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Constitutional Game - An Analytical Framework of Constitutional Law and Constitutional Politics

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Abstract

Most lawyers have a doctrinal understanding of constitution. They are skeptical of any political understanding of a constitution, feeling that this may taint the sacredness of the legal paradigm. Political scientists view things differently. They offer three approaches to understanding a constitution from the political paradigm perspective: the attitudinal approach, the institutional approach and the strategic approach. The author argues that the incorporation of the political paradigm into one's analytical framework is unavoidable if one wants to have a comprehensive understanding of the constitution.

After arguing that different paradigms can be integrated if alternative epistemological presuppositions are being adopted, the legal and political paradigms and approaches are integrated into an analytical framework of constitutional game illustrating how law and politics may interact in the constitutional development of a country-state.

Under this analytical framework of constitutional game, the constitutional processes in which decisions on the making, interpretation, implementation, adjudication and amendment or change of the constitution are made can be understood from features borrowed from the concept of game including players, rules of the game, winning goals, game resources, game actions, game field, interaction, strategy, and the end of the game.

Keywords: Constitution, Game, Paradigm, Law, Politics, Interpretation, Attitude, Institution, Strategy

1. Introduction

Almost every country-state now has a constitution. There are many decisions a country-state makes involve its constitution. There are decisions to make, implement, interpret, adjudicate, amend and change a constitution. To have a comprehensive understanding of a constitution, we need to know how all these decisions relating to a constitution are made.

Most lawyers treat a constitution as a legal code and apply the same doctrinal analysis to interpret a constitution as they would any other legal codes. Doctrinal analysis "aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources, the relative importance of which depends on the legal tradition and system within which the legal researcher operates." (Note 1)

Such a doctrinal mindset causes lawyers to view constitutional interpretation as mainly a process of assigning meaning. Their primary concern is to discern the meaning embedded in the constitutional text. A practical reason for the need to have a definite meaning for the text is that this is necessary to resolve constitutional disputes that may break out in a courtroom, a legislative chamber or even in the public square.

Legal scholarship is also predominately normative. (Note 2) The main interest of legal scholars is to make prescriptions to legal decision makers on how they should give meaning to the constitutional text and decide cases accordingly. This may be called the doctrinal paradigm or legal paradigm (Note 3) of the constitution. In this article, a constitutional paradigm is the perspective through which a constitutionalist with her presuppositions and disciplinary orientation understands the nature, functions, purposes and meaning of a constitution.

Applying the doctrinal paradigm, legal scholars and judges develop different legal principles or approaches to assist them in ascertaining the "right" meaning of the text of a constitution (Note 4) and debate with each other on what should be the proper method of interpretation. Bobbitt provides a summary of the six principles or approaches that are used by legal scholars and judges to discover the meaning of a constitutional provision. They are:

"…the historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary 'man on the street'); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the …ethos

that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule)." (Note 5)

Though the approaches are different and may even conflict with each other, they share the same assumption that upon identifying the right method of interpretation, one can make the right interpretive decision. (Note 6) However, the sufficiency of the legal paradigm to understand decision making concerning constitution has been questioned by many. (Note 7) Dahl comments that:

"…competent students of constitutional law, including learned justices of the Supreme Court themselves, disagree…where the words of the Constitution are general, vague, ambiguous, or not clearly applicable; where precedents may be found on both sides; and where experts differ in predicting the consequences of the various alternatives or the degree of probability that the possible consequences will actually ensue." (Note 8)

Besides lawyers, political scientists belong to another group which also has an interest in examining constitutions. As Sweet said, "All law is politics, but not all politics is law." (Note 9) Among all forms of law, constitution must be the one with the strongest political flavour. The status and coverage of a constitution make any decision concerning its making, interpretation, implementation, adjudication and amendment or change highly political because it deeply and widely involves and affects political and social interests and groups. (Note 10)

Unlike lawyers, political scientists' focus is not so much "what does the constitution mean?" but "why is the constitution understood by the political actors (including the court) in a particular way?" (Note 11) Different methods have been applied by political scientists to answer this question. Their approaches may be called the political paradigm of the constitution. There may be a very fine distinction between pure politics and constitutional politics and the differences will be explained in Part 4 of this paper. Therefore, in approaching constitution from a political paradigm, not all approaches in the study of political science will be borrowed. For those approaches that are borrowed to enrich the study questions concerning the making, interpretation, implementation, adjudication and amendment or change of a constitution, they may not be expressed in their original form. (Note 12)

The thesis of this paper is that for one to have a comprehensive understanding of decisions concerning constitution including its making, interpretation, implementation, adjudication and amendment or change, both the legal and political paradigms of the constitution have to be studied. Part 2 of this paper introduces the approaches of the political paradigm and explores the contribution of these approaches in enriching lawyers' understanding of a constitution. Part 3 explains why the two paradigms are not necessarily conflicting and could be complementary to each other. Part 4 puts forward an analytical framework: a constitutional game to integrate the legal and the political paradigms aiming to assist one in arriving at a comprehensive understanding of the constitution. Part 5 makes some conclusive observations on the value of this constitutional game analysis.

2. The approaches of the political paradigm of constitution

Like the legal paradigm, there is more than one approach from the political paradigm. At least three can be identified. (Note 13) They are the attitudinal approach, the institutional approach and the strategic approach. (Note 14) Political scientists also disagree among each other on what should be the proper approach of the political paradigm. I will argue that the debates among political scientists, among lawyers, and between political scientists and lawyers on which approach or paradigm should be preferred are unnecessary. All the approaches and paradigms can be integrated to give a comprehensive understanding of a constitution's complexity. (Note 15)

2.1. The Attitudinal Approach (Note 16)

According to the attitudinal approach, political actors give meaning to the constitution in light of their ideological attitudes and values (Note 17) and make decisions concerning the constitution accordingly so as to have those values realized in the constitutional system. There may not be too much difficulty in applying the attitudinal approach to political actors who are free to rely on their ideological attitudes and values to make political decisions like the members of the legislature or the chief executive. However, the explanatory power of the attitudinal approach may be more limited if it is applied to judges. Most people believe that judges make constitutional decisions only on the basis of its legal nature. That is the reason why most of the works on the attitudinal approach pertain to an analysis of judicial decision making.

Segal and Spaeth are the most prominent promoters of the attitudinal approach. (Note 18) As they explained in their most important publication, *The Supreme Court and the Attitudinal Model Revisited* (2002), (Note 19) the attitudinal approach "represents a melding together of key concepts from legal realism, political science, psychology, and economics." (Note 20)

Like the legal realists, the attitudinal approach deconstructs the legal paradigm by asserting that the legal text cannot be the actual basis of meaning given to constitutional provisions. Behavioralism from political science, in turn, provides the research methodologies and orientation. (Note 21) It also supplies the explanation that political actors are all

"motivated by their own preferences." (Note 22) The attitudinal approach obtains its definition of attitude from psychology. An attitude is "an interrelated set of beliefs about an object or situation." (Note 23) In the discussion of constitutional politics, the object of the beliefs may be the nature, purpose and function of a constitution and the situation of the beliefs may be the historical, ideological, economic, political, social and cultural background, and contexts from which a constitutional question arises and has to be answered. (Note 24)

The influence of economics can be seen from the emphasis of the attitudinal approach in which political actors choose a decision concerning constitution by applying an economic notion of rationality. (Note 25) They select an understanding of the constitution among various alternatives available within the framework of the formal and informal rules and norms that can best achieve their policy goal after considering whether the likelihood of this understanding will at the end be realized. (Note 26)

There are several major criticisms about the attitudinal approach. First, it fails to give sufficient account for factors which "complicate the relationship between a political actor's choice and the effectuation of his/her desired outcome." (Note27) Second, by dismissing the relevance of the legal nature of the constitutional text completely, the attitudinal approach gives no weight to the belief that a constitution would have "a constraining or a motivating force in the mind of political actors." (Note 28) Third, attitudinalists place too much emphasis on the individual preference of political actors and overlook "how preferences are constituted by broader, institutionalized patterns of meaning." (Note 29) Fourth, by concentrating on the instrumental value of a constitution to achieve what the political actors desired, there is not much description and analysis on the substantive values believed to be embedded in the constitution by the political actors. In other words, prescriptive and normative jurisprudence are excluded. (Note 30) Fifth, the attitudinal approach continues to see the decision of political actors concerning constitution as "shaped by forces outside their strategic context". (Note 31)

Nonetheless, the attitudinal approach opens a new perspective for one to see constitution not just from "a sterile brand of doctrinal analysis" but can develop a constitutional understanding with "deeper and more systemic attempts to predict and explain how and why political actors operating under a unique set of institutional constraints decide as they do." (Note 32)

2.2. The Institutional Approach

As stated above, one of the limitations of the attitudinal approach is that it fails to explain from where the ideological values of individual political actors originate from. The institutional approach asserts that the values and attitudes of political actors are shaped by the institution in which the political actors live and act.

Depending on the conception of institution, the institutional approach is further divided into the old and new institutional approaches. (Note 33) The old institutional approach sees the institution as the formal structures and concrete organizations of the state system (Note 34) while the new institutional approach (Note 35) accepts a "more dynamic and porous conception" (Note 36) emphasizing the informal norms, myths, habits of thought or background structures and patterns of meaning. (Note 37) Smith provides a very good summary of the institutional approaches:

"In these approaches of the study of politics, institutions are expected to shape interests, resources, and ultimately the conduct of political actors, such as judges, governmental officials generally, party or interest-group leaders, and other identifiable persons. The actions of such persons are in turn expected to reshape those institutions more or less extensively. Ideally, then, a full account of an important political event would consider both the ways the context of 'background' institutions influenced the political actions in question, and the ways in which those actions altered relevant contextual structures or institutions." (Note 38)

The new institutional approach adds to the old institutional approach by "showing how the more formal and tangible institutions that old institutionalists saw as causes or motivations for political actions are themselves understood by new institutionalists as created within a received framework of culture and the socially constructed mind." (Note 39)

Unlike the attitudinal approach (Note 40) which mainly uses individual persons (members of political institutions) as the basic unit of analysis, the new institutional approach considers how institutions "influence the self-conception of those who occupy roles defined by them in ways that can give those persons distinctively 'institutional' perspectives." (Note 41) Hence, institutions can be "a unit of analysis in their own right" (Note 42) and can adopt their own value preferences as more than just an aggregate of the preferences of their members. A political institution as a political actor is taken to be acting to a certain extent coherently (Note 43) and autonomously. (Note 44)

As members of institutions, individual political actors do not make decisions necessarily out of their personal preferences. They may make decisions to fulfill their duties and obligations which are defined by the institutions to which they belong. These duties and obligations are transmitted to them by socialization through their participation in the internal processes of the institution. (Note 45)

Political actors also do not necessarily make decisions rationally, in an instrumental sense, to select the best possible outcome that can realize their values. (Note 46) Decisions may be made just to create a certain symbolic effect which gives a perception of legitimacy for such an institution (Note 47) as expected or demanded by other political actors or institutions.

Applying the institutional approaches, especially the new version, to constitutional politics, decisions of political actors concerning constitution are influenced by the formal institution to which they belong and vice versa. This institution in turn is also influenced by the wider social institutions and vice versa.

