they] are not naturally defined by boundaries that permit exclusion of users,"[52] constitutional commons resources consist of citizen rights and rules of governance that are naturally defined and do give rise to rivalry and depletability. When a resource like the appropriation of governance authority between levels of government, for example, becomes fixed in a constitutional document, or in the body of jurisprudence interpreting that document, then it has fixed boundaries—there are clearly defined regulatory pastures where only the federal government may go and where only the states may go, as represented by the great federalism debates of our time.

2. Constitutional Resources and Excludablility

The second trait of commons resources is that it is difficult to exclude potential appropriators.[53] Within the context of constitutional law, the number of parties who join fights about the content and interpretation of constitutional language and the degree of access which every U.S. citizen maintains to bring a challenge to those interpretations certainly demonstrate non-excludability. Some of these fights occur with regard to ratification of amendments. While the threshold to secure amendments is significant, the First Amendment actually secures the right of all the Nation's citizens to advocate for political and legal change.[54] 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. Still, there is no dearth of constitutional litigation. Ultimately, none of the managers of the constitutional commons can

[51] See *supra* Part II.___ [Cite our discussion in Part II].
[52] Madison, 672.
[53] See *supra* Part II.___ [Cite our discussion in Part II].
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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, courts interpret the Constitution, and individual citizens sue to gain constitutional rights.

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 of our country and of the Constitution. 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, protections, 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 says does not always—or perhaps hardly ever—resolve what the text means. As a result, Reframers have 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 constitutional text, such as interpretations of the Commerce Clause or the Due Process Clause, this can be very fertile ground for those attempting to graze on the constitutional commons.

C. Examples of Constitutional Commons Conflicts

Here are two examples of how conflicts over the Constitution's meaning look through the lens of the commons.

First, consider the Fifth Amendment of the U.S. Constitution, which provides a governance resource and right of the citizenry establishing "nor shall private property be taken for public use without just compensation." What do those key terms—property, public use, take, and just compensation—mean? However we draw the boundaries and define the ambiguities, we see conflict, the outcome of which creates winners and losers—those who must compensate (governments) and those who will be compensated (property owners), or vice versa if the court rules that the government action is not a taking. This is the essence of rivalry in the commons. 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.[55] Ms. Loretto objected to a state regulation mandating that third party cable companies maintain access to private properties, like her apartment, in order to attach a cable box and wire effectively free of compensation to, or permission from, the private property owners. Ms. Loretto's case ended up in the Supreme Court, and the Court read the word "taken" to include any regulation that facilitates a physical occupation of another's land, no matter how slight. In this way, the case reordered the constitutional landscape. It provides a commons resource stream that creates future winners and losers (meaning governments who will be forced to compensate and private property owners who will be compensated). The constitutional resource also provides an incentive for potential litigants to modify their behavior. In this way, the Constitution bears a resemblance to Ostrom's natural resource commons, where instead of allocating the right of irrigators to access waters from a river, we see allocation of governance responsibilities and fundamental rights.

Second, the First Amendment of the Constitution guarantees that Congress will not make any law that "abridging the freedom of speech."[56] Due to the Fourteenth Amendment of the Constitution, this restraint equally applies to state governments.[57] The meaning of "freedom of speech," of course creates winners and losers, regardless of how it is construed. Those who 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. Rivalry obviously abounds. While there are many free speech cases to draw upon, consider as an example the case in which Gregory Lee Johnson

[55] Cite Loretto

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received a citation for violating Texas state law because he opted to demonstrate outside the 1984 Republican National Convention in Dallas by dowsing an American flag in kerosene and burning it. The case of Johnson v. Texas made its way to the Supreme Court, and in a 5-4 decision the Court decided that the First Amendment's protection of the freedom of speech reached far enough to protect Mr. Johnson's behavior. The impact of the decision not only reached Mr. Johnson but also any other person within the nation who chose to protest by burning an American flag. Of course, since those similarly situated can avail themselves of court protection, this interpretation created a valuable constitutional resource that is available to those who desire to take advantage of it.

D. Tragedy of the Constitutional Commons

If the Constitution produces streams of commons resources as the language of the Constitution is interpreted or altered, a question immediately comes to mind of what a tragedy of the commons would look like in this context? Indeed, as is the case with a wide range of resources, a central problem of having valued, limited resources free for the taking is that free-for-all might erupt. This free-for-all is frequently referred to as the tragedy of the commons.

