Constitutional Politics/Constitutional Law

Bruce Ackerman
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Recommended Citation
Ackerman, Bruce, "Constitutional Politics/Constitutional Law" (1989). Faculty Scholarship Series. 140.
https://digitalcommons.law.yale.edu/fss_papers/140
INTRODUCTION: LOOKING INWARD?

America is a world power, but does it have the strength to understand itself? Is it content, even now, to remain an intellectual colony, borrowing European categories to decode the meaning of its national identity?

This was not always a question posed by the American Constitution. When America was a military and economic weakling on the European fringe, it was at the forefront of constitutional thought. As it transformed itself into the powerhouse of the West, its leading constitutionalists became increasingly derivative. Two centuries onward, the study of the American Constitution is dominated by categories that owe more to European than to American thought and experience.

Unsurprisingly, this has led to a peculiarly ahistorical kind of theory.
Since the dominant conceptual frameworks have not been designed with American history in mind, they can hardly be used to reflect fruitfully on distinctive features of our constitutional development. Indeed, many of the most remarkable parts of the story are entirely ignored—if they were confronted, they would only embarrass European notions that were never designed to take them into account.

To discover the Constitution, we must approach it without the assistance of some philosophical guide imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber, provides the key. While Americans have borrowed much from such thinkers, they have built up a genuinely distinctive pattern of constitutional thought and practice. Once we have reconstructed the whole, we shall find it bears comparison with the deepest reflections on the nature of politics offered up by the greatest of the Greeks or Romans, Germans or English.

My interest in this reconstructive enterprise is not purely intellectual. The Constitution presupposes a citizenry with a sound grasp of the ideals that inspire our political practice. As we lose sight of these ideals, the organizing patterns of political life unravel. If “sophisticated” constitutionalists are blinding themselves to the distinctively American aspects of the Constitution, this must be a cause for more general concern.

Not that the mass of American citizens are at the mercy of their intellectuals when it comes to understanding their Constitution. After two centuries of civic experience, the rhythms of American constitutional life have become second nature for most of us—the two, four, six year electoral cycles, the distinctive interchanges between Congress and President, President and Court, Court and Congress, nation and state, politics and law. Along with these rhythms comes a rough and ready grasp of the animating constitutional ideals of American democracy.

Nonetheless, the intellectual alienation of opinion leaders takes its toll. Sophisticated talk gets around that political practices having a deep constitutional point are “really” mystifying rituals that distort the character of American politics. Generations of such talk loosen the popular grasp on the democratic ideals animating our constitutional life, increasing the vulnerability of these ideals at future moments of crisis.

The costs of intellectual alienation are no less evident when we turn from the mass of citizens to the caste of American lawyers and judges. As Tocqueville saw early on, this group has taken on a special responsibility in sustaining the Constitution’s operation on a day-to-day basis. As we shall see, practicing lawyers and judges have done a better job than one would suppose if one focused on the leading lights of the nation’s universities. Without giving the matter much thought, they have built up something I will call a professional narrative, a story about how the American people got from the Founding to the Bicentennial. This narrative colors
the constitutional meanings lawyers and judges give to the particular problems that press before them for decision. It contains, moreover, fundamental insights that purveyors of constitutional sophistication would do well to ponder. But, precisely because this pondering has not been going on, the existing professional narrative expresses these insights in ways that fail to capture their historical reality or constitutional complexity. If constitutional theorists turned their attention from Locke to Lincoln, from Rousseau to Roosevelt, they might contribute positively to the construction of a better professional narrative—one that is truer to the historical facts and to the constitutional ideals that animate our continuing experiment in self-government.

Behold, then, a pretty picture: an America in which a rediscovered Constitution is the subject of an ongoing dialogue among scholars, professionals, and the people at large; an America in which this dialogue allows the citizenry, and its political representatives, an ever-deepening sense of their historical identity as they face the transforming challenges of the future. Let I be mistaken too quickly for Pangloss, let me say that, even if this project succeeded beyond my wildest hopes, it would not lead straight-way to Utopia. As we discover the distinctive features of the Constitution, we will find much that is imperfect, mistaken, evil in its basic premises and historical development. Never forget that James Madison was a slaveholder as well as a great political thinker. And who can imagine that our Constitution's peaceful coexistence with injustice came to an end with Emancipation? We cannot remain comfortable with the status quo; the challenge is to build a constitutional order more just and free than the one we have inherited.