This approach is also subject to several criticisms. First, the institutional approach's understanding on the general question of preference formation is too narrow. There is no reason that preferences of political actors could only be shaped by their institutions but could not be motivated by various other factors at the same time. (Note 48) Second, the institutional approach does not provide much explanation on how institutions actually affect the behaviours of political actors. (Note 49) Third, if individual political actors are so inseparable from their specific institutional contexts, the institutional approach would not be able to accommodate at least a certain degree of creative individual choices relatively autonomous from the institutional contexts and social background structures that individuals are embedded within. Without such reflective autonomy of their members, there cannot be any change or improvement to the institutions generated from the inside. (Note 50) Fourth, it is said that political process is so much shaped by contingent events and subjective perceptions that it is highly unlikely that institutions could mould decisions of political actors in a very systematic manner. (Note 51)

Nonetheless, the institutional approach does add another dimension to the study of constitutional politics. Individual political actors might not be as unconstrained as the attitudinalists perceive. The source of such constraints could be external as well as internal. Decisions concerning constitution might not only be instrumental, but could also be symbolic.

2.3. The Strategic Approach (Note 52)

The strategic approach has several basic premises. First, political actors make constitutional decisions to achieve certain political goals. This is similar to the attitudinal approach. Second, unlike the attitudinalists, the strategic approach does not see political actors as unsophisticated actors who make decisions merely on the basis of their ideological attitudes. (Note 53) According to the strategic approach, political actors realize that their ability to achieve their goals depends on a consideration of the preferences of other political actors and actions they expect them to take. (Note 54) In other words, their decisions are dependent on the decisions of other political actors. Third, the choices available to political actors are structured by institutions. This is similar to the institutional approach but the strategic approach has a stronger emphasis on the external constraints rather than the internal constraints from institutions. (Note 55) Maltzman, Spriggs II and Wahlbeck give a very good description of how strategic considerations work in institutions:

"To act strategically…[political actors] must understand the consequences of their own actions and be able to anticipate the responses of others. Institutions facilitate this process and thus mediate between preferences and outcomes by affecting the [political actors] beliefs about the consequences of their actions. Institutions therefore influence strategic decision makers through two principal mechanisms – by providing information about expected behavior and by signaling sanctions for noncompliance." (Note 56)

On the basis of these premises, many followers of the strategic approach have applied a game-analytical framework to analyze the inter-relationships of political actors in different constitutional settings. (Note 57) This game analytical framework will be further elaborated in Part 4.

The strategic approach also has its criticisms. First, this approach presumes that there is at least a certain degree of institutional separation of powers within the constitutional system before political actors can act strategically. (Note 58) The explanatory power of the strategic approach is more limited for authoritarian regimes. Second, like all analysis relying on rational choice thinking, the strategic approach has another questionable assumption that all political actors must act rationally and only engage in instrumental politics. (Note 59) Third, it seems that the goals of political actors under the strategic approach must be short term and self-centred. (Note 60) This may be too narrow a view of what actually motivates political actors. Fourth, the strategic approach presents all interactions between political actors as if they are all in the form of competition, i.e. each competing to have one's goal be realized. This dismisses the possibility of consensus reached by the political actors through genuine dialogue or deliberation. (Note 61)

Nonetheless, another important dimension in understanding political actors in their decisions concerning constitutions is provided by the strategic approach. Constitutional politics is a dynamic process involving the interdependent decisions of all political actors who perceive, predict and prepare for the decisions of others before making their own.

3. Paradigm v. Paradigm? Approach v. Approach?

There is disagreement among legal scholars on what is the right legal approach to adopt. Political scientists also dispute with each other on what should be the right political approach. In addition, there is dissent between legal scholars and

political scientists on whether one should use a legal or a political approach to understand constitution; sometimes, fierce debate ensues. At other times, the opposing parties are simply ignored. Both situations may not be healthy for reaching an in-depth understanding of our legal reality.

3.1. Epistemological Presuppositions

These disagreements are caused by an epistemological presupposition that there can only be a single path to arrive at a unique understanding of reality. According to this presupposition, the different approaches and paradigms must then be incommensurable. If constitutional understanding is right, then all other approaches and paradigms cannot be right at the same time. (Note 62) However, must we see the approaches and paradigms of constitution as incommensurable? Must we approach the study of constitution with such a presupposition?

I will put forward some alternative epistemological presuppositions drawn from two general factual propositions that most people will accept intuitively or find it difficult to dispute. First, the world is a complex system and therefore a constitution must also be a complex system. Second, human beings have limited capabilities and therefore researchers in constitution also only have limited capabilities. No matter how intelligent and knowledgeable a person is, no one can claim that she can understand everything in this world or just a part of this complex world. These alternative epistemological presuppositions may help us overcome the theoretical bar from integrating the different approaches and paradigms into a bigger analytical framework for understanding constitution.

The concepts of "system" and "complexity" are borrowed from the general system theory. (Note 63) A systems view sees the world as a world full of systems. (Note 64) A system is understood to be "a complex of interacting elements" (Note 65) or "a regularly interacting or interdependent group of items forming a unified whole." (Note 66) This systems worldview provides us a perspective to analyse and understand the wholeness of the world, not only the details in its parts. Through it, we can see how parts are embedded in a bigger system which is also a part of an even bigger system. Also, we can appreciate how the connection, interaction, and interdependence between the parts and the systems work to make a particular system function. (Note 67) Applying the systems worldview to constitution, we can see that a constitution creates a constitutional system with at least the following elements: textual elements, institutional elements (the executive authorities, legislature, judiciary and civil services), (Note 68) ideological or normative elements, (Note 69) and political elements. (Note 70)

A constitution is not only a system; it is also a complex system. The complexity of a system illustrates the following characteristics: (1) Complex systems consist of a large number of elements. (2) The elements interact in a dynamic manner. (3) The interaction is fairly rich, i.e. any element in the system influences, and is influenced by, quite a few other ones. (4) The interactions are non-linear. (5) The effect of interactions can feed back onto the elements. (6) Complex systems are usually open systems, i.e. they interact with their environment. (7) Complex systems operate under conditions far from equilibrium. (8) Complex systems have a history. (9) Each element in the system is ignorant of the behavior of the system as a whole; it responds only to information that is available to it locally. (Note 71) Applying these characteristics to a constitution, there is little doubt that a constitution must be a very complex system.

Through this understanding of the complexity of systems, social systems and constitutional systems, we can see the problem of the original epistemological presupposition. It would not be too rational to insist that there can only be one single path to understand the reality concerning a system that is very complex. Therefore, I can now suggest some alternative epistemological presuppositions which may be more realistic.

First, a social system is composed of many distinct components each with their characteristics but the components are inseparable for the survival of the system. A constitutional system has its legal as well as political components and they are inseparable for the constitutional system to function. Therefore, to understand a constitution, we must adopt a method that can analyze both the legal and political components. Second, the same event in a complex system could have different dimensions of meaning and significance. (Note 72) A constitutional decision may have legal as well as political consequences. Therefore, to fully appreciate the impact of a constitutional decision resulting from the interactions between the elements to the constitutional system itself or with other social systems, we must consider a constitution's multi-dimensional implications. Third, the truth or reality may be reached or discovered by not just one method or one single path. To make a decision concerning constitution, a form of legal or political reasoning might produce the same conclusion. There is no need to exclude other paths to reality in our understanding of constitution.

Fourth, researchers may observe a phenomenon from different perspectives. What they can derive from the observation will depend on the vantage point at which they position themselves and from which they observe. Different researchers (legal and political), depending on their academic orientation, may have adopted different vantage points to approach a constitutional question. Different conclusions might be reached but this does not mean that one is right and the other must be wrong. They could be arrived at from different perspectives and considering all the conclusions complementarily may enrich our understanding of the reality. Fifth, even if researchers adopt the same perspective, they may have different perceptions of the same phenomenon owing to the different pre-understanding, background, training

and concern of the researchers. Through personal reflection on the differing reasoning and conclusions of other researchers, we may expose the subjective factors which might have distorted our perception and understanding of the reality. It can also enable us to have a deeper appreciation of the concerns of other researchers which we may have overlooked.

Sixth, the natural limitations on the capacity and ability of an individual researcher (or even a team of researchers) restrict most studies to a narrow scope of the phenomenon. Legal and political science scholars can only approach a narrow scope of a constitution. Working together can provide more pieces of the constitutional jigsaw puzzle. Seventh, the reality is never static and is, in fact, ever changing though it may appear to have no change for a long time. However, the impression of the lengthiness of the period is only considered from the perspective of the researchers. Researchers are also limited by time. In most situations, they can only study a phenomenon observable at a specific moment. Even if they can study a matter's behaviour in a time period, that time period cannot be too long (at least not longer than the life of the researcher).

The legal or the political nature of a constitution may seem to be more explicitly influencing the constitutional process during a certain period of the life of a constitution but as the constitutional process is also ever changing, the originally more explicit element may give way to another. If legal or political science researchers observe only a certain period of the life of the constitution, (Note 73) they may reach a wrong conclusion on the actual impact that the legal or political element could have upon the constitutional process in the whole lifespan of the constitution. Joining the legal and political researches together will allow a more thorough understanding of the evolutionary processes of the constitution.

These epistemological presuppositions: multi-component, multi-dimension, multi-path, multi-perspective, multi-perception, multi-scope and multi-period would justify an attempt to integrate the different approaches and paradigms. Surely, if they are incommensurable(Note 74) to such a degree that even these presuppositions could not help, this attempt to integrate may still fail. Therefore, we must now examine how incommensurable they are. (Note 75)

3.2. Integration of the approaches of the legal paradigm

If a political actor has to interpret a constitutional provision, she may have to choose one particular interpretation approach to assist her in determining the meaning to be given to the constitutional text and make decisions accordingly to resolve the constitutional question she encounters.

Seeing merely for the purpose of making decisions concerning constitution, the various approaches of the legal paradigm seem to be incommensurable because most political actors will only rely on one approach to interpret at a time though it is possible that several approaches of interpretation could reach the same conclusion on the meaning to be given to the constitutional text.

However, this is not the only way for us to use these legal approaches. If we do not ask this question: "How can a decision be made to resolve a constitutional dispute by applying the constitutional provision?" but "What are the options available in resolving a constitutional dispute?" or "What is the theoretical basis of each of the options?" or "Why has a particular option been chosen in resolving a particular dispute?" or "Which is the best option?" or "Is the option a legitimate one under the present constitutional context?" Then these approaches would not be incommensurable in a sense that only one can be right and the others must be wrong and have to be excluded. (Note 76)

Presenting all the approaches together in a form of pluralistic theory of constitutional interpretation (Note 77) will help us understand the complexity of legal reasoning of constitutional provisions and the interdependence of legal approaches with external standards and considerations.

3.3. Integration of approaches of the political paradigm

It seems that political scientists are more receptive to the political approaches advanced by their fellow colleagues. As they face no immediate need to make a decision in resolving a constitutional dispute and the main objective of their studies is to discover why a decision concerning constitution is made or provide guidance for decision making in the future, the need to make an exclusive claim is less pressing than it is for lawyers.