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 as will be explored in the companion piece to this article, these tragedies have largely been avoided due to the Constitution's status as a well-managed commons or long-enduring institution.

We see the tragedy of the commons play out in at least four potential ways when it comes to constitutional resources. First, the most predictable way for a tragedy of the commons to manifest itself is in the form of the erosion of governance, 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 though such an episode. Yet, what we see is that those situations that are termed *constitutional crises* can be fashioned as symptoms of constitutional tragedies of the commons. Such crises occur because of acute and unresolved disputes over the allocation of constitutional resources. Whether we are talking about disputes between branches of government (such as FDR's attempt to pack the Court), disputes between levels of government (like the secession of Southern States), disputes between the government and the electorate (like Bush v. Gore), or disputes between government and individuals (such as the Whiskey Rebellion).

Second, the tragedy of the commons may manifest itself in the context of constitutional resources through government instability.

Specifically, if too much rivalry over rights occurs, and jurisprudence shifts with the wind, this can lead to citizen 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, 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. Basically the same statutes were at issue, yet what was once unconstitutional was suddenly understood as constitutional. One can see how a continuance of these types of shifts in the rights of government and citizens could 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 commons resource is over-appropriated, disrupting the system and ultimately damaging the interests of commons managers. 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.

Third, and often hand-in-hand with concerns related to stability, we might see a loss of credibility in our government. Particularly, the government may lose its credibility when we see large 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,[58] opens the door to arguments surrounding governmental legitimacy. These credibility concerns can even be witnessed on micro-scales of constitutional law, as individual Supreme Court justices—and thus credibility of the entire Court in the aggregate—have been increasingly criticized for being inconsistent in their legal analysis as constitutional commons appropriators jockey for constitutional interpretations over time, or perhaps even captured by special interests engaged directly in jockeying for certain constitutional interpretations.[59]

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[58] Cite the *Kelo* case for this. The Court nonchalantly made clear it was public purpose rather than public use, but as evidenced by the push-back from the states the resource was viewed as far too important to leave in that state.

[59] Cite Scalia's inconsistent Raich, Lopez, and Morrison opinions as eroding his individual credibility, as well as the conflict over SC recusal as Justices hear cases involving political entities with which they have been involved in the past (cite Virelli).

Fourth, when too many rivalrous users enter the commons, the resulting fragmentation can lead to gridlock. The constant tussle over the allocation of constitutional resources can lead to nothing being done at all. Similarly to the early days of radio "with so many talking, nobody could be heard," when factions become so disparate, it may be impossible to run a government at all—as is arguably the case in our current federal government.

IV. THE CONSTITUTION AS A CONSTRUCTED CULTURAL COMMONS

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. While this is undoubtedly an important dimension of the Constitution, emerging from the commons literature is another dimension that is equally important in determining not only why and how these entities jockey for position, but also how they maintain and nourish, if you will, the constitutional rights or rules of governance which they have been allocated. A related question is why and how these entities come together to seek an allocation of constitutional resources from the constitutional commons in the first instance? This is at the heart of scholarship on constructed cultural commons and the communities that come together to pool knowledge and expertise in an effort to gain access to the commons resource debates described in Part III.

A. Constructed Cultural Commons Communities

Madison et al. argue that adaptation of Ostrom and other commons scholars' work provides a model for exploring the "construction of commons in the cultural environment."[60] These "constructed cultural commons" refer to "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 . . . ."[61] Whereas commons scholarship predominantly focuses on resources and how those resources are managed in the face of rivalry and non-excludability, constructed cultural commons are focused on the *communities* that arise and come together in a non-rivalrous manner to pool knowledge in an attempt to create resources valuable to society. For example, topics at the core of their analysis are communities that

[60] Michael J. Madison, Brett M. Frischmann, and Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010).

[61] Madison, 659.

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.

Evident in Madison et al.'s definition of constructed cultural commons is their primary focus on communities that develop intellectual property, broadly defined. Yet there are other types of constructed cultural commons communities, like those that come together to shape our understanding of the Constitution, that do not come together to pool *scientific* knowledge or create intellectual property.[62] Certainly, it is easy to argue that the origin of constitutional text and its meaning came about by a group effort. While at first glance the Constitution may be an unusual example of a constructed cultural commons resource, it does not seem entirely unanticipated by the literature. Viewed through the lens that Madison et al. provide for such communities, one could easily argue that the Framers and the Reframers of the Constitution collectively were engaged in an intellectual pursuit designed to develop cultural institutions to manage and organize society and its myriad of natural and human capital resources. Indeed, Madison et al. describe the constructed cultural commons framework as "relevant to property law, in particular, and social ordering, more generally."[63] While the Constitution does not fit into the core of the model developed by Madison, et al., it fits the broader set of communities that the authors hoped would be studied using their cultural constructed commons lens.