It hardly follows that we can build a better future by cutting ourselves off from the past. Especially when American public discourse constantly treats the constitutional past as if it contained valuable clues for decoding the meaning of our political present. No single essay—no single mind—can hope to do justice to the centuries of experience that serve as the historical foundation of our present patterns of constitutional thought and practice. All I can do here is to sketch the outlines of a larger work in progress that represents my best effort.1

This essay will have three parts. The first confronts the remarkable breach between theory and practice that burdens our present constitutional situation. While our civic practice remains rooted in the distinctive patterns of the American past, sophisticated constitutional thought has increasingly sought to elaborate the genius of American institutions with the use of theories generated elsewhere—to the point where these rival theories are more familiar in the universities than the one I shall be elaborat-

1. B. Ackerman, Discovering the Constitution (unpublished manuscript on file with author) [hereinafter Discovering the Constitution].
ing. Thus, it seems wise to begin by comparing the distinctive American matrix—which I will call dualistic democracy—with these more familiar academic rivals.

After glimpsing an organizing pattern in constitutional thought and practice, the second Part confronts the professional narrative modern lawyers use to express this pattern. As we shall see, dualist democracy places a special value on the political conclusions reached after an extraordinary process of popular mobilization, debate, and institutional testing that finally culminates in a citizen-movement earning the authority to make higher law in the name of We the People of the United States. This emphasis is taken up by professional lawyers and judges in the story they tell themselves about the constitutional past. Every day in the nation’s courtrooms and assembly-halls, lawyers, legislators, and judges look backward to a few great turning points in our history for guidance. The lessons these men and women take from the great constitutional transformations marked by the Founding, Reconstruction, and the New Deal deeply shape their understanding of the conflicting constitutional arguments swirling around them.

All practicing constitutionalists recognize the significance of all three of these turning points. There is, however, a big difference in the stories they tell about each of them. The prevailing patterns of professional narrative do not encourage lawyers and judges to reflect upon the things the Founding, Reconstruction, and the New Deal have in common. Instead, each of these three great jurisgenerative\(^2\) events is cabined by a set of lawyerly categories that emphasize how different one episode is from the next.

Of the three, the Founding is treated as if it were the most radical break with the past. Almost all modern lawyers recognize that, in proposing a new Constitution in the name of We the People, the Philadelphia Convention was acting illegally under the terms established by America’s first formal constitution—the Articles of Confederation solemnly ratified by all thirteen states only a few years before. Thus, while the thirteenth Article of Confederation required amendments to gain the unanimous consent of all thirteen state legislatures, Article Seven of the Federalists’ proposed Constitution blithely excluded state legislatures from any role in ratification, and went on to assert that the approval of special constitutional conventions meeting in only nine of the thirteen states sufficed to validate the Philadelphia Convention’s effort to speak for We the People of the United States.\(^3\)

---

Things are very different when the subject turns to the Civil War Amendments. Here modern law-talk exhibits a sharp dichotomy between substance and procedure. Substantively, everybody recognizes that these amendments profoundly transformed pre-existing constitutional principle.

If, however, we turn from the substance of the amendments to the process by which they became part of our higher law, a remarkable silence descends on the legal community. Modern lawyers simply assume that the Reconstruction Republicans obediently followed the formal tracks for constitutional amendment established by the Federalists in Article Five. According to received opinion, the Civil War Amendments are just that: ordinary amendments which, like all the others, owe their validity to the "rule of recognition" set out in the text of the 1787 Constitution. To put the point in a formula: While the professional narrative recognizes that Reconstruction was substantively creative, it supposes that it was procedurally unoriginal.

Even this much originality is denied the New Deal. Though everybody recognizes that the 1930's mark the definitive constitutional triumph of activist national government, they tell themselves a story which denies that anything deeply creative was going on. This view of the 1930's is obtained by imagining a Golden Age in which Chief Justice Marshall got things right for all time by propounding a broad construction of the national government's lawmaking authority. The period between Reconstruction and New Deal can then be viewed as a (complex) story about the fall from grace—wherein most of the Justices (not Holmes, of course) strayed from the path of righteousness and imposed their antidemocratic laissez-faire philosophy on the nation through the pretext of constitutional interpretation. Predictably, these acts of judicial usurpation set the judges at