Comparing the first edition (Note 78) of Segal and Spaeth's classic text on the attitudinal approach with their second edition, (Note 79) one will find that they have added a substantial section on the influence of rational choice theory to the development of the attitudinal approach. Segal later also makes the following comment:

"In sum, outside of the decision on the merits, attitudinal works, broadly defined, very much resemble many of the strategic-choice hypotheses of more recent vintages." (Note 80)

The contribution of the attitudinalists is also well recognized by followers of the institutional approach and the strategic approach. They all agree with the finding of the attitudinalists that decisions concerning constitutions, especially judicial decisions, are political decisions and the Court in making such decisions is also a policy-making body. They only disagree that the claims of the attitudinalists cannot be complete and adequate explanations of constitutional decision-making. (Note 81)

The difference between the institutional approach and the strategic approach is also not as substantial as one thinks. Speaking on behalf of the institutional approach, Gillman said,

"We agree that there are advantages to explore the ways in which judicial decision-making is influenced, constrained, or constituted by institutional contexts. We also agree…that our accounts should emphasize 'the political elements institutional development' and not merely 'organizational logic' or functionalism. …And so the benefits of rational choice institutionalism [strategic approach] should not be discounted on the grounds that it does not explain everything about institutional politics and the new historical institutionalism [institutional approach] should not be discounted on the grounds that it uses data that is not machine readable and feels no need to translate explanations into models." (Note 82)

Both followers of the institutional approach (Note 83) and the strategic approach (Note 84) agree that the two approaches are complementary. Even when they compete with each other, the competition could be a healthy one with each trying to demonstrate that it "is doing the most work" (Note 85) without excluding the contribution of the other. I agree with what Gillman said on the relationship between the approaches,

"No single method can illuminate everything we might be interested in knowing, and this means that we should evaluate the strengths and weaknesses of various approaches by asking whether they give us satisfying answers to particular questions." (Note 86)

3.4. Integration of the legal and political paradigms

For those within the same paradigm, trying to integrate may still be easy; but for those from totally different paradigms, an intuitive presumption may be that they are inherently incompatible. Fortunately, there are people who are already working to integrate law and politics. Barry Friedman is a professor of law at the New York University School of Law. He provides an alternative view on the relationship between law and politics: "Politics and law are not separated, they are symbiotic." (Note 87) He suggests that legal scholars do not need to resist any political project outright. He finds that the political paradigm could illuminate "rich veins even in the well-mined field of traditional normative and doctrinal scholarships." (Note 88)

With the insights from the political paradigm, legal scholars can continue to do their primary work in formulating normative constitutional doctrines but just in a new way. They could take up a new challenge by "designing workable doctrine" (Note 89) rather than indulge in designing doctrines for an ideal world out of touch with the issues of "practical implementation" and "realities of political trends." (Note 90) He challenges other legal scholars to make use of the findings from political scientists and develop new constitutional theories. (Note 91)

Even among the existing legal approaches, we can find that some of the political considerations have already been explicitly or implicitly considered. Just by referring back to the six legal approaches identified by Bobbitt, it is not difficult to find the concerns of institutionalists (old and new) in the historical, structural, ethical, and the doctrinal approaches. These approaches all require the political actors to infer the meaning of the constitutional text from matters embedded in the formal or informal institutions established directly or indirectly by the constitution.

Attitudinalists' emphasis on ideological values is not too different from the ethical approach which legitimizes political actors to refer to political or moral ideology which they believe to be the ethos of the society as the basis of their interpretation of the constitutional text. In the process of identifying the ethos of the society, it may not easy for the political actors to separate their personal values from those values they identified as the values of the society. It will also not be too difficult for followers of the prudential approach to befriend followers of the strategic approach as both must find cost-benefit analysis the most useful analytical tool. The loneliest ones may be the followers of the textual approach. However, even for them, the meaning of the constitutional text may in some cases be found within or determined by their interpretive communities which can also be a form of institution.

Similarly, legal considerations can be found in the analysis of the political approaches (Note 92) though Friedman warns that they should take law more seriously. (Note 93) The ideological attitude of the political actors can be a sincere commitment to follow the original understandings of the constitutional fathers and need not be some kind of political values. The text of the constitution and the accompanying norms as understood and enriched by an interpretive community applying whatever approaches of legal interpretation is surely a part of the institution in a wide (or new) sense. To follow the textual meaning of the constitution as far as possible may be a strategic constraint upon political actors as they may be expected to be doing so or their decisions concerning constitution may only be legitimate if they can demonstrate that they are so doing.

Therefore, the legal and political paradigms actually are not that far apart and there are already many points of contact which can be used as seedbeds for a full-scale integration to take place. However, before we finally move to integrate the two paradigms, some last words about integration have to be said.

3.5. Some thoughts on Integration

Integration presumes the existence of at least two distinct matters and it is about how they are linked together. The process of integration is not automatic. (Note 94) It requires a judgment regarding the guiding value for the integration which, in turn, will affect how the matters are integrated and the extent of their integration. (Note 95) In other words, the answer to the question of why we integrate underlies the answers for the questions of what to integrate and how to integrate. (Note 96)

If the objective of our project to integrate the legal and political paradigms of the constitution is just to develop a more comprehensive understanding, then the methodology for integration to be adopted in this project does not need to be so demanding as to require a complete blending of the two paradigms a new paradigm.

The legal and political paradigms can basically maintain their own entities and the contribution of each can still be recognizable in the analytical framework that will be developed in this integration project. Surely, this is not the only way to integrate the two paradigms as one may have an integration product that has a lesser or a higher degree of integration. In addition, the proportion of the ingredients may also vary depending on the taste of the chef or her customers. Even if the methodology is the same, the resulting integrated product may still be strong in a particular flavour, legal or political. As I am trained in the law, the integrated analytical framework may still be considered to be too legal by political scientists. Ironically, some legal scholars may at the same time feel that it is too political. These may be criticisms that an integrationist or interdisciplinarian must live with.

However, I believe the reward from participating in an integration project will surely outweigh these aspects. It may provide a valuable opportunity for a researcher in a particular discipline to reflect on some taken for granted "truths" in her discipline. (Note 97) To some, this may even transform her thinking of the subject and new perspectives or innovative methodologies may be developed. (Note 98) Even if all these cannot be achieved, a researcher can at least know how much she does not know. (Note 99)

4. Constitutional game (Note 100)

The integrated analytical framework for understanding constitution that I suggest in this article is a kind of game framework. (Note 101) This can illustrate how political actors, in an occasion where a constitutional decision is demanded or expected, interact with the constitutional text, the constitutional or institutional contexts and other political actors resulting in a constitutional decision that has an impact on the short- and long-term development of the constitutional system. To put it in a form that has a more easily accessible form/term of reference, I call this analytical framework 'a constitutional game'.

To be consistent with my epistemological presuppositions stated above, I do not claim that this analytical framework is complete or even comprehensive though I believe this concept of constitutional game could provide a more coherent framework to understand the complexity of the practices of any constitutional system.

Like all games, a constitutional game must have these basic features: (Note 102) (a) players; (b) rules of the game; (c) winning goals; (d) game resources; (e) game actions; (f) game field; (g) interaction; (h) strategy; and (i) end of the game.

4.1. Players of the constitutional game

To have a game there must be players and in most games there will be more than one player. The players in a constitutional game can basically be identified within the constitution. The institutions in the constitutional system (Note 103) and other political actors referred to directly or indirectly by the constitution are usually the main players of the game. (Note 104)

A constitutional game in a typical western liberal constitution has the president or/and the prime minister, the parliament, the supreme court or the constitutional court, and the bureaucracy as the main players. (Note 105) A new player can join a constitutional game if it has a significant role to play in the game after some fundamental changes in the social and political contexts.

There is an assumption that the players enjoy at least a certain degree of autonomy from the other players for a constitutional game to be played. If not, not many interesting things will happen in a constitutional game. Fortunately, in most constitutional systems, even in constitutional systems that are authoritarian, some form of separateness between the institutions still exist qualifying them to be players in a constitutional game.

4.2. The constitution as the rules of the game

All games have rules and the constitution is the rules for a constitutional game. In a pure political game, only power matters, (Note 106) but in a constitutional game the constitution provides a set of binding rules for the game and all players accept being bound by the constitution when they join the game. This is the most important thing that

distinguishes a constitutional game from a pure political game. In other words, players' willingness to be bound by the constitution is a precondition of this constitutional game. (Note 107)

In theory, the rules of any game must clearly set out what the roles of the players in the game are, how the players can win and actions the players can take in the game. If not, disputes will naturally arise and a game cannot be played effectively without such clear provisions. However, this may not be the case for the constitution as it sets the rules of the game in a constitutional game. Though a constitution will also set out for every player her role, game resources and limitations on game actions she can take in the game, the main difference between a constitutional game and other games is that a constitution in many cases cannot accurately or clearly define the roles, powers and limits of the players in the constitutional game. This is mainly caused by the ambiguity inherent in constitutional language. In such occasions where language cannot indicate what the exact roles, powers and limits of the players are, players will be left with a certain amount of room to choose what they want to do, what they can do, and what actual actions they will take in the game. This room within a constitution for players to make use of is the very special thing that makes constitutional decision making so complex and studying constitution so difficult but also so interesting.

Giving a certain interpretation or reading to the constitutional text is one of the main forms of action of a player in a constitutional game and resolving competing interpretations of the constitution by the players is one of the main forms of interaction between the players. Constitutional interpretation is, therefore, the key of a constitutional game.

4.3. Winning goals of players

Like all games, players in a constitutional game play to win. (Note 108) In most games, the winning goal of all players is the same; obtaining the highest score. Usually, there may only be one winner in the game and the game will end when a player wins. However, the winning goals for the players in a constitutional game may not be the same. (Note 109) The winning goal of each player is basically set out by the constitution. A player's winning goal is very much related to the institutional role assigned to her by the constitution. (Note 110) I refer to the institutional role of a player in a constitution as so perceived by the player as her constitutional position in a constitutional game. By ascertaining her constitutional position, a player in a constitutional game can define her winning goals.

The winning goal of a player may be very complicated such as to cause the constitutional system to actualize certain substantial values in the society on the basis of the player's ideological beliefs. The goal may also be as simple as just to ensure the terms of the constitution (no matter what) are followed by all players. Another special thing about the winning goals of players in a constitutional game is that they may not be constant. The constitution may assign a particular constitutional position to a player with the accompanying winning goals. However, because of the indeterminacy of the constitutional text to definitely and exclusively define the constitutional position of the players, the language of the constitution will always allow some room for an individual political actor as a player in the game to refine or develop her constitutional positions. Her winning goals may also be refined accordingly on the condition that they do not conflict directly with the positions and goals explicitly provided in the constitution and are considered to be legitimate by other players.

A player's personal ideological values may influence how she defines her constitutional positions and prioritizes her goals in the game. The institutional context may also have a similar influence upon a player. (Note 111)For example, the constitution may give the court the power to review administrative actions and the constitution may set that the basic goal for such review is to ensure that the administration acts are within the legal boundary of the empowering statutes. The court's winning goal in the game is to ensure the administrative bodies act within the legal boundary. However, there may still be room for the court to further develop the concept of legality and it may incorporate the concept of rationality or even proportionality into the concept of legality enriching it to such an extent that the court may achieve more winning goals than the one expressly provided by the constitution. The constitutional position of the court may then not be just a guardian of legality but a vanguard for good governance. Refining constitutional positions and winning goals within the space allowed or provided for by the constitution is actually part of the game actions, interactions and strategies of the players in a constitutional game.

4.4. Game resources of the players

Players come to a game with certain capabilities of their own or they may possess different levels of skills. The game will allocate to each of the players equal or unequal game resources which they can utilize to win the game. For example, in any card game, a player will be given a certain number of cards randomly and each card will enable her to take different actions in the game depending on the rules of the game. Some players may have more resources and their chance of winning the game will be enhanced.

It is the same situation in a constitutional game that players come to the game with different capabilities of their own and different levels of skills. The constitution may also allocate equal or unequal constitutional powers (games resources) which they can make use of by applying their personal capabilities and skills so as to attain their winning goals in the game. A parliament can make laws, but a president can veto those laws. A constitutional court can

invalidate a law by exercising its constitutional review power. These are all typical examples of game resources available to different players in a constitutional game.