1. Relevant Community of Actors

Of particular importance to determining the nature of a particular constructed cultural commons is an analysis of the relevant community of actors.[64] The relevant community of actors pool their collective knowledge and experience in hopes of shaping and managing constitutional commons resources. The most dominant constitutional community actors include the following: Congress, which establishes laws pursuant to constitutional authority; the executive, which administers and enforces the laws of Congress; the judiciary, which interprets the constitutionality of legislative, executive, state, and citizen actions; the states, which exercise police powers and which may challenge or cooperate with the federal government in its exercise of power; and, the citizenry, which bring legal actions through the judicial system, exert political influence to shape the work of Congress and the executive, and attempt to amend

[62] Indeed, a variety of new commons, such as silence, may be considered constructed cultural commons.

[63] Madison, 664.

[64] Madison, 689.

the Constitution through legal (i.e. constitutional) processes. Each of these actors shape the rules for access to constitutional resources.

2. Characteristics of the Community

The communities that pool resources to construct the constitutional cultural commons are quite different from many typical constructed cultural commons. Importantly, the contrast between constitutional communities and IP communities demonstrates how different constructed cultural commons communities can have different attributes, methods of producing resources, and goals for the resources they produce.

For example, a central focus for IP constructed cultural commons communities is to provide methods for producing IP resources by a different mechanism than mainstream IP's focus on proprietary rights and the allocation of those rights via the market or government regulation. Madison et al. state, "[t]he conventional view of property scholars, particularly those with interests in IP law, is that resource production and consumption are—and ought to be—characterized primarily by entitlements to individual resource units, held individually and allocated via market mechanisms,"[65] and assert that the "framework for collecting and analyzing case studies of constructed cultural commons across a wide range of domains that we describe below offers a method for assessing the validity of this property focused narrative."[66] They argue that "the logical and normative priority assigned to proprietary rights and government intervention may turn out to be misplaced"[67] in the IP context, noting that within the traditional IP paradigm,

> [p]rivate rights and private market exchange serve to limit, by law, the natural shareability of knowledge and innovation. At 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.[68]

[65] Madison 664.
[66] Madison, 664-65
[67] Madison 665
[68] Madison, 667

The authors seemed concerned that this traditional conception of the role of IP law could inhibit innovation, growth, and exchange of ideas. They would argue that contrary to the beliefs of many, IP institutions based on competition and markets that choose winners and losers may not be the best way to promote industriousness and creativity. In other words, an IP system based on the notion that one person's gain must correlate with another person's loss may actually lead to collective losses as well. Given this outlook, the authors instead promote the formation of IP cultural 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 to those resources (or at least claiming as many proprietary rights).

Constitutional communities, in contrast, may pool collective knowledge in a non-rivalrous way with a view toward the allocation and maintenance of a wide range of proprietary rights and rules of governance that are necessary to a stable social ordering—rights that may even be commons in nature and subject to rivalry at times. In other words, as described further in Part V, 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. In this way, constitutional communities can come together to facilitate the commons attributes of the Constitution discussed in Part III, as their success leads to one person's gain of a right under the Constitution, and a corollary loss of another's right to do the opposite. This, of course, is the very goal of having a Constitution in the first place—to provide a stable and law abiding society with both certainty regarding the nature of its rights, as well as the ability to reallocate those rights when societal needs call for it. So while IP communities may come together to create public good resources fully free of notions of propriety, entitlements, markets, and government intervention, constitutional communities may come together to create cultural public good resources that are in and of themselves proprietary rights or entitlements guaranteed by government intervention.