of the pre-existing Articles of Confederation," but suggests that the Articles should be viewed as a treaty whose obligations had lapsed as a result of state violations, and hence that the Convention was not acting illegally in calling upon nine or more states to secede from the Confederation. While some Federalists undoubtedly held this view in private, even they were reluctant to rely on it in public. Compare The Federalist No. 40, at 251, 254 (J. Madison) (C. Rossiter ed. 1961) (illegality explicitly conceded) with id. No. 43, at 279–80 (J. Madison) (noting that "perhaps, also" (emphasis in original) justification for ratification procedure "may be found" in breach-of-treaty theory). And, as Amar recognizes, many anti-Federalists denied that the Articles pledge of "perpetual" Union could be evaded so easily after so short a trial. See Art. XIII, reprinted in M. Farrand, The Framing of the Constitution of the United States 211, 223 (1913). Overall, I find Professor Kay's arguments more persuasive than Professor Amar's. At the very least, Amar's confidence in the legality of the Convention's end-run around the state legislatures was not shared by the Federalists themselves—who recognized that their "legal" argument for secession would not get them very far in popular debate, and that they would have to invoke other, more fundamental, principles of popular sovereignty if they hoped to legitimate their act of constitutional creation.

Indeed, the rest of Amar's article usefully emphasizes how important the principles of popular sovereignty were to the revolutionary generation—though, once again, I think he goes overboard in suggesting that the Convention's call for ratification by state conventions, rather than state legislatures, was legal under the laws of all thirteen states. While some states, like Massachusetts, had given great authority to constitutional conventions in their domestic law, see Amar, supra, at 1049–51, others, like Rhode Island, were much more backward in conceding that constitutional conventions, meeting in the name of the People, might legally modify pre-existing state charters. See Luther v. Borden, 48 U.S. (7 How.) 1 (1849).
odds with more democratic institutions, which acutely perceived the failure of laissez-faire to do justice to an increasingly complex and interdependent world. The confrontation between the New Deal and the Old Court serves as the climax in a traditional morality play of decline, fall, and resurrection. Only Justice Roberts' "switch in time," and the departure of the worst judicial offenders, permitted the Court to expiate its countermajoritarian sins without permanent institutional damage. If only the Justices had not strayed from Marshall's original path, perhaps all this unpleasantness could have been avoided!

As always, this basic story line invites countless disagreements about the precise character of the Marshallian vision, the precise scope of the latter-day aberrations. For present purposes, the critical point is simple enough: In contrast to the first two turning-points, modern lawyers do not describe either the substantive or procedural aspects of the New Deal by telling themselves a tale of constitutional creation. Instead, the triumph of the activist welfare state is mediated by a myth of rediscovery—it is as if the Founding Federalists had foreseen the works of Franklin Delano Roosevelt and would have been greatly surprised to learn that the struggles of the first third of the twentieth century were necessary to gain the welfare state's constitutional legitimation.

Founding Federalists→Illegal Constitution; Reconstruction Republicans→Formal Amendments; New Deal Democrats→Judicial Rediscovery of Ancient Truths. This schema suggests a subtle, but unmistakable, decline in the constitutionally generative capacities of the American people. Apparently, We the People have never again engaged in the sweeping kind of critique and creation attempted by the Founding Federalists. While we have made substantive revisions in the original structure, we have never again gone so far as to revise the very process of constitutional revision. A similar loss of energy is implied by the narrative's movement from the nineteenth to the twentieth centuries: While the Reconstruction Republicans gained the consent of the American people to fundamental changes in their pre-existing substantive principles, apparently the sweeping transformations won by the New Deal Democrats represented nothing more than a return to the wisdom of the early Founders.

I mean to question this core interpretive schema. Despite its familiarity, it is built on sand. Part Two presents a two-stage critique. First, it challenges the view that the Civil War Amendments were proposed and ratified in strict compliance with the rules of Article Five. Instead, the Republicans transformed the higher lawmaking system itself in their successful struggle to gain constitutional authority for their transformative initiatives. The new Republican process was far more nationalistic than the one described by the Federalists in the rules of Article Five. Rather than relying exclusively on a Federalist dialogue between assemblies on
the national and state levels, the Republicans gave Congress, the President, and the Court new roles in the evolving higher lawmaking system.

Once we rediscover the radical character of the Republicans' revision of our amendment procedures, we can move the critique of the reigning professional narrative to a second stage. Here we use the revised description of Reconstruction to gain a new perspective on the next great constitutional transformation: the struggle between the Roosevelt Presidency and the Old Court that culminated in the legitimation of the activist regulatory state. Rather than disguise it with a myth of rediscovery, we shall begin to see it as a twentieth-century variation on nationalistic themes first worked out in the 1860's. Like the Reconstruction Republicans, the New Deal Democrats amended the Constitution by provoking a complex constitutional dialogue between the voters at large and institutions of the national government, a dialogue that ultimately substituted for the more federalistic processes of constitutional revision detailed in Article Five. In contrast to the 1860's, however, this exercise in nationalistic revision was not interrupted in mid-stream by the assassination of a President and the substitution of a Vice-President who defected from the transformative coalition. As a consequence, the New Deal Democrats could work out a *model of Presidential leadership* in a far more elaborate way than could their Republican predecessors.