Apart from enabling players to refine their constitutional positions and winning goals, a constitution may allow some room for the players to refine what game resources they could use. For example, in exercising their powers to review legislation, a constitutional court may further develop what kind of constitutional remedies they can provide to a successful challenge of the constitutionality of a law especially if the constitution is silent on this.

4.5. Game actions

All players act in a particular way in a game to win. However, not all actions by a player are allowed by the rules of a game as there are limitations on the players' actions. As the constitution plays such an important role in a constitutional game, it should come as no surprise that most game actions concern constitutional decision making. Game actions in a constitutional game may include decisions on what provisions will be included in a constitution and how to express the provisions to ensure their goals will be achieved; what statute has to be made to implement the provisions of the constitution; how to exercise powers granted by the statute or the constitution to implement the provisions of the constitution; how the provisions of the constitution should be interpreted; what ruling should be given in adjudicating a constitutional dispute; which provisions in the constitution need to be amended and how they are to be amended.

In a constitutional game, because the constitutional positions and winning goals of the players are not the same, the specific actions they can take in constitutional decision making also differ. The players need to take these specific actions on constitutional decision making so that they can achieve their winning goals in the constitutional game.

Similarly, the constitution in a constitutional game also imposes limits on the kind of actions players can take. Every player must act in the game according to the constitution. Instead of using raw power to gain maximum benefits for themselves, all players have to play in conformity with the constitution to win. Free fights between the players are not allowed in a constitutional game just as they are banned in a pure political game. (Note 112)

Again, the constitution may not be specific enough to state what the exact limits on their actions are. In addition to the room given in the constitution for players to refine their constitutional positions with the accompanying winning goals and the constitutional powers (their game resources) they have in the game, there is also room for players to apply their understanding to the constitutional limits on their actions and refine these actions so that they may act beyond what the constitution expressly allows.

Because of the constitutional space accorded to players to refine their positions and powers, providing an interpretation of the constitutional text is the main form of action that all players can take in a constitutional game. This action may precede all their other actions in the constitutional game as players need to offer an interpretation of certain provisions in the constitution to justify their specific actions. In most cases, the interpretations are related with how they understand the constitutional provisions in relation to their positions and powers.

However, the player cannot arbitrarily choose any legal method of interpretation and meaning for the text. She is still under internal and external constraints as determined by the institutional contexts of the constitution. The constitutional text provides room for different interpretations but it also sets boundaries for interpretations a player can give. Each player will adopt a certain legal approach of interpretation and a particular meaning for the constitutional text that can best advance her constitutional position but this position will also impose constraints on the approach of interpretation and specific interpretation she will adopt. This is the internal constraint. The interpretation chosen cannot conflict with the specific constitutional position adopted by the player.

The language of the constitutional text is an external constraint. It would be very difficult for a player to justify an interpretation if the meaning adopted is a meaning that the language cannot bear. Another external constraint is the pressure generated from the interpretations by the other players who are also under their internal constraints. Depending on the relative powers and limitations in a constitutional game, a player may have to adjust even her legal approach to interpretation as a result of strategic interactions with the interpretations of other players. Constitutional interpretation is, therefore, part of a player's winning strategy in a constitutional game. (Note 113)

4.6. Playing Fields

Players' game actions must happen within the boundary of a certain defined playing field. As the game actions of players in a constitutional game are all related with constitutional decision making, it is natural to find the playing fields of a constitutional game in venues where the making, implementation, interpretation, adjudication and amendment of the constitution take place. The playing field of a constitutional game may be a constitutional convention, a meeting of the constitution's drafters, a cabinet meeting, an administrative official's office, a meeting with citizens by administrative officials, a legislature's chamber, a courtroom, or a referendum.

One common thing about all these playing fields is that they are all basically legal platforms. The consideration of legality plays a very important role in a legal platform in the sense that decisions made in the platform are expected

either to be expressed in legal terms or reached on the basis of certain legal codes. A legal platform is a process where legality plays a major role in legitimizing an action and an action's legality will be determined. Legality here is the concern expressed by the legal paradigm of constitution stated above. (Note 114)

Different playing fields or legal platforms may involve different kinds of game actions. Some players may only be allowed by the constitution to act in certain game fields. Different legal platforms may also have different processes of legitimatization and specific requirements in determining an action's legality.

After a constitution is made and the constitutional game starts, the main playing fields of a constitutional game are in the implementation, interpretation and adjudication stages. In these playing fields, based on how they see their own constitutional positions and winning goals, players will utilize the constitutional powers which they understand to be available for them to use and make constitutional decisions which they believe to be within the limits set by the constitution.

The nature of the playing fields as legal platforms imposes further constraints on the actions of the players in a constitutional game. Even though a player may have some room to determine her constitutional positions, powers and limits, any action taken must be recognized as a legitimate act by other players. As the actions are taken in a legal platform, they must at the end find legal authority from the constitution and this must likewise be recognized by the other players in accordance with the specific requirements on legality of that particular legal platform.

Though political bargaining and strategies may still be needed in constitutional decision making, other players of the game will apply and enforce the legal terms of the constitution and the specific requirements on the legality of that legal platform and determine whether the action in question is legal and therefore legitimate.

As mentioned above, players will have to give an interpretation to the constitutional text before they take other actions in the game so as to justify those actions. Therefore, the interpretation given by a player will also have to be considered by other players to be a legitimate interpretation in the legal platform in which the need for constitutional decision making arises.

Illegitimate actions by any player may be counteracted by other players. Such a player may be paralyzed from taking further action in the game or be forced by other players to abandon her illegitimate action and get back on the right track if she still wants to stay in the game. This is how the players interact in a constitutional game.

A typical example is how a constitutional court in a constitutional adjudication applies the constitutional provision to determine whether a legislative act is unconstitutional. The constitutional court exercises its constitutional review power under the constitution to determine whether the legislative act is unconstitutional, but the manner of how the constitutional court exercises this power must also be considered as legal and legitimate by other players in the sense that the constitutional court is acting within the goals, powers and limits set by the constitution.

4.7. Interaction between the players

Interaction between the players is the key to any game, including a constitutional game. Players act within the playing field but they do not act alone. Any action by a player will immediately attract reactions from the other players and their actions are to block her way to obtain her winning goal if it causes a conflict with their winning goals or would cause them to lose the game. A player must also immediately respond to the reactions of other players. Therefore, interaction in a game is a continuous process of actions and reactions between the players.

The interaction in a constitutional game is the same. As mentioned above, the main form of action of players in a constitutional game is to provide constitutional interpretations of the constitutional text to justify their specific actions. These specific actions are needed for obtaining their winning goals in the game. As the playing fields of a constitutional game are legal platforms, other players can react by considering these acts as legally illegitimate. The main form of reaction from other players will include their competing interpretations of the constitutional provisions and accompanying specific actions.

If a player makes certain constitutional decisions on the basis of her interpretation of the constitution which is related to her position or powers but is considered to be legally illegitimate by some other players, they will respond by making another constitutional decision to cancel out the first decision on the basis of their constitutional interpretation of the constitution in pursuance of their positions and powers.

A law passed by the parliament may be vetoed by the president who believes the law is unconstitutional. The parliament may override the veto by a special majority but the constitutionality of the law is further challenged in the constitutional court. The constitutional court may declare such a law as unconstitutional but a referendum may be held to amend the constitution with the effect of endorsing the invalidated law. All these interactions between the players happen within the framework of the constitution, but they also originate from the different readings of the constitution by the players.

As a constitutional game emphasizes legality, players in the game fields all apply a notion of legality to judge the legitimacy of the other player's action. However, legal legitimacy is only one aspect of legitimacy. Fallon suggests that in addition to legal legitimacy, there are also sociological legitimacy and moral legitimacy. (Note 115)

Legal legitimacy looks at the legality of an action and if an action is considered to be illegal or to have contravened legal norms, the act will be illegitimate. Legal legitimacy may be the basic requirement of legitimacy. The mere fact that an act has complied with the legal requirements on content and process will already bestow on it at least a certain level of legitimacy no matter what the actual content is. However, a legally valid act may still be considered as illegitimate or an illegal act may be legitimate if we see legitimacy beyond legality.

The notion of sociological legitimacy does not refer to what makes an act legitimate but only captures the actual attitude of a person towards an act. A person's acquiescence to an act may indicate that she accepts the legitimacy of that act no matter what causes her acceptance.

Sociological legitimacy can have different degrees. People may accept the legitimacy of an act because they personally support the act. People may accept by convention because most other people also accept. They may accept out of habit or accept merely out of indifference. People may accept but only reluctantly if their negative sentiment is not strong enough to cause them to object to it. Even people who do not accept the legitimacy of an act may still give an impression that they accept the legitimacy until and unless they take any overt action to object to it. (Note 116)

Moral legitimacy goes back to examine what causes a person to accept the legitimacy of an act. It looks at legitimacy from the perspective of moral justifiability. As Fallon points out: "Even if a regime or decision enjoys broad support, or if a decision is legally correct, it may be illegitimate under a moral concept if morally unjustified." (Note 117)

There is no space to examine the different theories of moral legitimacy here. What is relevant to our discussion is that beyond legal legitimacy, which is very much emphasized by the game fields in a constitutional game, considerations of sociological and moral legitimacy may also cause reactions from other players in the game.

The room in a constitution for players to refine their positions, powers and limits provides space for the consideration of sociological and moral legitimacy to influence actions and reactions of players. There may be situations in which an action of a player may not seem to be legally legitimate, but the degree of illegitimacy to another player may not be strong enough that she may choose not to react against it and accommodate it by giving an alternative reading to the constitution which may not be her preferred one.

In another situation, a player's act may be legally legitimate, but there may be another player who considers that the act is morally illegitimate according to her theory of moral justification and she will react against the act. However, in all these situations where the legality of act cannot resolve the differences between the players, (Note 118) all players must still put their views in legal terms as legal legitimacy is still the ultimate standard on legitimacy to be applied in the game field. They will utilize the room for alternative interpretations of the constitution to justify their actions, inaction and reactions. If we do not include these other notions of legitimacy in our analysis, we will fail to see the political aspects of a constitutional game and cannot explain the behaviour of players in the game. (Note 119)

4.8. Strategy

In a game, players will develop strategies that can maximize their chance of winning. All players in a constitutional game will also have their winning strategies. Players will strategically use their resources in their interactions with other players in order that their winning goals can be attained. A player may need to adjust or refine her original strategy and in some cases, may even have to adopt a completely different strategy.

In making constitutional decisions in a constitutional game, players will try their best to justify their actions by giving an expansive reading to the constitution which can best fit their winning goals and accompanying actions. All players will play according to their understanding of the constitution and strive to win the game through exerting influence upon other players by their game resources to accept their reading of the constitution in the legal platforms. This may be a player's basic strategy. However, such actions of a player may attract reactions from other players who will block her way to achieve her goals. She must also develop a strategy in the game that can avoid other players who are trying to prevent her from winning the game.

As we can see, the understanding of the constitutional provisions by a player on her own positions, powers and limitations may not be the same or may even be in conflict with how other players in the game perceive these things. Owing to the ambiguity inherent in constitutional provisions, players will tolerate a certain degree of differences in their understanding of each others' role, powers and limitations. As a result, there is always a varying degree of room for each player to fine tune their winning strategy which will not immediately attract a reaction from others. However, if a player moves beyond that, reactions from other players are expected though the exact dividing line is drawn differently.