Ultimately, while a rigid allocation of rights may be adverse to the benefits that IP constructed cultural commons communities seek to provide, a firm allocation of rights that constitutional communities may work toward is indispensable to creating a stable society and the rules of social ordering and effective governance upon which society depends. Citizens having a right to vote or not, a right to have an abortion or not, or a right to be subject to health care regulations that include individual mandates or not are each firm allocations of proprietary rights. These rights may be allocated directly by the text of the Constitution itself, as in the case of voting, or rather by the judiciary through constitutional interpretation, as in the case of

abortion under the fundamental right of privacy and health care mandates under the power to tax. Once these rights are distributed via constitutional law, there arises a provision of social ordering whereby the right (i.e. the "resource") has been allocated from the commons (i.e. the Constitution). In addition, the "government intervention" that Madison et al. argue may be misplaced in the traditional view of IP law is the very goal sought by a constitutional constructed cultural commons community, which seeks 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.[69]

B. Constructed Cultural Commons Resources

Madison et al. note that the set of resources being pooled is key to determining the nature of a particular constructed cultural commons.[70] Within the constitutional commons, the resources being pooled are the allocation of citizens' rights, rules of governance structuring the relationships between the government and its citizens and between levels of government, and perhaps a variety of other constitutional resources that will be discovered in future analysis of the constitutional commons.

Madison et al. focus predominantly on communities creating public goods that, unlike commons resources, do not face limitations posed by rivalry (depletability) but that, like commons resources, are characterized by non-excludability.[71] So in the IP context, communities come together to 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 their own, nor does ones use of that knowledge resource detract from, or rival, another's use.

Similarly, the resources that constitutional communities come together to create, alter and promote may be property rights (as in the case of the Fifth amendment), civil rights and liberties (as with the right to privacy and abortion), allocation of governance rules and

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[69] 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. Each of these are subsumed under the constructed cultural commons that is the Constitution. In other words, private property 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.

[70] Madison, 689.

[71] Madison, 672.

authority between levels of government (as with the Commerce Clause), between branches of government (as with executive veto), and between the government and its citizens (as in the right of freedom of religion), and rules of judicial remedy to allow enforcement of those rights and rules (such as the right to due process). Each of these are public goods in character, despite the fact, as discussed in Part V, commons resource battles had to take place to achieve their allocation. But once a Fifth Amendment right to just compensation, for example, is established, no one person's reliance that right reduces the availability of that property right to another. No one corporation's consumption of the First Amendment right to be considered a "person" 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 reduces another state's consumption of that resource. The list could go forever on, describing the public good, constructed cultural commons resources that constitutional communities come together to create through pooled knowledge and experience through amendment procedures, litigation, executive orders or agency regulations, or judicial opinions.

C. Framers and Reframers as Constitutional Communities

As with commons resources, which we discussed in Part III, we can discuss the Framers through the lens of the constructed cultural commons. Specifically, the historical communities that came together to pool knowledge and experience to draft the Constitution took part in what is perhaps the most important intellectual endeavor in the governance context of all time. 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 many capable people the right to vote (e.g., women, non-whites, and non-land owners). While the Constitution and Bill of Rights did not provide perfection, it did provide a way for the document to change as the times would demand. Enter the Reframers.

The Reframers are communities who 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 for either new constitutional resources and new interpretations about the appropriation of existing constitutional resources or to ward off such changes. Thus freedom was given to slaves, the right to vote was given to both minorities and women, and the original system of checks and balances remains pretty much untouched.

To gain an understanding of how Framers and Reframers of the constitutional constructed cultural commons go about creating those resources, we should look to the goals or objectives they maintain,[72] the degrees to which their communities are open and the character of control those communities maintain,[73] and the governance, or rules-in-use, they utilize.[74]

1. Goals or Objectives of Constitutional Communities

Madison et al. note that "it is important to identify the particular problem or problems that a given commons is constructed to address." Why did the Framers come together to construct the constitutional commons, and why does Congress, the executive, the judiciary, and the citizenry continue to look to it to resolve conflicts as well as rights and governance problems? Identifying problems is not a particularly difficult task 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.[75] In the same way, as described in III C, a variety of problems can be identified regarding the commons dimensions of the Constitution, because when Congress, the executive, the judiciary, and the citizenry jockey in a rivalrous manner over non-excludable constitutional resources. For example, we might see erosion or instability of government, loss of checks and balances or government credibility, or governance gridlock and stagnation. Yet the problems that constitutional communities seek to address go somewhat above and beyond the tussle over commons resources, and are aimed at *maintaining* the public goods attributes of constitutional rights and rules of governance. So, 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.[76]

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[72] Madison, 691.

[73] Madison, 694.

[74] Madison, .