Part Two, in short, denies the need to continue telling ourselves a professional narrative in which we cast ourselves as the epigones of bygone eras of constitutional creativity. By confronting the original documents left to us by the Founding Federalists, Reconstruction Republicans, and New Deal Democrats, we can gain the resources to tell ourselves a different story—one in which the dualistic project in higher lawmaking begun at the Founding was creatively adapted, time and time again, by Americans of later generations as they struggled over, and sometimes won, the constitutional authority to speak in the name of We the People. To jargonize: Since the received narrative recognizes only two great jurisgenerative eras in our constitutional history, I shall call it a *two-solution* narrative and urge its replacement by a *three-solution* narrative which recognizes that the project of constitutional politics has had its transformative triumphs in the twentieth century and continues, both in victory and defeat, onward to the present day.

Part Three sketches the way this three-solution narrative provides a new framework for understanding the modern Supreme Court. The key idea here is *synthetic interpretation*. We are familiar enough with the problem, if not the term, as we puzzle over the relationship between the transformations in public values wrought by the Civil War Amendments. Under any interpretation of these great texts, they destroyed a host of eighteenth-century premises concerning slavery, federalism, and citizenship. However coherent the Founding scheme of government may have
been before the War, the old system was fragmented by the new nationalistic, libertarian, and egalitarian affirmations proclaimed by the Republicans in the name of the People. While so much was always clear, it was quite another matter to synthesize new and old into a coherent doctrinal structure. Precisely which fragments of the Founding order were now inconsistent with the new Republican constitution? Which aspects might be saved if they were reinterpreted in the light of the new Republican affirmations? From its first encounter with these questions in the Slaughterhouse Cases\(^4\) of 1873, the Court has self-consciously struggled with the synthetic problems involved in integrating Founding (time one) and Reconstruction (time two) into a principled doctrinal whole. Perhaps the most famous modern synthetic problem is raised by Hugo Black's claim that the Fourteenth Amendment (time two) made the Bill of Rights (time one) binding on the states.\(^5\) But there are many other issues that raise similar questions.

I will invite you to apply the lessons you have learned from these synthetic exercises to analogous problems that arise as soon as one views the New Deal as a creative constitutional achievement that transformed constitutional premises as radically as Reconstruction had two generations before. Once this three-solution narrative is accepted, the familiar effort at one-two synthesis will seem only one facet of a larger interpretive enterprise left to the courts in the wake of the New Deal's affirmation of activist national government. In addition to the continuing interpretive effort to make sense of the relationship between Founding and Reconstruction, judges—and the rest of us—must also confront two other sides of a synthetic triangle left to us in the aftermath of the New Deal. On one side, there is the one-three problem: What is the relationship between the New Deal's affirmation of the activist welfare state and the Founding ideals of limited government and individual rights? The final side of the triangle is defined by the two-three problem: how to understand the relationship between New Deal welfarism and the egalitarian and libertarian principles announced during Reconstruction?

These basic interpretive questions cannot be stated cleanly within the reigning two-solution narrative, which pretends that John Marshall would have had no constitutional problems validating the National Industrial Recovery Act.\(^6\) Since the professional narrative asserts that there was nothing new about the New Deal, it cannot self-consciously confront the interpretive difficulties involved in synthesizing the (nonexistent) new principles of the 1930's into the fabric of our higher law. Despite the lack

---

4. 83 U.S. (16 Wall.) 36 (1873).
of theoretical encouragement, however, modern lawyers and judges have been far too sensible to ignore the obvious and pervasive ways in which our public values and institutional practices have been transformed by the legitimation of the activist state over the past half-century. Indeed, they have been far more astute in their practical judgments than the academic commentators who have been keeping score by the wrong scorecard on the side-lines. To make my case, I shall invite you to reread the opinions for the Court in Brown v. Board of Education and Griswold v. Connecticut from the perspective offered by a revised three-solution narrative.

I. Theory: Dualist Democracy

A. The Basic Idea

Begin with a capsule statement of the dualist project. Above all else, a dualist constitution seeks to distinguish between two different kinds of decision that may be made in a democracy. The first is a decision by the American People; the second, by their government.

Decisions by the People occur rarely, and under special constitutional conditions. Before gaining the authority to enact its proposals into the nation’s higher law, a political movement must, first, convince an extraordinary number of its fellow citizens to take its proposed initiative with a seriousness that they do not normally accord to politics; second, allow opponents a fair opportunity to organize their own forces; third, convince a majority of Americans to support transformative initiatives as their merits are discussed, time and again, in the deliberative fora provided by the dualist constitutional order for this purpose. It is only those initiatives that survive this specially onerous higher lawmaking system that earn the special kind of legitimacy the dualist accords to decisions made by the People.