If a player perceives that her act will be considered illegitimate by other players but still insists on taking that action, she will have to take the risk that she may be paralyzed by other players from playing the game further or be forced to

abandon the action she has taken if she wants to stay in the game unless her game resources make her so strong that she can ignore any reaction from the other players. A rational player will not take an action if she perceives that the action will be considered as illegitimate by other players. This is a more advanced strategy. However, to do so a player must know what would be the reactions of the other players to her actions. If a player could have complete information about the other players, her chance of winning will surely be much greater. However, no player in a game could have complete information. She must then base her decisions on the incomplete information she has and predict what may be the action of the other players.

Therefore, it is important to players in a constitutional game to gather as much information as possible about the other players. (Note 120) Such information may be gained through mutual interaction. The first piece of information that a player must have is about the interpretative approaches adopted by the other players. As the approach of interpretation to be adopted by a player is determined by her perceived constitutional position which, in turn, is influenced by the player's ideological values and institutional contexts, all these are also relevant information. Another piece of information that a player needs in a constitutional game is whether the other players will consider her action to be illegitimate especially from the perspectives of sociological and moral legitimacy.

As a player's information and perception of the reactions of the other players reveal themselves to be wrong, her actions or reactions may be over-conservative or over-aggressive. After many rounds of playing this game, a player may forecast the possible reactions of other players to her acts. If she can learn from that, her chance of winning the game increases.

4.9. End of the game

In most games, there is a clear end to the game. But there is no end to a constitutional game. Players in a constitutional game want the game to be played continuously. A constitutional game will only end when some players are no longer willing to be bound by the constitution as they perceive that they can never win in the game. They would then like to reset the whole game by enacting a new constitution or revoking the constitution. Therefore, in a constitutional game, no matter what the winning goals of the other players are, every player will share at least one winning goal in common, that is to have the game maintained. To do so, each player must play in such a way that all other players can achieve their winning goals at least to a certain extent. If not, some players may be so frustrated that they may choose to end the game by quitting/leaving it. In another words, a constitutional game is a win-for-all game if it is played well.

Such a state may be called the equilibrium of a constitutional game. If all players have almost equal game resources in the game, equilibrium will be achieved through give and take interactions between the players in the legal platforms. Equilibrium will be maintained through the operation of such a balancing mechanism. This illustrates how the legal paradigm integrates with the political paradigm, especially the strategic approach. However, if all players fail to follow or honour the constitution, the constitutional game will collapse. Either another constitution is made and a new constitutional game with a new constitution will replace the collapsed one or a constitutional game will regress to a pure political game.

5. Conclusion

Even if I can convince you that a constitutional game can successfully integrate the legal and political paradigms of a constitution, I must still explain what values this analytical framework has which cannot be observed by having the two paradigms of constitution analyzed separately.

First, using a game framework allows us to understand a constitution not just from one political actor's perspective but to consider it from the perspectives of all political actors, old and new or existing and potential. The problem of the legal paradigm is that it only focuses on one political actor, i.e. the court, and ignores how other political actors would understand the constitution.

Second, a major function of this game analytical framework is to demystify the "sacredness" of the so-called "legal meaning" of constitutional text. Many people believe that the key to the resolution of constitutional disputes is to discover the "legal meaning" or the "right answer" of the relevant constitutional text by using the proper rule of interpretation to interpret the relevant constitutional provision. However, a constitutional game framework shows that there is no such "one" proper rule of interpretation or "one" right answer. Different legal meanings may be arrived at after applying the same rule of interpretation and different rules of interpretation may arrive at the same legal meaning.

Third, the constitution remains to play a central role in a constitutional game as the rules of the game. The significance of law in constitutional politics is reemphasised. If the second reason is a response to the over-legalistic approach of the legal paradigm, then this is a response to the under-legalistic approach of the political paradigm. It avoids the problem of the political paradigm which sees everything only from the perspective of rational calculation, power struggle, or self interest. There is a fundamental difference between a constitutional game and a pure political game but this might have been overlooked by the political paradigm.

Fourth, the complexity in the interaction between the constitutional text and the political actors is exposed. They have a dialectical relationship. One the one hand, the constitution is the source of authority of the political actors and sets the legal boundaries for the political actors. On the other hand, political actors enjoy a certain degree of freedom to redefine the legal boundaries by making use of the inherent language indeterminacy of the constitutional text. The process of interpretation is not as rigid or mechanical as putting in the right coin and receiving the right product from a slot machine. However, it also does not mean that the constitutional text can be manipulated by a political actor to bear any meaning in the interpretation process. The first view arises from the legal paradigm and the second view arises from the political paradigm. The reality is that political actors interpret within the boundaries set by the constitution but they will make use of the room available in the constitution to achieve what they can achieve on the basis of their readings of their constitutional positions assigned by the constitution.

Fifth, the constitutional game analysis provides a framework broad enough to accommodate various strands of institutional influences upon political actors (legal and non-legal, formal and informal, symbolic and substantial, internal and external) together with their ideological values in accounting what cause political actors to adopt a particular interpretation of the constitution. The constitutional game accepts the important role that institutions play in influencing the decisions of political actors but it also does not need to adopt a form of institutional determinism excluding the autonomous and creative role individual political actors could play in the constitutional process.

Sixth, the notion of rationality in constitutional interpretation is uncovered which is often hidden in legal analysis. The interaction between the political actors and their strategic planning provide a lot of explanation on how they formulate their actual stances and behaviors in constitutional decision making. Though the explanation may still solely be focused on the external aspects of the institutional impact, this is already much more than what has been achieved in the past. Going deeper into the mind of the political actors may need the integration of another discipline, psychology, in the study of constitutional politics. Constitutional game analysis does not over-emphasize the role of rational choice as it is considered to be only one of the many factors that affect the actions of political actors though it may be a very important one. In addition, it does not limit itself to instrumental rationality and actions taken to fulfill duties or to serve symbolic functions can be accommodated in the strategic planning of the political actors.

Seventh, the interaction between political actors and the development of strategies in a constitutional game open an understanding of the dynamic aspect of constitutional interpretation and practices. This dynamic nature of the constitution process has long been discovered by the political paradigm but is just ignored by the legal paradigm. Legal scholars tend to only see the constitutional process, and in particular the interpretation process, as a static process. Their sole concern is whether the political actors, especially the judges, have found the right method of interpretation and arrived at the correct meaning. However, the political paradigm may also have a limitation in this aspect. It looks mainly at the outcome of the dynamic constitutional process but very often overlooks the detailed reasoning in the interpretation provided by the political actors. If we accept that the legal text is still a major force influencing the choices of the political actors, a fuller picture can be arrived at if legal scholars can introduce a dynamic view in their understanding of the interpretation of the constitution and this is how the constitutional game analysis can contribute to this discourse.

Eighth, even though the constitutional game analysis does not explicitly mention what substantive values political actors should read into the constitution, some substantive constitutional values are already embedded in the constitutional game analysis like rule of law, constitutionalism, separation of powers and autonomy. Also, this framework does not prevent researchers (legal or political) from recommending what substantial values should be embedded in the constitution and the framework may be broad enough to accommodate many substantive values. Constitutional game analysis only gives a warning to such normative projects to beware of any institutional constraint which may make any such prescription unworkable. Normative scholars could then refine their proposals to have a practical dimension (Note 121) as well as an evolutionary dimension. (Note 122)

One may still be dissatisfied that a study following this constitutional analytical will be too disorganized as it is not structured according to major court decisions or legal principles that one may find in typical legal analysis. For those who have an interest in legal history, they may also be frustrated that a constitutional game analysis will usually not follow a chronological order.

I admit that a constitutional game analysis will not be a typical legal analysis. Actually, if it looks too much like a typical legal analysis, my purpose in writing this article would have failed. Political scientists may also find that this analytical framework does not apply typical methodologies and skills in political science. However, as I am not trained in political science, one should not have such expectations.

The reality may be fragmented and we often apply our analytical framework to force out a coherent picture of the reality which may not be the "real". The constitutional game analytical framework may look fragmented because I am not using the traditional approaches under the legal and political paradigms of constitution but an integrated paradigm.

The reality that sees through this analytical framework must also be a distorted picture of the reality but it may still have its value if it can expose some phenomenon that other analytical frameworks have failed to reveal.

Therefore, if the constitutional game analytical framework can shed new light on traditional doctrines such that lawyers and political scientists can reexamine their doctrinal biases through the lens of the other, the objective of constitutional game analysis would have been achieved.

References

Alder, John. (2001). Incommensurable Values and Judicial review: The Case of Local Government. *Public Law*, pp. 711-735

Avedon, E.M. (1971). The Structural Elements of Games. In Elliott M. Avedon and Brian Sutton-Smith (Eds.), *The Study of Games*. New York: John Wiley & Sons, Inc.

Bix, Brian. (1993). *Law, language, and legal determinacy*. Oxford: Clarendon Press.

Bobbitt, Philip. (1991). *Constitutional interpretation*. Oxford, UK & Cambridge, USA: Blackwell.

Burgress, Susan R. (1993). Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, and Judicial Supremacy. *Polity*, 25, 446.

Burnham, Peter, Gilland, Karin, Grant, Wyn, and Layton-Henry, Zig. (2004). *Research Methods in Politics*. Basingstoke, England; New York: Palgrave Macmillan.

Bertalanffy, Ludwig von. (1950). An Outline of General System Theory. *British Journal for the Philosophy of Science*, 1, 134-165.

Bertalanffy, Ludwig von. (1968). *General System theory: Foundations, Development, Applications*. New York: George Braziller.

Clayton, Cornell W. (1999). The Supreme Court and Political Jurisprudence: New and Old Institutionalisms. In Clayton, Cornell W. and Gillman, Howard. (Eds.) *Supreme Court Decision-Making*. Chicago and London: The University of Chicago Press.

Cilliers, Paul. (1998). *Complexity and Postmodernism: Understanding Complex Systems*. London: Routledge.

Crawford, Chris. (1984). *The Art of Computer Game Design* (Chapter 1: What is a Game). Berkeley, Calif.: Osborne/McGraw-Hill.

Dahl, Robert A. (1957). Decision-making in a democracy: the supreme court as a national policy-maker," *Journal of Public Law*, 6, 279.

Dooyeweerd, Herman. (1953). *A New Critique of Theoretical Thought, Vol. I: The Necessary Presuppositions of Philosophy*. Amsterdam: H. J. Paris; Philadelphia: Presbyterian and Reformed Pub. Co.

Dworkin, Ronald, (1977). No Right answer. In Hacker, P. M. S. and Raz, J. (Eds.), *Law, morality, and society: essays in honour of H. L. A. Hart*. Oxford: Clarendon Press.

Elster, Jon. (1986). *Rational Choice*. New York: University Press.

Epstein, Lee and Knight, Jack. (1997). The New Institutionalism, Part II. *Law and Courts*, 7 Spring Issue, 4.

Epstein, Lee and Knight, Jack. (2000). Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead. *Political Research Quarterly*, 53, 625-661.

Epstein, Lee, Knight, Jack, and Shevetsova, Olga. (2001). The Role of Constitutional Courts in Establishment and Maintenance of Democratic Systems of Government. *Law and Society Review*, 35, 117-163

Eskridge, William N. Jr. (1991). Reneging on History? Playing the Court/Congress/President Civil rights Game. *California Law Review*, 79, 613.

Fallon Jr., Richard H. (1987). A constructive coherence theory of constitutional interpretation. *Harvard Law Review*, 100, 1189

Fallon, Richard H. Jr. (2001). *Implementing the Constitution*. Cambridge, Massachusetts, and London, England: Harvard University Press.