[75] 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)."

[76] "The 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

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, and transactions cost problems."[77] This is exactly the goal of constitutional commons communities, to achieve collective action and coordination, and to overcome transaction costs, in order to create public goods constitutional resources. This creation of a public goods resource may very well involve jockeying over the commons dimensions of the Constitution, as discussed further in part V, but the creation and maintenance of such resources is a primary objective of constitutional communities nonetheless.

2. Degrees of openness and character of control[78]

Madison et al. note that "[c]ommons regimes are defined both by the degree of openness and control that they exhibit with respect to contributors, users, and resources, and by the assignment of control, or custody of the power to administer access."[79] The rules by which constitutional communities operate determine the amount of openness, of course, and unlike traditional commons resources, which are depletable and subject to tragic overconsumption, there is no need to limit access to a constitutional community. There is no need for such limits because constitutional communities and the constitutional public goods resources they seek to create and maintain "are not subject to the same natural constraints [as traditional commons] and are naturally shareable without a risk of congestion or overconsumption. Rarely does 'too much information' diminish the value of individual items of information."[80]

To be clear, there may be certain practical limitations on the ability of citizens, for example, to access constitutional communities. As described by Madison et al., "openness describes the extent to which there are barriers to possession or use. Openness varies according to the costs of surmounting barriers (in terms of money, conditions, or other restrictions) to exploitation."[81] So, what are the limitations of those in poverty in hiring a lawyer to push a constitutional case? And yet this is the very role of constitutional communities—to overcome transaction costs associated with access to constitutional resources and pool knowledge and experience in a way that benefits underprivileged citizens by providing them access not only to the public goods constitutional resources themselves (i.e.

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exploiting the intellectual resource, the production of commonly useful platforms for further creativity, and so forth."

[77] Madison et al. 691.

[78] Madison, 694.

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[81] Madison, 695

acting on the right to an abortion), but also gives them a voice in the commons rivalry that gives rise to the public good resource in the first instance (i.e. gives them a voice in case like *Roe v. Wade* and in the creation of constitutional rights).

Madison et al. continue,

> openness with regard to a community describes our capacity to relate to that community as a contributor or user of resources that comprise in part the cultural commons. Thus, openness describes the extent to which there are criteria for or barriers to membership or participation in the creative or innovative processes that the cultural commons is intended to support. Openness also describes the extent to which a particular community is accessible to and interconnected with related context, institutions, and social practices.[82]

The Constitution as a matter of institutional design is intended to be open to all citizens, as well as to Congress, the states, the executive and the judiciary. These Reframers access constitutional communities in a variety of ways. Citizens enter into, participate in, and contribute to constitutional communities at the voting booth, through litigation and citizen-suits, through commenting on executive agency actions, etc. Members of Congress capitalize on the openness of constitutional communities by legislating with like-minded members of Congress, as does the judiciary when it's members come together on either the majority or minority side of 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 this of course can be replaced by a different, and perhaps opposing, set of constitutional communities upon the arrival of the next President.

3. Governance or Rules-in-use[83]

Madison et al. look to a variety of factors to determine what the nature of governance or rules-in-use are for constructed cultural commons communities.

The first is history and narrative. Given that the first written constitution was the United States Constitution, the very word "Constitution" invokes the concept of allocating rights in an appropriate manner and the establishment of effective governance structures and valuable social ordering. And the modern narrative also

[82] Madison, 696
[83] Madison, .

impacts our conception of the appropriate mode of governance or rules-in-use the Constitution should provide. Is the U.S. Constitution a "living document" that adjusts social ordering as society changes and new needs arise, as put forth by some constitutional communities, or is it beholden to an originalist approach whereby it is to preserve social ordering based upon conceptions of governance adopted by the Framers? Constitutional communities are key to shaping this debate, coming together to pool their knowledge and resources and access the Constitution 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.

The next factor is entitlement structures and resource provisions. The resources provided by constitutional communities, allocation of rights, rules of governance, and 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.

Next, the institutional setting is not only the governance structure itself, but also the collection of markets, industries, firms, individuals, races, genders, age groups, lower level governments, agencies, and so forth who actively engage in constitutional communities and create and maintain constitutional resources.

