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The Holmes Lectures: The Living Constitution

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2006 OLIVER WENDELL HOLMES LECTURES

THE LIVING CONSTITUTION

Bruce Ackerman

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THE LIVING CONSTITUTION

Bruce Ackerman[*]

I. LECTURE ONE: ARE WE A NATION?

The telephone rang, and a familiar conversation began: since 1989, the State Department had been badgering me to serve on delegations to advise one or another country on its constitutional transition to democracy. I had refused, and refused, and refused: no junketing for me, no ignorant professing in front of politicians I did not know on countries I barely understood.

But once again, I heard an earnest midwestern voice at the end of the line, speaking self-importantly in the name of the Special Assistant to the Assistant to the Deputy Assistant Secretary of State. This time, he assured me, it was going to be completely different.

The State Department wasn't asking me to help write a constitution in a language I couldn't read. It was inviting me to engage in a one-on-one tutorial with the great Akhil Alfarabi, a master of both the European and Islamic legal traditions, who was eager to extend his understanding to American constitutional law. Nothing but mutual enlightenment, the cheery voice guaranteed: it was past time to bridge the fearsome cavern separating the great legal systems of the world. And they were asking only for a week of my time.

Why not? I asked, and I soon found myself, jetlagged, encountering a smiling Alfarabi at an undisclosed location. After drinking endless cups of tea, we began serious conversation where I always begin: with the written Constitution, starting from the words "We the People" and working our way to the end of the text.

Alfarabi fulfilled my fondest expectations. He was a master of the art of elaborating profound legal principles out of lapidary texts and listened intently as I presented the famous words left behind by the American Founding and Reconstruction. A couple of days of joyful conversation passed, and we finally moved into our final lap: the texts of the twentieth century. But Alfarabi was getting impatient, and a bit

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[*] Sterling Professor of Law and Political Science, Yale University. This is a revised version of the Holmes Lectures delivered at the Harvard Law School on October 3–5, 2006. Many thanks to the critical commentary from my many friends at the Harvard and Yale Law Schools and to the outstanding work of my research assistants: Tendayi Achiume, Lawrence Benn, Kate Brubacher, Julien Cantegreil, Eric Citron, Dawn Hewett, Marin Levy, Jennifer Nou, Jessica Roberts, Solene Romieu, Justin Slaughter, Bartlomiej Szewczyk, and Taisu Zhang.

resentful, at my treating him like a brilliant first-year student. "How about changing roles," he suggested, "and letting me take the lead in interpreting the last few constitutional amendments?"

Truth to tell, I was a bit doubtful: for all his learning, he didn't have the foggiest idea of American history. But after all, I didn't have any idea of his country's history, and that hadn't stopped us from engaging in some great conversation.

"Why not?" I asked myself, glimpsing the ghost of John Dewey[1] enthusiastically nodding his approval: "We have reached the Twenty-First Amendment. What do you think it means?"

"Well, the year is 1933, and Franklin Roosevelt is coming into office — he's the one who announced the New Deal, no?"

I nodded enthusiastically, as is my habit, and was greatly relieved to learn that the guy knew more about my country's history than I knew of his.

"And looking at the amendment," said Akhil, "I can see precisely why they call it the New Deal. I find it deeply regrettable that the American people repealed the ban on the consumption of alcoholic beverages, but as a lawyer it's obvious that something very new is happening: We the People are demanding a sharp cutback in overly ambitious federal regulatory schemes. The larger constitutional principle is clear: the era of Big Government is over." Alfarabi spoke with confidence, for great lawyers never lack self-confidence.

Before I could figure out what to say, Akhil was pushing on to the next amendment. "This Twenty-Second Amendment," he explained triumphantly, "only confirms my interpretation. I see that it was enacted when Harry Truman was in the White House — wasn't he a loyal follower of Roosevelt? — and the text makes it clear that the People are moving right along in the direction marked by Roosevelt's New Deal. In 1933, they repudiated Big Government; now they are cutting the imperial presidency down to size by limiting incumbents to two terms in office. There can be no doubt about the larger point: goodbye Big Government, goodbye imperial presidency — a New Deal indeed."

He smiled, confident of his mastery of the interpretive techniques I had taught him when elaborating the great texts of the eighteenth and nineteenth centuries. But I paused, once again, before responding, and Alfarabi raced ahead.

As he mumbled something about the District of Columbia, I glanced apprehensively at the Twenty-Fourth Amendment, prohibiting

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[1] Or was it my friends Ian Ayres and Barry Nalebuff? *See* BARRY NALEBUFF & IAN AYRES, WHY NOT?: HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL 115–32 (2003) (suggesting the analytic utility of appreciating potentially symmetric situations).

the states and the national government from imposing poll taxes in federal elections. This is the only modern text that hints at the civil rights era's preoccupation with racial justice. Would Alfarabi catch the point?

Yes, I'm happy to report, nothing escaped his bright eye and inquiring mind, but his reading emphasized the plain meaning of the text. The amendment marks the first time in American history that the Constitution explicitly condemned wealth discrimination, and Alfarabi took this ball and ran with it: "If the government can't charge a fee when it comes to voting, surely it can't burden other fundamental rights of citizenship. So the key question raised by Twenty-Four is obvious: how to define the range of basic interests protected against invidious economic discrimination?"

"Never thought of that," I muttered, but Akhil was already moving on, and when he encountered the Twenty-Sixth Amendment, guaranteeing the right to vote for eighteen-year-olds, he began to connect the dots in the great American fashion: "What," he asked, "is the common thread linking the ban on voting discrimination against teenagers with the ban on voting discrimination against poor people?"[2]

His eyes darted forward to see whether the remaining amendments contained the answer, but he was shocked to find that he had arrived at the end of his journey. Thirty-five years have passed since the Twenty-Sixth Amendment was enacted in 1971, and the American people have added absolutely nothing to their written text — unless you count an odd little provision, initially proposed in 1789, forgotten for almost two centuries, and then revived and ratified by the states in 1992, forbidding members of Congress from immediately raising their own salaries.[3]

"Hmm," said Alfarabi, "I guess nothing much has happened in America since the teenagers' historic struggle for constitutional rights. Nevertheless, I am now in a position to formulate the basic question left by the modern era of development: how can a weak federal government, with a chastened presidency, do justice to the People's repudiation of wealth discrimination and its ringing endorsement of teenage rights?"

"That's not quite how we Americans think about our twentieth-century legacy," I said gently.

"Really?" said Alfarabi, "where have I gone wrong?"

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[2] *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (advocating a holistic approach to textual interpretation).

[3] *See* Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101, 101–08 (1994) (discussing the problematic validity of the Twenty-Seventh Amendment).

"In taking these amendments so seriously and looking upon them as the source of large new principles."

"But that's precisely what you Americans always do. The First Amendment, you explained, doesn't explicitly guarantee 'freedom of association,' but you derive this right from the principles underlying the written text. Sometimes you call it a penumbra, sometimes you call it an emanation, sometimes — as in the case of 'freedom of association' — you almost forget that the words aren't in the First Amendment. But you do it all the time with your ancient texts, and that's just what I've been doing with your modern amendments. Aren't they even more important, since they were passed more recently?"

"A good question, but no American asks it."

"That's curious," said Alfarabi. "What accounts for such blindness?"

"Maybe your brilliant interpretations suggest a paradoxical answer: if we treated recent amendments as important statements of principle, we would be falsifying the great truths about the constitutional achievements of the twentieth century. You see, the New Deal did not represent a repudiation of big government, but its sweeping popular affirmation. And the civil rights era revolutionized America's commitment to racial equality and wasn't centrally concerned with discrimination against the poor or the young."

"You may say anything you like, my dear Professor Ackerman, but if you will forgive me, you seem to be making all this up out of thin air. With the greatest respect, it is simply impossible to read the text to support your claims."

* * * *

A funny thing happened to Americans on the way to the twenty-first century. We have lost our ability to write down our new constitutional commitments in the old-fashioned way. This is no small problem for a country that imagines itself living under a written Constitution.

Seventy-five years of false notes and minor chords, culminating in a symphony of silence — and the twenty-first century will be no different. Simply look around you. We are now in the midst of great debates about abortion and religion, about federalism and the war powers of the presidency. But nobody expects a constitutional amendment to resolve any of these issues — instead, we see only symbolic gestures on matters like flag burning and gay marriage.

When it comes to serious business, movement-activists in the Republican Party are trying to change our Constitution by following the higher lawmaking script elaborated during the New Deal. They are looking for brilliant jurists who could emulate Justices Black, Frankfurter, and Jackson in writing landmark opinions that sweep away the law of the preceding era and create a brave new world for the constitu-

tional future. If they have their way, Republican Presidents will add right-thinking judges to the Roberts Court until it transforms *Roe v. Wade*[4] into the *Lochner v. New York*[5] of the twenty-first century — the great anti-precedent stigmatizing an entire era of constitutional law.[6] It is judicial revolution, not formal amendment, that serves as one of the great pathways for fundamental change marked out by the living Constitution. Despite their insistence on the primacy of the written text, movement-Republicans are not misled by their own rhetoric when it comes to the serious business of transforming constitutional politics into constitutional law.[7]

But judicial revolution isn't the only way to transform constitutional values in the modern era. A second great pathway involves the enactment of landmark statutes that express the new regime's basic principles: the Social Security Act,[8] for example, or the Civil Rights Acts of the 1960s.[9] Once again, the Republican Right is agitating for similar landmarks, and as in the New Deal, the Supreme Court is resisting its initial efforts, striking down, for example, a recent statutory ban on "partial birth abortions."[10] But if movement-Republicans keep on winning elections on highly ideological platforms, the Court will retreat, just as it did during the New Deal.[11] If the Republican Party doesn't sustain its control over the presidency and Congress,[12] the push for landmark statutes will subside, and the status quo will endure.

Whatever the future may hold, don't expect big changes through formal amendments. We the People can't seem to crank out messages

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[4] 410 U.S. 113 (1973).

[5] 198 U.S. 45 (1905).

[6] *See* Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 788–90 (2000) (discussing the canonization of Justice Holmes's *Lochner* dissent).

[7] *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006) (arguing that originalism "provides its proponents a compelling language in which to seek constitutional change through adjudication and politics").

[8] Pub. L. No. 74-271, 49 Stat. 620 (1935).

[9] Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

[10] Stenberg v. Carhart, 530 U.S. 914 (2000).

[11] Conservative Republicans in Congress responded to *Carhart* with the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201. A challenge to this statute was pending before the Court at the time of these Lectures. *See* Planned Parenthood Fed'n of Am., Inc., v. Gonzales, 445 F.3d 1163 (9th Cir. 2006), *cert. granted*, 126 S. Ct. 2901 (2006). If a majority upholds the constitutionality of this relatively narrow effort to circumscribe the doctor-patient relationship, its decision will encourage the right-to-life movement to push for a far broader congressional assault on *Roe v. Wade*. So long as conservative Republicans remain in control of Congress and the presidency, a landmark statute repudiating *Roe* remains a distinct possibility, catalyzing the confrontation with a (changing) Court envisioned in the text.

[12] I wrote these lines in the summer of 2006, and I delivered them the following October. I will defer a discussion of the 2006 elections to another time.

in the way described by Article V of our Constitution. Our writing machine has gone the way of the typewriter. But why?

There are three possibilities: there is something wrong with the machine, something wrong with the American people, or nothing wrong with either. Conventional wisdom gives the happy answer: it's a good thing that formal amendment is so hard; otherwise, the Constitution would become a mess, full of details signifying little.

The happy answer is half-right: yes, it *should* be hard to amend the Constitution, but there are plenty of different ways to make things hard. The question is whether the Founders' way makes sense.

My answer is "yes and no": it did make sense for them, but it no longer makes sense for us. After two centuries of development, America's political identity is at war with the system of constitutional revision left by the Framers. We understand ourselves today as Americans first and Californians second. But the amendment system was written for a people who thought of themselves primarily as New Yorkers or Georgians. We have become a nation-centered People stuck with a state-centered system of formal amendment.

This disjunction between state-centered form and nation-centered substance serves as the dynamic force behind the living Constitution. Although Americans may worship the text, they have not allowed it to stand in the way of their rising national consciousness. Since the Civil War, they have given decisive and self-conscious support to national politicians and their judicial appointees as they have repeatedly adapted state-centered institutions, and constitutional texts, to express national purposes. The great challenge for constitutional law is to develop historically sensitive categories for understanding these developments.

Alfarabi is a creature of my own imagination,[13] but there are many flesh-and-blood thinkers and doers throughout the world who actually believe that Americans are operating on the basis of the formal Constitution. This has caused all sorts of mischief as they use the world he-

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[13] Alfarabi, by the way, was a great Islamic thinker who spent most of his life in tenth-century Baghdad. His main project was the integration of Greek philosophy into Islamic thought, but he was also an important music theorist and performer. For a recent introduction to his political thought, see PHILIPPE VALLAT, FARABI ET L'ÉCOLE D'ALEXANDRIE: DES PRÉMISSES DE LA CONNAISSANCE À LA PHILOSOPHIE POLITIQUE (2004). Any similarity between the historical Alfarabi and my imaginary character is strictly coincidental.

This isn't true when it comes to the not-so-subtle reference to my friend Akhil Amar — though his views of the latter-day amendments are far from those I attribute to Alfarabi, his interpretive methods display certain similarities (and differences). *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005). Beyond the particular amendments and with regard to the larger question, Professor Amar has yet to deal squarely with the constitutional status of the great twentieth-century transformations raised by my imaginary dialogue. He is, however, planning a book dealing with the unwritten constitution, which will clarify his position on this central matter.

gemon as a model for their own constitutional arrangements — the fiasco in Iraq is only the last in a line of formalist failures. Yet it is one thing to fool the rest of the world; quite another, to fool ourselves. We won't be able to define, let alone resolve, our fundamental constitutional problems until we confront the long and complex transformation in American political identity that has reduced our written Constitution into a radically incomplete statement of our higher law.

Begin by seeing the Framers as they saw themselves. Fifty-five men went to Philadelphia, but only thirty-nine signed the document.[14] Almost all had forged continent-wide bonds during and after the Revolutionary War. Time and again, they had shown that they were prepared to die for the Union. Compared to the average citizen, they were revolutionary nationalists, and they proved it when they came out of their secret sessions in Philadelphia to propose a new Constitution in the name of We the People of the United States. Although the Articles of Confederation required all thirteen states to approve any change, the Framers declared that nine states would suffice to begin new political life under their Constitution. Going further, they cut the existing state governments out of the ratification process, demanding that each state hold an extraordinary ratifying convention unknown to its constitutional law.[15]

To appreciate the magnitude of these moves, suppose that the recent Constitutional Convention in Europe had taken similar steps. Like the American Articles of Confederation, the current treaties establishing the European Union require the unanimous consent of all member states for any revision.[16] And like the New World of the eighteenth century, the Old World of the twenty-first is characterized by a weak citizen attachment to the Union and a strong commitment to nation-states.[17] The Brussels Convention, moreover, was full of proud

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[14] Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 514 (1995).

[15] *Id.*

[16] *See* Consolidated Version of the Treaty of the European Union art. 48, Dec. 24, 2002, 2002 O.J. (C 325) 5, 31. Current law is based on consistent practice from the very beginning of European integration. *See* Treaty Establishing the European Atomic Energy Community art. 204, Mar. 25, 1957, 298 U.N.T.S. 169.

[17] *See, e.g.*, OPTEM S.A.R.L., PERCEPTIONS OF THE EUROPEAN UNION: A QUALITATIVE STUDY OF THE PUBLIC'S ATTITUDES TO AND EXPECTATIONS OF THE EUROPEAN UNION IN THE 15 MEMBER STATES AND THE 9 CANDIDATE COUNTRIES 36–52 (2001), *available at* http://ec.europa.eu/governance/areas/studies/optem-report_en.pdf (indicating relative commitment to nation and the EU throughout the Continent). As in the America of the eighteenth century, the citizens of different states vary in their affiliation with the Union; broadly speaking, commitment to the EU becomes weaker as one moves north and west. *See id.* These basic trends continue to the present day. *Cf.* OPTEM, THE EUROPEAN CITIZENS AND THE FUTURE OF EUROPE: QUALITATIVE STUDY IN THE 25 MEMBER STATES, at 22 (2006), *available at* http://ec.europa.eu/public_opinion/quali/ql_futur_en.pdf (discussing Europeans' fears that the EU could impair national identity).

invocations of the example that had been set at Philadelphia two centuries before.[18]

Suppose, then, that Brussels had invoked the Philadelphia precedent and declared that the proposed Constitution would come into force when ratified by slightly more than two-thirds of the member states — say, eighteen out of twenty-five to match Philadelphia's nine out of thirteen.[19] Suppose further that Brussels had followed Philadelphia in ignoring the states' ratification procedures — insisting, for example, that Germany hold a referendum on ratification, regardless of what the German Basic Law might say on the matter.[20]

I could go on and on in describing the revolutionary character of the American Founding,[21] but I've already said enough to suggest that the talk at Brussels of the Philadelphia Convention was idle chatter. Even the imperious Valéry Giscard d'Estaing, the Convention's chairman, never seriously considered following George Washington in lead-

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[18] *See, e.g.*, Thomas Ferenczi & Arnaud Leparmentier, *La Convention Propose une Constitution à 450 Millions d'Européens*, LE MONDE, June 14, 2003, *available at* http://www.lemonde.fr/web/article/0,1-0@2-3214,36-323916,0.html ("Nous pouvons nous comparer à la convention de Philadelphie . . . ." (quoting Eurodeputy Alain Lamassoure) (internal quotation mark omitted)). A regular commentator on the movement toward a closer Union, writing under the name Publius, critically appraises the comparisons with Philadelphia in his Letter 27. Publius, European Letter 27 (Feb. 2003), http://www.euraction.org/lett/N27.htm.

[19] When the Convention began work, there were only fifteen members of the Union, but ten new states joined on May 1, 2004. *See* Treaty Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the European Union, Sept. 23, 2003, 2003 O.J. (L 236) 17. When the new states became full members, their ratifications were required before the new Constitution could come into effect. *See* Presidency Conclusions, Copenhagen European Council para. 3 (Dec. 12–13, 2002), *available at* http://ec.europa.eu/employment_social/enlargement/docs/pres_conclusions_copenhagen_en.pdf.

[20] The Brussels Convention made no effort to impose a single ratifying procedure on all members of the Union, allowing each to ratify under its own constitutional procedures. Treaty Establishing a Constitution for Europe art. IV-447(1), Oct. 29, 2004, 2004 O.J. (C310) 1, 191. Some states have chosen a referendum; others, ratification by parliament. At present, fifteen states have ratified, *see* EUROPA, Constitution: Interactive Map, http://europa.eu/constitution/ratification_en.htm (last visited Apr. 7, 2007), and if the ground rules had only required adoption by three-fourths of the states of the Union, it would have been politically feasible to obtain three or four more yes votes without taking the extraordinary measures adopted by the Federalists to win nine assents from the original thirteen states, *see* Ackerman & Katyal, *supra* note 14, at 529–37 (detailing Federalist tactics in various state ratifying conventions).

When the French and Dutch voters rejected the Constitution, there was no inclination by the Union's leaders to rethink their commitment to unanimity. They simply extended the ratification deadline as they pondered their next moves. *See* Presidency Conclusions, Brussels European Council paras. 42–49 (June 15–16, 2006), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/90111.pdf.

[21] *See generally* Ackerman & Katyal, *supra* note 14.

ing a frontal assault on state sovereignty in the name of the rising Union.[22]

Yet this centralizing breakthrough was absolutely essential to the Philadelphia Convention's success. As in the cases of France and the Netherlands today, North Carolina and Rhode Island flatly rejected the proposed Constitution of 1787, and they continued to stay out of the Union even as President Washington and the First Congress began operating in 1789.[23] If unanimity had been the rule, the vetoes entered by these two states would have set back the Federalist campaign for "a more perfect Union" for a decade, perhaps forever.

The Founding Federalists were revolutionary nationalists, but they were also realists. They knew they couldn't get away with a ratification or amendment process that was entirely nation-centered — say, a nationwide referendum that would have required sixty percent approval of their initiative by all Americans who went to the polls to vote.[24] At this foundational level, the Convention built a state-centered federation in which national institutions could merely propose, but not ratify, constitutional initiatives, leaving it up to a supermajority of the states to make the final decision.

Only the bloodbath of Civil War gave birth to a stronger national identity. For the first time in American history, the Framers of the Fourteenth Amendment declared forthrightly that national citizenship was primary and state citizenship was secondary. With these words,

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[22] Without engaging in any significant discussion, the Convention simply projected the past practice of seeking unanimity onto its proposed Constitution. *See generally* Treaty Establishing a Constitution for Europe, *supra* note 20, pt. I, at 11–40 (detailing areas requiring unanimity).

[23] Ackerman & Katyal, *supra* note 14, at 537–39.

[24] As Marshall explained in his high-nationalist opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

> The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification." This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States — and where else should they have assembled? *No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.* Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people [of the United States] themselves, or become the measures of the State governments.

Id. at 403 (emphasis added).

Two centuries later, such "wild political dreams" seem a perfectly plausible way for Americans to break the veto granted to five percent of the population by Article V of the 1787 Constitution. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 403–18 (1998) (proposing a nation-centered process of amendment to complement Article V).

the Republicans aimed to transform the Federalists' state-centered federation into a nation-centered federation. But this revolution, it turned out, was merely a paper triumph: it would take a very long time before it would become a functioning part of the living Constitution. For starters, the Republican Congress during Reconstruction failed to confront, let alone resolve, the full institutional implications of its paper assertion of the primacy of American citizenship. It was content to stretch the state-centered Constitution of the Founders beyond its breaking point to achieve the Republicans' short-term ends, without creating adequate nation-centered structures for future constitutional development.

The first crisis came when the Southern states refused to ratify the Fourteenth Amendment, thereby depriving it of the three-fourths majority required by Article V. Instead of accepting defeat, Congress responded with the use of force — destroying the dissenting state governments, reconstructing new ones, and unconstitutionally keeping the reconstructed states out of the Union until they gave their consent to the new nationalizing amendments.[25]

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[25] I describe the pervasive legal problems in 2 ACKERMAN, *supra* note 24, at 99–252. Professor Amar tries to sweep all these difficulties under the rug in sixteen pages of his *America's Constitution: A Biography*. *See* AMAR, *supra* note 13, at 364–80. Relying heavily on Senator Charles Sumner's interpretation of the constitutional guarantee of "republican government," Professor Amar argues that the Republican Congress was justified in excluding representatives from the all-white Southern governments created under the supervision of Andrew Johnson. Blacks in these states composed at least a quarter of the entire population, and on Senator Sumner's view, a state could not disenfranchise such a large fraction of its free population without losing it status as a "republican government." *See id.* at 368–76.

But Senator Sumner's views were self-consciously repudiated by the Reconstruction Congress in framing the Fourteenth Amendment. Professor Amar barely notes that the amendment's second section expressly deals with the problem of black disenfranchisement, reducing the size of a state's House delegation in "proportion" to the disenfranchised black share of "male inhabitants of such State, being twenty-one years of age, and citizens of the United States." U.S. CONST. amend. XIV, § 2. This provision is flatly inconsistent with the Sumner/Amar theory, which would deny *all* congressional representation to the Southern states.