Fallon, Richard. (2005). Legitimacy and the Constitution. *Harvard Law Review*, 118, 1789-1853.

Fiorinal, Morris. (1995). Rational Choice and the New (?) Institutionalism. *Polity*, 28, 109.

Ferejohn, John A. and Weingast, Barry R. (1992). A Positive Theory of Statutory Interpretation. *International Review of Law and Economics*, 22, 263-279.

Ferejohn, John and Shipan, Charles. (1990). Congressional Influence on Bureaucracy. *Journal of Law, Economics, and Organization*, 6, 1-20.

Friedman, Barry. (2005). The politics of judicial review, *Texas Law Review*, 84, 257.

Friedman, Barry. (2006). Taking Law Seriously. *Perspectives on Politics*, 4, 261-276.

Griffin, Stephen M. (1994). Pluralism in Constitutional Interpretation. *Texas Law Review*, 72, 1753.

Gilman, Howard. (1996). More or Less than Strategy: Some Advantages to Interpretative Institutionalism in the Analysis of Judicial Politics. *Law and Courts*, 7, Winter Issue, 6.

Gillman, Howard. (1997). Placing Judicial Motives in Context: A Response to Lee Epstein and Jack Knight. *Law and Courts*, 8 Spring Issue, 10.

Ginsburg, Tom. (2003). *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Chapter 3). Cambridge: Cambridge University Press.

Habermas, Jürgen. (1996). Paradigms of Law. *Cardozo Law Review*, 17, 771.

Hall, Peter A. and Taylor, Rosemary C. R. (1996). Political Science and the Three New Institutionalism,. *Political Studies*, XLIV, 936.

Harris, Pickens E. (1937). Philosophic Aspects of Integration. In Hopkins, L. Thomas (Ed.), *Integration: Its Meaning and Application*. New York, London: D. Appleton-Century Company.

Held, David. (1987). *Models of Democracy*. Cambridge: Polity Press.

Hommes, Hendrik Jan van Eikema. (1979). *Major Trends in the History of Legal Philosophy* (Chapter 15). Amsterdam, New York, Oxford: North-Holland Publishing Company.

Immergut, Ellen M. (2006). Historical-Institutionalism in Political Science and the Problem of Change. In Wimmer, Andreas and Kössler, Reinhart (Eds.), *Understanding Change: Models, Methodologies, and Metaphors*. New York: Palgrave Macmillan.

Klein, Julie Thompson. (1990). *Interdisciplinarity: History, Theory, and Practice*. Detroit: Wayne State University Press.

Knight, Jack. (1994). Symposium: The Supreme Court and the Attitudinal Model. *Law and Court*, 4, Spring Issue, 5-6.

Knight, Jack. (1997). The Supreme Court and the Attitudinal Model. *Law and Courts*, 7 Spring Issue, 5.

Knight, Jack and Epstein, Lee. (1996). On the Struggle for Judicial Supremacy," *Law and Society Review*, 30, 87.

Kuhn, Thomas. (1996). *The structure of science revolutions* (3rd ed.). Chicago and London: The University of Chicago Press.

Laszlo, Ervin. (1996). *The Systems View of the World: A Holistic Vision for Our Time*. New Jersey: Hamption Press, Inc.

Lawrence, Susan. (1994). Symposium: The Supreme Court and the Attitudinal Model. *Law and Court*, 4, Spring Issue, 3.

Lopucki, Lynn M. (1996). The Systems Approach to Law. *Cornell Law Review*, 82, 479

Macey, Jonathan R. (1991). Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies. *Geo. L. J.*, 80, 671-703.

March, James G. and Olsen, Johan P. (1984). The New Institutionalism: Organizational Factors in Political Life. *The American Political Science Review*, 78, 734.

Marsh, David and Stoker, Gerry. (1995). *Theory and methods in political science*. Basingstoke: Macmillan.

Maltzman, Forrest, Spriggs II, James F., and Wahbeck, Paul J. (1999). Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making. Clayton, Cornell W. and Gillman, Howard. (Eds.) *Supreme Court Decision-Making*.

Maveety, Nancy. (2003). The study of judicial behavior and the discipline of political science. In Maveety, Nancy (Ed.), *The pioneers of judicial behavior.* Ann Arbor: The University of Michigan Press.

McCubbins, Mathew D. and Schwartz, Thomas. (1984). Congressional Oversight Overlooked: Police versus Fire Alarms. *American Journal of Political Science*, 28, 165-179

Moran, Joe. (2002). *Interdisciplinarity*. London and New York: Routledge.

Murphy, Walter. (1964). *Elements of Judicial Strategy*. Chicago: University of Chicago Press.

Nissani, Moti. (1995). Fruits, Salad, and Smoothies: A working definition of Interdisciplinarity. *Journal of Educational Thought* , 29, 121, at 125.

Nissani, Moti. (1997). Ten Cheers for Interdisciplinarity: The Case for Interdisciplinary Knowledge and Research. *The Social Science Journal*, 34, 201, at 210.

Philip, Derek L. (1975). Paradigms and Incommensurability. *Theory and Society*, 2, 37.

Post, Robert. (1990). Theories of constitutional interpretation, *Representation*, 30, 13-41.

Pritchett, Herman. (1948). *The Roosevelt Court: a study in judicial votes and values 1937-1947*. New York: Macmillan.

Raz, Joseph. (1986). *The Morality of Freedom* (Chapter 13: Incommensurability). Oxford: Clarendon Press

Rhode, David W. and Spaeth, Harold J. (1976). *Supreme Court Decision Making*. San Francisco: W. H. Freeman.

Riker, William H. and Ordeshook, Peter C. (1973). *An introduction to positive political theory*. Englewood Cliffs, New Jersey: Prentice-Hall, Inc.

Rogers, James R. (2001). Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction. *American Journal of Political Science*, 45, 84-99.

Rubin, Edward L. (1997). 'Law And' and the methodology of law. *Wis. L. Rev.* 521.

Sacks, Jonathan. (2002). *The Dignity of Difference: How to Avoid the Clash of Civilizations* (Chapter 3: The Dignity of Difference: Exorcizing Plato's Ghost). London, New York: Continuum.

Schubert, Glendon. (1974). *The judicial mind revisited: psychometric analysis of supreme court ideology*. New York: Oxford University Press.

Segal, Jeffrey. (1997). Separation-of-Powers Games in the Positive Theory of Congress and Courts. *American Political Science Review*, 91, 28-44.

Segal, Jeffrey A. (1999). Supreme Court Deference to Congress: An Examination of the Markist Model. In Clayton, Cornell W. and Gillman, Howard (Eds.), *Supreme Court Decision-Making*. Chicago and London: The University of Chicago Press.

Segal, Jeffrey A. and Spaeth, Harold J. (1993). *The supreme court and the attitudinal model* (Chapter 2). Cambridge University Press.

Segal, Jeffrey A. and Spaeth, Harold J. (2002). *The supreme court and the attitudinal model revisited*. Cambridge University Press.

Skocpol, Theda. (1995). Why I am an Historical Institutionalist. *Polity*, 28 103.

Smith, Roger M. (1988). Political Jurisprudence, the New 'Institutionalism,' and the Future of Public Law. *American Political Science Review*, 82, 89.

Smith, Rogers M. (1994). Symposium: The Supreme Court and the Attitudinal Model. *Law and Court*, 4, Spring Issue, 8-9.

Smith, Rogers M. (1997). "The Supreme Court and the Attitudinal Model. *Law and Courts*, 7 Spring Issue, 8.

Spaeth, Harold J. (1972). *An Introduction to Supreme Court Decision Making*. San Francisco: Chandler.

Spaeth, Harold J. (1995). The Attitudinal Model. In Lee Epstein (Ed.), *Contemplating Courts*. Washington, D. C.: Congressional Quarterly Inc.

Sweet, Alec Stone. (2007). The politics of constitutional review in France and Europe. *International Journal of Constitutional Law*, 5, 69.

Vanberg, Georg. (2001). Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review. *American Journal of Political Science*, 45, 346-361.

Vick, Douglas W. (2004). Interdisciplinarity and the discipline of law. *Journal of Law and Society*, 31, 163.

Woozley, A.D. (1979). No right answer. *Philosophical Quarterly*, 29, 25.

Notes

Note 1. Vick, Douglas W. (2004). Interdisciplinarity and the discipline of law. *Journal of Law and Society*, 31, 163, at 178.

Note 2. Rubin, Edward L. (1997). 'Law And' and the methodology of law. *Wis. L. Rev.* 521, at 522 and Friedman, Barry. (2005). The politics of judicial review, *Texas Law Review*, 84, 257.

Note 3. The word "paradigm" has been very popular in academic study since Thomas Kuhn published his book, *The Structure of Science Revolutions* in 1962. Kuhn defined a paradigm as "an entire constellation of beliefs, values and techniques, and so on, shared by the members of a given community." See Kuhn, Thomas. (1996). *The structure of science revolutions* (3rd ed.) (p. 175). Chicago and London: The University of Chicago Press. In legal study, the concept of paradigm has also been used. See Habermas, Jürgen. (1996) Paradigms of Law. *Cardozo Law Review*, 17, 771 in which Habermas has used paradigm to refer to the social ideal or social vision that guides making and applying law.

Note 4. I have not provided a very elaborate description of the different approaches as I assume that the readers of this article are mainly lawyers and they are familiar with these approaches of the legal paradigm. For the detailed description of the different approaches, see Bobbitt, Philip. (1991) *Constitutional interpretation* Oxford, UK & Cambridge, USA: Blackwell; Fallon Jr., Richard H. (1987) A constructive coherence theory of constitutional interpretation. *Harvard Law Review*, 100, 1189; and Post, Robert. (1990). Theories of constitutional interpretation, *Representation*, 30, 13-41.

Note 5. Bobbitt, Note 4, pp. 13-14. Bobbitt preferred to use the term, modality, which is defined as "the way in which [one] characterize a form of expression as true."

Note 6. Ronald Dworkin put forward his controversial "one right answer thesis" in Dworkin, Ronald, (1977). No Right answer. In Hacker, P. M. S. and Raz, J. (Eds.), *Law, morality, and society: essays in honour of H. L. A. Hart*. Oxford: Clarendon Press. The thesis is much disputed. See Woozley, A.D. (1979). No right answer. *Philosophical Quarterly*, 29, 25, and Bix, Brian. (1993) *Law, language, and legal determinacy*. Oxford: Clarendon Press, (Chapter 4).

Note 7. Segal and Spaeth provided a comprehensive critique on the legal paradigm. See Segal, Jeffrey A. and Spaeth, Harold J. (2002). *The supreme court and the attitudinal model revisited* (Chapter 2). Cambridge University Press.

Note 8. Dahl, Robert A. (1957). Decision-making in a democracy: the supreme court as a national policy-maker," *Journal of Public Law*, 6, 279 at 281.

Note 9. Sweet, Alec Stone. (2007). The politics of constitutional review in France and Europe. *International Journal of Constitutional Law*, 5, 69, at 72.

Note 10. The three central issues in politics are "the selection of society preferences, the enforcement of the choices that reveal them and the production of goals or outputs that embody the choices." Different decisions concerning a constitution all involve these three central political issues. See Riker, William H. and Ordeshook, Peter C. (1973). *An introduction to positive political theory* (p. 2). Englewood Cliffs, New Jersey: Prentice-Hall, Inc. William Riker is the pioneer of the positive political theory which is one of the major approaches (the strategic approach) to study constitutions from a political perspective. See discussion below.

Note 11. Friedman, Note 2 (p. 258).