Decisions made by the government occur daily, also under special constitutional conditions. Most important, key decisionmakers must be held accountable at the ballot box for their performance; moreover, a structural effort is made to encourage them to deliberate seriously about the public interest and to constrain efforts by narrow but well-organized interests to use government to oppress especially vulnerable or poorly organized groups.

Even when this system of normal politics is operating well, the dualist constitution tries to prevent the daily decisions reached by government from being confused with the rare decisions reached by the People. Despite the ongoing temptation to exaggerate their authority, constitutional officers of government are not to presume that an ordinary electoral victory has given them a mandate to overturn considered judgments previ-

7. For more elaboration, see Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013 (1984) [hereinafter Storrs].
ously reached by the People. If they wish to enact laws that overrule previously established principles of higher law, elected politicians must take to the specially onerous obstacle course provided by a dualist constitution for this purpose. Only if they succeed in mobilizing their fellow citizens and gaining persistent popular support, despite opponents' repeated efforts to block their initiatives, do political leaders finally earn the authority to proclaim that the People have changed their mind and have given their government new marching orders.

Such a brief statement raises more questions than it answers. One set involve fundamental issues of institutional design. First, there is the design of the higher lawmaking system: How to organize a process that will reliably mark out the rare occasions when a political movement rightly earns the special recognition accorded decisions made by We the People after mobilized deliberation? Second, there is the design of normal lawmaking: How to create incentives for elected officials to engage in the kind of public-spirited deliberation that will best serve the public interest in daily lawmaking and administration? Third, there is the design of preservation mechanisms: How to preserve the considered judgments of the mobilized People from illegitimate erosion by normal constitutional government?

And then there are questions that transcend issues of institutional design: Is dualist democracy a good form of government for America? The best? If not, what's better? This Part does not aim for final answers. It will be enough to describe how the very questions provoked by dualist theory suggest different inquiries from those motivated by theories of the American Constitution now dominant in the academy. Although each academic competitor differs from dualism in a distinct way, it may help to begin by noting the one thing they have in common. For all their luxuriant variety, they all ignore the special importance the dualist interpretation places on constitutional politics—by which I mean to describe the series of political movements that have, from the Founding onward, tried to mobilize their fellow Americans to participate in the kind of engaged citizenship that, when successful, deserves to carry the special authority of We the People of the United States.

But let me be more specific.

B. Monistic Democracy

Of the modern schools of constitutional theory, the monistic democrats have the most impressive pedigree: Woodrow Wilson,9 James Thayer,10

8. See id. at 1017–31.
9. W. Wilson, Congressional Government (1885); W. Wilson, Constitutional Government in the United States (1911).
Charles Beard, Oliver Wendell Holmes, Robert Jackson, Alexander Bickel, John Ely, and many other distinguished thinkers and doers have played important roles, over the course of a century, in making this the dominant opinion among serious constitutionalists today. As with all received opinions, complexities abound. But at its root, the monist idea is very simple: Democracy requires the grant of plenary lawmaking authority to the winners of the last general election—so long, at least, as the election was conducted under free and fair ground rules and the winners do not seek to use their power to prevent the next free and fair election.

This monistic idea motivates, in turn, a critical institutional conclusion: During the period between elections, any institutional check upon the electoral victors is presumptively anti-democratic. For sophisticated monists, this presumption does not necessarily imply a flat condemnation of all checks on the current legislative majority. Perhaps certain checks may prevent the victors from refusing to call the next scheduled election; perhaps others are justified by a richer appreciation of the social and political preconditions for a truly “free” or “fair” electoral process. While these exceptions may have great practical importance, monists refuse to allow them to obscure the fundamental point: When the Supreme Court, or anybody else, sets about to invalidate a statute, this action suffers from a “countermajoritarian difficulty” which must be squarely confronted by any thoughtful citizen who considers himself a democrat.

In the work of this school, the brooding omnipresence is (an idealized version of) British parliamentary practice—which demonstrates, at the very least, that monistic democracy is no pipedream. For more than a century now, the Prime Minister has won her office after a relatively fair election. Barring exceptional circumstances, the House of Commons has given its unswerving support to the proposals of Her Majesty’s Government. If the People of Great Britain do not like what’s going on, they will return the Opposition at the next election. Until that time comes, neither the House of Lords, nor the Queen, nor the courts try seriously to undermine the legislative decisions made by a majority of the Commons.