Professor Amar's preference for Senator Sumner's theory over the plain meaning of the amendment is especially remarkable given his general embrace of textualist methods of interpretation. And yet even this sweeping methodological swerve doesn't get Professor Amar to his destination. Even if Senator Sumner's theory trumps the text, it must confront some uncomfortable facts: in 1868, the Reconstruction Congress refused to admit Congressmen and Senators from individual Southern states *even after these states admitted blacks to the suffrage, and even after Congress expressly found that they qualified as "republican governments."* Indeed, a Southern state's ratification of the Fourteenth Amendment was not enough. Congress required the representatives of the early ratifying states to wait outside its doors until enough of their fellow Southern governments endorsed the amendment so as to provide the necessary three-fourths majority under Article V. *See* First Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429 (1867); *see also* 2 ACKERMAN, *supra* note 24, at 231 (analyzing constitutional problems). This last move was flat-out unconstitutional, and neither Amar, nor anybody else, has ever tried to justify it — preferring to ignore the facts altogether. *See* ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN

These revolutionary activities led to short-run success, but they required such enormous political energy that they exhausted the constitutional ambitions of the Republican Party and the American people. Once the Fourteenth and Fifteenth Amendments were ratified by the reconstructed Southern governments, the country's political attention moved elsewhere, and nobody was prepared to consider seriously whether the new nation-centered understanding of American citizenship required a nation-centered system of constitutional revision.

The same thing happened in response to the presidential election crisis of 1876. The dispute between Hayes and Tilden was resolved, once again, through extraconstitutional means without confronting the larger question it raised: did it still make sense for the country to elect its primary national leader through the fiction of a state-centered Electoral College?[26]

And the same thing happened in 1873, when the Supreme Court's decision in the *Slaughterhouse Cases*[27] transformed the great promise of the new Citizenship Clauses into a mockery, virtually reading these new provisions out of the Constitution. It would take much more than a piece of paper to make the primacy of the American nation into a living constitutional reality.

SYSTEM OF GOVERNMENT 54 (1955) ("The legislative history of [the Fourteenth] Amendment is not enlightening, *and the history of its ratification is not edifying*." (emphasis added)).

Professor Amar's reliance on Senator Sumner's extreme theories simply bears no relationship to the text of the Fourteenth Amendment or to the prevailing congressional understandings of the time. Worse yet, his Sumnerian approach also trivializes the Fifteenth Amendment. On the Sumner/Amar view, this amendment was not necessary to guarantee Southern blacks their voting rights, since depriving them of the franchise would immediately disqualify them under the "republican government" clause. Instead, the Fifteenth Amendment would have had the sole purpose of protecting black voting rights in the *North*, where blacks comprised less than twenty-five percent of the adult population. *See* Richard Primus, *In the Beginnings*, NEW REPUBLIC, Apr. 24, 2006, at 27, 29–30 (reviewing AMAR, *supra* note 13) (commenting on the arbitrariness of the Sumner/Amar twenty-five percent cutoff between republicanism and oligarchy). But the text of the Fifteenth Amendment contains no such limitations, and the Framers of the amendment certainly thought they were "cement[ing] the political rights and power of blacks in the South." ALEXANDER KEYSSAR, THE RIGHT TO VOTE 94 (2000); *see also* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 49 (1965). Once again, Professor Amar's embrace of Senator Sumner's theories leads him to ignore the most obvious features of the Constitution's text and history.

Instead of ignoring the facts surrounding the proposal and ratification of the Reconstruction Amendments, it is more profitable to reflect on the underlying reasons why the Republicans in Congress were obliged to distort the federalist forms of Article V in their desperate effort to validate the nationalist substance of their new amendments. *See infra* pp. 1766–71.

[26] *See generally* 7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 (Supp. 1988). After dithering for a decade, Congress finally enacted a statute that merely patched the old system in ways that haunt us still. *See* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 640–43 (2004) (discussing the Electoral Count Act of 1887, ch. 90, 24 Stat. 373).

[27] 83 U.S. (16 Wall.) 36 (1873).

Too bad for us. If the Civil War generation had followed through, Americans would have been in a better position to confront the great crises of the twentieth century. At various points, we have been in dire need of nation-centered systems of constitutional revision, presidential selection, and citizenship entitlement.

But there was a very good reason why the nineteenth century didn't help us out. Despite the brave words of the Fourteenth Amendment, Americans of that time still remained profoundly uncertain in their commitment to the primacy of the nation. Everybody recognized that secession was no longer in the cards, but it would require the great events of the twentieth century before ordinary Americans unequivocally put the nation first in their political identities.[28]

The First World War, followed by the Great Depression, followed by the Second World War, impressed an entire generation with the need to address the great questions of war, peace, and economic welfare on the national level. The sense of American community became stronger with the next generation's struggle for civil rights at home and liberal democracy abroad. And it has been reinforced once again by September 11th.

This deepening political consciousness was supported by broader transformations in social and cultural life. A century ago, America remained a European settler-republic looking to the Old World for cultural leadership and struggling for recognition as an equal to the Great Powers of Europe. Now, America speaks to the world in its own distinctive accents — attracting and repelling, but very much the great cultural force of the age. America may not be a very civilized place, but it is a civilization. And its inhabitants find themselves at the center of revolutions in transportation, communications, education, and business, which combine to teach one great message: although you may be living in Montana today, you or your children may be making a life in Florida or Ohio the day after tomorrow. And if you do put down roots elsewhere, you will find that, despite regional variations, they speak American out there.

No need to exaggerate. I don't suggest that Americans think of themselves as citizens of a unitary nation-state on the model of, say, nineteenth-century France. We remain Pennsylvanians or Oregonians

[28] Professor Robert Wiebe, who devoted much of his life to the subject, remarks: "Contrary to later myths, the Civil War strengthened regional far more than comprehensive loyalties. *Union* referred to a constitutional doctrine, to the winning side in the war, not the whole United States." ROBERT H. WIEBE, WHO WE ARE: A HISTORY OF POPULAR NATIONALISM 92 (2002). On Wiebe's view, the late nineteenth century marked the transition in popular consciousness toward more national self-understandings. *See* ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920, at 133–63 (1967). This nationalizing dynamic has been intensified by the communications and transportation revolutions, as well as the wars and crises, of the twentieth century.

as well as Americans, but the textual promise of the Fourteenth Amendment has finally become a living reality: we are Americans first. And as the priority of national citizenship has become a fixture of the living Constitution, the inadequacy of other state-centered forms inscribed in the text, and unchanged since the Founding, has become a very serious problem.

This is the underlying point of my fabulous conversation with Alfarabi. Since he is blissfully unaware of the living Constitution, he supposes that the official amendments express the key changes in America's constitutional identity during the twentieth century.

His is a perfectly natural assumption. It just doesn't happen to be true. As a consequence, his interpretations are eccentric because every American intuitively recognizes that the modern amendments tell a very, very small part of the big constitutional story of the twentieth century — and that we have to look elsewhere to understand the rest.

But where? A blur of legal landmarks whiz by in the collective consciousness: the Social Security Act and *Brown v. Board of Education*,[29] the Civil Rights Acts and *Griswold v. Connecticut*[30] — the list could go on and on. Whichever cases and landmark statutes you might or might not add, I am pretty certain of one thing: all the texts you propose will have been produced by national, not state, institutions, as befits the constitutional conclusions reached by We the People of the *United* States.

The trouble comes when we compare the cases and landmark statutes on our lists. Mine might contain the Administrative Procedure Act,[31] but yours might not; yours might include *Roe v. Wade*, but others emphatically disagree. Is there any way to resolve these disputes, besides pounding on the table with increasing vehemence? Is it possible to elaborate criteria, rooted in basic constitutional principles, that would allow lawyers and judges to separate the wheat from the chaff in a disciplined fashion?

This is the central problem raised in these Lectures. To state the problem crisply, begin with the idea of an *official* constitutional canon — the body of texts that conventional legal theory places at the very center of the legal culture's self-understanding. In America today, the official canon is composed of the 1787 Constitution and its subsequent formal amendments. At present, however, there is a yawning gap between this official canon and the nation-centered self-understanding of the American people. The profession has been trying to fill this gap with an *operational* canon — as I shall call it — that promotes land-

[29] 347 U.S. 483 (1954).
[30] 381 U.S. 479 (1965).
[31] Pub. L. No. 79-404, 60 Stat. 237 (1946).

mark statutes and superprecedents to a central role in constitutional argument. But these attempts have proceeded in an ad hoc fashion, and it is past time for us to reflect on these efforts at adaptation and build an official constitutional canon that is adequate for use by lawyers and judges of the twenty-first century.

I will be elaborating some of the critical questions we should be asking in defining this canon. My test case will be the civil rights era, and I will be trying to define its distinctive contribution to the official canon in the next Lecture. But my own conclusions are less important than my invitation to the larger legal community to take an active role in this project. The challenge is to understand the constitutional achievements of *all* of the generations since 1776, including Americans who lived in the twentieth century. Without a disciplined acknowledgement of the great legal texts of the modern era, constitutional law will fail to provide Americans of the twenty-first century the guidance they require as they confront the challenges of the future.[32]

The redefinition of the constitutional canon is already proceeding apace, most obviously at the recent Senate confirmation hearings of President George W. Bush's Supreme Court nominees. Senators of both parties spent hours and hours trying to pin down John Roberts and Samuel Alito on a variety of key twentieth-century texts. Led by Senator Arlen Specter, the nominees were repeatedly asked whether they recognized *Roe*, or some other case, as a superprecedent that was especially entrenched in our law.[33] The nominees bobbed and weaved

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[32] Under the intellectual leadership of Professors Jack Balkin and Sandy Levinson, legal scholarship has increasingly appreciated the importance of defining the canon. *See* LEGAL CANONS (J.M. Balkin & Sanford Levinson eds., 2000). Their own essay is inspired by literary theory and suggests that the legal canon should be defined in terms of the particular audience to which the canonical texts are directed: one canon might be suitable for law students; another, for citizens; and so forth. *See* Balkin & Levinson, *Legal Canons: An Introduction*, *in* LEGAL CANONS, *supra*, at 3, 5. This is a useful approach, but it is not mine. I have one, and only one, problem in mind, and it can arise before many different audiences. The problem is the constitutional legitimation of power: whenever *anybody* challenges the constitutionality of *any* use of power, the ensuing conversation will find participants focusing on a relatively small number of texts as they attack or defend the challenged action. The canon's function is to identify these texts.

The question of constitutional legitimacy arises in many fora — from the Supreme Court to the PTA meeting to the breakfast table. As participants debate the particular issue before them, they may find that they have sharply different views about the texts that rightly belong in the canon. Nevertheless, they will invariably agree on one point: there is only one Constitution in America, and whatever its canonical statements include, they should control all uses of legitimate power. If, for example, a participant in a breakfast table conversation invokes the Bible in assessing the constitutionality of some challenged use of power, and if he is not merely engaged in early morning chit-chat, he is implying that judges, legislators, and his fellow citizens should also consult the Bible in resolving the particular constitutional problem when it comes before them.

[33] *See Confirmation Hearing on the Nomination of Samuel Alito To Be Associate Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 321 (2006) [hereinafter *Alito*] (Statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) ("Do you agree that *Casey* is a super precedent or a super stare decisis as Judge Luttig said?");

in response, but the very questions mark a significant step forward in the redefinition of the canon.

This suggests that our operational canon presently contains at least two components: one part is composed of the official canon, and the other of judicial superprecedents. The Supreme Court has an institutional obligation to recognize that superprecedents crystallize fixed points in our constitutional tradition, and should not be overruled or ignored in the course of doctrinal development. In this, of course, superprecedents resemble formal amendments, which play a similar shaping role in the operational canon.

What is even more interesting, superprecedents are often given much greater weight than items in the official canon. *Brown v. Board of Education* is a *much* more important reference point than, say, the guarantee of "a republican form of government" in the Founding text.[34] While no Supreme Court nominee could be confirmed if he refused to embrace *Brown*, he could safely confess great puzzlement about the meaning of "republican" government and gain a seat on the bench — despite the fact that "the republican government" clause was absolutely central to the Founding generation.[35] When we look away from our official theories for a moment, we see that the living Constitution is organized on the basis of an operational canon that does not even assign primacy, much less exclusivity, to the official canon.

And yet we are presently reshaping the operational canon in a haphazard and undertheorized fashion.[36] Though the notion of a "superprecedent" is becoming familiar, we have not yet begun to consider, for example, whether landmark statutes also deserve a central place in the modern constitutional canon. My affirmative answer isn't all that novel: most notably, Abraham Lincoln repeatedly claimed that the Missouri Compromise should be accorded a "sacred" status comparable to

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Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 144–45 (2005) [hereinafter *Roberts*] (Statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) (asking Judge Roberts whether *Roe* qualified as a "super-duper precedent in light . . . of 38 occasions to overrule it"). Judge Roberts was more explicit than Judge Alito in his acknowledgement of *Roe* and *Casey*, but both nominees recognized the superprecedential status of some great decisions of the twentieth century. *Compare, e.g.*, *Roberts*, *supra*, at 145 (*Roe*), *with Alito*, *supra*, at 393 (*Roe*), *and id.* at 452 (*Brown*).

[34] U.S. CONST. art. IV, § 4.

[35] For a good account of the rise of the clause during the nation's first century and its precipitous decline after Reconstruction, see WILLIAM WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972).

[36] I applaud Professor Michael J. Gerhardt for raising some of the larger questions in his recent exploratory essay, *Super Precedent*, 90 MINN. L. REV. 1204 (2006). But these Lectures take a different approach from Professor Gerhardt's. They aim to identify superprecedents by considering whether they were generated as crucial points in the complex institutional process through which the American people exercise their popular sovereignty.

the Constitution itself.[37] During the twentieth century, a series of important writers has called on the profession to move beyond the common law's skeptical treatment of legislation and to treat major statutes, in Justice Stone's words, as "a source of law, and as a premise for legal reasoning."[38] But we have yet to begin the serious exploration of this view's implications for the nuts and bolts of constitutional law.

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[37] Lincoln originally borrowed this thought from his rival Stephen Douglas, who had viewed the Missouri Compromise as possessing

> an origin akin to that of the constitution of the United States . . . . All the evidences of public opinion at that day, seemed to indicate that this Compromise had been canonized in the hearts of the American people, as a sacred thing which no ruthless hand would ever be reckless enough to disturb.

Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 247, 251–52 (Roy P. Basler ed., Rutgers Univ. Press 1953) (quoting a speech made by Senator Douglas in 1849) (internal quotation marks omitted). Lincoln repeatedly castigated Douglas for repudiating the "canon[ical]" Compromise in backing the Kansas-Nebraska Bill. *Id.* at 254, 257–59, 261; *see also* Abraham Lincoln, Speech at Bloomington, Illinois (Sept. 26, 1854), *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra*, at 234, 236. In later addresses, Lincoln adopted the Douglas formula without attributing it to its originator. *See, e.g.,* Abraham Lincoln, Speech at Quincy, Illinois (Nov. 1, 1854), *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra*, at 285, 285 (referring to the Compromise as a "sacred thing which no ruthless hand should have dared to destroy"); Abraham Lincoln, Speech at Clinton, Illinois (Oct. 14, 1859), *in* 3 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra*, at 487, 488 (referring to the Compromise as a "sacred compact").

[38] Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13 (1936). Speaking broadly, this effort to redeem the dignity of legislation begins at the turn of the century with the European-inspired work of Professors Pound and Freund, *see* Ernst Freund, *Interpretation of Statutes* 65 U. PA. L. REV. 207 (1917); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908), and proceeds in the next generation to famous essays by Stone, *supra*, and James McCauley Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213 (1934). Leading modern contributors are GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982), and JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999). All these works encourage an integration of statutory principles into the larger body of judge-made common law.

Another line of thought goes further and seeks to identify a set of "framework statutes" that serve quasi-constitutional functions. Once again, the initial breakthrough comes from a legal scholar with European training. *See* Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 481–92 (1976) (identifying "framework legislation" as a preferred tool for regulating constitutional problems in foreign affairs). More recently, Professors Eskridge and Ferejohn develop this "framework" theme in a pathbreaking analysis. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001). As they recognize, it is easier for a super-statute to pass their criteria than mine. *See id.* at 1267–75. This seems appropriate, as I am concerned with landmark statutes that deserve *full* admission into the constitutional canon, while they deal with a broader class of super-statutes that deserve *quasi*-constitutional status of a lesser, but still very significant, kind. *Id.* at 1264–67. Given these different objectives, our approaches seem more complementary than competitive.

Finally, Professor Cass Sunstein has developed the notion of "constitutive commitments" that are "widely accepted and cannot be eliminated without a fundamental change in social understanding." CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS 62 (2004). As paradigmatic examples, he mentions the right to join a labor union, the right to social security, and the right to be free from racial discrimination by employers — the very rights that are codified in statutes that, on my view, deserve a central place in the modern constitutional canon. *Id.* at 62–63. According to

Sustained reflection will not only enrich the ongoing enterprise of constitutional interpretation. It will also highlight the high stakes involved in the effort by Justice Scalia, and many others, to challenge the very notion of a living Constitution. We will come to see Justice Scalia's challenge as an invitation to cut ourselves off from the American people's great constitutional achievements of the twentieth century.

This is sheer folly. I do not propose to worship at the shrine of the twentieth century. From the Founding to the present day, each generation of Americans has contributed something to our constitutional legacy — some more, some less — and each generation has made its share of mistakes. But to cut ourselves off from three-quarters of a century, simply because Americans successfully mobilized to express their new constitutional conclusions through national institutions, and not through the state-centered institutions envisioned by the Founders — *that* is folly.

I want to emphasize the historicist character of my critique. For me, the "living Constitution" is not a convenient slogan for transforming our very imperfect Constitution into something better than it is. While the effort to make the Constitution into something truly wonderful is an ever-present temptation, the problem with this high-sounding aspiration is obvious: there are lots of competing visions of liberal democratic constitutionalism, and the Constitution shouldn't be hijacked by any one of them. The aim of interpretation is to understand the constitutional commitments that have actually been made by the American people in history, not the commitments that one or another philosopher thinks they should have made.[39] On this key point, I am closer to Justice Scalia than to Professor Ronald Dworkin.[40] I part company when Scalia joins Alfarabi in assuming that the formal text

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Professor Sunstein, disturbing these commitments would amount to "a violation of a trust," but nonetheless "it is not seriously argued that they are encompassed by anything in the Constitution." *Id.* at 62.

To which I say: "It all depends on what Professor Sunstein means by capitalizing 'Constitution.'"

[39] Professor Jed Rubenfeld's fine work on the nature of constitutional commitment is particularly relevant. *See* JED RUBENFELD, FREEDOM AND TIME 91–103 (2001); JED RUBENFELD, REVOLUTION BY JUDICIARY 71–141 (2005).

[40] *Compare* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 1–38 (1996), *with* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3 (Amy Guttman ed., 1997). There is a very wide distance between Justice Scalia and Professor Dworkin, with space enough for many different views about interpretation.

There is a closer connection between Professor Dworkin's earlier work on the central importance of integrity in legal interpretation in RONALD DWORKIN, LAW'S EMPIRE (1986), and my current thinking — but this is not the place to elaborate the similarities and differences.

contains the *complete* constitutional canon, thereby cutting himself off from the last seventy-five years of constitutional achievement.

Justice Scalia is not the only one making this mistake. Almost everybody does, albeit in a watered-down form. To see my point, distinguish two issues: canon definition and canon interpretation. The first seeks to identify the key texts of our tradition; the second, to figure out what they mean. Almost all of our debates center on the second question. Some think that the grand abstractions of the formal Constitution should be limited to the particular understandings of the generation that enacted them; others think that it is up to the living to fill in the best interpretation of the First Amendment or the Equal Protection or Due Process Clauses. But both sides focus on the same constitutional canon — the formal text running from Article I, written in 1787, through the latest twentieth-century amendment. To be sure, the advocates of living constitutionalism more readily grasp the significance of twentieth-century transformations as they elaborate the modern meaning of ancient texts. But they do so in ways that sometimes distort these more recent achievements, and they sometimes use the more abstract texts in the official canon as a springboard for elitist efforts to revolutionize American values.

Originalists, in contrast, lack the courage of their convictions. Perhaps Justice Thomas is willing to question the constitutionality of paper money, but I suspect that even he would find this prospect a bit daunting.[41] Certainly Justice Scalia proudly declares himself a reasonable originalist and explicitly tempers his fidelity to Founding understandings when they are too out of line with existing precedents and contemporary realities. But Justice Scalia lacks principles to explain when he will be reasonable and when he will be originalist.[42]

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[41] *See* Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 (concluding that paper money is inconsistent with original understanding); *cf.* Hepburn v. Griswold, 75 U.S. (6 Wall.) 603, 627 (1870), *overruled by* Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871). *Hepburn* was overruled after court-packing. *See* CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT, RECONSTRUCTION AND REUNION, 1864–88, pt. 1, at 677 (1971).

[42] Justice Scalia has famously described himself as a "faint-hearted originalist," Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861–64 (1989), who uses the doctrine of stare decisis as a pragmatic device to restrain an all-out assault on the twentieth century, *see, e.g.*, Gonzales v. Raich, 125 S. Ct. 2195, 2206–08 (2005) (accepting the New Deal's legitimation of broad national regulatory power); Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 40, at 129, 138 (arguing that modern doctrine's expansive understanding of the First Amendment is "irreversible," regardless of "whether or not [these doctrines] were constitutionally required as an original matter"). More generally, Justice Scalia understands that "the whole function of the doctrine" of stare decisis is "to make us say that what is false under proper analysis must nonetheless be held true, all in the interest of stability." *Id.* at 139. Justice Scalia recognizes the "pragmatic" character of his approach, but despite his famous denunciation of discretionary judgments in constitutional law, he creates a gaping exception when it comes to deciding when constitutional truth is more or less important than constitutional stability. *See id.* at 140.

It is time to question the premise organizing these familiar debates. Rather than focusing myopically on the great texts of the eighteenth and nineteenth centuries, we must redefine the canon to permit a deeper understanding of what Americans did, and did not, accomplish over *all* of our history, including the part that is closest to us.

By taking up the problem of canon definition, we shall be preparing the way for a breakthrough in the current impasse over interpretation. Once we get clearer about *what* we should be interpreting, the debate over *how* to interpret will take a different shape. Many disagreements that sound fundamental today will turn out to be arguments over the proper weight to be given to principles derived from twentieth-century texts as opposed to those inherited from earlier centuries.[43] In contrast, proponents of similar-sounding positions today may often find that they have deeper disagreements than they had formerly imagined.

If my proposal were adopted — and stranger things have happened — legal debate would have a rather different shape in 2020. Nowadays, slogans like originalism and living constitutionalism serve as soundbites suggesting their advocates' political positions on a wide range of hot-button issues. But a redefined canon would create a host of strange allies in the ongoing conversation that is our Constitution. Not, mind you, that the participants would magically come to universal agreement on the One True Meaning of the reformulated canon; but at least they would be talking to one another, rather than shouting at one another, about the contributions made by every generation over the course of the past two centuries.

My ultimate aim, in short, is to deny that law is politics by other means and that constitutional interpretation is mere pretense. Since the time of *Marbury v. Madison*,[44] our legal culture has managed to provide Americans with a common reference point even as they waged an unceasing effort to transform the constitutional baseline for succeeding generations.[45] If we allow this culture to disintegrate into a partisan shouting match, we will lose a great deal.

But we will never construct a solid foundation for legal interpretation by pretending that the American people have accomplished nothing of importance over the past seventy-five years. The life of the law, somebody once said,[46] is not only logic but experience. The time has

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[43] For some preliminary reflections, see 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 86–99 (1991) (outlining the problem of intergenerational synthesis).

[44] 5 U.S. (1 Cranch) 137 (1803).

[45] I develop these reflections on *Marbury* further in BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 224–44 (2005).

[46] Not Holmes, who categorically devalues logic in his famous dictum. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Transaction Publishers 2005) (1881). Holmes softens his "anti-logical" stance a bit in the text following immediately after his great apothegm:

come to build a canon for the twenty-first century based on the truth of the entire American experience.