Note 12. For the different approaches of political science, see Marsh, David and Stoker, Gerry. (1995). *Theory and methods in political science* (Chapter 1-6). Basingstoke: Macmillan.

Note 13. Maveety, Nancy. (2003). The study of judicial behavior and the discipline of political science. In Maveety, Nancy (Ed.). *The pioneers of judicial behavior* (p. 5). Ann Arbor: The University of Michigan Press.

Note 14. These approaches are developed by political scientists in their study of judicial behaviour. Among all political actors in a constitutional system, judges are more likely to adopt a legal paradigm in understanding a constitution. If judges are also found to have been applying a political paradigm of constitution, the other political actors must also be using a political paradigm to understand a constitution though the political factors influencing their understanding would be very different from those of judges.

Note 15. See Part 3 and Part 4.

Note 16. If it is considered from a wider perspective of political science rather than just within the context of constitutional politics, this approach can be referred to as the behavioural approach.

Note 17. Segal and Spaeth, Note 7 (p. 86).

Note 18. Earlier works on the attitudinal approach include Pritchett, Herman. (1948). *The Roosevelt Court: a study in judicial votes and values 1937-1947*. New York: Macmillan and Schubert, Glendon. (1974). *The judicial mind revisited: psychometric analysis of supreme court ideology*. New York: Oxford University Press. The significant difference between the more recent work of the attitudinal approach and the earlier works is that later works have based their analysis more from the rational choice analysis borrowed from economics. See the discussion below.

Note 19. Note 7.

Note 20. Segal and Spaeth, Note 7 (p. 86).

Note 21. There are eight main claims for behavioralism: (1) There are discoverable regularities in politics which can lead to theories with predictive value. (2) Such theories must be testable in principle. (3) Political science should be concerned with observable behaviour which can be rigorously recorded. (4) Findings should be based on quantifiable data. (5) Research should be made systematic by being theory oriented and directed. (6) Political science should become more self-conscious and critical about its methodology. (7) Political science should aim at applied research that can provide solutions to immediate social problems. The truth or falsity of values is not its proper concern as it cannot be amenable to empirical investigation. (8) Political science should become more interdisciplinary and draw on the other social sciences. See Burnham, Peter, Gilland, Karin, Grant, Wyn, and Layton-Henry, Zig. (2004). *Research Methods in Politics* (p. 15). Basingstoke, England; New York: Palgrave Macmillan.

Note 22. Pritchett, Note 18 (pp. xii, xiii) cited in Segal and Spaeth, Note 7 (p. 87).

Note 23. Spaeth, Harold J. (1972). *An Introduction to Supreme Court Decision Making* (p. 65). San Francisco: Chandler.

Note 24. A different understanding of object and situation is provided in Segal and Spaeth, Note 7 (p. 91). Further elaboration of their understanding can be found in Spaeth, Harold J. (1995). The Attitudinal Model. In Lee Epstein (Ed.), *Contemplating Courts* (p. 307). Washington, D. C.: Congressional Quarterly Inc.

Note 25. Like the strategic approach, the attitudinal approach also incorporates rational choice analysis into its analytical framework. Attitudinalists do not believe the institutional and strategic context could impose too much constraint on political actors in making decisions concerning constitution. However, they agree that the pure form of the approach, i.e. political actors can decide according to their unconstrained preferences, is only applicable to supreme court judges in deciding issues on merits in constitutional adjudication. In those cases, they are insulated from institutional and strategic constraints because the judges have lifetime tenure, no ambition for higher office and control over the court's agenda. For other situations faced by supreme court judges and other political actors, attitudinalists' stance may not be too different from the strategic approach. See Segal, Jeffrey A. (1999). Supreme Court Deference to Congress: An Examination of the Markist Model. In Clayton, Cornell W. and Gillman, Howard (Eds.), *Supreme Court Decision-Making* (pp. 237-239). Chicago and London: The University of Chicago Press.

Note 26. Segal and Spaeth, Note 7 (p. 92-97). See further Rhode, David W. and Spaeth, Harold J. (1976). *Supreme Court Decision Making*. San Francisco: W. H. Freeman.

Note 27. Knight, Jack. (1994). Symposium: The Supreme Court and the Attitudinal Model. *Law and Court*, 4, Spring Issue, 5-6.

Note 28. Smith, Rogers M. (1994). Symposium: The Supreme Court and the Attitudinal Model. *Law and Court*, 4, Spring Issue, 8-9.

Note 29. Clayton, Cornell W. (1999). The Supreme Court and Political Jurisprudence: New and Old Institutionalisms. In Clayton, Cornell W. and Gillman, Howard. (Eds.) *Supreme Court Decision-Making* (pp. 28-29). Chicago and London: The University of Chicago Press. This is the major criticism from the institutional approach. See discussion below.

Note 30. Rubin, Note 2. Rubin believes that legal scholarship is characterized by its prescriptive and normative quality. Removing such discussion from constitutional study, the attitudinal approach would have no interest for lawyers.

Note 31. This is the major criticism from the strategic approach. See Maltzman, Forrest, Spriggs II, James F., and Wahbeck, Paul J. (1999). Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making. Clayton, Cornell W. and Gillman, Howard. (Eds.) *Supreme Court Decision-Making* (pp. 47-48). See discussion below.

Note 32. Lawrence, Susan. (1994). Symposium: The Supreme Court and the Attitudinal Model. *Law and Court*, 4, Spring Issue, 3.

Note 33. Clayton, Note 29 (p. 32).

Note 34. It is actually the most traditional approach in political science and has an intellectual history even earlier than the behaviorism behind the attitudinal approach which only prospered in the 1950s and 1960s.

Note 35. Some authors include the strategic approach within new institutionalism and refer to this new institutional approach as the historical institutional approach. See Clayton, Note 29 (p. 31) and Gilman, Howard. (1996). More or Less than Strategy: Some Advantages to Interpretative Institutionalism in the Analysis of Judicial Politics. *Law and Courts*, 7, Winter Issue, 6.

Note 36. Ibid. But see Burgress, Susan R. (1993). Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, and Judicial Supremacy. *Polity*, 25, 446, at 450. Burgess believed the distinction between the old and new institutionalism is more than that: "At its most fundamental level, the new institutionalism posits an understanding of

man that moves beyond narrow self-interest, a conception of politics broader than mere decisional outcomes or aggregated preferences, and a conception of law and legal rhetoric that encompasses more than manipulation or mystification." See also March, James G. and Olsen, Johan P. (1984). The New Institutionalism: Organizational Factors in Political Life. *The American Political Science Review*, 78, 734, at 738.

Note 37. Smith, Roger M. (1988). Political Jurisprudence, the New 'Institutionalism,' and the Future of Public Law. *American Political Science Review*, 82, 89, at 91. See the definition adopted by Smith which included "not only fairly concrete organizations, such as governmental agencies, but also cognitive structures, such as the patterns of rhetorical legitimation characteristic of certain traditions of political discourse or the sorts of associated values found in popular 'belief systems.'"

Note 38. Ibid.

Note 39. Clayton, Note 29 (p. 33).

Note 40. The strategic approach also places more emphasis more on the individual political actor.

Note 41. Smith, Note 37 (p. 95). See also March and Olsen, Note 36 (p. 739).

Note 42. Smith, Note 37 (p. 95). See also March and Olsen, Note 36 (p. 739): "Without denying the importance of both the social context of politics and the motives of individual actors, the new institutionalism insists on a more autonomous role for political institutions. The state is not only affected by society but also affects it. Political democracy depends not only on economic and social conditions but also on the design of political institutions….they are also collections of standard operation procedures and structures that define and defend interests. They are political actors in their own rights."

Note 43. March and Olsen, Note 36 (pp. 738-739). Coherence of a political institution means that it makes choices on the basis of some collective interest or intention, alternatives, and expectations. Political institutions may have varying degree of coherence but institutionalists believe that the collective interest is substantial enough to view an institution acts as a coherent collectivity.

Note 44. March and Olsen, Note 36 (pp. 739). The claim of autonomy means that processes internal to political institutions, although possibly triggered by external forces, affect how they make decisions.

Note 45. March and Olsen, Note 36 (pp. 739-741).

Note 46. This is the major difference between the institutional approach and the strategic approach.

Note 47. March and Olsen, Note 36 (pp. 741-742).

Note 48. Epstein, Lee and Knight, Jack. (1997). The New Institutionalism, Part II. *Law and Courts*, 7 Spring Issue, 4, at 7.

Note 49. Hall, Peter A. and Taylor, Rosemary C. R. (1996). Political Science and the Three New Institutionalism,. *Political Studies*, XLIV, 936, at 950.

Note 50. Clayton, Note 29 (p. 34).

Note 51. Immergut, Ellen M. (2006). Historical-Institutionalism in Political Science and the Problem of Change. In Wimmer, Andreas and Kössler, Reinhart (Eds.), *Understanding Change: Models, Methodologies, and Metaphors* (p. 254). New York: Palgrave Macmillan.

Note 52. The earliest work on the strategic approach may be Murphy, Walter. (1964). *Elements of Judicial Strategy*. Chicago: University of Chicago Press. For the development of the strategic approach, see Epstein, Lee and Knight, Jack. (2000). Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead. *Political Research Quarterly*, 53, 625-661.

Note 53. Some attitudinalists do accept that political actors may take into consideration the preferences of other actors but just believe that they are not substantial enough to cause the political actors to compromise their ideological values. See Clayton, Note 29.

Note 54. Epstein and Knight, Note 48 (p. 4). This is drawn from the rational choice theory. For rational choice theory in general, see Elster, Jon. (1986). *Rational Choice*. New York: University Press.

Note 55. The strategic approach includes intra-institutional (i.e. between different political actors or organs of the same institution like the interaction between different judges in the same court and between the supreme court and the court of appeal) and inter-institutional constraints as the external constraints while the institutional approach sees the constraints as originating internally from the institution as an entity in itself.

Note 56. Maltzman, Spriggs II and Wahlbeck, Note 31 (p. 47).

Note 57. See Eskridge, William N. Jr. (1991). Reneging on History? Playing the Court/Congress/President Civil rights Game. *California Law Review*, 79, 613 (United States); Knight, Jack and Epstein, Lee. (1996). On the Struggle for Judicial Supremacy," *Law and Society Review*, 30, 87 (United States); Vanberg, Georg. (2001). Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review. *American Journal of Political Science*, 45, 346-361 (Germany); Epstein, Lee, Knight, Jack, and Shevetsova, Olga. (2001). The Role of Constitutional Courts in Establishment and Maintenance of Democratic Systems of Government. *Law and Society Review*, 35, 117-163 (Russia); Ginsburg, Tom. (2003). *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Chapter 3). Cambridge: Cambridge University Press (Asian Countries). For other methods of the strategic approach, see Epstein and Knight, Note 48 (pp. 641-651).

Note 58. Most studies in this field involve a constitutional court with certain degree of constitutional review power.

Note 59. Gillman, Howard. (1996). More or Less Than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics. *Law and Courts*, 7 Winter Issue, 6, at 9.

Note 60. Gillman, Howard. (1997). Placing Judicial Motives in Context: A Response to Lee Epstein and Jack Knight. *Law and Courts*, 8 Spring Issue, 10, at 11.

Note 61. Ibid.

Note 62. Jonathan Sacks calls this presupposition 'Plato's Ghost'. See Sacks, Jonathan. (2002). *The Dignity of Difference: How to Avoid the Clash of Civilizations* (Chapter 3: The Dignity of Difference: Exorcizing Plato's Ghost). London, New York: Continuum.