So far as the monist is concerned, this British design captures the essence of democracy. The problem posed by America is its failure to follow the trans-Atlantic model. Rather than granting a power monopoly to a single, popularly-elected House of Representatives, the Americans tolerate

11. C. Beard, An Economic Interpretation of the Constitution of the United States (1913).
16. For a balanced statement of the monist view, see J. Choper, Judicial Review and The National Political Process 4-59 (1980).
17. For the classic statement of this “difficulty,” see A. Bickel, supra note 14, at 16–23.
a great deal of insubordination from branches whose electoral connection is suspect or nonexistent. While the Senate gets its share of the lumps, the principal object of monistic scorn is, of course, the Supreme Court. Whoever gave Nine Old Lawyers the authority to overrule the judgments of our elected politicians?

As I have suggested, there are monistic answers to this question. Thus, constitutional conservatives like Alexander Bickel,18 centrists like John Ely,19 and progressives like Richard Parker20 have all proposed roles for the Supreme Court that operate within monistic premises. For present purposes, an analysis of monistic solutions is not as important as the framework which makes the "countermajoritarian difficulty" seem so important. So far as the dualist is concerned, the monist begs a big question when he asserts that the winner of a fair and open election is entitled to rule with the full authority of We the People. While rule by electoral victors is surely to be preferred to an authoritarian putsch by electoral losers, the dualist denies that all statutes gaining the support of a legislative majority in Washington D.C. represent the considered judgment of a mobilized majority of American citizens.

It follows that the dualist does not view every American departure from the British parliamentary model as if it suffered from a "countermajoritarian difficulty" threatening the democratic legitimacy of the Constitution. Instead, she can see a profoundly democratic point to some of the most distinctive features of American practice. For her, the most fundamental fact about our system is that, in contrast to British-style monism, the Constitution establishes a two-track law-making system. If our elected politicians hope only to win normal democratic legitimacy for an initiative, they are directed down the normal lawmaking path and told to gain the assent of the House, Senate, and President in the normal ways. If, however, they hope for higher lawmaking authority, they are directed down a specially onerous lawmaking path—to be discussed in Part II of this essay. Only if a political movement successfully negotiates the special challenges of the higher lawmaking system can it rightfully claim that its initiative represents the considered judgment of We the People of the United States.

Once the two-track character of the system is recognized, the dualist can propose democratic interpretations of many institutional features that endlessly puzzle the monist. Most obviously, all the time and effort required to push an initiative down the higher lawmaking track would be wasted unless steps were taken to prevent future normal politicians from enacting statutes that impugned a successful movement’s higher law

achievement. If future politicians can so easily ignore such successes, why would any mass movement ever take the trouble to overcome the special hurdles placed on the higher lawmaking track?

To maintain the integrity of higher lawmaking, all dualist constitutions must provide for one or more institutions to discharge a preservationist function. These institutions must effectively block efforts to repeal established constitutional principle by the simple expedient of passing a normal statute. They must force the reigning group of elected politicians to take to the higher lawmaking track if it wishes to question the judgments previously made in the higher law accents of We the People.

It follows that the dualist will begin his encounter with the Supreme Court from a very different perspective than the monist. The monist treats every act of judicial review as presumptively anti-democratic, and strains to save the Supreme Court from the "countermajoritarian difficulty" by one or another ingenious argument. In contrast, the dualist sees the discharge of the preservationist function by the courts as an absolutely essential part of a well-ordered democratic regime. Rather than threatening democracy by frustrating the statutory demands of the political elite in Washington, D.C., the courts serve democracy by protecting the hard-won judgments of a mobilized citizenry against fundamental change by political elites who have failed to establish the requisite kind of mobilized support from the citizenry at large.

This is not to say that any particular decision by the modern Supreme Court can be justified in preservationist terms. Before getting down to cases, we will have to consider the special problems involved in interpreting a Constitution whose basic institutional and substantive premises have been transformed, and transformed again, by Americans during the first two centuries of its existence. The key point is that dualists cannot dismiss a good-faith effort by the Court to interpret the Constitution as "anti-democratic" simply because it leads to the invalidation of normal statutes. Instead, the judicial effort to look backward and interpret the great higher lawmaking achievements of the past seems an indispensable part of the larger dualist project of distinguishing the will of We the People of the United States from the acts of We the Normally Elected Politicians of the United States.