II. LECTURE TWO: THE CIVIL RIGHTS REVOLUTION

Constitutional history goes in cycles. Since 1776, each rising generation has looked up the political heights to find that the government of the day was hell-bent on oppression. Time and again, the same response: organize an oppositional movement in the political wilderness, reclaim corrupt government in the name of We the People, and redefine America's constitutional future. We have been through eight major cycles: In 1776, the revolutionary cry was "no taxation without representation," but when this victory was finally won,[47] the Jeffersonian Republicans were soon leading the charge for a second American revolution;[48] a generation later, the Jacksonians were denouncing the Bank of the United States and its stranglehold on ordinary Americans[49] — only to see their political hegemony destroyed by the rising Republican Party rallying the People against the Jacksonian defense of the slave power;[50] a generation later, the Republicans had become the spokesmen for the status quo, provoking a Populist crusade climaxing in the presidential elections of 1896 and 1900.[51]

But then, something different happened: in contrast to every great protest movement since 1776, the Populists failed to scale the commanding heights, and a period of stuttering followed, with a host of middle-level changes without a strong sense of direction[52] — until

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> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Id. For an insightful discussion, see Scott Brewer, *Traversing Holmes's Path Toward a Jurisprudence of Logical Form*, *in* *THE PATH OF THE LAW* AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 94 (Steven J. Burton ed., 2000).

[47] *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969).

[48] *See generally* ACKERMAN, *supra* note 45.

[49] *See generally* GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION (forthcoming 2007). Professor Magliocca makes an important contribution to the relatively understudied cycle involving the rise, triumph, and fall of Jacksonian constitutionalism.

[50] *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988).

[51] *See generally* LAWRENCE GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA (1976).

[52] There are many specialist studies of particular amendments passed during the Progressive Era, but no book compares the very different forms of constitutional politics that generated the various amendments of that era. For a work that tries to view progressivism as a whole, without undertaking this comparison, see MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920 (2003).

Franklin Roosevelt took up the populist campaign against "economic royalism" in response to the Great Depression, and then broadened and deepened New Deal constitutionalism during the Second World War.[53] Yet this decisive breakthrough served only to frame the next generation's constitutional politics, culminating in Martin Luther King, Jr.'s successful appeal to the American people during the civil rights era; and we are, quite obviously, living through yet another cycle today.

With each turn of the wheel, the oppositional movement proposes a revisionist diagnosis of the public and its problems — sometimes gaining massive support from the American people, sometimes falling short. Whatever the fate of particular movements, the cyclical pattern recurs and recurs — the brainchild of America's shotgun marriage between the Revolutionary Enlightenment and Protestant Christianity.[54]

The living Constitution is a product of these eight cycles of popular sovereignty,[55] and its study requires careful attention to the themes and variations elaborated over the course of two centuries. History is full of surprises. No cycle is the exact replica of any other. But if we are to understand the real and existing American Constitution, we must put each cycle in the context of the others, summing up the constitutional conclusions reached by the American people over two centuries of struggle. We cannot blindly suppose that the formal constitutional text tells us all — or even most — of what we need to know.

Begin by reflecting on the great institutional divide that separates the Founding model of popular sovereignty from the recurring pattern that has emerged over the past two centuries. The Philadelphia Convention neither expected nor desired Presidents to claim popular mandates for sweeping constitutional change[56] — this plebiscitary theme begins only with Thomas Jefferson and ends, for the moment, with

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The rise of the Progressive Party in 1912, led by presidential candidate Theodore Roosevelt, provided an opportunity to give the varieties of progressivism a stronger institutional focus. *See* Sidney M. Milkis & Daniel J. Tichenor, *"Direct Democracy" and Social Justice: The Progressive Party Campaign of 1912*, 8 STUD. AM. POL. DEV. 282 (1994). Although Roosevelt won more votes than Republican William Howard Taft, his movement-party did not manage to defeat the Democrat Woodrow Wilson, who gained the presidency with only forty-two percent of the popular vote. David Leip's Atlas of U.S. Presidential Elections, 1912 Presidential Election Results (2005), http://uselectionatlas.org/RESULTS/national.php?year=1912.

[53] *See* BRUCE ACKERMAN & DAVID GOLOVE, IS NAFTA CONSTITUTIONAL? 45–96 (1995); 2 ACKERMAN, *supra* note 24, at 279–311.

[54] *Compare* SACVAN BERCOVITCH, THE AMERICAN JEREMIAD (1978), *with* HANNAH ARENDT, ON REVOLUTION (1963).

[55] Other significant constitutional movements have made contributions as well — most notably those occurring in the aftermath of Populism's defeat. Given the inadequacies of presidential leadership during this period, some of the notable movement successes during the interregnum between Populism and the New Deal were memorialized through the classical Article V system in the Sixteenth, Seventeenth, Eighteenth, and especially the Nineteenth, Amendments.

[56] *See* JAMES W. CEASER, PRESIDENTIAL SELECTION 42–46 (1979).

George W. Bush.[57] The failure of the Founders to foresee this development was forgivable: there weren't any presidentialist systems around at the time, and past history pointed them to popular assemblies as the privileged forum for popular sovereignty. During the Glorious Revolution, it was the Convention/Parliament that spoke for the People, definitely not the King, and this scenario had just been repeated during the American Revolution.

The Philadelphia Convention was part of this citizen-assembly tradition[58] and projected it into the future. One of the Founders' great aims was to prevent the presidency from becoming a platform for demagogues. They excluded the presidency from any role in constitutional revision and designed the Electoral College to prevent Presidents from claiming a popular mandate from the American people. Their Whiggish history had taught them that the great enemies of republics were demagogues like Caesar and Cromwell, and they were determined to block this particular path to tyranny in the new republic.[59]

But when tested by events, their constitutional machinery was shattered with spectacular speed. The ink was hardly dry before the partisan struggle between Adams Federalists and Jeffersonian Republicans destroyed the original understanding of the presidency during the election crisis of 1800.[60] The basic change is only dimly reflected in the revised election mechanics established by the Twelfth Amendment.[61] The shift involved the transformation of the presidency into an office that could legitimately speak in the name of the American people and was therefore entitled to play a key part in the ongoing process of higher lawmaking.

The victorious Jeffersonians created a three-part pattern of popular sovereignty that would reverberate through American history. I call it the movement-party-presidency pattern, and its historical development is at the center of my understanding of the living Constitution.[62] Since this pattern wasn't anticipated by the Founders, we must study its dynamics in a common law fashion, comparing each great cycle of presidential leadership with the others. There is no other way to understand how the American people have *in fact* sought to maintain control over their government over the past two centuries.

Movement, party, presidency — some definitions would be helpful. The defining feature of a movement is its activists, a large body of citi-

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[57] *See* ACKERMAN, *supra* note 45, at 249–50.

[58] *See* WOOD, *supra* note 47, at 162–67.

[59] *See* CEASAR, *supra* note 56, at 48.

[60] *See* ACKERMAN, *supra* note 45, at 16–35, 77–93.

[61] *See id.* at 203–06.

[62] *See id.* at 21–22, 256–66; Bruce Ackerman, *The Broken Engine of Progressive Politics*, AM. PROSPECT, May–June 1998, at 34.

zens who are willing to invest enormous time and energy in the pursuit of a new constitutional agenda. Jeffersonian Republicans weren't blowing smoke in asserting that a "second American revolution" was required to save the Republic from the "monocratic" Federalists.[63] Whatever you or I might think about their diagnosis, *they* really believed it and, no less importantly, acted on it; the same is true of Lincoln's Free Soil Republicans and Roosevelt's New Deal Democrats and George W. Bush's Religious Right.

Which leads to the idea of a movement-party. Most movements don't get off the ground, and most that do don't form a new party or colonize an old one. But as the Jeffersonians taught, a movement-party can be a powerful thing, providing a home for conviction-politicians who view their election as a popular mandate for fundamental change.

Movement-parties are always in a race against time. Idealistic motivations fade because some problems get solved, others go away, and new problems arise that defy the movement's ideology. Power begins to corrupt movement-politicians, and the party increasingly serves as a magnet for opportunists who couldn't care less about its originating ideals. The broad popular movement for constitutional change inexorably becomes a memory.

Call this the *normalization of movement politics*,[64] and it gives added importance to the third element in the pattern: the plebiscitarian presidency.[65] By virtue of his strategic position, a movement-President has the organizational resources to win the race against time by mobilizing a winning coalition in Congress in support of landmark legislation and by winning the confirmation of movement-judges to the Supreme Court.

All of this defies the expectations of the Framers, but our twentieth-century experience requires us to confront it squarely, because it provides the key to the dilemma that I presented in my first Lecture. Our problem, you will recall, is that the formal system of amendment no longer marks the great changes in constitutional course ratified by the American people over the last seventy-five years.[66] I argued in my first

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[63] *See* ACKERMAN, *supra* note 45, at 24–25.

[64] In speaking of the "normalization of movement politics," I adapt a familiar Weberian notion — the "bureaucratization of charisma" — to American political life. For a comparable effort, see ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY (Eden Paul & Cedar Paul trans., Jarrold & Sons 1915). But Michels is a very distant role model since his subject was the bureaucratization of the European Socialist parties in late-nineteenth-century Europe, involving dynamics that were very different from the American experience with movement-parties.

[65] Though it does not use the term, the best book in political science on presidential plebiscitarianism is STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 36–39, 41–43 (1993) (describing "politics of reconstruction" and "politics of articulation").

[66] *See supra* pp. 1741–42.

Lecture that this failure was the product of an increasing mismatch between the federalist framework of formal amendment and the rising national consciousness of the American people. Given this mismatch, it no longer made sense to allow a small minority of the states — which might contain fewer than five percent of the country's inhabitants[67] — to veto new fundamental commitments made self-consciously by sustained national majorities. If popular sovereignty was going to have a future in twentieth-century America, Americans would have to develop a credible constitutional vocabulary that allowed the nation to address, and sometimes resolve, the fundamental questions tossed up by history.[68] Here is where today's thesis enters: precisely because the movement-party-presidency pattern goes back to the days of Jefferson, it provided a deeply familiar language for popular sovereignty that filled the void left in the public mind by the marginalization of the formal Article V system.

The watershed was the movement-party-presidency of Franklin Roosevelt, which successfully legitimated the activist welfare state in landmark statutes like the National Labor Relations Act[69] (NLRA) and the Social Security Act, and in superprecedents like *Wickard v. Filburn*[70] and *United States v. Darby*.[71] But since I have already written about the birth agonies of the New Deal regime,[72] this Lecture takes a first look at the distinctive presidential dynamics of the civil rights revolution. Forty years have passed since the days of Earl Warren and Martin Luther King, Jr., and Lyndon Johnson — long enough to put their constitutional breakthrough into historical perspective. I will be arguing that the institutional dynamics of the Reconstruction and the New Deal provide powerful insights into the process through which the Court, the President, and Congress managed to speak for the People during the civil rights era. With the aid of these examples, I will be presenting the landmark statutes of the 1960s as functionally equivalent to the constitutional amendments of the 1860s. It follows that they deserve a central place in the constitutional canon for the twenty-first century.[73]

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[67] The thirteen least populous states contain thirteen million citizens, or about 4.5% of the country. An amendment can fail, then, if it is opposed by fewer than 3% of Americans, so long as they are strategically distributed. *See* U.S. Census Bureau, Annual Estimates of the Population for the United States, Regions, and States and for Puerto Rico: April 1, 2000 to July 1, 2006, at tbl. 1 (2006), http://www.census.gov/popest/states/tables/NST-EST2006-01.xls.

[68] *See supra* pp. 1749–51.

[69] Pub. L. No. 74-198, 49 Stat. 449 (1935).

[70] 317 U.S. 111 (1942).

[71] 312 U.S. 100 (1941).

[72] *See* 2 ACKERMAN, *supra* note 24, at 255–382. For a review of the ensuing debate, see Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165 (1999).

[73] Although it has some antecedents, *see* sources cited *supra* note 38, my discussion of landmark statutes is relatively novel in the American context. But the use of such statutes is already part of

In past work, I have shown how key constitutional transformations in American history have passed through a distinctive institutional dynamic, consisting of five phases: signaling, proposing, triggering, ratifying, and finally consolidating the new principles supported by the American people.[74] I will be using this same framework here.

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There are always lots of movements trying to push their constitutional agendas onto the center stage of popular debate. Most fail, but occasionally one or another major institution adopts a movement-agenda in a way that compels sustained attention across the political spectrum. This *institutional signal*, as I call it, inaugurates a serious exercise in constitutional politics, with movements and countermovements mobilizing to confront the rising agenda as it becomes increasingly salient.

From the era of Thomas Jefferson to the era of George W. Bush, this signaling function has typically been the sovereign prerogative of a President backed by a movement-party. But things were different at mid-century: this time around, it was the Supreme Court that forced the question of equality onto the center of the constitutional stage.[75] In

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contemporary French constitutional practice. Under the Fifth Republic, the Constitutional Court is authorized to identify "fundamental principles recognized by the laws of the Republic," and it has done so on ten occasions. *See* Bruno Genevois, *Une Catégorie de Principes de Valeur Constitutionnelle: Les Principes Fondamentaux Reconnus par les Lois de la République*, 14 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 477 (1998) (discussing the first nine cases); *Décisions et Documents du Conseil Constitutionnel: Jurisprudence*, 13 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 8, 12–19 (2002) (discussing the most recent decision). For a broader assessment of the use of statutes as sources of constitutional principles, see VÉRONIQUE CHAMPEIL-DESPLATS, LES PRINCIPES FONDAMENTAUX RECONNUS PAR LES LOIS DE LA RÉPUBLIQUE: PRINCIPES CONSTITUTIONNELS ET JUSTIFICATION DANS LES DISCOURS JURIDIQUES 69–107 (2001).

[74] *See* ACKERMAN, *supra* note 45, at 7–11; ACKERMAN & GOLOVE, *supra* note 53, at 73–104; 2 ACKERMAN, *supra* note 24, at 23–25.

[75] It is true, of course, that the presidency of Harry Truman was a significant moment in the history of civil rights. His nominating convention was the scene of the Dixiecrat revolt in response to the adoption of a strong civil rights plank in the platform. Once he was elected, Truman famously desegregated the military, and his Justice Department took consistently favorable positions, as amicus curiae, in important civil rights cases.

Nevertheless, it would be stretching to say that all this presidential activity amounted to a signal placing the civil rights agenda at the very heart of American political life. In fact, Truman avoided any strong positions on civil rights during the 1948 presidential campaign. *See* GARY A. DONALDSON, TRUMAN DEFEATS DEWEY 188–89 (1999). And if there was anything dominating the constitutional agenda during the Truman and early Eisenhower Administrations, it was the movement led by Joseph McCarthy, not the one led by the likes of Martin Luther King, Jr. (who was still in school). *See* BARBARA SINCLAIR, THE TRANSFORMATION OF THE U.S. SENATE 53 (1990) ("Early in the decade [of the 1950s], concern over subversive activities and over McCarthyism were the dominant issues, at least among political elites. . . . Civil rights for blacks, which

calling *Brown v. Board of Education* an institutional signal, I take a middle path between legalists who exaggerate *Brown*'s significance and political scientists who trivialize it.[76] For legalists, the Warren Court appears at the center of the story throughout the entire civil rights era, leading a reluctant nation to heed, at long last, the commands of the Fourteenth Amendment. Political scientists are right to scoff at this judge-centered vision — *Brown* remained very vulnerable until the Court was reinforced by constitutional politics during the Johnson presidency. But while *Brown* failed to integrate many schools of the Deep South during the 1950s,[77] it did catalyze an escalating debate that ultimately penetrated the nation's workplaces and churches, breakfast tables and barrooms, in a way that is rare in America (or any other country for that matter).[78]

Trivializers don't do justice to this central point. Higher lawmaking in America is never a matter of a single moment; it is an extended process, lasting a decade or two, that begins when a leading governmental institution inaugurates a sustained period of extraordinary popular debate, which gradually culminates in a series of key legal texts that express the will of a decisive majority of ordinary Americans at the polls. *Brown*'s role in precipitating this debate is a big deal.[79] It assured that fundamental change, if it ever came, would not come as the result of some diktat from above, but through debate and decision from below.

But *would* Americans ever make a decisive break with Jim Crow? There have been many failed constitutional moments in our history, and throughout the 1950s, *Brown* provoked a strong segregationist backlash.[80] No sober observer could say whether this counter-

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had regained agenda status in the late 1930s, was a continuing issue but one with little saliency beyond the participants and those directly affected.").

Truman's efforts on behalf of civil rights, while a significant development in the evolution of normal politics, were overwhelmed by the debate precipitated by the Cold War and did not remotely compare with the pervasive debate catalyzed by *Brown*, *Cooper v. Aaron*, 358 U.S. 1 (1958), and the rising civil rights movement of the later 1950s.

[76] The legalists are legion; the classic trivializing account is GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42–169 (1991).

[77] *Id.* at 50 tbl.2.1, 53 tbl.2.2 (establishing that substantial integration occurred only during the late 1960s, after the enactment of the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965).

[78] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 364–66 (2004).

[79] There are two basic questions about *Brown*: Did it discharge the signaling function? If so, did it *legitimately* do so? The first question requires an empirical investigation of the extent to which *Brown*, and later *Cooper*, provoked an ongoing and wide-ranging debate in the country; the second question requires a theory of interpretation that defines the occasions under which well-established precedents, like *Plessy v. Ferguson*, 163 U.S. 537 (1896), may be legitimately overruled. I try to answer the first question here; I tried to answer the second in 1 ACKERMAN, *supra* note 43, at 142–50. I hope to discuss the relationship between these two answers in future work.

[80] *See* KLARMAN, *supra* note 78, at 389–442.

mobilization would bring the movement for racial justice to a screeching halt.[81]

Kennedy's victory in 1960 did nothing to resolve the uncertainty. His public record on civil rights had been weaker than Nixon's during the 1950s,[82] and the Democrats were traditionally the party of Jim Crow. Public opinion polls show that ordinary Americans didn't believe that the Democratic Party was more racially liberal than the Re-

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[81] Here I part company with Professors Klarman and Rosenberg, who suggest that underlying economic and social changes made dramatic progress in race relations almost inevitable within the next generation. *See id.* at 310; ROSENBERG, *supra* note 76, at 40.

I am skeptical. As will appear, *see infra* pp. 1769–70, the passage of the landmark statutes was not a political inevitability in the 1960s. And if the civil rights movement had failed to take advantage of its window of opportunity, we might still be waiting for the return of another politically propitious moment for a massive legislative breakthrough. If the opportunity had been missed, the next generation might well have witnessed smaller legal initiatives, and social norms might have evolved in generally egalitarian directions. But it is easy to underestimate the extent to which the landmark statutes of the 1960s have served as salient benchmarks in the evolution of social practice. If they had not gained passage, we might well be struggling against many unapologetically racist practices that Americans have now put behind them.

More generally, I reject models of societal change that seek to identify social and economic sectors that serve as "the engine of history" while treating all the other sectors as if they were mere epiphenomena. The Marxist distinction between "base" and "superstructure" is the most familiar example of this device, but Professors Klarman and Rosenberg are reviving an older Whiggish version in asserting that the economic and educational gains by blacks were the engines of inevitable racial progress in politics and law.

[82] Even his admirers recognize that Kennedy "knew and cared comparatively little about the problems of civil rights and civil liberties" during his years in the Senate. THEODORE C. SORENSEN, KENNEDY 17 (1965). As he campaigned for the vice-presidential nomination in 1956, Kennedy undertook a largely successful effort to win Southern support against his rival, Estes Kefauver of Tennessee, whose strength was north of the Mason-Dixon line. *See* NICK BRYANT, THE BYSTANDER: JOHN F. KENNEDY AND THE STRUGGLE FOR BLACK EQUALITY 58 (2006) ("Bizarre though it was to see segregationists cheering on a Roman Catholic Harvard graduate, Mississippi's twenty delegates whooped rebel yells as they cast their votes for the New Englander, while Strom Thurmond's South Carolina delegation kept up a steady chant throughout of 'We Want Kennedy, We Want Kennedy.'"). Kennedy also voted with the South to weaken the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, despite intense dissatisfaction from Massachusetts's civil rights organizations. BRYANT, *supra*, at 66–76. In contrast, Vice President Nixon squarely condemned the evisceration of the 1957 Act as "one of the saddest days in the history of the Senate, because it was a vote against the right to vote." *Id.* at 76.

Nixon made his own affirmative contribution to the civil rights cause in his capacity as President of the Senate. Southern filibusters were then based on Senate Rule 22's requirement of a two-thirds majority for cloture. It was traditionally understood that a two-thirds vote was also required to amend Rule 22, but Nixon ruled otherwise at the Senate's organizational session. He stunned the South by announcing that Rule 22 could be amended by a simple majority vote. *See* 103 CONG. REC. 178–79 (1957). While Majority Leader Lyndon Johnson managed to deflect this assault on the filibuster, Nixon's ruling suggested a genuine commitment, as it would have been easy for him to follow Senate precedents.

As the 1960 campaign reached its climax, Kennedy famously telephoned Coretta King when Georgia threw her husband into jail. This gesture did win black votes, but a single phone call was hardly enough to mark a decisive turn from Kennedy's "Southern strategy" of the 1950s.

publican Party during the late 1950s and early 1960s.[83] Only one thing was clear: if, against the odds, Kennedy chose to put the power of the presidency behind the civil rights movement of Martin Luther King, Jr., he would rip apart the New Deal party that had propelled him into power.[84]

This point marks a key difference between the civil rights era and other constitutional moments. The great movements of the nineteenth century had created new political parties as vehicles for popular sovereignty, and Franklin Roosevelt managed to integrate the dynamic movements of his time into the Democratic Party of the 1930s. Consider Roosevelt's treatment of the labor movement: during its first Hundred Days, the New Deal broke sharply with the old regime by recognizing collective bargaining as a fundamental right — first in the National Industrial Recovery Act[85] (NIRA), and, later, in the NLRA.[86] These statutory initiatives, in turn, provoked a mass unionization campaign, with organizers marching through the country with signs proclaiming, "The President wants YOU to join a Union!"[87]

This was definitely not the message President Kennedy sent to the freedom-rides and sit-ins of the early 1960s. There were no grand ini-

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[83] Between 1954 and 1962, Americans considered the Republicans to be the more racially liberal political party, albeit by relatively small margins. *See* EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS 111 fig.4.7 (1989). This is hardly surprising: not only were the Republicans the party of Lincoln, but it was a Republican Chief Justice who had written the opinion in *Brown* and a Republican President who had given the decision crucial support at Little Rock. While Northern black voters had moved into the Democratic Party during the New Deal, Eisenhower had successfully made significant inroads in 1956, winning almost 40% of the black vote. *Id.* at 46.

The Republicans lost their image of racial liberalism between 1960 and 1964, when there was a rapid shift of about twenty-five percentage points in favor of the Democrats as the civil rights agenda moved onto center stage in Washington under a liberal Democratic Congress and presidency. *Id.* at 46 fig.2.1.

[84] Roy Wilkins of the NAACP recalled:

> The first thing that leaked out of the [Kennedy] White House . . . within ten days of his election . . . [was] this word that he positively was not going to advocate any civil rights legislation in the new Congress . . . because he did not want to split the party and didn't want to split the Congress when he had so much new legislation on major issues that he wanted to [have passed].

DAVID NIVEN, THE POLITICS OF INJUSTICE: THE KENNEDYS, THE FREEDOM RIDES, AND THE ELECTORAL CONSEQUENCES OF A MORAL COMPROMISE 27–28 (2003) (omissions in original) (internal quotation marks omitted). *See generally* Donald W. Jackson & James W. Riddlesperger, Jr., *John F. Kennedy and the Politics of Civil Rights*, *in* PRESIDENTIAL LEADERSHIP AND CIVIL RIGHTS POLICY 107 (James W. Riddlesperger, Jr. & Donald W. Jackson eds., 1995) (reviewing the literature and emphasizing Kennedy's political pragmatism).

[85] Pub. L. No. 73-67, 48 Stat. 195 (1933) (repealed 1966).

[86] *See generally* KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991) (elaborating the radical character of the New Deal transformation of labor relations).