Note 63. Ludwig von Bertalanffy is generally regarded as the pioneer of the general system theory. See Bertalanffy, Ludwig von. (1950). An Outline of General System Theory. *British Journal for the Philosophy of Science*, 1, 134-165.

Note 64. Bertalanffy, Ludwig von. (1968) *General System theory: Foundations, Development, Applications* (p. 3). New York: George Braziller.

Note 65. Bertalanffy, Note 63 (p. 143).

Note 66. This is a dictionary definition adopted by Lopucki, Lynn M. (1996). The Systems Approach to Law. *Cornell Law Review*, 82, 479, at 482.

Note 67. See Laszlo, Ervin. (1996). *The Systems View of the World: A Holistic Vision for Our Time* (pp. 10-12). New Jersey: Hamption Press, Inc.

Note 68**.** These are the political actors.

Note 69. The constitutional norms incorporated in the constitutional text setting the goals or ideals of the constitution.

Note 70. These are the choices of the political actors made under the constitutions.

Note 71. Cilliers, Paul. (1998). *Complexity and Postmodernism: Understanding Complex Systems* (pp. 3-5). London: Routledge.

Note 72. Hommes applying the theory of Herman Dooyeweerd identifies the following dimensions (aspects) in any matter in the world: numerical, spatial, kinematic, physical, biological, sensory, logical-analytical, cultural-historical, symbolic or linguistic, social, economic, aesthetic, legal (juridical), ethical and fiduciary. See Hommes, Hendrik Jan van Eikema. (1979). *Major Trends in the History of Legal Philosophy* (Chapter 15). Amsterdam, New York, Oxford: North-Holland Publishing Company, and Dooyeweerd, Herman. (1953). *A New Critique of Theoretical Thought, Vol. I: The Necessary Presuppositions of Philosophy* (Prolegomena and pp. 22-165). Amsterdam: H. J. Paris; Philadelphia: Presbyterian and Reformed Pub. Co.

Note 73. They might ignore certain periods of the constitutional process since the element of the constitution which is the orientation of their research might not be too active during those periods. As a result, those periods would not be interesting enough for them to conduct in-depth analysis.

Note 74. The concept of incommensurability was first raised by Thomas Kuhn, the historian on science, claiming that different paradigms are incommensurable. See Kuhn, Note 2, p.148. Derek L. Philip provides a critique of the incommensurability of paradigms and concludes that different paradigms need not be incommensurable on the condition that the paradigms are not postulated as totally closed systems. See Philip, Derek L. (1975). Paradigms and Incommensurability. *Theory and Society*, 2, 37, at 60. Kuhn later modified his position on incommensurability in "Commensurability, Comparability, and Communicability," *Proceedings of the Biennial Meeting of the Philosophy of Science Association*, Vol. 1982, Volume Two, pp. 669-688.

Note 75. If the conflicts between the approaches or paradigms involve some fundamental values that are incommensurable other than on the philosophical methods, the approaches and paradigms might be more difficult to be incorporated into one analytical framework. For the concept of incommensurable values, see Alder, John. (2001).

Incommensurable Values and Judicial review: The Case of Local Government. *Public Law*, pp. 711-735 and Raz, Joseph. (1986). *The Morality of Freedom* (Chapter 13: Incommensurability). Oxford: Clarendon Press. However, even if the approaches and paradigms are developed on the basis of some incommensurable values, this does not mean that there is no possibility that these could not be compatible with each other at least in the sense that people with incommensurable values could still live peacefully within the same community and cooperate to build the community together.

Note 76. See Bobbit, Note 4 (Chapter 5: Justifying and Deciding) and Griffin, Stephen M. (1994) . Pluralism in Constitutional Interpretation. *Texas Law Review*, 72, 1753, at 1767.

Note 77. Griffin, Note 76.

Note 78. Segal, Jeffrey A. and Spaeth, Harold J. (1993). *The Supreme Court and the Attitudinal Model* (Chapter 2). Cambridge University Press.

Note 79. Segal and Spaeth, Note 7 (Chapter 3).

Note 80. Segal, Note 25 (p. 239).

Note 81. Knight, Jack. (1997). The Supreme Court and the Attitudinal Model. *Law and Courts*, 7 Spring Issue, 5 and Smith, Rogers M. (1997). "The Supreme Court and the Attitudinal Model. *Law and Courts*, 7 Spring Issue, 8.

Note 82. Gillman, Note 59 (p. 10).

Note 83. Skocpol, Theda. (1995) Why I am an Historical Institutionalist. *Polity*, 28 103, at 106.

Note 84. Fiorinal, Morris. (1995). Rational Choice and the New (?) Institutionalism. *Polity*, 28, 109, at 110.

Note 85. Rogers M. Smith, "Ideas, Institutions, and Strategic Choices" (1995) 28 *Polity* pp.135-140.

Note 86. Gillman, Note 59 (p. 10).

Note 87. Friedman, Note 2 (p. 333).

Note 88. Friedman, Note 2 (p. 262).

Note 89. Friedman, Note 2 (p. 337).

Note 90. Friedman, Note 2 (p. 336). See also Fallon, Richard H. Jr. (2001). *Implementing the Constitution*. Cambridge, Massachusetts, and London, England: Harvard University Press.

Note 91. Friedman, Note 2 (pp. 331-337).

Note 92. See Ferejohn, John A. and Weingast, Barry R. (1992). A Positive Theory of Statutory Interpretation. *International Review of Law and Economics*, 22, 263-279.

Note 93. Friedman, Barry. (2006) Taking Law Seriously. *Perspectives on Politics*, 4, 261-276.

Note 94. Harris, Pickens E. (1937). Philosophic Aspects of Integration. In Hopkins, L. Thomas (Ed.), *Integration: Its Meaning and Application* (p. 50). New York, London: D. Appleton-Century Company.

Note 95. Nissani, Moti. (1995). Fruits, Salad, and Smoothies: A working definition of Interdisciplinarity. *Journal of Educational Thought* , 29, 121, at 125.

Note 96. For the four methods used in integration or interdisciplinary study, see Klein, Julie Thompson. (1990). *Interdisciplinarity: History, Theory, and Practice* (pp. 64-65). Detroit: Wayne State University Press.

Note 97. Moran, Joe. (2002). *Interdisciplinarity* (p. 182). London and New York: Routledge.

Note 98. Ibid.

Note 99. Nissani, Moti. (1997). Ten Cheers for Interdisciplinarity: The Case for Interdisciplinary Knowledge and Research. *The Social Science Journal*, 34, 201, at 210.

Note 100. From the title, one can already see the influence of the strategic approach of the political paradigm. See Note 57.

Note 101. The strategic approach is very much close to the game theory which is a branch of applied mathematics studying strategic interaction of individuals. These studies start off as scientific projects aiming at giving explanation to structures and rules for how individuals' decisions and acts are interrelated or predicting what strategic options are available to an individual in a specific situation of strategic interaction. Based on certain assumptions on rationality of individual choices, these game theoretical models or applications of these models specify the relevant parameters that will be manipulated by the players in the game and adopt deductive analysis to gain an understanding of specific aspects of different social phenomena. However, for this study, I will only follow the game theory to the extent of constructing a game framework where different players in the constitutional process interact with the other players strategically. I

will not follow the path of developing game theoretical models or applying a game theoretical model to predict the choices of players in a particular circumstance as in most studies using game theory.

Note 102. For definitions of game, see Crawford, Chris. (1984). *The Art of Computer Game Design* (Chapter 1: What is a Game). Berkeley, Calif.: Osborne/McGraw-Hill; Avedon, E.M. (1971). "The Structural Elements of Games. In Elliott M. Avedon and Brian Sutton-Smith (Eds.), *The Study of Games*. New York: John Wiley & Sons, Inc.; Langdon, Kevin. (1979) What is a Game? [Online] Available: http://www.polymath-systems.com/games/whatgame.html (12 December 2009); and Kramer, Wolfgang. (2000). What is a game, really? [Online] Available: http://www.thegamesjournal.com/articles/WhatIsaGame.shtml (12 December 2009).

Note 103. For an example of how different constitutional institutions interact in a constitutional game, see Segal, Jeffrey. (1997). Separation-of-Powers Games in the Positive Theory of Congress and Courts. *American Political Science Review*, 91, 28-44.

Note 104. The prominent role to be played by institutions in a constitutional game is borrowed from the institutionalists of the political paradigm.

Note 105. See Note 57. See also Ferejohn, John and Shipan, Charles. (1990). Congressional Influence on Bureaucracy. *Journal of Law, Economics, and Organization*, 6, 1-20; Macey, Jonathan R. (1991). Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies. *Geo. L. J.*, 80, 671-703; and McCubbins, Mathew D. and Schwartz, Thomas. (1984). Congressional Oversight Overlooked: Police versus Fire Alarms. *American Journal of Political Science*, 28, 165-179.

Note 106. In this understanding, there is no condition on how the constitution was made. When the constitution is respected by all players so that it has a binding effect upon their acts, a political game becomes a constitutional game. However, as will be illustrated by Hong Kong's constitutional game, a player in a game may set the rules of the constitution in such a way that it is vested with almost all powers under the constitution. This kind of constitutional game will be played quite differently from games where no player in the game has such overwhelming powers. It will be very easy for this kind of game to relapse back to a pure political game where win or lose is decided only by crude power. In other words, the rule of law and constitutionalism are conditions for a constitutional game.

Note 107. This is also the presumption of the legal paradigm and its relevance in constitutional analysis is therefore clearly demonstrated.

Note 108. This idea of making a constitutional decision as if it is a player who plays to win in a game clearly originates from the strategic approach of the political paradigm.

Note 109. Winning a game is closely related to how a game ends. As the winning goals of players in a constitutional game may not be the same, there may be more than one winner in a constitutional game and a constitutional game may not end when a player wins. Please see the discussion below on the end of the game.

Note 110. It is not difficult to see the influence of the institutionalists of the political paradigm in this relationship between a constitution, institutions established by the constitution, roles of the players, constitutional positions of the players and the winning goals of the players.

Note 111. The influence of the attitudinalists and the institutionalists can be felt here.

Note 112. The significance of the constitution as a set of rules setting out what game actions are allowed originates from the legal paradigm.

Note 113. See further discussion below on game fields, interaction and strategy in a constitutional game. The emphasis of using legal platforms as the game fields is also under the influence from the legal paradigm.

Note 114. The emphasis of using legal platforms as the game fields is also under the influence from the legal paradigm.

Note 115. Fallon, Richard. (2005). Legitimacy and the Constitution. *Harvard Law Review*, 118, 1789-1853.

Note 116. Held, David. (1987). *Models of Democracy* (p. 238). Cambridge: Polity Press.

Note 117. Fallon, Note 115 (p. 1796).

Note 118. These situations may not be common in a constitutional game or in the day-to-day operation of a constitutional system, but we cannot deny that they often arise when there is constitutional controversy or dispute and often may have a long-lasting impact on the development of the constitutional system.

Note 119. The political paradigm has a very important contribution to this part of the analysis.

Note 120. For the importance of information in constitutional politics, see Vanberg, Georg, Note 57 and Rogers, James R. (2001). Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction. *American Journal of Political Science*, 45, 84-99.

Note 121. Normative scholars can provide practical advice on how to overcome the institutional obstacles to the successful application of their proposals.

Note 122. With the understanding of the institutional constraints, normative scholars can provide an evolutionary plan for their proposals and the implementation of their proposals can be divided into stages with each stage having more limited goals. Each stage can aim to transform the institutional contexts only to an extent just to prepare for a later stage of development to enter.