Additionally, Madison et al. look to legal structures that affect the pool itself, asserting that "positive law and direct government involvement with a particular cultural commons are likewise keys to understanding it . . . Here, legislators and judges often find that law can reinforce and sustain a pool that is determined to be welfare-enhancing."[84] This is clearly and directly describing the role that the Constitution plays in facilitating the creation of constitutional communities to provide rights allocation and rules of governance of which the entire citizenry can avail themselves.

Next we look to governance mechanisms, which in the constitutional community context should not seek to interfere with who joins the community or who "participat[es] in decision making about how the resources will be produced and managed."[85] The governance mechanisms 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 establishes rules regarding who may participate in Congress, courts, and the executive branch, how the Constitution

[84] Madison et al. 702
[85] Madison et al 703

may be amended, when individuals can exercise rights to enter court or the voting booth to shape the constitutional commons, and so forth.

Finally, we must look to "patterns and outcomes emanating from a particular action arena and solutions and benefits." Constitutional communities "should be assessed not only in light of [their] ostensible purposes but also in light of [their] consequences."[86] 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, the citizenry) and commons resources (rights, rules of governance, and social ordering). In other words, the Constitution is a relative successfully managed constructed cultural commons. The Constitution produces an increasingly refined allocation of rights and presumably more stable social ordering, though there are certainly cases where some constitutional communities would see less stable social ordering (such as, for example, the *Citizens United* case).

D. Constitutional Challenges Posed by Constitutional Communities

Just as commons resources in the context of the Constitution may give rise to tragedies of over-appropriation of resources, resulting in governance instability, gridlock, erosion, and loss of credibility, so too do constitutional communities give rise to potential problems. The primary way this plays out is through the aggregation of too much power in the hands of one constitutional community relative to another. In this way, the constitutional commons may not only give rise to overconsumption of the constitutional resource as discussed in Part III, but might also fail to adequately facilitate reframing efforts by some constitutional communities, whether it be the executive, legislature, judiciary, or perhaps most likely, the citizenry. Madison et al. 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."[87] In the constitutional commons there might be an undersupply of rights provisions prompted by the failure of constitutional communities (courts, executive, the legislature, or citizens) to provide the resource. For example, even in the presence of, first, constitutional provisions providing civil rights in 1868,[88] second, Supreme Court judicial interpretations mandating civil rights in

[86] Madison et al 704-705.
[87] Madison, 697
[88] Cite constitutional amendments providing equal protection, etc.

1954,[89] and acts of Congress doing the same in 1964,[90] the Constitution continually failed to provide civil rights protections to certain segments of the citizenry, and in particular African Americans. One constitutional community—those who opposed civil rights protections for African-Americans—had such a stranglehold on the resource, aggregation 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 the 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.

Furthermore, this scenario demonstrates that constitutional communities in this way can conflict, in that the Court upheld civil rights long before the other communities got on board, with the citizenry composed of white majoritarians as a community still not on board in some instances.

V. OUR CONSTITUTIONAL COMMONS

Constitutional resources are complex. As discussed in Part III, some dimensions of constitutional resources fit the mold of traditional commons resources. Within that discussion, the article explores the ways in which insights from the commons literature apply to constitutional resources. An important lesson of that analysis is that within efforts to create and modify constitutional resources, we often find a throng of rivalrous resource appropriators who have every incentive to appropriate as many constitutional resources as possible. If left unchecked, this resource, like all commons resources, tends toward the tragedy of the commons. In this context, a tragedy of the commons can lead to diminishing institutions that are critical to maintaining the rule of law and their credibility.

Part IV provides a very different picture of constitutional resources and the communities that attempt to create them. Using insights from the constructed cultural commons literature, the article examines the collaborative work of constitutional communities in the provision of and advocacy for constitutional resources. Dimensions of constitutional resources at issue in Part IV behave more like public goods. Within that conversation, we discuss the ways in which constitutional communities emerge and sustain themselves as they work collaboratively.

In this Part, the article weaves together insights from these literatures to provide a more holistic understanding of constitutional

[89] Brown v. Board of education
[90] Civil Rights Acts

resources. This approach recognizes that some dimensions of constitutional resources are better viewed through the traditional lens of the commons and that other dimensions are best thought of as public goods created by constitutional communities. In fact, as demonstrated below, constitutional communities come together and engage in traditional commons rivalry with other constitutional communities in an attempt to create public goods constitutional resources. In this way the traditional commons dimension of the Constitution is inextricably intertwined with the constructed cultural commons dimensions. We call this multidimensional structure of constitutional resources the "Constitutional Commons."