[87] *See* IRVING BERNSTEIN, TURBULENT YEARS 37–125 (1970) (summarizing unionization campaigns provoked by the passage of section 7(a) of the NIRA).

tiatives for racial justice during his first Hundred Days. Kennedy waited three years before coming up with a strong legislative proposal.[88] Even then, he was not prepared to overpower a bitter-end Senate filibuster by Southern Democrats. The white South had provided the President with his margin of victory in 1960, and he was not going to burn his bridges to a key constituency with a revolutionary Civil Rights Act in the run-up to his campaign for reelection.[89]

The movement-party-presidency dynamic was stalled — at least until 1965, and possibly forever.[90] It was only a paradoxical mix of tragedy and comedy that opened up a constitutional space for decisive action. First, the comedy — our existing system of vice-presidential selection is a bad joke, giving presidential candidates powerful incentives to "balance the ticket" by naming a running mate from a different region who speaks with a different ideological accent.[91] Next, the trag-

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[88] A generally admiring Arthur Schlesinger summarizes Kennedy's civil rights program during his first two years as "piecemeal improvements in existing voting legislation, technical assistance to school districts voluntarily seeking to desegregate, an extension of the life of the Civil Rights Commission." ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 951 (1965). For surveys of the broader array of Kennedy's activities, which, apart from crisis management, mixed symbolic gestures on civil rights with the appointment of racist federal judges in the South, compare CARL M. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION (1977), a broadly sympathetic reading of Kennedy's early years, with BRYANT, *supra* note 82, at 225–427, a broadly critical reading. When Kennedy announced a new civil rights initiative in February 1963, it turned out to be "a collection of minor changes far more modest than the 1956 Eisenhower program." GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 24 (1969). Kennedy moved into higher gear only in response to the scenes of police brutality precipitated by civil rights actions in Birmingham, Alabama. His June 11 television address emphasized, for the first time, the moral dimensions of the civil rights question, and he followed up a week later with the Administration's first strong legislative initiative. BRYANT, *supra* note 82, at 417–28.

[89] *See* NICK KOTZ, JUDGMENT DAYS 62 (2005) ("[A]s the 1964 election drew closer, Kennedy seemed less eager. As it became clear that Senator Barry Goldwater, a conservative Arizonan, probably would be the Republican presidential nominee, King sensed that Kennedy was less inclined to push for civil rights.").

[90] This view was broadly shared by establishment insiders and movement outsiders. From the outside, Martin Luther King, Jr., said that if Kennedy had lived, "there would have been continual delays, and attempts to evade [civil rights legislation] at every point, and water it down at every point." TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63, at 922 (1988) (internal quotation mark omitted). From the inside, Harvard Law School Dean Erwin Griswold, a member of the Civil Rights Commission from 1961 through 1967, comments in his oral history:

> One of the most amazing things of the last 25 years is how much Johnson did for civil rights. He went far beyond what anyone could expect. Much more was accomplished under Johnson than would have happened if Kennedy had stayed [alive]. Of course, the times were different, but it wasn't just the assassination. Kennedy did not have his feet on the ground in civil rights.

Interview with Erwin Griswold, Member, U.S. Civil Rights Comm'n (Oct. 29, 1975) (transcript on file with the John F. Kennedy Library, Boston, Scott Rafferty Papers, Box 1).

[91] The Jeffersonians drafted the Twelfth Amendment with one goal in mind: to avoid turning 1804 into a replay of the electoral crisis of 1800. *See* ACKERMAN, *supra* note 45, at 203–06. The original Constitution had caused this crisis by allowing presidential electors to cast *two* votes for

edy — when an assassin's bullet strikes the President down, the country regularly confronts a double shock: not only the shock of loss, but also the shock generated by a rising Vice President jerking politics in a radically new direction.

Reconstruction provides the most spectacular historical example. In 1864, Lincoln selected a Southern War Democrat, Andrew Johnson, to balance the ticket, and so John Wilkes Booth's bullet put a racial conservative in the White House at a moment when Republicans were preparing a great leap forward on racial justice. When the Republican Congress first met in December 1865, the Fourteenth Amendment wasn't a high priority. Instead, Republicans were preparing to use the recently ratified Thirteenth Amendment as a platform for a series of landmark statutes vindicating the nation's new commitment to equality. It was only Johnson's repeated vetoes that forced the congressional Republicans to propose the Fourteenth Amendment as their election platform in 1866 as they struggled to fend off Johnson's fierce campaign to oust them from office.[92]

If Booth had missed his mark at Ford's Theatre, lawyers would be telling themselves a very different story. In this alternate universe, there would have been no angry veto messages by the President denouncing landmark statutes like the Civil Rights Act of 1866;[93] nor would the Republican Congress have found it necessary to pass a "court-shrinking" bill that prevented the President from filling Supreme Court vacancies with racial conservatives.[94] If Lincoln had been safe in the White House, he would have proudly signed the landmark statutes and filled the Supreme Court vacancies with strong Republican

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the presidency, without designating the candidate they intended to serve as Vice President. When all Republican electors cast their ballots for the Jefferson-Burr ticket in 1800, the Constitution forced the two candidates into a runoff in the House, generating a constitutional crisis. *See id.* at 30–35. By enacting the Twelfth Amendment in a last-minute rush before the next presidential election, the Republicans eliminated this scenario by stipulating that each elector cast one vote for President and another distinct vote for Vice President. They did not appreciate, however, that this would create a dynamic in which presidential vacancies would often be filled by Vice Presidents with very different convictions — in part because political party dynamics were not well understood at this early phase of American history. *See id.* at 203–06.

[92] *See generally* 2 ACKERMAN, *supra* note 24, at 169–78.

[93] Act of Apr. 9, 1866, ch. 31, 14 Stat. 27; *see also* 2 ACKERMAN, *supra* note 24, at 170–71.

[94] *See* Act of July 23, 1866, ch. 210, 14 Stat. 209. The statute was a response to Johnson's effort to fill a vacancy with his Attorney General, Homer Stanbery. Rather than considering the nomination on the merits, Congress passed a "court-shrinking" bill over the President's veto, providing that the departure of Justices from the bench would operate to reduce the size of the Court until it had reached seven in number. The size of the Court was expanded to nine immediately upon Grant's election, *see* Act of Apr. 10, 1869, ch. 22, 16 Stat. 44, with Senator Charles Buckalew explaining: "The reduction was made under peculiar circumstances, and with some reference to political considerations two or three years since. Now that those have passed away, I see no objection to increasing the number of the judges of that court by one or two." CONG. GLOBE, 40th Cong., 2d Sess. 1487 (1869).

Justices who would have overruled *Dred Scott v. Sandford*[95] and upheld the landmark statutes in eloquent judicial opinions that would serve as legal benchmarks for generations of jurists.[96] With landmark statutes and superprecedents on the books, it would have been unnecessary for the Republicans to go further and propose the first section of the Fourteenth Amendment. The Reconstruction of the 1860s would have looked more like the second Reconstruction of the 1960s — with formal amendments playing a smaller role, and with landmark statutes and judicial opinions much more prominent.[97]

Now fast-forward to the 1960s: Kennedy, like Lincoln, balanced his election-year ticket with a Southerner named Johnson.[98] But this time, the assassin's bullet shifted the presidency sharply to the left, not to the right. While Andrew Johnson repudiated the movement-Republicans of the 1860s, Lyndon Johnson rejected Kennedy's caution on civil rights, making common cause with Martin Luther King, Jr., to generate a novel variation on the presidentialist model of popular sovereignty.[99]

Johnson faced a different political context from his fallen predecessor. He was the first Southern President in the White House since Andrew Johnson left in disgrace in 1869,[100] and he could count on a pow-

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[95] 60 U.S. (19 How.) 393 (1857).

[96] Lincoln did not make a secret of these intentions. He had repeatedly stated that the aim of Republican politics was to get *Dred Scott* "reversed if we can, and a new judicial rule established upon this subject." Abraham Lincoln, Sixth Debate with Stephen A. Douglas (Oct. 13, 1858) *in* 3 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 37, at 245, 255. And again, "[w]e know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this." Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 37, at 398, 401.

[97] *See* 2 ACKERMAN, *supra* note 24, at 274–77. Some or all of the other provisions of the Fourteenth Amendment might well have been seriously considered by the Republicans. These provisions dealt with the repeal of the three-fifths compromise (Section 2), banning former Confederates from a wide range of offices (Section 3), and prohibiting compensation for the emancipation of slaves (Section 4). But the Republicans would have taken the Article V route only if the Lincoln Court had struck down landmark statutes seeking to achieve the same objectives.

[98] *See* LYNDON BAINES JOHNSON, THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963–1969, at 91 (1971) (reporting Kennedy's effort to persuade him to accept the vice-presidential nomination because it would "assure support in the Southern states").

[99] *See generally* KOTZ, *supra* note 89, at 250–77 (elaborating the complex relationship between King and Johnson).

[100] Woodrow Wilson was born and raised in the South, but he owed his national prominence to political success in New Jersey. Johnson was extremely sensitive to the special problems he faced as the nation's first Southern President since the Civil War:

> [There is] a disdain for the South that seems to be woven into the fabric of Northern experience. This is a subject that deserves a more profound exploration than I can give it here . . . . Perhaps it all stems from the deep-rooted bitterness engendered by civil strife over a hundred years ago, for emotional clichés outlast all others and the Southern cliché is perhaps the most emotional of all. Perhaps someday new understanding will cause this bias to disappear from our national life. I hope so, but it is with us still.

JOHNSON, *supra* note 98, at 95.

erful "favorite son" vote even if he took the high road on civil rights.[101] For Kennedy, a Senate filibuster of a strong civil rights bill was political poison, alienating white Southerners just when he was appealing for their votes in his reelection campaign — remember, this was in the days before the Voting Rights Act of 1965.[102] In contrast, a filibuster provided Johnson with a golden opportunity to demonstrate to the nation that he had outgrown the stereotype of the reactionary Southern politician.[103]

Johnson refused all efforts at a "compromise" that would water down the bill, and faced down the longest filibuster in history.[104] With national polls registering seventy percent support for a strong bill,[105] he

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[101] Despite Johnson's background, he lost five states of the Deep South to Barry Goldwater, largely on the race issue. *See* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT, 1964, at 380 (1965). But Johnson's "favorite son" appeal was sufficient to carry Texas and the middle and upper South, despite his decisive support of the Civil Rights Act. *See* ROBERT DALLEK, FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961–1973, at 182–83 (1998) (explaining Johnson's Southern strategy).

[102] Pub. L. No. 89-110, 79 Stat. 437.

[103] Johnson's previous civil rights record was mixed at best. During his first decade in the House, from 1938 to 1948, Johnson voted in stereotypical Southern fashion against every civil rights initiative. *See* MARK STERN, CALCULATING VISIONS: KENNEDY, JOHNSON, AND CIVIL RIGHTS 120 (1992). And even as Majority Leader of the Senate, he successfully beat down Richard Nixon's invitation to weaken the filibuster rules at the 1957 opening session of the Senate. *See* ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 857–58 (2002). At that point, he began to shift, using his power as Majority Leader to deliver civil rights acts in 1957 and 1960, but drastically weakening them to avoid Southern filibusters. *See id.* at 893–96, 911, 942–43 (discussing the Civil Rights Act of 1957); *see also* ROBERT MANN, THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS 198–99, 252–60 (1996) (discussing the Civil Rights Acts of 1957 and 1960); JONATHAN ROSENBERG & ZACHARY KARABELL, KENNEDY, JOHNSON, AND THE QUEST FOR JUSTICE: THE CIVIL RIGHTS TAPES 23–25 (2003) (same). Johnson also pursued a cautiously pragmatic approach when Kennedy appointed him Chairman of the Committee on Equal Employment Opportunity. *See* DALLEK, *supra* note 101, at 23–30. But with King's movement gaining new levels of national support in 1963 and 1964, Johnson faced a very different political environment, as he later explained:

> I knew that if I didn't get out in front on this issue [the liberals] would get me . . . . I had to produce a civil rights bill that was even stronger than the one they'd have gotten if Kennedy had lived. Without this, I'd be dead before I could even begin.

Id. at 114 (alteration in original) (internal quotation marks omitted). Richard Russell echoed Johnson's sentiment when he told a reporter, "If Johnson compromises, . . . he will be called a slicker from Texas." *See id.* (internal quotation marks omitted).

[104] *See* SEAN J. SAVAGE, JFK, LBJ, AND THE DEMOCRATIC PARTY 120–21 (2004); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 94–95 (1985). Johnson initially hesitated on whether to compromise, *see* WHALEN & WHALEN, *supra*, at 125, but his indecision was momentary, and of no strategic significance.

[105] With the civil rights bill stalled in the Senate, an April 1964 Harris Poll asked a random sample of 1250 respondents: "From what you know or have heard, do you favor or oppose the civil right[s] bill?" Seventy percent were in favor; only thirty percent were opposed or not sure. Louis Harris & Assocs., Harris Survey (Apr. 1964), *available at* iPOLL Databank, http://www.ropercenter.uconn.edu/ipoll.html. Shortly after the bill was signed into law, a Gallup Poll in October indicated nearly 60% were in favor and 31% were opposed (with 87% of these believing that

delivered the epochal Civil Rights Act of 1964[106] as the presidential campaign of 1964 was beginning in earnest. "Who would have thought a year ago that this could happen?" asked Attorney General Robert Kennedy as the bill headed for passage.[107]

The assassin's bullet largely accounts for the sharp differences in the patterns of constitutional leadership prevailing during the first and the second Reconstructions. In 1866, Booth's bullet forced the movement–Republican Party to abandon the presidency and to rely on Congress to deepen the nation's constitutional commitment to equality. Once the presidency was lost, Republicans could no longer hope to confirm movement-Republican Justices to create superprecedents overruling *Dred Scott* and to expound the nation's new constitutional commitments to equality. Instead, they confronted a steady stream of presidential vetoes challenging their landmark statutes. If they hoped to triumph over this presidential assault, Republicans had little choice but to consolidate their egalitarian ambitions through formal amendments under Article V — even though this strategy required military power to reconstruct Southern governments in ways that were almost guaranteed to alienate white opinion over the long run.[108]

The assassin's bullet had a very different — but equally surprising — consequence in the 1960s. Rather than pushing a movement-Congress to the center stage as in the 1860s, it pushed a movement-presidency to the forefront. This time around, the movement for racial justice was not forced into a dueling match with a racially conservative President. Martin Luther King, Jr., could join with Lyndon Johnson to create a movement-presidency, which would push a reluctant Congress to pass the Civil Rights Act that would frame the constitutional meaning of the 1964 elections.

Once we appreciate the role of the assassin's bullet, we can see that the proposal of the Fourteenth Amendment in 1866 and the enactment of the Civil Rights Act in 1964 played precisely the same function within the larger dynamic of popular sovereignty. Both actions pushed the system from the signaling stage to the proposal stage. The American people were now on notice that their political representatives were moving beyond the rhetoric of revolutionary reform and were proposing specific legal measures that would radically transform the Constitution as it was then understood.

We now reach the third stage in the process. Here ordinary voters get their first chance to pass judgment on the brave new initiatives un-

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the bill went too far and 5% believing that it went not far enough). Gallup Org., Gallup Poll (Oct. 1964), *available at* iPOLL Databank, http://www.ropercenter.uconn.edu/ipoll.html.

[106] Pub. L. No. 88-352, 78 Stat. 241.

[107] KOTZ, *supra* note 89, at 141.

[108] *See supra* note 25 and accompanying text.

dertaken in their name in Washington, D.C. During the first Reconstruction, this happened in 1866 when President Johnson barnstormed around the country appealing to Americans to throw the Radical Republicans out of Congress;[109] in 1964, this happened when Barry Goldwater ran for President after voting against the Civil Rights Act.[110] In both cases, a conservative victory would have put an abrupt end to the exercise in constitutional transformation: if the 1866 election had gone against the Republicans and in favor of Andrew Johnson's Democrats,[111] the Fourteenth Amendment would never have been ratified;[112] if the 1964 election had come out in favor of Barry Goldwater, there would never have been a Voting Rights Act of 1965 or a Civil Rights Act of 1968 — even the 1964 Act might not have survived the backlash.[113]

But it didn't turn out that way. Instead, the decisive defeat of the conservatives permitted the victors to claim a sweeping mandate from the People. If *Brown* was the signal and the Civil Rights Act was the proposal, the campaign of 1964 culminated in a triggering election, which legitimized the Act's revolutionary reform in the name of We the People — authorizing further landmark statutes and pushing the institutional dynamic toward a fourth stage: ratification.

* * * *

I have been using Reconstruction as a lens to gain perspective on the civil rights revolution. But as the popular sovereignty dynamic reached its peak in the presidential election of 1964, the legacy of the New Deal proved even more important. Americans in the prime of life during the 1960s had lived through the dramatic political and institutional standoffs of the 1930s. These experiences provided constitutional paradigms that framed the meaning of the 1964 election.

The crucial reference point was Roosevelt's landslide victory over Alf Landon in 1936. This triumph authorized the President to claim a sweeping mandate from the People for his New Deal, and Lyndon Johnson was aiming for the same kind of popular mandate in 1964. When Johnson went to the city of Memphis a week before the election, he tried to define the mandate he was seeking. After denouncing

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[109] *See* 2 ACKERMAN, *supra* note 24, at 180.

[110] *See infra* pp. 1772–73.

[111] To increase its popular appeal, the conservative opposition called itself the National Union Party during the election campaign of 1866, but this bipartisan image faded as Democratic stalwarts took increasing control. *See* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE 194–96 (1974).

[112] *See* 2 ACKERMAN, *supra* note 24, at 178–83.

[113] *See infra* pp. 1778–79.

Goldwater's assault on a variety of New Deal programs, the President turned to the future:

> The settled issues of the 1930's are not the issues of the 1960's, and that is really the choice you have to make. Do you want to go back to the thirties or do you want to go forward with the sixties?
>
> . . .
>
> If I take my compass or my ruler and take a direct line down the center of this crowd and divide you, we can do little; but united, as we are, there is little that we cannot do. And you know one of the things that I think we ought to do, and I say this as a man that has spent all of his life and cast his every vote in Texas, and as the grandson of two Confederate veterans, I think one of the things that we are going to have to do is wipe away the Mason-Dixon line across our politics.
>
> And because we are good people and because we are fair people, and because we are just people, and because we believe in the Good Book, we are going to have to follow the Golden Rule, "Do unto others as you would have them do unto you," and when we do that, we are going to wipe away the color line across our opportunity.
>
> The mandate of this election is going to be a mandate to unite this Nation. It is going to be a mandate to bind up our wounds and to heal our history, and to make this Nation whole as one nation, as one people, indivisible, under God.[114]

Like Lyndon Johnson, Barry Goldwater was up-front in his ambitions for a sweeping mandate from the People. Ever since Roosevelt crushed Landon in 1936, the Republican Party had nominated a series of me-too candidates who accepted basic New Deal premises — Willkie, Dewey, Eisenhower, and Nixon. These "Modern Republicans," as they proudly called themselves, earned nothing but Goldwater's contempt. He launched a direct attack on the New Deal and saw the Civil Rights Act of 1964 as yet one more step down the road to serfdom.[115] Although he was not a racist, he cast his vote against the Act, and in a Senate speech reported on front pages throughout the nation, he made it plain that New Deal constitutionalism was his real enemy. So far as he was concerned, the Act's effort to regulate "private enterprise in the

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[114] Lyndon B. Johnson, Remarks on the River Front in Memphis (Oct. 24, 1964), *in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1406, 1408–09 (1965). In retirement, Johnson reflected retrospectively on the 1964 campaign:

> I decided to seek a new mandate from the people. If Goldwater wants to give the voters a choice, I concluded, then we'll give them a *real* choice . . . . Suddenly all the old nit-picking arguments that separated our parties had been swept aside. We were now engaged in a colossal debate over the very principles of our system of government.

JOHNSON, *supra* note 98, at 103; *see also* SKOWRONEK, *supra* note 65, at 336–41 (discussing Johnson's use of Roosevelt, as well as his victory of 1936, as a reference point).

[115] *See* BARRY GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 25–31, 65–67 (1960) (attacking Modern Republicanism); *id.* at 68–75 (attacking the welfare state as socialistic).

area of so-called public accommodations and . . . employment"[116] was not only unwise as a matter of policy — it was flatly unconstitutional without the enactment of a new constitutional amendment, ratified by the states as provided by Article V.[117]

The election of 1964, in short, raised a central question of constitutional dimension, and one which Johnson's leadership on behalf of the landmark statute put in high relief: was the Civil Rights Act unconstitutional, as Goldwater charged, or a decisive affirmation of constitutional commitment, as Johnson asserted?

The 1936 landslide victory in support of the New Deal provided the relevant benchmark for determining the People's answer to this question. Goldwater was crushed in a Landon-sized landslide,[118] and the voters swept into power the most liberal Congress since the end of the New Deal.[119] This not only allowed Johnson to claim a mandate on

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[116] 110 CONG. REC. 14,319 (1964) (statement of Sen. Goldwater). Goldwater's speech was front-page news for the *New York Times*. *See* Charles Mohr, *Goldwater Says He'll Vote "No" on the Rights Measure*, N.Y. TIMES, June 19, 1964, at 1 ("'If my vote is misconstrued, let it be, and let me suffer its consequences,' the Arizona Senator said."). The *Times* reproduced the Republican frontrunner's speech in full. *See Text of Goldwater Speech on Rights*, N.Y. TIMES, June 19, 1964, at 18. Legal columnist Anthony Lewis explained, on the same page, why Goldwater's constitutional views were no longer accepted by the courts. *See* Anthony Lewis, *The Courts Spurn Goldwater View*, N.Y. TIMES, June 19, 1964, at 18.

[117] *See* 110 CONG. REC. 14,319 (1964). Goldwater emphasized that his "basic objection" was to New Deal constitutional ideas that authorized the enactment of the Civil Rights Act without a new formal amendment. He also denounced the "creation of a Federal police force of mammoth proportions" and "the development of an 'informer' psychology in great areas of our national life — neighbors spying on neighbors, workers spying on workers, business spying on businessmen . . . ." *Id.* But this policy critique came only after his refutation of New Deal constitutionalism.

[118] Both Roosevelt and Johnson gained about 61% of the popular vote in 1936 and 1964. ALICE V. MCGILLIVRAY ET AL., AMERICA AT THE POLLS, 1960–2004: A HANDBOOK OF AMERICAN PRESIDENTIAL ELECTION STATISTICS 23 (2005); ALICE V. MCGILLIVRAY & RICHARD M. SCAMMON, AMERICA AT THE POLLS, 1920–1956: A HANDBOOK OF AMERICAN PRESIDENTIAL ELECTION STATISTICS 13 (1994). Republicans responded to the electoral debacle of 1964 by returning to their custom of awarding their presidential nominations to representatives of the "Modern Republican" wing of their party. Richard Nixon and Gerald Ford firmly planted themselves within the Willkie-Dewey-Eisenhower tradition of accommodation to the New Deal constitutional regime. *See* MELVIN SMALL, THE PRESIDENCY OF RICHARD NIXON 24 (1999) (describing Eisenhower's endorsement); STEVEN WAGNER, EISENHOWER REPUBLICANISM: PURSUING THE MIDDLE WAY 121 (2006) (describing the philosophy of Modern Republicanism). Ronald Reagan's rise to the presidency in 1980 would signal a new round of constitutional politics that challenged basic premises of the New Deal and civil rights era. But in 1964, Reagan was only beginning his political career as Governor of California.