C. Rights Foundationalists

In confronting the monistic school of constitutional theory, the dualist's main object is to break the tight link that monists have managed to construct between two distinct ideas: the idea of "democracy," on the one hand, and the idea of "parliamentary sovereignty" on the other. Like monists, dualists are democrats—they believe that the ultimate constitutional authority in America is the People of the United States. They disagree
only about how easy it should be for normally elected politicians to claim the full authority of We the People.

In contrast, the primacy of popular sovereignty is directly challenged by a second modern school. These theorists do not completely deny a place for popular government in their scheme of constitutional values; their commitment to democracy is, however, constrained by an even deeper commitment to fundamental rights. Unsurprisingly, members of this school differ when it comes to identifying the rights that are fundamental. Conservatives, like Richard Epstein, emphasize the foundational role of property rights;21 liberals, like Ronald Dworkin, emphasize each individual's right to be treated as an equal and autonomous moral agent;22 collectivists, like Owen Fiss, stress the rights of disadvantaged groups to equal treatment.23 These transparent differences should not blind us to the idea that binds these disparate positions together. Whatever rights are Right, members of this school agree that the American Constitution is concerned, first and foremost, with their protection. Indeed, the whole point of having rights is to trump decisions rendered by democratic institutions that otherwise have the legitimate authority to define the collective welfare. To emphasize this common thread, I shall call this group rights foundationalists.

As with the monists, this school is hardly a trendy creation of the moment. There is, however, an interesting difference between the lineages which the two schools construct for themselves. While the monists refer back to a series of American thinkers and doers from Wilson and Thayer to Frankfurter and Bickel, the foundationalists seem to favor philosophical writers further removed from the local action—with Kant (via Rawls24) and Locke (via Nozick25) presently serving as the most important sources of inspiration. The question for us, though, is not the philosophical depth of the competing foundationalists, but the way foundationalists as a group differ from the more democratic schools we have considered.

Begin with the monists. I think it is fair to say that they are hostile to rights, at least as the foundationalists understand them. Indeed, it is precisely when the Supreme Court begins to invalidate statutes in the name of fundamental rights that the monist begins to worry about the “counter-
majoritarian difficulty” that renders the Supreme Court presumptively illegitimate.26

This “difficulty” does not seem so formidable to the foundationalist. She is more impressed by the fact that even a democratic legislature might endorse any number of oppressive actions—establish a religion, authorize torture or . . . ; and when such outrages occur, the foundationalist insists that courts intervene despite the breach of majoritarian principle: Rights trump democracy, so far as she is concerned. Provided, of course, that they are the right Rights.

And there’s the rub. While some rights-oriented theorists do not seem overly impressed with the perils of arbitrariness involved in the identification of rights, this anxiety induces more thoughtful members of the school to recur to great philosophers like Kant and Locke in an effort to understand the Constitution. If the Constitution may properly be construed to allow judges to trump democracy in the name of Rights, should not theorists aid in the process by elaborating the constitutional implications of the most profound reflections on rights available in the Western tradition?

For the monist, however, the foundationalist’s turn to the Great Books is yet another symptom of her anti-democratic disease. Whatever the philosophical merit of the resulting speculations into the nature of our Rights, the foundationalist’s discourse is invariably esoteric—involving encounters with authors and doctrines that most college-educated people successfully avoided during their most academic moments. This elitist talk of Kant and Locke only emphasizes the illegitimacy involved in removing fundamental questions from the democratic process.

Such monistic objections, of course, hardly convince the foundationalist. They only generate further anxiety about the ease with which monistic democracy can be swept aside by obscurantism and demagoguery. And so the debate proceeds, with the two sides talking past one another: Democracy/Fundamental Rights/Demo . . . on and on, point and counterpoint, with all the talk changing few minds.

How does the introduction of dualism change the shape of this familiar conversational field? By offering a framework which allows both sides to accommodate some—if not all—of their concerns. Once again, the basic mediating device is the dualist’s two-track system of democratic lawmaking. It allows an important place for the foundationalist’s view of “rights as trumps” without violating the monist’s deeper commitment to the primacy of democracy in the scheme of constitutional values. To see how the accommodation works, suppose that a rights-oriented movement took to the higher-lawmaking track and successfully mobilized the People to en-

---

26. Not that monists necessarily oppose all exercises of judicial review. As I have suggested, members of this school have been quite ingenious in justifying the judicial protection of one or another right as instrumental for the ongoing democratic functioning of the regime. See, e.g., J. ELY, supra note 15.
dorse one or another Bill of Rights. Given this achievement, the dualist can readily endorse the judicial invalidation of later statutes that undermine these rights, even when they concern matters, like the protection of personal freedom or privacy, that have nothing much to do with the integrity of the electoral process so central to monistic conceptions of democracy. For, as we have seen, the dualist believes that the Court furthers the cause of democracy when it preserves these rights against erosion by politically ascendant elites who have yet to mobilize the People to support the repeal of preestablished higher law. Thus, unlike the monist, the dualist will have no trouble supporting the idea that rights can properly trump the conclusions of normal democratic politics. She can do so, moreover, without the need for non-democratic principles of the kinds preferred by the rights foundationalist. Thus, the dualist can offer a deeper reconciliation of democracy and rights to those who find a certain amount of truth in both sides of the point/counterpoint that had previously been elabo-
rated in the dialogue between monists and foundationalists.