While our thinking on this more holistic picture of the Constitutional Commons is still quite preliminary, from the outset of our analysis regarding how these different dimensions of the Constitutional Commons relate with one another, we noticed a cyclical pattern of constitutional change.

A. Cycle of Resource Creation and Appropriation within Our Constitutional Commons

1. 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."[91] Ostrom provided what she termed an "Institutional Analysis and Development," or, "IAD," framework for analyzing these situations. The IAD framework does so by focusing on a particular "action arena," which itself consists of "participants" and "action situations" that "interact as they are affected by exogenous variables . . . and produce outcomes that in turn affect the participants and the action situation."[92] 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)."[93] Exogenous variables include the rules participants use to order relationships,[94] the

[91] Ostrom, Understanding institutional diversity, pg. 6.
[92] Ostrom UID, pg. 13.
[93] Ostrom UID, pg. 14.
[94] These rules may traditionally be considered regulations, instructions, precepts, or principles. Ostrom uses the term rules in the regulation sense, "thought of as the set of instructions for creating an action situation in a particular environment." Ostrom UID 16-17.

biophysical or material conditions that action arenas act upon, and the attributes of the community within which an action arena is placed.[95] After exogenous variables feed into the action arena, and its concomitant interactions between action situations and participants, "evaluative criteria" may be used to "judge the performance of the system by examining the patterns of interactions and outcomes."[96] 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."[97] So, if these outcomes are positive, the feedback on the participants may encourage them to pursue the status quo in an even more dedicated manner, while negative outcomes may cause participants to restructure the action arena or 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 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."[98] Indeed, an illustration in the environmental and constitutional context may make these theoretical propositions more tangible. Imagine that the exogenous variables include the biophysical or material conditions related to the habitat of a species that may be endangered, a community structure in which this habitat is located that may be private property, government-owned property or some combination of the two, and rules related to procedures for listing and the substantive protection of the species under the federal Endangered Species Act (ESA). The action arena might involve action situations where participants either actively support or oppose listing the species under the ESA. These participants 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 may 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. 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 species whose habitat is situated in the same manner as that in question. Evaluative criteria might be used by either

[95] Ostrom UID, pg. 15
[96] Ostrom, UID, pg. 13.
[97] Ostrom UID, pg. 13-14.
[98] Ostrom UID, pg. 16.

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 the endangered species context.

This analysis may even apply more directly in the constitutional context, as parties perhaps challenge specific applications of the ESA as beyond the scope of authority granted to the federal government under the Commerce Clause, such as may be the case with Justice Roberts' "hapless toad." Importantly for this section, 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. In other words, these communities may seek to shape the constitutional landscape and provide and maintain a public good constitutional resource—if they succeed in having an application of the ESA declared unconstitutional, then no similarly situated private property owners or state governments that avail themselves of the right to manage the resource free of federal government interference inhibit other similarly situated entities from doing so.

2. The Constitutional Commons Cycle and IAD

As we know from constitutional history, at the Constitutional Convention that convened during the summer of 1787, some but not all of the delegates wanted something more from the meetings than a mere revision of the Articles of Confederation. They wanted a Constitution that was more capable of unifying the fragmented jurisdictions and citizenry that made up the disaffected colonies. 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. It seems a textbook example of the collaborative communities examined in the constructed cultural commons literature. What we see emerge then are framing coalitions.

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 time of the delegates of the convention was spent trying to overcome what seemed at the time intractable conflicts. When we think about the give-and-take, the tireless negotiations, and the concessions made and won, our constitutional history is seen much very clearly through the lens of the commons. 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 big states versus small states. At other times disputes arose between northern states and southern states jockeying for certain constitutional resources they believed would give them a governance advantage. 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. 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 in Philadelphia. This clash of framing coalitions 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 they be published as the *The Federalist Papers* or aired as political issue ads on television present similar interactions, constitutional communities working collaboratively together attempting to create advocacy materials (i.e., building framing coalitions) and then these materials being employed 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 texts almost always take on public good attributes. One person's exercise of their Fifth Amendment right to remain silent does not hamper that of another, nor does one's exercise of freedom of speech diminish that of another. So, even though the battles to create, modify, retain, or abolish constitutional resources fits well within the commons literature, once those resources are created these goods most often take the form of non-rivalrous public goods focused upon in the constructed cultural commons literature.