[119] Democrats outnumbered Republicans by 295 to 140 in the House, the largest margin since 1936; in the Senate, the margin was 68 to 32, the largest since 1940. No less significantly, "Democrats now held a large enough majority to prevail on some measures despite defections by southerners." KOTZ, *supra* note 89, at 261. In particular, "[t]he new 89th Congress was . . . so inspirited by the massive mandate over Goldwater, who had conspicuously voted against the Civil Rights Act of 1964, that there was little doubt that the Administration's new voting-rights bill would pass in some form." HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 166 (1990).

civil rights; it also gave him the political leverage to translate these words into deeds by leading Congress to enact further landmark legislation like the Voting Rights Act of 1965.[120]

The living Constitution was passing a vital test: the presidential candidates were talking to one another, rather than past one another, on the great issues that divided them. And it was providing the nation with a benchmark — the New Deal landslide of 1936 — for determining whether one side had won the argument decisively or whether both sides might legitimately suppose that the People continued to confront the question with an open mind.

Given its centrality to the living Constitution, the notion of a "popular mandate" is worth more attention than constitutional lawyers have given it. It is easy to be skeptical of the entire idea.[121]

American elections are never single-issue affairs. Voters always have a variety of disparate concerns. Yet talk of a "popular mandate" on one or another Great Issue seems to falsify this obvious point. In 1964, for example, Johnson and Goldwater disagreed not only on the federal government's role in securing racial justice, but on the larger program of economic justice laid out in the President's vision of the Great Society; they also disagreed about foreign policy, with Johnson successfully portraying Goldwater as a "trigger-happy" militarist.[122] This multiplicity of issues is typical and serves as the basis for an important objection to the very idea of a "popular mandate."

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[120] Johnson's reflections on his landslide victory are suggestive (but hardly dispositive):

> Many people felt we should rest after the victory of the 1964 Civil Rights Act, take it easy on Congress, and leave some breathing space for the bureaucracy and the nation. But there was no time to rest. . . .
>
> I feared that as long as these [black] citizens were alienated from the *rights* of the American system, they would continue to consider themselves outside the *obligations* of that system. I tried to state this position as fully as I could in the Presidential campaign. I wanted a mandate to move forward, not simply a sanction for the status quo.
>
> On November 3, 1964, the American voters gave me that mandate. I moved to use it quickly. I directed Attorney General Nicholas Katzenbach to begin the complicated task of drafting the next civil rights bill — legislation to secure, once and for all, equal voting rights.

JOHNSON, *supra* note 98, at 160–61 (footnote omitted). Although Johnson ordered Katzenbach to work on the statutory options, he did not make the Voting Rights Act a high priority until later in 1965, when his electoral mandate had been reinforced by King's movement activities on behalf of voting rights in Selma, Alabama. *See infra* pp. 1782–83 and note 142.

[121] For a classic statement of the skeptical case, see Robert A. Dahl, *Myth of the Presidential Mandate*, 105 POL. SCI. Q. 355 (1990). For other studies, see PATRICIA HEIDOTTING CONLEY, PRESIDENTIAL MANDATES: HOW ELECTIONS SHAPE THE NATIONAL AGENDA (2001); GEORGE C. EDWARDS III, AT THE MARGINS: PRESIDENTIAL LEADERSHIP OF CONGRESS (1989); GEORGE C. EDWARDS III, THE PUBLIC PRESIDENCY: THE PURSUIT OF POPULAR SUPPORT (1983); STANLEY KELLEY, JR., INTERPRETING ELECTIONS (1983).

[122] *See, e.g.*, DENISE M. BOSTDORFF, THE PRESIDENCY AND THE RHETORIC OF FOREIGN CRISIS 57 (1994) (describing Johnson's campaign attack on Goldwater).

Call it the "bundling problem": if many Americans were using their ballots in 1964 to vote for prudent moderation in foreign affairs, it seems wrong-headed to view the Democratic landslide as representing a mandate for racial justice. More generally, talk of a "mandate from the People" invariably privileges a subset of issues and ignores others that were important to the voters on election day.

Despite its initial charms, this objection should be rejected. It is too broad legally and too shallow philosophically. On the legal side, the bundling problem is hardly a unique difficulty posed by modern forms of presidential leadership in constitutional revision. It is equally troublesome when it comes to Article V amendments: voters generally don't focus on candidates' positions on potential amendments when casting ballots for Congress and state legislatures — many other national and local issues are far more salient. Nevertheless, constitutional lawyers treat a new formal amendment as an unproblematic expression of We the People, without looking beyond the fact that three-fourths of the state legislatures had given their solemn approval.

Which leads to a deeper philosophical point. Some constitutional systems do indeed respond to the bundling objection by trying to remove the resolution of constitutional matters from the hands of elected politicians. Special referenda procedures are a familiar part of the constitutions of many states and foreign countries. But the American Constitution is different. When operating both in its federal mode (under Article V) and in its national mode (under the living Constitution), the system leaves it to our political representatives to determine when the time is ripe to claim a mandate from the People and translate its meaning into enduring and fundamental legal texts. In the federal mode, these texts take the form of Article V amendments; in the national mode, landmark statutes and superprecedents. To put the point in a single line, the American system relies on the forms of *representative democracy* to determine the credibility of a popular mandate and does not depend on the forms of *direct democracy*.

Both direct and representative systems face the same problem — talk is cheap, and it is all too easy for elected politicians to claim a mandate from the People under conditions in which such a claim is inappropriate.[123] Given this obvious point, both systems make it hard for political claims of a "mandate" to gain institutional credibility. Under the direct system, these claims are tested through a specially structured referendum mechanism, which gives the voters the final say. Under the representative system, politicians must keep on winning elections until they can gain assent to a revision from a variety of rep-

[123] For a discussion of these conditions, see 1 ACKERMAN, *supra* note 43, at 266–94 (elaborating the criteria of breadth, depth, and decisiveness).

resentative institutions that are normally at loggerheads with one another.

Our national Constitution is firmly committed to the representative system: when operating in its federal mode, it requires a movement for constitutional revision to carry the votes of two-thirds of our representatives in both houses of Congress and to gain the assent of three-fourths of the states; when operating in its national mode, it requires constitutional reformers to maintain their electoral momentum in the face of vigorous dissent by the conservative branches in the system of separation of powers. It is only when a constitutional movement wins sustained control of all three branches of the national government that it can *earn* the popular mandate to enact landmark statutes and to obtain the judicial elaboration of superprecedents.

Both the direct and representative systems have their strengths and weaknesses. In direct systems, the questions put before the People in referenda may be misleading, and the voters may often be poorly informed about the real stakes involved. The method of representative government has different vices. The representatives have a better understanding of the issues, but the way they express new solutions in their decisive legal texts may diverge significantly from the prevailing understandings held by the broader public.

Neither system is perfect — but that's life, and we had better learn to live with it. While there are many ways to improve existing systems of direct and representative government,[124] my task here is to interpret the American Constitution as it is, not as it ought to be. Within the existing American system, the bundling objection is simply inapt: it falsely supposes that our Constitution seeks to test claims of a mandate by isolating single issues for focused decision by the voters, rather than collective and sustained deliberation by representatives.[125] Instead, we

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[124] For some suggestions, see 2 ACKERMAN, *supra* note 24, at 410–16; and Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 666–68 (2000).

[125] I hope to address, in future work, the current tendency of politicians and pundits to define "popular mandates" by referring to public opinion polls on the underlying issues raised in a campaign. This development raises very fundamental issues: it is one thing to revise our existing system of representative democracy to incorporate *public* referenda as a mode of defining popular mandates; quite another, to treat *privatized* polling numbers as if they were the functional equivalent of a public referendum. For some skeptical remarks on the present state of public opinion polling, see BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 7–8 (2004).

At best, public opinion polls serve as crude indications of the breadth of popular support. Still, these polls repeatedly revealed supermajorities of sixty to seventy percent supporting the civil rights bill. *See supra* note 105. This suggests that Johnson and the liberal Congress were not using Goldwater's unpopular positions on foreign policy as a springboard for imposing unpopular policies on civil rights.

A June 1964 Gallup poll suggests the same conclusion. The poll asked, "If two candidates of your own party were alike in all respects except that one candidate took a strong stand in favor of civil rights and the other took a strong stand against civil rights, which man would you be more likely to prefer?" This question seeks to determine the respondent's position, *all other things being*

should recognize that American politicians earn their authority to speak for the People by successfully negotiating a demanding institutional obstacle course that gives their opponents repeated opportunities to defeat their claims in a series of national elections. The point of my five-stage analysis is to determine whether the constitutional reformers of the civil rights era managed to make it across the finish line.

From this perspective, the landslide victory of 1964 had a very different constitutional significance for each of the three great issues raised in the campaign. President Johnson did not proclaim his War on Poverty until his State of the Union Address of 1964,[126] and so his landslide victory simply served as an institutional signal that, like *Brown* a decade earlier, began a period of sustained popular debate on a new reform agenda.[127]

Johnson's foreign policy mandate had even less constitutional significance. Rather than signaling a new beginning in foreign policy, the President was seeking to reassure Americans that he would operate well within the bipartisan consensus established by Harry Truman and Dwight Eisenhower. It was Goldwater, not Johnson, who was emphasizing the need for a fundamentally new approach.

In contrast, the civil rights agenda was now ripe for serious consideration by the People, given the past decade of heated debate in courts and legislatures, dinner tables and workplaces, throughout the nation.[128] And the striking contrast between Johnson and Goldwater inexorably tied the future of race relations to the campaign — not only was the issue salient, but the rivals obviously intended to drive the country in very different directions.[129] What is more, the voters swept

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equal. The public's answer: 63% would vote for the pro–civil rights candidate, 23% for the anti–civil rights candidate, and 15% had no opinion. *See* Gallup Org., Gallup Poll (June 25–30, 1964), *available at* iPOLL Databank, http://www.ropercenter.uconn.edu/ipoll.html.

[126] The Great Society came even later, on May 22, 1964. *See* Lyndon Baines Johnson, Remarks at the University of Michigan (May 22, 1964), *available at* http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/640522.asp.

[127] The Democrats failed to follow up on this signal by carrying through their antipoverty agenda to a successful conclusion over the next decade. The defeats of Hubert Humphrey and George McGovern made it plain that the American people were not prepared to endorse a *constitutional* assault on economic inequality — although, of course, many of the statutory initiatives of the Johnson years continue to have an important impact on the welfare of Americans today. For a perceptive discussion of the Supreme Court's refusal to constitutionalize the War on Poverty, which rightly emphasizes the significance of Humphrey's defeat, see SUNSTEIN, *supra* note 38, at 153–71.

[128] *See* WHITE, *supra* note 101, at 305 ("[D]iscussion of [civil rights] probably obsessed [private] American conversation in the summer and fall of 1964 more than any other [issue].").

[129] At a meeting early in the campaign, Goldwater and Johnson responded to a wave of black urban riots by agreeing informally, on July 24, to refrain from statements that could further inflame the volatile situation. But at a press conference before that meeting, Johnson made it clear that "he had no intention of taking the civil rights issue out of the campaign." DALLEK, *supra* note 101, at 134. I have given Johnson's Memphis "mandate speech" pride of place in the text, but

an extremely liberal Congress into power, one which was prepared to back the President's claim to a mandate on civil rights.[130]

Within this context, the Democratic victory of 1964, like that of 1936, qualifies as a triggering election, pushing the popular sovereignty dynamic into a new phase: ratification. During this period, it still remained possible for conservatives to beat back the liberal assault on the constitutional status quo ante — but it became more difficult. Suppose, for example, that the Goldwaterites had experienced a remarkable political revival during the elections of 1966, 1968, and 1970 — sweeping a new President and Congress into power who managed to repeal the landmark statutes and rededicate the country to Barry Goldwater's constitutional views during the dawning days of the new decade. Under this scenario, today's lawyers would look back on 1964 as a mere blip, representing little more than a moment of demagogic madness.

This thought experiment helps refine the constitutional significance of triggering elections in the American experience. Before the 1964 election, the great debate between civil rights and states' rights was in relative equipoise, with neither side in the clear ascendancy in the struggle for public support. But once Johnson and the Democratic Congress swept the polls, even bitter-end racial conservatives were obliged to recognize that the main current of national opinion was moving against them. To mark this point, I borrow the familiar notions of "burden of persuasion" and "burden of going forward" from the law of evidence: with its sweeping victory in presidential and congressional elections, the movement for constitutional reform had now decisively discharged its *burden of persuasion*, and the *burden of going forward* had now shifted to the partisans of the old regime. Unless the

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the President had already made a high-visibility speech on the issue in New Orleans on October 9, at the end of Lady Bird Johnson's old-fashioned railroad tour of forty Southern towns. The First Lady's theme, covered by the national press, was racial justice and the need "to put behind us things of the past." *See* RANDALL B. WOODS, LBJ: ARCHITECT OF AMERICAN AMBITION 542–44 (2006).

Barry Goldwater's position on civil rights was longstanding and well known. As we have seen, Goldwater clearly stated the constitutional grounds of his opposition both in his book, *see* GOLDWATER, *supra* note 115, at 25–35; *see also supra* p. 1772, and in his Senate floor speech opposing the Civil Rights Act, *see* 110 CONG. REC. 14,319 (1964); *see also supra* notes 116–117 and accompanying text. Goldwater repeated these familiar themes in a high-visibility speech on October 22, *see* Press Release, Republican National Committee, Nationwide TV Address on "The Free Society" (transcript of ABC television broadcast Oct. 22, 1964) (on file with the Harvard Law School Library), and he blitzed the South during the closing weeks of the campaign with regionally televised speeches emphasizing his conservative position on civil rights. *See* SOMEHOW IT WORKS: A CANDID PORTRAIT OF THE 1964 PRESIDENTIAL ELECTION 203 (Gene Shalit & L.K. Grossman eds., 1965). This last-minute emphasis on the civil rights issue increased Goldwater's support in the deep South. *See* Angus Campbell, *Interpreting the Presidential Victory*, *in* THE NATIONAL ELECTION OF 1964, at 256–81 (Milton C. Cummings, Jr., ed., 1966).

[130] *See supra* note 119.

conservatives could regain control of some of the central institutions of the national government, and do it quickly, the separation of powers would begin generating a self-reinforcing stream of landmark statutes and superprecedents that would consolidate the rising regime of racial justice in a way that would endure for generations. I mark this shift in the burden of going forward by saying that the system of popular sovereignty was moving into its ratification phase.

At this point, the Supreme Court reentered the drama in a big way. Its response to the Civil Rights Act of 1964 and the Voting Rights Act of 1965 would profoundly shape the ratification enterprise: on the one hand, it could strike down the new landmark statutes in the manner of the Old Court in the 1930s, forcing the movement-presidency to return again to the voters for a further mandate; or on the other, it could learn a different lesson from the New Deal experience and endorse the constitutionality of the new statutes, thereby putting a heavier burden on racial conservatives as they returned to the electorate to reverse the triumphalist interpretation of the 1964 election.

The Court didn't keep the country waiting to hear its answer. President Johnson signed the Civil Rights Act on July 2, 1964, and within months cases challenging its constitutionality were speeding their way to the Court. The Justices heard arguments while the election campaign was still in progress, and they unanimously upheld the new landmark statute in two cases, *Heart of Atlanta Motel*[131] and *McClung*,[132] only a month after the voters had given the President and his liberal Congress their sweeping victory.

But appearances were deceiving. Despite the absence of dissent, the Justices had real difficulties resolving the two cases. Their problem was stare decisis. In the aftermath of Reconstruction, the Court had famously struck down a public accommodations statute in the *Civil Rights Cases*[133] of 1883. And if the modern Court had followed this important precedent, it would have been obliged to repudiate large portions of the new Act, despite the 1964 landslide.

To be sure, the Warren Court hadn't allowed stare decisis to prevent it from overruling *Plessy*[134] in 1954. And if the Justices had overruled the *Civil Rights Cases* in 1964, *Heart of Atlanta Motel* and *McClung* would have eclipsed *Brown* in the modern constitutional canon. In this alternative scenario, today's lawyers and judges would be studying *these* cases, not *Brown*,[135] in their effort to elaborate the

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[131] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[132] Katzenbach v. McClung, 379 U.S. 294 (1964).

[133] 109 U.S. 3 (1883).

[134] Plessy v. Ferguson, 163 U.S. 537 (1896).

[135] *See* David Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989) (discussing the evolution of *Brown*'s constitutional meaning over time).

breakthrough principles of equal protection and state responsibility that served as the foundation of the landmark Act of 1964.

But it was not to be — even though a majority of the Court, including the Chief Justice, was prepared to overrule the *Civil Rights Cases* if this were the only way to uphold the new statute.[136] There would have been a big problem if Chief Justice Warren had led the Court down this path. The records from the Justices' conferences show that an equal protection opinion would have provoked a strong dissent from Justice Harlan, and perhaps others.[137] This dissent would have pro-

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[136] The smoking gun is an opinion written by Justice Clark during the Court's internal deliberations over *Bell v. Maryland*, 378 U.S. 226 (1964). While the Court was deliberating, Congress was debating the civil rights bill. *See* Tom Clark, Draft Opinion in *Bell v. Maryland* (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1312, Folder 4).

Bell was the Court's toughest sit-in case because it did not involve any of the more obvious forms of state action. The Maryland court had simply enforced a race-neutral criminal trespass statute against protesters who had refused to leave a restaurant upon the manager's request. *Bell*, 378 U.S. at 227. To reverse the convictions, the Court was obliged to consider whether the expansive definition of state action elaborated by *Shelley v. Kraemer*, 334 U.S. 1 (1948), had supplanted the *Civil Rights Cases*' more restrictive notion in the area of public accommodations. Justice Black assembled a five-man majority (including Justices Harlan, Clark, Stewart, and White) for upholding the trespass convictions. Justice Black's opinion affirmed the authority of the *Civil Rights Cases* and narrowed *Shelley*'s sweeping rationales. *See* Hugo Black, Draft Opinion in *Bell v. Maryland* (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1312, Folder 4).

But at the last moment, Justice Clark defected, reflecting a concern that a decision against the sit-in protestors would give new respectability to the ongoing Southern filibuster against the civil rights bill. See, for example, Justice Brennan's statement that he "was so concerned that if [the Court] came down with *Bell v. Maryland* on constitutional grounds, it would kill the civil rights act," *quoted in* HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 168 (1992).

Justice Clark stopped the Court from issuing Justice Black's opinion on May 15, and he soon began working on his own draft invalidating the sit-in convictions on the basis of an expansive interpretation of *Shelley*. Reflecting his concerns about the pending Civil Rights Act, Justice Clark's opinion explicitly invited Congress to take the "necessary steps" to legislate clear rules that would "meet the necessities of the situation." Clark, *supra*, at 14. Justice Clark circulated his opinion on June 11, and it quickly gained a five-man majority, with Chief Justice Warren predicting that it would "without doubt be a classic." BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY 523 (1983).

As all this was happening inside the Court, there was a breakthrough in the Senate. A bipartisan coalition had broken the three-month-old filibuster the day before Justice Clark circulated his draft. Justice Stewart then defected from Justice Black's no-longer-majority opinion on June 16. But he did not make a U-turn on the merits by joining Justice Clark. Instead, Justice Stewart helped Justice Brennan cobble together a new five-man majority (Justices Warren, Douglas, and Clark joined them) that disposed of *Bell* on procedural grounds and deferred the constitutional questions raised by the new Act until *Heart of Atlanta Motel* and *McClung*.

Justice Brennan's opinion ultimately prevailed, but Justice Clark's draft opinion for the Court demonstrates that, when it seemed imperative, there were five votes for extending *Shelley*'s broad view of state action and rejecting the authority of the *Civil Rights Cases* on issues involving public accommodations.

[137] At the Court's conference on *Heart of Atlanta Motel* and *McClung*, Harlan unequivocally stated, "On the Fourteenth Amendment, I would stand by the *Civil Rights Cases* and hold [the

vided a platform for every racist in the nation to urge a new round of defiance against the 1964 Act's effort to inaugurate a new era of race relations in this country.[138]

Here is where New Deal constitutionalism came to the rescue. Neither Justice Harlan nor anybody else was prepared to dissent from an opinion upholding the Act on the basis of an expansive New Deal reading of the Commerce Clause. The Court's unanimity achieved its objective: it deprived bitter-end racists of any semblance of judicial support.[139]

But the Court's embrace of the Commerce Clause also serves to frame my main thesis: at the greatest egalitarian moment in our history, the Supreme Court of the United States treated a landmark statute as if it involved the sale of hamburger meat in interstate commerce, leaving it to Martin Luther King, Jr., and Lyndon Johnson to elaborate the nature of the nation's constitutional commitments.[140] To learn the real constitutional reasons for the Civil Rights Act of 1964, we must admit the landmark statute itself into the constitutional canon and treat the

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Civil Rights Act of 1964] unconstitutional." THE SUPREME COURT IN CONFERENCE (1940–1985), at 727 (Del Dickson ed., 2001); *see also* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN 253 (1992) ("Justice Harlan undoubtedly would have been unwilling to support the [Fourteenth] [A]mendment's use in an assault on private discrimination.").

[138] During the early 1950s, Chief Justice Warren could afford to take a lot of time to gain unanimity for *Brown*. *See* RICHARD KLUGER, SIMPLE JUSTICE 678–99 (1976). No other major institution was forcing the Court's hand on racial matters, and it was entirely up to the Justices to decide whether or not to push the equal protection question to the forefront of the nation's constitutional agenda. (This is why I describe *Brown* as discharging the signaling function, and nothing more.) But by 1964, the popular sovereignty dynamic had moved on and the Court was no longer in control of events — the legitimacy of the Civil Rights Act had now been reinforced by a sweeping mandate from the People in November, and now that the voters had decisively rejected Goldwater, a lengthy delay by the Court would have generated widespread uncertainties about the Act's constitutionality, thereby endowing bitter-end efforts to defend Jim Crow on the ground with some legitimacy.

[139] Technically speaking, Justice Clark's opinions for the Court in *Heart of Atlanta Motel* and *McClung* were not unanimous, since Justice Black filed a special concurrence. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 268–278 (1964) (Black, J., concurring) (opinion also made applicable to *McClung*). But from the doctrinal point of view, Justice Black's concurrence disposes of the cases using precisely the same Commerce Clause theories elaborated by Justice Clark. Justices Douglas and Goldberg also filed concurrences that relied on the Fourteenth Amendment as an alternative ground, but neither took the trouble to write a serious analysis of the *Civil Rights Cases*, referring instead to their separate opinions in previous cases. *See id.* at 279 (Douglas, J., concurring); *id.* at 291 (Goldberg, J., concurring).

[140] Justice Clark appeared almost embarrassed in discussing the moral foundations of the Act. He explained in *Heart of Atlanta Motel* that congressional regulation under the Commerce Clause is "no less valid" when it is "legislating against moral wrongs." *Id.* at 257. While the motel was located close to an interstate highway, the restaurant involved in *McClung* was off the beaten track for out-of-state travelers, and it was here where Justice Clark found it necessary to emphasize that "the restaurant purchased locally approximately $150,000 worth of food, $69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the State." Katzenbach v. McClung, 379 U.S. 294, 296–97 (1964).

history of its enactment with the same respect that we give to the debates surrounding the formal amendments of the first Reconstruction.

I shall return to this point, but for the moment, let's indulge a very different thought experiment and imagine that the Court had gone to the opposite extreme: instead of evading the *Civil Rights Cases* of 1883 with a Commerce Clause opinion, it squarely confronted the question of stare decisis. But under my hypothetical scenario, the majority flatout refused to repudiate the constitutional legacy of the nineteenth century. When forced to choose between stare decisis and the new landmark statute, the Court came down on the side of tradition, striking down large portions of the Civil Rights Act — just as Barry Goldwater had hoped.[141]

This act of judicial resistance would have transformed the political landscape. Instead of advancing the civil rights agenda as part of the Great Society vision outlined in his State of the Union Address,[142] Johnson would have been obliged to respond emphatically to the Court's defiance of the popular will — through either court-packing or

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[141] Suppose that the Rehnquist/Roberts Court had been propelled into the 1960s by the magical operation of a time machine. Then, my scenario would have been anything-but-hypothetical. The current Court has emphatically embraced the *Civil Rights Cases*:

> The force of the doctrine of *stare decisis* behind [the *Civil Rights Cases*] stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur — and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

United States v. Morrison, 529 U.S. 598, 622 (2000).

Today's Court is more nuanced in its embrace of *stare decisis* when it comes to the superprecedents of the New Deal era, like *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Darby*, 312 U.S. 100 (1941). Chief Justice Warren was emphatic in his embrace of New Deal jurisprudence, assuring his brethren at the Conference for *Heart of Atlanta Motel* that "Congress need make no findings. The commerce power is adequate [to uphold the Civil Rights Act]." Chief Justice Earl Warren, Statement at Conference of October 5, 1964, *in* THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 137, at 726. In contrast, the majority in *Morrison* was unimpressed by the economic data collected by Congress, and struck down the Violence Against Women Act under the Commerce Clause as well as the Fourteenth Amendment. *See Morrison*, 529 U.S. at 614–17.

A mechanical application of *Morrison* might lead today's Court to overrule *McClung*, if not *Heart of Atlanta Motel*, but there is little chance of this happening in the foreseeable future. While the Roberts Court may continue to nibble around the edges of *Darby* and *Wickard*, the odds are a million to one that it will continue to acknowledge *McClung*, as well as *Heart of Atlanta Motel*, as a superprecedent.

[142] WOODS, *supra* note 129, at 558. Even after his State of the Union, Johnson was reluctant to make the Voting Rights Act a high priority until King's movement activities at Selma pushed the question into the center of political consciousness. Only then did Johnson reach the high point of his movement-presidency in his great speech before Congress, urging the enactment of the new initiative, with the climactic endorsement of the movement's watchword, "We Shall Overcome." *See* DALLEK, *supra* note 101, at 212–19 (describing how Johnson's initial low priority was overcome by King's activities in Selma); *see also* KOTZ, *supra* note 89, at 311 (recounting a portion of Johnson's speech).

a formal constitutional amendment. As in the New Deal–Old Court scenario, the Supreme Court's resistance would have led the President and Congress to dissipate a great deal of the political capital generated by their landslide victory on election day.[143] With the Supreme Court encouraging renewed white resistance, it would have been tough for Martin Luther King, Jr., to sustain his nonviolent leadership as rioting broke out in black ghettos throughout the nation.[144] With both Johnson and King on the defensive, it's hard to believe that any proposal for a constitutional amendment could have gained the support of three-fourths of the states, as required by Article V.

Under this originalist scenario, Americans in the 1960s might well have failed to translate the heroic engagements of the civil rights movement into a series of landmark statutes expressing the American people's new commitments to political, social, and economic equality. But thanks to the Supreme Court's New Deal deference, the movement-presidency won its race against time, following up the initial Civil Rights Act with the Voting Rights Act of 1965[145] and the Fair Housing Act of 1968.[146]

Nevertheless, it was still within the power of the American people to use the election of 1968 to call the emerging commitment to racial equality into serious question. George Wallace was a serious candidate in a three-man race, and he didn't have to win to provoke a period of anxious reappraisal. It would have sufficed for him to collect enough electoral votes to throw the election into the House, and then make a deal to give Richard Nixon the presidency in exchange for a dramatic rollback of civil rights legislation. No less importantly, Nixon could have tried to preempt this Wallace threat by calling for a revision of the landmark statutes, thereby attracting millions of Wallace voters into his column.

But nothing of the sort happened. Nixon's moment of truth came in October 1968, as public opinion polls revealed that Hubert Humphrey was making a dramatic comeback. But Nixon refused to pander

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[143] Roosevelt's court-packing debacle was never far from Johnson's mind: "LBJ [was] resolved not to waste his political capital with Congress, as FDR had done with the submission of his ill-fated court-packing bill in 1937." SAVAGE, *supra* note 104, at 247. Savage fails to note that Roosevelt did not think he had a choice — if he had not threatened court-packing, he would have run the risk that his Second New Deal would go down in smoke. Like it or not, Johnson would have been equally obliged to "waste his political capital" if the Court had struck down large parts of the Civil Rights Act of 1964.

[144] *See* DALLEK, *supra* note 101, at 232–37.

[145] Peter Shane's brilliant analysis of the Voting Rights Act is the appropriate starting point for further reflection on the landmark statute's claims to a central place in the constitutional canon. *See* Peter M. Shane, *Voting Rights and the "Statutory Constitution,"* 56 LAW & CONTEMP. PROBS. 243 (1993). To my knowledge, nothing comparable has been written on the 1968 Fair Housing Act.

[146] Pub. L. No. 90-284, tit. VIII, 82 Stat. 73.

to the racist vote[147]: although he ran a "law and order" campaign that expressed the popular revulsion at the riots and violence of the late 1960s, he expressly supported the landmark statutes passed during the Johnson presidency. At about the same time, Wallace's popular support peaked at twenty-one percent, but then declined rapidly, leaving Nixon the clear winner in the Electoral College.[148] Though Nixon was not demanding further great leaps forward, he wasn't moving backward in the manner of Barry Goldwater, let alone George Wallace.[149] His electoral victory served to complete the ratification process, ending serious political debate over the landmark statutes.

Civil rights legislation did not come to a halt during the next few years, but Nixon did not make it a central priority.[150] As the civil rights movement splintered after King's assassination, politics returned to a more normal key — with liberal congressional leaders cutting deals with a President who had many more important concerns. The days of a movement-presidency speaking in the name of the People were past, but this should not conceal the Nixon Administration's accomplishment in consolidating the landmark statutes — both by supporting further legislation[151] and by sustaining bureaucratic momentum in the en-

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[147] *See, e.g.*, THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1968, at 363, 372 (1969) (noting that Nixon denied himself the racist vote, fearing that its explicit embrace would undermine his effectiveness as a presidential leader if he won the election).

[148] *See id.* at 347; *see also* David Leip, *1968 Presidential Election Results*, *in* DAVID LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS (2005), http://uselectionatlas.org/RESULTS/national.php?year=1968 (showing that George Wallace won 13.5% of the national vote).

[149] Nixon's civil rights rhetoric in 1968 was distinctly moderate. He opposed busing but promised to "enforce Title VI of the Civil Rights act." NIXON-AGNEW CAMPAIGN COMMITTEE, NIXON ON THE ISSUES 98 (1968); *see also* NIXON-AGNEW CAMPAIGN COMMITTEE, NIXON SPEAKS OUT 59 (1968) (citing "a decade of revolution in which the *legal* structure needed to guarantee equal rights has been laid in place").

Nixon's moderation contrasts with George Wallace's campaign rhetoric. Wallace called for "modifications in the Civil Rights Bill," which was "not in the interests of any citizen of this country, regardless of their race." GEORGE C. WALLACE, "HEAR ME OUT" 18 (1968). He also continued to preach segregation. *See id.* at 118 ("[I]f we amalgamate into the one unit as advocated by the Communist philosophy, then the enrichment of our lives, the freedom for our development is gone forever. We become, therefore, a mongrel unit . . . .").

[150] Though Nixon commissioned a series of policy task forces to establish an agenda for his first hundred days in office, there was no "task force on civil rights per se, none on equal employment opportunity, or on school desegregation or voting rights." GRAHAM, *supra* note 119, at 305.

[151] For present purposes, Nixon's position on the Voting Rights Act is most important. When it was enacted in 1965, it had a five-year term, was focused entirely on the South, and had an immediate impact: in 1964, only 35.5% of the black voting-age population in the South was registered; by 1969, this figure had increased to 64.8%. Progress in the Deep South was even more impressive: in Alabama, the proportion increased from 19.3% to 61.3%; in Georgia, from 27.4% to 60.4%; in Louisiana, from 31.6% to 60.8%; in South Carolina, from 37.3% to 54.6%; and in Mississippi, from 6.7% to 66.5%. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1970, at 369, *available at* http://www2.census.gov/prod2/statcomp/documents/1970-05.pdf.

Given these striking successes, the Nixon Administration might have declared that the Act had accomplished its mission and that it should be allowed to lapse at the end of its five-year term.

forcement effort. By 1972, the Nixon Administration had transformed the law on the books into irreversible realities on the ground. Although the Administration fell short of some liberal demands,[152] it embraced others — including affirmative action — with remarkable vigor.[153]

All in all, the Administration's success in consolidating the new regime was very substantial when judged by the relevant historical benchmark. At a comparable stage in the First Reconstruction, the Grant Administration was transparently failing to follow through on the promises of the Fourteenth and Fifteenth Amendments.[154] But this was not happening the second time around — the law on the books was becoming a powerful reality throughout the land. Constitutional consolidation was as complete as it ever gets.

There is no need to exaggerate. I do not suggest that today's America has put its race problems behind it. But compared to the First Reconstruction, the Second should be considered a relative success. When Booker T. Washington and W.E.B. DuBois confronted the Reconstruction Amendments at the dawn of the twentieth century, they could only view them as grim parodies of constitutional pretension. We stand at the same distance from the civil rights era, but the landmark statutes endure as a central reality of the living Constitution, and that is no small matter.

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But instead the Administration proposed a five-year renewal. No less importantly, the Nixon Administration spearheaded the nationalization of the Act's scope to encompass all the states of the Union. *See* GRAHAM, *supra* note 119, at 335. This greatly enhanced the principled foundation of the statute, making it clear that it was not a passing element in a regional vendetta, but a fundamental commitment to the broad-based, and bureaucratically effective, pursuit of equality in voting.

[152] The most notable shortfall involved school busing, which Nixon had opposed in 1968, *see supra* p. 1783 and note 149, and continued to oppose throughout his presidency, most notably by appointing four Justices to the Court who went on to create a new majority coalition that rolled back busing in *Milliken v. Bradley*, 418 U.S. 717 (1974). *See also* RICHARD M. NIXON, BUSING AND EQUALITY OF EDUCATIONAL OPPORTUNITY, H.R. DOC. NO. 92-195, at 1–16 (1972). Nevertheless, Southern schools continued desegregating throughout Nixon's term, reaching higher levels of integration than in the North. *See* JOAN HOFF, NIXON RECONSIDERED 89–90 (1994) (noting that the Nixon administration found itself "producing an impressive statistical record on school desegregation," lowering the Southern and national rates to eight and twelve percent respectively).

[153] The Nixon Administration pushed affirmative action far beyond anything contemplated under Johnson or Kennedy, especially in the area of employment. *See* GRAHAM, *supra* note 119, at 342.

[154] *See* FONER, *supra* note 50, at 557–62 (describing retreat during later years of the Grant Administration); WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869–1879, at 25–55, 166–86 (1979) (same).

We have been putting the Civil Rights Revolution in historical perspective, exploring its relationships to past cycles of popular sovereignty — most notably Reconstruction and the New Deal. This has allowed us to pinpoint differences, as well as similarities: beginning with the way that the Court, rather than the presidency, served as the key signaling institution; then how an assassin's bullet gave constitutional leadership to a movement-presidency in the 1960s, instead of a movement-Congress as in the 1860s; and finally how New Deal precedents allowed Lyndon Johnson to claim a Rooseveltian mandate from the People in 1964 and permitted the Supreme Court to defer to this popular mandate in upholding the Civil Rights Act.

Each of these contrasts is worthy of more reflection. But I want to focus on a key difference that can easily escape attention, because it involves the dog-that-didn't-bark. From the time of Thomas Jefferson to the days of Franklin Roosevelt, the principal agent of popular sovereignty in America has been the movement-party. But the civil rights era was different: We most definitely observe a movement, led by Martin Luther King, Jr., and ultimately supported by millions of followers, both black and white, throughout the nation. But we definitely don't see a party that served as the political vehicle for this movement. The Democratic Party left by Franklin Roosevelt had a split personality — with liberal Northerners and racist Southerners in an uneasy political coalition. And the same was true of the Republicans — with anti–New Dealers like Barry Goldwater rejecting civil rights initiatives that were perfectly acceptable to "Modern Republicans" like Richard Nixon and Senate Republican leader Everett Dirksen. This split between the movement and the party system made the translation of constitutional politics into constitutional law an especially tricky business.

Most obviously, it was particularly difficult for the movement to pressure the President and Congress into embarking on an ambitious legislative program, since this would generate severe political tensions that might rip both parties into shreds. This meant that a great deal would depend on the movement leadership's political skills — and most notably on Martin Luther King, Jr.'s mix of high Gandhian principle and shrewd media politics. King planned his Southern campaigns with the aim of provoking horrendous television images of racist brutality.[155] These dramatic pictures shocked the national conscience in a

[155] As King explained in the *Saturday Review*, his aim in organizing nonviolent demonstrations at Selma was to provoke violence and force the nation to witness scenes of police brutality, thereby calling "Americans of conscience" to "demand federal intervention and legislation." Martin Luther King, Jr., *Behind the Selma March*, SATURDAY REV., Apr. 3, 1965, at 16; *see also* KLARMAN, *supra* note 78, at 429; Laurie Hayes Fluker, The Making of a Medium and a Movement: National Broadcasting Company's Coverage of the Civil Rights Movement, 1955–1965 (May 1996) (unpublished Ph.D. dissertation, University of Texas) (on file with the Harvard Law School Library).

way that mere words had never done and could never do — encouraging racial liberals of both parties to take the high road on civil rights.[156]

To put the point in a single line, King used *media-politics* as an alternative to a *movement-party* as an engine for higher lawmaking — and it worked. But there were dangers lurking. King was making himself hostage to the calculations of the media business: if TV producers believed that black militants made for better broadcasts, King's version of nonviolence could readily be overwhelmed by the scenes of the Watts riots. Although movement-parties also lose momentum over time, they don't lose it nearly as quickly as media-politicians.

The absence of a movement-party also caused serious problems for ordinary voters. If Americans didn't approve the Fourteenth Amendment in 1866 or the New Deal in 1936, they could simply throw the party of constitutional reform out of office and hand the government over to the party seeking to preserve the old regime. But things were more complicated in the 1960s: when the Southern Democrats launched the longest filibuster in Senate history against the Civil Rights Act of 1964, the cooperation of Senate Republican leader Everett Dirksen was absolutely central in gaining the requisite two-thirds majority needed to close off the filibuster and enact landmark legislation.[157] If, however, a "Modern Republican" like Dirksen or Nelson Rockefeller had gained the Republican presidential nomination in 1964, the voters would have been deprived of the clear yes-or-no choice provided by the nomination of Barry Goldwater.

But as luck would have it, the right kind of Republican came to the fore at the right moments in the higher lawmaking process — Dirksen joining with the Democrats to pass the Civil Rights Act, Goldwater presenting a clear choice in 1964, and Richard Nixon supporting the new regime in 1968 and consolidating it thereafter.

And yet, it could have turned out very differently. The nation's hopes for a new beginning in race relations might have been overwhelmed by race riots, party bickering, and legislative impasse. The absence of a movement-party placed an extraordinarily heavy burden on particular acts of political leadership to push the process onward to a collective sense of resolution. The paradoxical combination of Earl Warren, Dwight Eisenhower, John Kennedy, Martin Luther King, Jr., Lyndon Johnson, Everett Dirksen, Barry Goldwater, and Richard Nixon had somehow allowed the American people to organize a meaningful process by which they could debate and decide on their constitutional course. Despite the challenges and tragedies, Americans had managed to transcend the pettiness of politics, and the chaos of mass

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[156] *See* KLARMAN, *supra* note 78, at 421–42.

[157] *See, e.g.*, HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY 77–86 (1992).

action, to affirm their support for a series of landmark statutes that broke the back of Jim Crow in this country.

The question is whether we are equal to the lesser challenge of honoring this collective achievement by admitting these landmarks into the constitutional canon for the twenty-first century. The partisans of the formalist Constitution trivialize the civil rights era. As we have seen, the formal text does not mark it out as a period of great constitutional creativity, and, so far as they are concerned, that is that. Instead, they tell a Whiggish story portraying the 1960s as merely fulfilling the constitutional commitments made a century before.[158]

My aim has been to provide common law tools that will permit the profession to recognize the Second Reconstruction for what it was — one of the greatest acts of popular sovereignty in American history. In making their grand refusal, the formalists are worshipping at the shrine of John Wilkes Booth. They fail to appreciate that it was Booth's bullet that disrupted the standard pattern of presidential leadership that has been at the heart of constitutional politics since the age of Jefferson. If Booth had missed his mark in Ford's Theatre, the formal Constitution would never have been amended to include the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Instead, the Republicans would have spent the next few years elaborating the constitutional meaning of citizenship and equality largely through landmark statutes and judicial superprecedents.

In other words, it is the 1860s, not the 1960s, that represent the historical oddity in constitutional development. The civil rights era is simply one more variation on the great theme of presidential leadership, with movement support, for constitutional change in the name of the American people. The legal landmarks emerging from this moment of popular sovereignty should not be denigrated merely because they took the form of statutes rather than formal amendments.

To be sure, the leading principles of the Civil Rights Act of 1964 could be repealed by a simple majority of Congress, if supported by the President. But this is also true of *Marbury v. Madison*: a sufficiently determined national majority could decisively undermine the current practice of judicial review. Yet this formal point does not deprive *Marbury* of a canonical place in our tradition. As with *Marbury*, we all recognize that an all-out assault on the Civil Rights Act, or the Voting Rights Act, could not occur without a massive effort comparable to the political exertions that created these landmarks in the first place.[159]

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[158] *See infra* Lecture Three.

[159] The recent congressional decision to extend the Voting Rights Act for *twenty-five* years is especially notable. Some Republican conservatives campaigned for a short-term extension, but the Administration insisted on making a generational commitment, leading a very conservative Congress to give resounding support to a statute that has become a constitutional landmark, as sug-

This suffices for my argument. I have no interest in constructing a constitutional canon for eternity. It is hard enough to define one that makes sense at the dawn of the twenty-first century. I do not stand before you with a crystal ball: if some future generation does indeed make the collective effort to repeal the landmarks of the 1960s, it will then be living in a different constitutional world, and it will have to define a very different canon for itself. It is enough for us to do justice to our own past and present a canon worthy of it to our successors.

The final Lecture probes more deeply into the jurisprudential foundations of my proposal, but I conclude this one with a more lawyerly argument, based on *Brown v. Board of Education*. As we have seen, Senator Specter was right to call it a superprecedent[160]: any lawyer or judge who questions *Brown*'s legitimacy places himself outside the jurisprudential mainstream. Yet this uncontroversial truth is all I need to make my point: when we consider the factors that led to the canonization of *Brown*, we will find that they equally support the canonization of the landmark statutes of the 1960s.

Call it my "horse and cart" argument, and it begins by noting the long delay before *Brown* achieved its canonical status.[161] It was in 1959, for example, that Herbert Wechsler rose to challenge *Brown*'s legitimacy in one of the more famous Holmes Lectures.[162] Wechsler's critique was mild, even tentative, compared to the extravagant constitutional claims made in the Southern Manifesto.[163] Yet his lawyerly questions generated a wave of professional anxiety. Only a year before, in its Little Rock decision, the Court had tried to silence further mainstream debate by asserting that it was "supreme in the exposition . . . of the Constitution" and that the time had come for all law-abiding Americans to obey its *Brown* decrees.[164] And yet here was a leading

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gested by its new title: Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, 120 Stat. 577. The measure passed by a vote of 390 to 33 in the House, 152 CONG. REC. H5207 (2006), and unanimously in the Senate, 152 CONG. REC. S8012 (2006); *see also* Hamil R. Harris & Michael Abramowitz, *Bush Signs Voting Rights Act Extension*, WASH. POST, July 28, 2006, at A3 (detailing administration enthusiasm for the measure despite GOP resistance in the House).

[160] *See supra* note 33.

[161] Sometimes cases do become canonical the minute they are decided: *Wickard* and *Darby* provide obvious examples. But these cases were decided at the final, or consolidation, stage of the New Deal, while *Brown* was handed down at the initial, or signaling, stage of the civil rights era. *See* 2 ACKERMAN, *supra* note 24, at 373–75.

[162] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[163] *See* 102 CONG. REC. 4515 (1956) ("The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law.").

[164] Cooper v. Aaron, 358 U.S. 1, 18 (1958). To enhance its effort at auto-canonization, the Court's decision ostentatiously wrapped *Brown* in the mantle of *Marbury* and then interpreted *Marbury* as establishing judicial supremacy. *See id.* For a dissenting view on *Marbury*, see

liberal law professor, speaking from the holy-of-holies at the Harvard Law School, insisting that the debate must continue. Although Wechsler's critique provoked quick and powerful responses from *Brown*'s defenders in the legal academy,[165] the ongoing debate served to confirm Wechsler's basic point: continuing dissent to *Brown* was not the monopoly of segregationist bitter-enders, but was a serious option for mainstream professionals. And so long as this was true, *Brown* could hardly qualify as a superprecedent, in Senator Specter's sense.

It was only as a result of the successful constitutional politics of the 1960s that the profession finally moved beyond Wechsler's doubts. By the time Richard Nixon got into the White House, even conservatives such as William Rehnquist were no longer free to voice doubts that liberals such as Wechsler had expressed a decade before — at least if they wished to gain Senate confirmation to the Supreme Court.[166] *Brown*, in short, is a case involving *retroactive canonization* — and it is this point that sets the stage for my "horse and cart" argument.

We put the cart before the horse when we treat *Brown* as a superprecedent without recognizing that *Brown*'s canonization is a product of the *very same popular sovereignty dynamic* that gave us the landmark statutes. More precisely, it was the movement-presidency of Lyndon Johnson and Martin Luther King, Jr., that provided the horsepower that drove the landmark statutes onto the books, and it was the election of the "Modern Republican" Richard Nixon that marked the decisive end to the *Plessy* era. The retroactive canonization of *Brown* was merely the cart that the legal profession created in response to the self-conscious decision by the American people to inaugurate a new era of racial justice in this country.

The Warren Court recognized this key point at the height of the movement-presidency, but it has grown dim with the passage of time. The Court's moment of truth came in *Katzenbach v. Morgan*,[167] its 1966 decision upholding the Voting Rights Act. As with the Civil Rights Act of 1964, the new statute swept away a key Supreme Court precedent, *Lassiter v. Northampton County Board of Elections*,[168] which had upheld the administration of literacy tests under the Fourteenth Amendment. And as with the *Civil Rights Cases*, the Court was

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ACKERMAN, *supra* note 45, at 196–97 (reading *Marbury* in light of *Stuart v. Laird*, 5 U.S. 299 (1803)).

[165] *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

[166] *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 414–46 (2000) (arguing that the turning point for *Brown* occurred during the course of Senate hearings on Richard Nixon's Supreme Court nominations).

[167] 384 U.S. 641 (1966).

[168] 360 U.S. 45 (1959).

sharply divided on the wisdom of overruling *Lassiter* — understandably so, since *Lassiter* had been decided in 1959, not in 1883, and so required an especially embarrassing institutional reversal.[169]

The Court responded to its predicament in precisely the same way as in *Heart of Atlanta Motel* and *McClung*: it upheld the landmark statute by devising a rationale that avoided the repudiation of its prior case law. But this time around, the Court couldn't conceal the poverty of its equal protection doctrine by escaping to the New Deal Commerce Clause. From a New Deal perspective, upholding the new Civil Rights Act under the Commerce Clause was an easy matter; but even the most expansive New Dealer would have trouble with the notion that "commerce among the states" included the federal regulation of voting rights. And so the Justices were obligated to take a different doctrinal route, and one which glimpsed — however imperfectly — the extent to which the Second Reconstruction was moving beyond the limited notions of constitutional equality inherited from the First Reconstruction. To express this point, the Court adopted an expansive reading of the Enforcement Clause of the Fourteenth Amendment, interpreting it as a grant to Congress of the power to ratchet up the constitutional requirements of equal protection beyond the Court's restrictive jurisprudence.[170] *Morgan*'s expansive interpretation has, of course, been a source of perplexity amongst commentators and courts ever since.[171] But happily, I don't need to get into the details to make my main point, which involves *Morgan*'s impact on the operational canon. Whatever else it does or doesn't mean, *Morgan* placed lawyers on notice that they must give respectful treatment to the constitutional judgments expressed in the Voting Rights Act of 1965, *even when these were incompatible with the best judicial interpretation of the Equal Protection Clause of 1868*. This decision amounts to the canonization of the landmark statute, allowing its principles to trump those expressed by the formal amendments of the 1860s.