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 tussle 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 constructed commons lens.

These materials, however, are often eventually used in attempts to influence courts or the court of public opinion to understand the Constitution to have a particular meaning. Whatever courts decide (even if they opt not to decide), they are in a world of rivalrous conflicts that produce winners and losers. These are what we consider reframing fights.

Similarly 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 commons dimension of these resources live on—and often drive 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 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).[99] 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.

B. Implications of Our Constitutional Commons

Understanding the lessons of the traditional commons and the constructed cultural commons literatures is vital to our understanding of the provision and redistribution of constitutional resources. Within these literatures, we see tensions that have been with United States from its founding. We also see that it is through cooperation that framing coalitions arise and are maintained. For those who value constitutional protections, powers, rights and other constitutional resources, Benjamin Franklin's wisdom serves us well, when he said, "We must, indeed, all hang together, or most assuredly we shall all hang separately." While the force of his embedded pun has faded, it is this spirit that serves as a thread that that has bound the United States together and sustained its Constitution for centuries.

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[99] This can be seen in the nationalist versus federalist shifts in U.S. Supreme Court Commerce Clause jurisprudence over time. CITE Chemerinsky

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 echo up to the present day. The literature reveals an unyielding paradox embedded within the Republic, even as we find the threat that binds us in some dimensions of the Constitutional Commons, we also find the pull that unyieldingly tugs at our constitutional fabric.

More concretely, the synergistic effects of cultural constitutional communities coming together to engage in traditional commons conflicts over resource allocation distinguishes the constitutional commons from traditional commons in very important ways. Madison et al. note that,

> unlike commons in the natural resource environment, cultural commons arrangements usually must create a governance structure within which participants not only share existing resources but also engage in producing those resources. This characteristic of cultural commons produces a more intertwined set of exogenous variables because separating the managed resources from the attributes and rules-in-use of the community that produces them is impossible . . . How people interact with rules, resources, and each other, in other words, is itself an outcome that is inextricably linked with the form and content of the knowledge or informational output of the commons.[100]

Natural Resource commons are naturally constructed, of course, arising out of the physical, chemical, and other scientific processes that constitute the environment (see Figure 1, below). This may act as a limit on the options available to natural resource commons mangers, who must necessarily manage the natural environment as it comes to them. But with the resources created by constitutional communities, and the commons battles in which they engage, there are unique interactions between the constitutional resources and the communities, since the constitutional communities had a hand in creating, designing, and allocating the resource in the first instance. Because, as depicted in Figure 2, below, constitutional communities are the genesis of the constitutional resources in the first instance, there is a continual feedback loop between the constitutional commons and the communities that manage it not seen in the natural resource context.

[100] Madison 674.

Madison et al. assert that "although natural resource management often focuses on sustainability, in the cultural commons the goal generally goes beyond sustainability to innovation, growth, and progress."[101] The cycle of Constitutional Commons continues to turn. We see that constitutional communities engaging in commons battles to create public good constitutional resources facilitates, on the one hand, a governance system that allows progress, an ever-refined understanding of the allocation of rights it is meant to ensure and protect, and the adoption of new rules of social ordering and governance as circumstances change (the role of constitutional communities in creating those public goods and moving beyond sustainability and toward growth and progress). Yet it also facilitates a commons rivalry that is foundational for the protection, stabilization, and sustainability of the allocation of rights and rules of governance. It would be antithetical to a stable constitutional governance system if it shifted with the wind of new ideas and new approaches to governance and gave rise to ever-shifting and ever-increasing rights.

Importantly, the parties appropriating resources from the Constitutional Commons and coming together to form constitutional communities—appropriators and managers consisting of the executive, judiciary, Congress, and the citizenry—are often the same people. When members of Congress come together to push through an act, they are a constitutional community seeking to establish a right or a set of rules based upon collective knowledge and the pursuit of social ordering. Yet the members of Congress opposed to the passage of that act creating that right or set of governance rules constitute a distinct constitutional community rivaling the former group to have the constitutional commons resource allocated differently. The same might be said for an executive who seeks to veto the act. Citizens challenging that law as unconstitutional may form a constitutional community pooling collective knowledge in an effort to defeat another constitutional community who supports the law. Five justices of the Supreme Court who agree that the statute is constitutional may be said to be a constitutional community rivaling four Justices making up a constitutional community pooling knowledge in opposition to the constitutionality of that law.

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