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[169] *Lassiter* unanimously upheld the constitutionality of literacy tests, so long as they were administered fairly. The conference notes in *Morgan* suggest that five Justices were prepared to overrule *Lassiter*, but that seven were prepared to uphold the power of Congress, under Section 5, to trump the Court's constitutional understanding of the limits of the Equal Protection Clause. *See* THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 137, at 827–28. As with *Heart of Atlanta Motel*, the Court chose the doctrinal path that maximized the size of the judicial majority prepared to give its support to the landmark statute.

[170] *See Morgan*, 384 U.S. at 651 (noting that Section 5 "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment").

[171] Important work stretches over the decades, from the early article, Robert A. Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 SUP. CT. REV. 81, to the recent essay, Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 478 (2000).

But it has been downhill since 1966. The critical retreat began with *Washington v. Davis*.[172] In this case, the Burger Court famously refused to give the Civil Rights Act of 1964 the canonical status that the Warren Court had granted the Voting Rights Act. And more recently, the Court has been whittling away at *Morgan* in a series of controversial decisions.[173] Speaking as a court-watcher, I don't think that the Roberts Court will be reversing these recent precedents anytime soon.

But this Lecture hasn't been about court-watching. It is the opening shot in the battle for the hearts and minds of the next generation, represented by the law students in my audience. When your time comes to exercise legal authority in the name of the American people, you will have to work out your own master narrative of the constitutional past. You, and you alone, will decide whether to emphasize the First Reconstruction, the one that failed, while trivializing the Second Reconstruction, the one that succeeded. You, and you alone, will decide whether to persist in our present habit of worshipping the Court in *Brown* while disparaging the decision of the American people to heed the call of King and Johnson and decisively support the landmark statutes of the 1960s.

I urge you to correct the mistakes of the current Supreme Court. Even if your generation does come to recognize the achievements of the Second Reconstruction, constitutional law will never become a mechanical business. Reasonable judges and lawyers will predictably disagree about the best interpretation of the principles expressed in the landmark statutes, and they will disagree about the best way to weave the legacy of the 1960s into the larger fabric of American constitutional law. Nevertheless, there is a big difference between a legal debate about the constitutional meaning of equality that gives starring roles to Congressman Bingham and Senator Sumner, and one that recognizes the centrality of Martin Luther King, Jr., and Lyndon Johnson to the living Constitution. It is the difference between conjuring up the gray eminences of an ever-more-distant past and bearing witness to the voices of a generation whose struggle for popular sovereignty is coming to an end.

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[172] 426 U.S. 229 (1976).

[173] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 527–28 (1997) ("There is language in our opinion in *Katzenbach v. Morgan* . . . which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one."). For a telling critique based on a theory of constitutional moments, see Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J.L. & POL. 381 (2000). For another probing, and fundamentally compatible, critique, see Post & Siegel, *supra* note 171, at 478.

We pass the torch of the living Constitution on to you, in the hope that it will still be flickering when you pass it on to your children as they prepare themselves for the challenges of American citizenship.

III. LECTURE THREE: THE CONVERSATION BETWEEN GENERATIONS

Is the Constitution a machine or an organism? These rival metaphors have dominated constitutional thought, but during different centuries. Our Enlightenment Founders gave us the machine that might tick-tock to eternity if only we followed the written instructions in the operating manual.[174]

But this dream was shattered by the Civil War, and when Reconstruction Republicans changed the machine's operating instructions, their constitutional amendments were overwhelmed by the political and social realities they had tried to reshape. The enormous Republican effort to transform race relations through constitutional formalism turned out to be a miserable failure.

The moment was ripe for intellectual reappraisal, and America's universities were up to the task. For the first time in their history, Harvard and Columbia were becoming centers of serious graduate and professional education, joining upstarts like Chicago and Johns Hopkins in their admiration of German *Wissenschaft*.

The consequences for constitutional thought were profound. Woodrow Wilson's Johns Hopkins doctoral dissertation, *Congressional Government*, waged all-out war on the machine metaphor. The *Federalist Papers*, he explained, "were written to influence only the voters of 1788, [but] still, with a strange, persistent longevity of power, [they] shape the constitutional criticism of the present day, obscuring much of that development of constitutional practice which has since taken place."[175] Speaking for his academic generation, Wilson was determined to bring an end to benighted ancestor worship. Serious people should stop fixating on the "literary" Constitution[176] and focus on the organic

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[174] Professor Michael Kammen provides the most comprehensive historical treatment of the machine metaphor in MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986). His book also recognizes the rise of the organicist critique, *id.* at 156–84, but fails to appreciate its fundamental character, noting merely that the organicist approach "that reached its apogee during the quarter century after 1890 has not yet disappeared," *id.* at 170.

[175] WOODROW WILSON, CONGRESSIONAL GOVERNMENT 30 (Johns Hopkins Univ. Press 1981) (1885).

[176] *See id.* ("The Constitution in operation is manifestly a very different thing from the Constitution of the books."). Wilson was influenced by Walter Bagehot's pathbreaking *The English Constitution*, published in 1867: "An observer who looks at the living reality will wonder at the contrast to the paper description. He will see in the life much which is not in the books; and he will

evolution of real-world patterns of authority.[177]

Wilson's book was a large success, greatly enhancing organicist legal critiques that Holmes and Thayer were developing in and around the tiny academic enclave that was the Harvard Law School.[178] For these founding fathers of modern constitutional thought, Darwinian evolution, not Newtonian mechanics, provided the intellectual key to the universe; their legal efforts were but a small part of a grand intellectual project to place human development in its evolutionary context.[179]

Within this brave new world of academic scholarship, Madison cut a pathetic figure.[180] He might have fancied himself the inventor of a

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not find in the rough practice many refinements of the literary theory." *Id.* (quoting WALTER BAGEHOT, THE ENGLISH CONSTITUTION 5 (Miles Taylor ed., Oxford Univ. Press 2001) (1867)).

[177] Note Wilson's use of organic metaphors in his scholarly declaration of independence from the *Federalist Papers*:

> It is, therefore, the difficult task of one who would now write at once practically and critically of our national government to escape from theories and attach himself to facts, not allowing himself to be confused by a knowledge of what that government was intended to be, or led away into conjectures as to what it may one day become, but striving to catch its present phases and *to photograph the delicate organism in all its characteristic parts exactly as it is today*; an undertaking all the more arduous and doubtful of issue because it has to be entered upon without guidance from writers of acknowledged authority.

Id. (emphasis added).

[178] Holmes explicitly adopts an evolutionist stance in his famous denunciation of legal logic in *The Common Law*, in which he writes:

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. . . . The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; *but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past*.

HOLMES, *supra* note 46, at 1–2 (emphasis added). As will become clear, I endorse the italicized portion of Holmes's statement. Organicism is also evident in the works of Professor James Thayer. *See, e.g.*, JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (Boston, Little, Brown, & Co. 1896); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[179] *See* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54–55 (Transaction Publishers 2002) (1908) ("The government of the United States was constructed upon the Whig theory of political dynamics, which was a sort of unconscious copy of the Newtonian theory of the universe. In our own day, whenever we discuss the structure or development of anything, whether in nature or in society, we consciously or unconsciously follow Mr. Darwin, but before Mr. Darwin, they followed Newton.").

[180] Douglass Adair perceptively describes Madison's decline and fall:

> Madison was still "father" of the Constitution after Appomattox, for such tags once rooted in the textbooks seem impossible to eradicate; but he was a parent treated with increasing disrespect — a parent to be apologized for — by the most authoritative commentators who wrote on *The Federalist* and the Constitution between the Civil War and the end of the nineteenth century. The most widely read biography of the Virginian written during this period, Gay's, treated him with contempt and scorn; Henry Adams, in the great history of Madison's administration, etched his portrait of the President with the acid of irony. Henry Cabot Lodge, P. L. Ford, and Goodwin Smith in the process of edit-

new science of government, but his Constitution had merely succeeded in freezing American development at an especially unfortunate historical moment. Misled by Montesquieu, Madison had supposed that the separation of powers was central to the British Constitution.[181] But in fact Britain was already evolving in the direction of something better — modern parliamentary government with power concentrated in the House of Commons. From the vantage of the late nineteenth century, there was no comparison between the vibrant debates of Gladstone and Disraeli in the House of Commons and the desultory exchanges between President Chester Arthur and congressional barons in the America of the Gilded Age. Unfettered by a written constitution, the British were successfully expanding their suffrage at a time when America's Fifteenth Amendment was becoming a dead letter. Could there be any question that organic evolution, not mechanical checks-and-balances, was the path to the future?[182]

By the turn of the century, Madison's star had fallen so low that the American Hall of Fame ignored him when it opened in 1900 to honor the great statesmen of the past.[183] Only in 1913 did his reputation begin to recover, but in a paradoxical fashion: his writings became central

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> ing *The Federalist* stole — the word is exact — twelve of the essays written by Madison and attributed them to Hamilton, who all these editors agreed was the greatest of the Founding Fathers.

Douglass Adair, *The Tenth Federalist Revisited*, *in* FAME AND THE FOUNDING FATHERS 75, 79–80 (Trevor Colbourn ed., 1974) (citations omitted).

181 Holmes comments on Montesquieu's mischaracterizations:

> [Montesquieu's] England — the England of the threefold division of power into legislative, executive and judicial — was a fiction invented by him, a fiction which misled Blackstone and Delome. . . . "Living across the Atlantic, and misled by accepted doctrines, the acute framers of the Federal Constitution, even after the keenest attention, did not perceive the Prime Minister to be the principle executive of the British Constitution, and the sovereign a cog in the mechanism."

OLIVER WENDELL HOLMES, *Montesquieu*, *in* COLLECTED LEGAL PAPERS 250, 263 (1920) (quoting BAGEHOT, *supra* note 176, at 53). Holmes's harsh judgment has stood the test of time. *See* ROBERT SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 300–01 (1961) (describing Montesquieu's misunderstandings).

182 As Woodrow Wilson put it, commenting on a book by Henry Cabot Lodge:

> Mr. Lodge is quite right in saying that the Convention, in adapting, improved upon the English Constitution with which its members were familiar, — the Constitution of George III. and Lord North . . . . It could hardly be said with equal confidence, however, that our system as then made [in 1787] was an improvement upon that scheme of responsible cabinet government which challenges the admiration of the world to-day, though it was quite plainly a marked advance upon a parliament of royal nominees and pensionaries and a secret cabinet of "king's friends."

WILSON, *supra* note 175, at 200–01.

Thayer's admiration of British-style government is obvious in his famous essay on the origins and nature of American constitutionalism. *See* Thayer, *supra* note 178, at 138 (proposing that a system without judicial review would require the legislature to consider more seriously whether proposed laws are unconstitutional); *id.* at 155 (suggesting that legislatures of countries with unwritten constitutions are more respectful of private rights).

183 *See* Adair, *supra* note 180, at 80.

in Charles Beard's famous effort to drive the last nail into the Founders' coffin.[184] It's hard to believe today, but *Federalist 10* was not then considered one of Madison's major accomplishments — after all, it is only a newspaper article written in haste during New York's ratification campaign. But for a professional historian like Professor Beard, searching the archives for half-forgotten newspaper articles was precisely his business. And in Professor Beard's hands, *Federalist 10* became a smoking gun, exploding the hagiographic myths of the past. There it was, in black and white: Madison's proud boast that the new Constitution would suppress "[a] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project."[185] Professor Beard had taken a decisive step beyond Wilson: the Founders' machine was not only obsolete, but it was originally intended to frustrate the aspirations of a modern democratic society for social justice.[186] The task for clear-thinking lawyers, judges, and Americans was obvious: it was time to move beyond ancestor worship and engage in the hard work of adapting antiquated constitutional arrangements to the felt necessities of the modern age.

By the time Beard's book became a publishing sensation, Wilson was President, and Holmes and Brandeis were on the Court challenging nineteenth-century orthodoxies. But it was only during the New Deal that the new organicism triumphed decisively in our constitutional law. Roosevelt's court-packing campaign was inspired by British precedents. The President vividly recalled the days of his youth when the Asquith government in Great Britain had advanced a modern form of liberalism emphasizing social justice, only to confront a veto by the House of Lords.[187] Prime Minister Asquith refused to retreat and insisted on his democratic authority to deprive the Lords of their constitutional veto over his plan to redistribute wealth from the rich to ordinary Britons. Asquith resolved the resulting crisis by obtaining a promise from the King to pack the Lords with enough Liberal peers to force it to surrender its veto on legislation.[188]

In Roosevelt's eyes, Asquith's move served as an influential precedent. The Supreme Court was the American equivalent of the unelected House of Lords, and its obstructionism could be resolved by a

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[184] *See id.* at 86–87. Beard's singular contribution was, of course, his materialistic critique of the Founding. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (Transaction Publishers 3d ed. 2003) (1913).

[185] THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

[186] *See* BEARD, *supra* note 184, at 152–83.

[187] *See* WILLIAM LEUCHTENBURG, THE SUPREME COURT REBORN 94–95 (1995). FDR doesn't seem to have gotten his facts straight, confusing efforts to pass a home rule bill for Ireland with Asquith's effort to force the Lords to accept Lloyd George's budget. *Id.*

[188] *See* ROY JENKINS, MR. BALFOUR'S POODLE 102–03, 178–79 (1954).

trans-Atlantic form of Lords-packing.[189] When the smoke cleared, the American Constitution finally ended up in a very British place: Roosevelt, like Asquith, had no need to make good on his court-packing threat.[190] The Supreme Court adapted organically to the rise of modern liberalism by canonizing the New Deal constitutional vision in superprecedents like *Wickard* and *Darby*. The era of mechanical constitutional amendments was over.[191]

As America emerged from the Second World War, the seeds planted by Wilson and Beard, by Holmes and Brandeis, had grown into a mighty forest of case law and commentary. For the overwhelming majority of leading thinkers — Frankfurter and Bickel, Hand and Wechsler, Jackson and Hart — one thing was clear: the Enlightenment Founders and their Reconstruction successors had simply failed to anticipate, much less control, the unruly dynamics of American history. As Justice Jackson famously put it at the dawn of the modern era in *Barnette*[192]:

> The task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was at the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and so-

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[189] *See* LEUCHTENBERG, *supra* note 187, at 94–95 (noting recurring references to the British precedent in cabinet discussions). Public references to the House of Lords controversy were commonplace. *See, e.g.*, ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 182 (1941) ("Property interests . . . had come to regard the Supreme Court as their own House of Lords and to believe they had a moral right to control its sheltering veto.").

[190] For a major reinterpretation of the relationship between the American and British constitutional traditions over the past two centuries, see Rivka Weill, *We the British People*, 2004 PUB. L. 380; and Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMP. L. 429 (2006).

[191] Testifying in defense of court-packing at the Senate hearings, Assistant Attorney General Robert Jackson doubted whether any set of formal amendments could "offset the effect of the judicial attitude reflected in recent decisions." *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. 43 (1937). As he put it: "It may be possible by more words to clarify words, but it is not possible by words to change a state of mind." *Id.* His emphasis on organic adaptation is also a major theme in his classic book that, like the *Federalist Papers*, attempts a comprehensive interpretation of his generation's constitutional achievement. *See* JACKSON, *supra* note 189, at 174 ("The [Old] Court had struck at the Constitution itself by denying to it the capacity of adaptation to 'the various crises of human affairs.' The greatest expounders of the Constitution, from John Marshall to Oliver Wendell Holmes, have always insisted that the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events." (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819))).

[192] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

> cial advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions.[193]

There is anxiety here, but also a certain confidence in organic judicial development, nurtured by a scholarly tradition that now stretched back for more than half a century (and a common law tradition rooted in centuries of practice). Organism had triumphed over mechanism: if the Constitution were to survive, judges had no real choice but to use their judgment to determine which constitutional traditions would survive the "transplant" onto modern American "soil."

Only Hugo Black dissented. He had been a fierce champion of the court-packing plan in the Senate, and Roosevelt nominated him in 1937 in a fit of pique after his initiative had been rejected. The President wanted to show his contempt for his opponents by pushing a leading court-packer onto the Court.[194] Shortly after his confirmation, Justice Black's reputation suffered a further setback. He was forced to make a humiliating confession on national radio when his lifetime membership card for the Ku Klux Klan suddenly became public. Despite angry demands for Black's resignation, Roosevelt refused to withdraw his support: his new Justice was a solid vote in support of New Deal legislation, and that was enough for the moment.[195] Nobody suspected that America was getting a great civil libertarian, let alone a closet jurisprude.

But Justice Black surprised them all. As an autodidact, he developed his ideas in splendid isolation from the constitutional thinking of his time — Bible-Belt Protestantism, not Darwinian evolutionism, served as the intellectual backdrop for his constitutional philosophy. If he had remained a Senator, he would have been a constitutional crank crying in the wilderness — but the luck of the draw had given him a platform to force a skeptical legal world[196] to confront his self-confident reassertion of mechanical jurisprudence.

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[193] *Id.* at 639–40.

[194] *See* LEUCHTENBURG, *supra* note 187, at 210–11 ("Far from seeking to placate Congress by picking a moderate . . . [Roosevelt's] selection of Black was a symbolic and defiant act. . . . The Senate was even more a target for revenge, for it had just humiliated him in the Court-packing battle. Donald Richberg, a prominent New Dealer, confided, Clapper noted, that 'Roosevelt was mad and was determined to give Senate [sic] the name which would be most disagreeable to it yet which it could not reject.'").

[195] *See id.* at 188–99.

[196] *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (disparaging mechanical approaches to law).

As it happened, Justice Black's version of originalism placed him on the right side of history: with barely a hint of irony, he opined that the Framers were emphatic defenders of free political speech, committed partisans of legislative reapportionment, and great believers in school desegregation.[197] No serious historian would support such extravagances, but the next cycle of academic research did serve Justice Black's cause in the longer run. A rising group of scholars like Gordon Wood and Eric Foner revised the dark picture of the Framers left behind by Charles Beard's generation. They did not deny, of course, that the Founding Federalists feared redistribution[198] or that the Reconstruction Republicans believed in the free market.[199] But they successfully refocused attention on more neglected aspects of the constitutional past, most notably the Founders' revolutionary commitment to popular sovereignty and the Reconstruction Republicans' radical commitment to racial equality. While Justice Black defined his originalism long before these scholars' views came to ascendancy in the 1960s and 1970s, the new historians served his larger cause by displacing the vigorous muckraking of the Progressive period with a more sympathetic treatment of the Framers' aims and ideals.

The new historiography, together with Black's heroic defense of freedom and equality, provides the evolving context for more recent judicial affirmations of the old-time religion. Though liberals may despair at the reactionary decisions of Justices Scalia or Thomas, they cannot forget — no matter how they try — that Hugo Black was the original originalist on the modern Supreme Court. The Black-Scalia conjunction suggests that there may be something more to originalism than the political sloganeering of right-wing Republicans: perhaps it really is best to view the Constitution as a wonderful machine that will

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[197] *Compare, e.g.*, HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 49 (1968) (expounding Justice Black's famously absolutist views on the "freedom of speech"), *with* Leonard W. Levy, EMERGENCE OF A FREE PRESS (1985); *compare* Wesberry v. Sanders, 376 U.S. 1, 8 (1964) (making the extraordinary claim that one-man one-vote was "a principle tenaciously fought for and established at the Constitutional Convention"), *with* James A. Gazell, *One Man, One Vote: Its Long Germination*, 23 W. POL. Q. 445, 462 (1970) ("Although the framers and ratifiers knew about the system of representation by equally populated districts, only a small minority on record favored it . . . .").

Justice Black also signed on to *Brown* despite its problematic relationship to the prevailing understandings of "equal protection" at Reconstruction. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

[198] *See* WOOD, *supra* note 47, at 626 (rejecting Beard's narrow materialism, but asserting the continuing relevance of the Progressive interpretation of the Founding); *see also* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990).

[199] *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 11 (1970) ("Political anti-slavery was not merely a negative doctrine . . . it was an affirmation of the superiority of . . . a dynamic, expanding capitalist society . . . .").

propel us into the twenty-first century so long as the Justices remain faithful to its operating instructions?

A similar suggestion was coming from abroad. Under heavy American influence, Germany, Italy, and Japan sought national salvation after wartime defeat through written constitutionalism. But then the movement took on a life of its own, with India, France, the European Union, Eastern Europe and South Africa all embracing judicial review as a basic component in their (very different) schemes of government.

A century ago, the Holmeses of America looked abroad to compare the triumph of organic development in Britain with the tragic failure of Reconstruction in America. But today, the whole world seems to be designing constitutional machines to check and balance power in the name of human rights.[200] It is ironic that Justice Scalia has chosen this moment to warn American lawyers against the intellectual temptations of comparative constitutionalism — the worldwide embrace of written constitutions provides powerful support for his claim that textualism is a serious jurisprudence, not merely political sloganeering.[201]

It is one thing for South Africans or Germans to follow a constitution handed down a decade, or a half-century, ago;[202] quite another for Americans to cling to an antique text that fails to mark any of the nation's recent achievements. "[W]e must realize," as Holmes himself reminds us, that our constitutional development

> could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[203]

Justice Holmes wrote these words in 1920 — and surely they have not lost their force in 2006. Nevertheless, the rise of the Black-Scalia

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[200] To be sure, many of these mechanical efforts have been failures — with Iraq coming at the end of a long list of fiascos left in the wake of the retreat by Western imperial masters from direct control in the Third World. But this dismal list should not divert attention from the many successful efforts to stabilize liberal democracies with written constitutions.

[201] There is an additional factor: the current generation of historians is more sympathetic to the aims of the Founders and Reconstructers than their Beardian predecessors of the Progressive Era. *See supra* pp. 1794–96.

[202] This is not to say that the Germans, or other leading constitutional courts, have embraced anything like the mechanical jurisprudence of Justice Black or Justice Scalia. To the contrary, teleological interpretation is the dominant technique. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 42 (2d ed. 1997) (describing Germany's "more open-ended approach to judicial decision making"); Peter Lerche, *Stil und Methode der Verfassungsrechtlichen Entscheidungspraxis*, *in* 1 FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT 333 (Peter Badure & Horst Dreier eds., 2001).

[203] Missouri v. Holland, 252 U.S. 416, 433 (1920).

view over the past half-century has, paradoxically, made them seem more controversial. It will not be enough for the next generation to determine its jurisprudential destiny with a citation either to Justice Holmes or to Justice Black. It will have to make up its own mind. So what will it be: is the Constitution a machine or an organism?

I say: "Neither." Both sides are half-right, and it is time to move beyond their rival half-truths and build a new foundation. The party of Holmes is right to insist that our constitutional arrangements have changed in ways that our eighteenth- and nineteenth-century forbearers could not have begun to imagine. But the party of Black is right to insist that the Holmesians have packaged this insight in an unacceptably elitist form. From the days of Holmes and Brandeis to those of Kennedy and Souter, organicists have taken the common law method of adaptation to serve as their guide — slowly, by half steps, the common law judge senses the changing patterns of social mores and keeps the law in tune with life. This common law turn is understandable, given the tradition's central place in our legal culture. But it does not do justice to the crucial importance of popular sovereignty in constitutional development.[204]

The common law tradition was created by judges for judges. While modern versions encourage judges to engage in a complex dialogue with their many publics, the judiciary remains firmly in the driver's seat. Within this framework, an opinion of the Court, like *Marbury* or *Wickard* or *Brown*, becomes a superprecedent when it is affirmed and reaffirmed by generations of judges despite the changing temper of the times.[205]

This approach does permit adaptation and has an important place in our constitutional development. But its judge-centered character slights the central importance of popular sovereignty. The party of Holmes does not seek to determine when the People have spoken, what they have tried to say, or how these acts of popular sovereignty can remain relevant in a changing world. It asks what *judges* have said in the past, which judgments have stood the test of time, and which require further judicial adaptation to keep up with changing social mores.[206]

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[204] *See generally* BLACK, *supra* note 197; Scalia, *supra* note 40.

[205] Justice Alito elaborated this court-centered theory of superprecedent at his hearings. *See Alito*, *supra* note 33, at 455 ("[T]here is wisdom embedded in decisions that have been made by prior Justices who . . . are scholars and are conscientious, and when they examine a question and they reach a conclusion, I think that's entitled to considerable respect, and of course, the more times that happens, the more respect the decision is entitled to . . . .").

[206] The leading spokesmen for the common law approach, in its many variations, seem to reside in Chicago. *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003) (arguing for judicial pragmatism in formulating doctrine); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (arguing for judicial minimalism in

In contrast, the party of Black is right to insist that the Constitution's authority is generated by the mobilized and self-conscious commitments of We the People. And yet the Blackians' narrow focus on the formal amendment mechanism described in Article V gives an anachronistic twist to their professions of faith. While they speak endlessly about the primacy of popular sovereignty, they trivialize the central twentieth-century texts that codify the great triumphs of modern constitutional politics. Instead of interpreting these landmark statutes and superprecedents with sympathetic attention, they endlessly debate the meaning of the merest jottings from the Founding and Reconstruction.

We have reached, then, my promised moment of half-truth, or better, half-truths: The party of Hugo Black celebrates the principle of popular sovereignty but trivializes the modern achievements of the American people. The party of Oliver Wendell Holmes recognizes that the living Constitution has moved far beyond the Founding and Reconstruction, but it trivializes the principle of popular sovereignty.

I have been offering a way out. If we expand the twenty-first-century canon to add the decisive texts of the New Deal and the civil rights era to those of the Founding and Reconstruction, we no longer must choose between an antiquarian approach to popular sovereignty and a court-centered approach to modernity. By expanding the canon, the profession can develop the contemporary meaning of our Constitution after confronting *all* the great legal texts generated by *all* the great acts of popular sovereignty in our history. In taking this step, lawyers will enable their fellow citizens to define their own place in an ongoing constitutional tradition that did not end with the Founding, or Reconstruction, but will continue until the death of the Republic.

A professional effort to redefine the canon will also pay off when we get down to the business of deciding cases. Despite their protestations to the contrary, neither Blackians nor Holmesians actually practice what they preach. Though mechanists pretend that they can derive compelling decisions exclusively from the eighteenth- and nineteenth-century texts, they unpredictably swerve whenever contrary precedents seem too overwhelming. Though organicists emphasize the wisdom of adapting existing case law to contemporary realities, they typically make half-hearted gestures toward one or another clause to appease the ancient spirits of the Framers. Judges on both sides display too much

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the elaboration of doctrine); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that "[t]he common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices"); *see also* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

common sense to embrace the harsh dichotomies of their competing philosophies.

Yet both sides obscure their concessions through the use of legal fictions. As Professor Lon Fuller made clear in his classic study, legal fictions aren't merely falsehoods — they are falsehoods that are "not intended to deceive."[207] Under the old writ system, everybody knew that Messrs. Doe and Roe were not suing in ejectment and that places like Jamaica were not (as the bill of Middlesex would have it) located in Cheapside. Nevertheless, these fictions offered the only way of achieving sensible results within a formalist legal culture that refused to reform itself.

The same dis-ease currently afflicts American constitutional law. Our most important fiction involves the pervasive use of "myths of rediscovery" to save both Blackians and Holmesians from reaching unreasonable results. For starters, both mechanists and organicists pretend that the Commerce Clause somehow legitimates the overwhelming expansion of national regulatory power since the New Deal revolution[208] — although they embrace this fiction about the Founding for different reasons. The mechanists indulge the myth because they fear a massive popular backlash if they wage all-out war against the modern regulatory state. The organicists find the myth attractive because it gives them a defense against charges of judicial activism and permits them to continue with the serious business of adapting the Founders' obsolete notions of "commerce" to the felt necessities of the twenty-first century.

A similar marriage of convenience obtains when it comes to the civil rights revolution. Both sides converge on the proposition that *Brown* was not only rightly decided in 1954, but that "separate but equal" was *never* a constitutionally legitimate response to the problem of public education. Once again, mechanists are willing to falsify the complexity of the original understanding because they fear a backlash if they question *Brown*,[209] and organicists are happy to use *Brown* as a

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[207] LON L. FULLER, LEGAL FICTIONS 6 (1967). Special thanks to John Langbein for encouraging me to reread Fuller.

[208] On the mythic account, Chief Justice Marshall's opinion in *McCulloch* suffices to establish the modern regulatory state's roots in the Founding. But *McCulloch* did not fully anticipate contemporary realities, and it occupied an extreme point in a much larger conversation in the early Republic. Indeed, the Taney Court was prepared to overrule *McCulloch*, if given an appropriate opportunity. *See* MAGLIOCCA, *supra* note 49, at 71–73, 84–86; Mark A. Graber, *Antebellum Perspectives on Free Speech*, 10 WM. & MARY BILL RTS. J. 779, 808 n.161 (2002). I further interrogate this myth in 1 ACKERMAN, *supra* note 43, at 34–57.

[209] Responding to this embarrassment, Michael McConnell tries to legitimate *Brown* on originalist grounds. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1131–40 (1995). But this exercise in originalist theology has been decisively refuted by Michael Klarman. *See* Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell,* 81 VA. L. REV. 1881 (1995).

springboard for further evolution of an egalitarian jurisprudence appropriate to the changing mores of the twenty-first century.

These myths of rediscovery exist in many variations, but it is more important to step back from the details and combine them together. In this now-conventional story, judges lived through a Dark Age early in the twentieth century — lasting roughly through 1937 in the case of *Lochner*, and roughly through 1954 in the case of *Plessy*.[210] During this Dark Age, the Court unaccountably failed to understand the true legal meaning of the Commerce, Equal Protection, and Due Process Clauses. Then came Whiggish moments of Enlightenment: miraculously, the Justices cast away their blinders to reveal the Constitutional Truth That Had Been There The Whole Time — and all has been basically right with the world ever since.[211]

It will be tough to convince judges to give up this metanarrative. Not only is it sufficiently capacious to allow Blackians and Holmesians to continue their internecine battle for supremacy over the legal mind. Not only is it sufficiently flexible to allow judges of both persuasions to avoid decisions that offend common sense. But it is ego gratifying as well: in this storyline, the problem with the *Lochner* and *Plessy* eras was that most judges didn't have the wit to heed the emphatic dissents of Justices Holmes and Harlan. But now that modern judges have learned the lessons of these great dissenters, they can afford to ignore anything that serious legal historians and political scientists may say about the reigning myths of rediscovery.

My revisionary proposal, in contrast, puts the People, not the Court, at the center of constitutional development. It insists that ordinary Americans, led by such figures as Franklin Roosevelt and Martin Luther King, Jr., have made as large a constitutional contribution as the

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[210] The terminating date of the *Lochner* era is a subject of endless debate — Professor Barry Cushman, for example, says it is either 1934 or 1941, but not 1937. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998). The end date of the *Plessy* era has also been disputed, with Professors Michael Klarman and Lucas Powe persuasively suggesting that the *Plessy* era ended in the early 1960s, not in the 1950s. *See* KLARMAN, *supra* note 78, at 381 ("That litigation alone could not desegregate schools was clear by 1960 . . . ."); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 178 (2000) (noting the declining role of litigation in the desegregation movement by 1962). For present purposes, these are just details. The key point is that the dominant metanarrative has a Whiggish structure — a Dark Age yields to the present Age of Enlightenment.

[211] I don't expect the Roberts Court to challenge this storyline in a fundamental way. Justice Thomas has famously called upon his colleagues to repudiate the New Deal myth of rediscovery. *See* United States v. Lopez, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring) ("Although I may be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years."). But there is no indication that any other Justice is prepared to join him. And while *Brown* itself recognizes its problematic roots in Reconstruction, even Justice Thomas hasn't suggested that this should prompt a serious period of agonizing reappraisal by originalists. *But cf.* McConnell, *supra* note 209, at 1131–40 (seeking implausibly to ground *Brown* in the original understanding).

generations led by George Washington and Abraham Lincoln — and that the job of the Supreme Court is to recognize this point when making sense of the living Constitution.

When working with the expanded canon, the Supreme Court's job is neither to defend the original understanding of the constitutional texts inherited from the Founding and Reconstruction, nor to ponder the complexities of the countermajoritarian difficulty raised by the elitist character of common law constitutionalism. Its task is to reflect upon *all* the principles affirmed by the American people, and to use these principles as a check and balance on the political pretensions of the present day. When the Court strikes down a statute in the name of We the People of past generations, it certainly does force the politicians of the present to think twice before pressing forward in a direction that threatens foundational commitments.

But it begs a big question to call the Court's intervention antidemocratic. The begged question is this: have the politicians of today earned the special kind of authority that past spokesmen for the People gained only after a decade or more of intensifying public debate, institutional contestation, and self-conscious decision by the American people at the polls?

Generally speaking, the answer will be an obvious "no." Most statutes and executive decrees simply don't proceed from the sustained deliberation typical of our great acts of popular sovereignty. In the standard case, judicial review is best understood as a crucial resource in organizing a dialogue between generations: by striking down a statute, the judges are forcing Americans of today to take seriously the views of preceding generations, and to think harder before they revise the constitutional principles affirmed by We the People of yesterday.

This is not ancestor worship. My case for a conversation between the generations is based on a realistic assessment of contemporary democratic life. As public opinion research abundantly establishes, most Americans have better things to do than follow the zigs and zags of Washington debate.[212] They are too deeply involved in too many other pursuits — from earning a living, to coaching Little League, to serving God's will, to making sense of their personal lives.

This opens up a large space for political representatives to pass laws that would never gain the public's considered consent if it had been paying serious attention. While there are practical reforms that might help improve the quality of participation in normal politics,[213] I do not yearn for a never-never land in which most Americans become political

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[212] *See* ACKERMAN & FISHKIN, *supra* note 125, at 5–14.
[213] *See id.*

junkies like you or me.[214] Citizenship is only one of many activities that make modern life worth living — and much is lost, as well as gained, by yanking tens or hundreds of millions out of their ordinary lives to take part in a high-stakes political struggle over the future of American law.

It is for good reason, then, that the typical American voter doesn't view the typical American election as providing the winners with a sweeping mandate to destroy the greatest historical achievements of the American people. If a political coalition has this ambition, it should not be allowed to achieve its aims through smoke and sound bites. It should be prepared to confront Supreme Court opinions that explain why and how statutory initiatives offend the considered judgments of the People of the past. It should be required to engage in a sustained effort to gain the mobilized support of today's Americans to revise their constitutional legacy. Only then will it have *earned* the constitutional authority to demand, in the name of the American people, that future courts admit new landmark statutes and superprecedents into the evolving constitutional legacy passed on to future generations.

I don't expect too much from my proposal. If scholars, and ultimately judges, build a new constitutional canon, the profession will be studying twentieth-century texts with the same high seriousness it accords ancient ones, but we won't reach a single common understanding of the meaning of these texts, any more than we do today with our more restrictive canon. It will remain for the Court to exercise judgment, and prudence, in elaborating the contemporary significance of past acts of popular sovereignty.

Sometimes the Justices will make serious mistakes, but these blunders should be placed into a larger perspective. Political life is full of pathologies: Presidents regularly claim strong mandates from the People that they can't sustain in the court of public opinion; Senators and Representatives pander to special interests; campaign gurus blitz the airwaves with misleading and divisive appeals; and ordinary Americans turn away in disgust at the meaningless sound bites and recurring scandals. Amidst all these competing pressures, the President and Congress will sometimes dither, sometimes pass serious legislation that makes a genuine effort to define the public interest, and sometimes propel the country over a moral precipice. Within this human-all-too-human tragicomedy, the Court adds something valuable to the mix. Quite simply, the Justices are the only ones around with the training and the inclination to look back to past moments of popular sover-

[214] In contrast to my position, Professor Roberto Unger seems to endorse a political ideal that contemplates a *constant* commitment to high-energy politics. *See, e.g.*, ROBERTO MANGABEIRA UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE 213–20 (1998).

eignty, and to check the pretensions of our elected politicians when they endanger the great achievements of the past.[215] By expanding the canon to include the twentieth century, the profession will be providing the courts with the intellectual resources needed to discharge the function of judicial review in a more thoughtful fashion.

The legal effort to define the achievements of the twentieth century will also clarify our present constitutional situation. Since September 11th, we have witnessed yet another presidential effort to gain the support of the American people for a basic transformation of our constitutional values in the name of the "war on terror." We won't get very far in understanding this exercise by consulting the traditional categories of Article V. These formalisms fail to envision any presidential role in the process of constitutional revision, much less the role that has developed organically from the times of Thomas Jefferson through the days of Lyndon Johnson. But once we cast aside our formalist blinders, we can begin to treat our present situation in the spirit of the last Lecture — in which we tried to gain legal perspective on the civil rights movement by comparing its institutional dynamics to the most successful exercises in popular sovereignty of the past.[216]

Recall the most important point: popular sovereignty is not a matter of a single moment; it is a sustained process that passes through a series of stages — from the signaling phase through culminating acts of popular decision to consolidation. The first question to ask isn't whether the movement–Republican Party of George W. Bush has already completed its constitutional revolution, but whether it has fairly begun: has it signaled to the American people that the time has come for a serious constitutional reappraisal?

My answer is an unequivocal "yes." September 11th, by itself, did not constitute this signal — any more, say, than the stock market crash signaled the need for a New Deal. Herbert Hoover was given three years before the next presidential election to show that his own approach was adequate to the Great Depression. But he failed, and it was the election of 1932 that signaled decisive popular support for the consideration of a new constitutional agenda. Like Herbert Hoover, George W. Bush was given three years to patch together an emergency response to a large and unforeseen crisis, but this time the voters did not throw him out. To be sure, he didn't win in a landslide, nor did

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[215] Alexander Bickel was exaggerating when he supposed that "[j]udges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 25–26 (1962). Most judges I know are far too busy to be serious scholars, but they are typically far more thoughtful on constitutional matters than most of the political types who inhabit the rest of our constitutional world.

[216] *See supra* pp. 1757–93.

the Republicans carry Congress by New Deal margins. But with the neoconservative movement in control of both the presidency and the Congress, the signal coming out of the 2004 elections was unmistakable: if Americans didn't like the "war on terror" that was being proposed in their name, they had better get their act together and do something about it.

We are now at the proposal stage: as in the 1930s, the Supreme Court is beginning to challenge aspects of the presidential initiatives that assault entrenched constitutional understandings, forcing the political branches to refine their revolutionary proposals;[217] in the meantime, the opposition Democrats will be given an opportunity, both in 2006 and 2008, to appeal to the People to reject or to modify the basic premises of the President's war on terror.[218]

The jury is still out: after all, the Reagan presidency also signaled the need for fundamental change but ultimately failed to win the decisive support of the American people,[219] and we may see the same thing happen again. But then again, we may not: the signal of 2004 may culminate in the ratification by the People of a fundamentally new constitutional regime that moves far beyond the question of national security to redefine a host of other principles and practices.

We shall see.

My point is that we do *not* see: America's lawyers have blinded themselves to the most obvious realities that they confront as citizens — and only because the official canon, established by Article V, blinkers our vision of constitutional change and prevents us from exposing the present exercise in presidential leadership to disciplined legal analysis.

I myself reject the very idea that we are fighting a "war on terror." I believe that only tragedy awaits us if the American people endorse this pernicious notion.[220] But my own opinion is one thing; constitutional law is another — and as a lawyer I tell you that, if the movement–Republican Party continues to win the Congress and the Presidency through 2012, there will be a constitutional revolution in this country.[221]

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[217] In both *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court has resisted the President's aggressive assertions of power in the "war on terror," but it is too soon to say how it will all turn out.

[218] These Lectures were originally delivered in October of 2006. *See supra* note 12.

[219] *See* 2 ACKERMAN, *supra* note 24, at 390–92.

[220] *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006).

[221] I describe the doctrinal revolution looming on the horizon in Bruce Ackerman, *The Art of Stealth*, LONDON REV. BOOKS, Feb. 17, 2005, at 3. For a similar view, see CASS R. SUNSTEIN, RADICALS IN ROBES (2005).

Even if the present exercise fails and the defenders of the established order manage to beat back the challenge, no constitutional regime lasts forever. Sometime in the twenty-first century, a day will come when our representatives in Washington do manage to revolutionize our constitutional ideals and practices. The only question is whether change will come through top-down power plays, or through mobilized debate, institutional struggle, and self-conscious decision from below.

The final answer will be in the hands of our fellow citizens. But the stories lawyers tell about our constitutional development will make a difference — both in shaping the perceptions of judges, legislators, and Presidents, and in framing broader public understandings of democratic possibility. We dishonor our fellow citizens when we tell them a tale that treats their parents and grandparents as if they were pygmies compared to the constitutional giants of the ever-receding past. We should offer them instead a view of constitutional development that invites them to follow in the footsteps of Franklin Roosevelt and Martin Luther King, Jr. — to dream their own Dreams and make their own New Deals, and to build a better America in the twenty-first century.

Perhaps our children and grandchildren will be equal to this challenge; perhaps not. But we will fail them if we falsify our rich heritage of self-government and leave behind a formalist parody.

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So: in the final analysis, is the living Constitution a machine or an organism?

I've rejected the false dichotomy offered up by the party of Black and the party of Holmes. But we are now in a position to break out of the current impasse and integrate organic and mechanical elements into a deeper form of understanding.

Speaking broadly, the argument advanced in these Lectures is based on two organic developments — one in political consciousness, and the other in political institutions. Consciousness is primary: over the course of the twentieth century, ordinary citizens have come to identify themselves as Americans first, and Texans second. This transformation has given deeper meaning to institutional changes that have long since outstripped the expectations of the Founders — most notably, the rise of the presidency, supported by movements and parties, to a leadership position in the higher lawmaking system.[222] The successes of Franklin

[222] In a recent article, Professors Daryl Levinson and Richard Pildes rightly emphasize the need for constitutional theory to recognize the centrality of political parties in our system of government. They argue, again rightly, that this requires a revision of standard accounts of the separation of powers: the branches operate very differently depending on whether they are all controlled by the

Roosevelt and Lyndon Johnson in gaining broad popular consent for decisive constitutional breakthroughs both reflected and reinforced the notion that We the People of the *United* States can express our constitutional will through national institutions, and not only through the federalist system described by Article V. These achievements of the modern presidency provide the crucial precedents framing the constitutional meaning of the present era — in which George W. Bush is seeking to win the decisive mandate from the People that eluded Ronald Reagan. And they also serve as the springboard for moving beyond Justice Black's mechanical Article V method of specifying acts of popular sovereignty to a more common law method of identifying the landmark statutes and superprecedents of the twentieth century that are deserving of canonical status.

So an appreciation of the organic path of historical development is absolutely essential to an adequate understanding of the American Constitution as it moves forward into its third century. But at the same time, I want to emphasize the enduring significance of Founding machinery in shaping the development of the living Constitution. Pride of place goes to the separation of powers, and especially to the Founding decision to stagger terms in office — two for the House, four for the President, six for the Senate, and life for the Supreme Court.

This makes it almost impossible for a movement-party to gain control over all the levers of power at a single moment, and imposes a more deliberate pace on constitutional revision. Though one or another leading institution may signal the rise of a new constitutional agenda, there will be at least one holdout controlled by the partisans of the old regime. The point-counterpoint between the transformative and conservative branches frames the meaning of ongoing electoral combat — as each side urges the voters to oust its rivals from their positions of power on election day.

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same party. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2332–34, 2338–47 (2006). My arguments here contribute three points to those made in their outstanding essay. First, I emphasize how the dynamic movement from divided-party to single-party control may be accompanied by a sustained debate over, and popular decision resolving, large matters of constitutional principle. Second, this dynamic process of debate and decision differs significantly depending on the identity of the branch(es) that elaborate the rising movement-agenda and those leading the resistance. Third, while Professors Levinson and Pildes emphasize that American political parties have historically differed in the degree of their ideological coherence, *see id.* at 2332–38, they do not root these differences in the dynamics of the rise and fall of popular movements, or in the changing relationships of movements to political parties over time.

On a more fundamental level, my emphasis is on the dynamics of separation of powers over time, while Professors Levinson and Pildes focus on the way it operates at any single point in time. A satisfactory view should incorporate both diachronic and synchronic perspectives. The breakthrough essay by Professors Levinson and Pildes should be an essential reference point in future work.

This dynamic system of checks and balances places the burden of persuasion on the partisans of the new constitutional vision: they must keep winning elections long enough to gain control of all three branches in order to achieve a constitutional breakthrough in the form of landmark statutes and superprecedents.[223]

I predict that the separation of powers will be the central mechanism for constitutional transformation in the coming century. Perhaps some accident of history may cause it to misfire; perhaps this will force the protagonists into a desperate effort to crank up the antiquated state-centered machinery of Article V. Anything is possible — it happened during Republican Reconstruction in the nineteenth century, and it happened during the Progressive Era — but similar scenarios seem unlikely under twenty-first-century conditions.

In contrast, the separation-of-powers machine remains deeply entrenched in current practice. And, as history shows, it can play itself out in a host of different variations. It is the business of constitutional law to analyze these variations with care. These case studies provide crucial reference points for diagnosing the dynamics of the coming struggles to make new higher law in the name of the American people — allowing lawyers to assess, in a professionally disciplined fashion, when and whether a movement has managed to signal the need for its fellow Americans to take its constitutional agenda seriously, and how successful it has been in gaining broad and decisive support for its initiatives.

History doesn't repeat itself; but it is all we have, and it is a precious source of constitutional precedents that we can, in common law fashion, apply to our recent past and changing future. Whatever surprising variations are in store for us in the coming century, one thing is certain: all movements finally run out of steam, bringing an end to the sense of common enterprise that enables the President, Congress, and the Court to generate cycles of landmark statutes and superprecedents that endure over the generations. As ordinary Americans turn away from high-energy politics, different parties will win control of different branches of government, with different visions of America's future finding different champions in the House, Senate, and presidency. At this point, the separation of powers makes it possible for the Supreme

[223] Professors Jack Balkin and Sanford Levinson also emphasize the importance of capturing all three branches of government — and holding them over a period of time — in their theory of doctrinal revolutions. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001). Their work, however, does not distinguish between political parties in which movements play a major role, and political parties that are controlled by the instrumental actions of less ideological politicians. As a consequence, their theory of "partisan entrenchment" fails to recognize the decisive significance of those rare occasions when all three branches of government are dominated by a movement-party.

Court to remember the achievements of the recent past, and integrate them into our evolving constitutional legacy.[224]

But there is nothing inevitable about this process. The Court may instead choose to trivialize the recent past and mystify ancient wisdom: no machine can actually force judges to serve as the keepers of our collective memory. This is a task for ongoing legal reflection, engaged professional debate, and thoughtful judicial decision. Even if the profession develops an adequate constitutional canon, this achievement will not suffice to sustain the Republic as it faces the shocks and surprises of the twenty-first century. If the future is anything like the past, there will be a need for constitutional renewal and revision — and it will be up to ordinary Americans to tell the difference between the demagogue and the statesman and to mobilize to set the government on a sound course.

Nevertheless, for all its limitations, the professional updating of the canon will keep our constitutional conversation on the right track. With the aid of America's lawyers, our fellow citizens will constantly be reminded that popular sovereignty has not suffered a mysterious death in modern times, but that the American people have remained an active force in governing their own affairs.

And that, my friends, is the beginning of wisdom.

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[224] For pathbreaking work exploring the political dynamics that control the degree of judicial independence within the system of separation of powers, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991); and William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).