Not that this reconciliation will prove satisfactory to all members of the previously contending schools. The problem for the committed foundationalist, unsurprisingly, is the insufficiently deep foundations the dualist has built for the protection of rights. Granted, concedes the foundationalist, the dualist will applaud the judicial protection of rights if a warrant for this special treatment can be found in prior successful higher lawmak-
ing activity. But that is an awfully big "if." What if the People have not adopted the right Bill of Rights? Should the Constitution then be construed in ways that allow the statutory perpetration of injustice?

Dualists and foundationalists continue to answer this question differently. For the dualist, constitutional protection of rights depends on a prior democratic affirmation on the higher lawmaking track. To put the point in a single line: The dualist’s Constitution is democratic first, rights-
protecting second. For the committed foundationalist, this priority is re-
versed. The Constitution is first and foremost concerned with the protec-
tion of the right Rights; it is only after these rights-constraints have been satisfied that We the People are constitutionally authorized to work their will.

This theoretical disagreement has many practical implications as foundationalist and dualist debate the substance of modern constitutional doctrine. This is not the place, though, to get into these vital doctrinal details. The question is whether the dualist can advance some very general argument that will defeat any and all foundationalist interpretations of our existing constitutional arrangements.

My answer is yes; moreover, the source of this general argument

---

27. I have considered the complaints of the die-hard monist elsewhere, see Storrs, supra note 7, and so will focus here only on the objections of the strong foundationalist.
should, by now, begin to seem familiar. As in the case of our earlier confrontation with the monist, it is the design of the American two-track lawmaking system that serves as the key. Just as the monist proved incapable of accounting for the very existence of a higher lawmaking track, so the foundationalist has trouble accounting for an important fact about the particular design of the American higher lawmaking system.

The fact is that our Constitution has never (with two exceptions I consider shortly) explicitly entrenched existing higher law against subsequent revision by the People. Thus, while the original Constitution gave higher law protection to slavery, at least it did not try to make it unconstitutional for Americans of later generations to reconsider the question. Similarly, when Americans of the early twentieth century enacted Prohibition into our higher law, they did not seek to make their Amendment unamendable. In these two cases, of course, the People have indeed exercised their right to change their mind. And few among us would say that we were the worse for repeal. The general availability of repeal, however, is a very great embarrassment for foundationalist interpretations of our Constitution. For it would seem to authorize amendments to our higher law that most modern foundationalists consider morally disastrous.

A hypothetical case may help make the point. Suppose that the religious revival prominent in the Islamic world turns out to be the first wave of a Great Awakening that envelops the Christian West. A general revulsion against godless materialism yields mass political mobilization that finally results in a successful campaign for formal repeal of part of the First Amendment. With the dawn of the new millennium, Amendment XXVII is proclaimed throughout the land:

Christianity is hereby established as the state religion of the American people.

The enactment of the Christianity Amendment might well inaugurate a deep transformation of our higher law heritage—on the same order, though of a very different kind, as those achieved by the Reconstruction Republicans and New Deal Democrats in earlier generations. Moreover, such an amendment offends my own commitment to freedom of conscience. Nonetheless, if I were then unlucky enough to be a Justice of the Supreme Court (serving as a hold-over from the last secular Administration of the 1990’s), I would have no doubt about my constitutional responsibility. While I hope I would maintain my conviction that the establishment of Christianity had been a terrible wrong, it would now be my judicial responsibility to uphold it as a fundamental part of the American Constitution. If some die-hard secularist brought a lawsuit in 2001 seeking to convince the Supreme Court to declare the Twenty-seventh Amendment unconstitutional, I would join my colleagues in summarily rejecting
the petition—or resign my office and join in a campaign to convince the American People to change their mind.

The one thing I would not do is the thing suggested by foundationalism: write a dissent asserting that the First Amendment had not been validly amended. Moreover, I would be very much surprised if many commentators who presently wrap themselves up in foundationalist rhetoric would do any differently.28

I do not suggest that such a dissent would be preposterous under any and all constitutional arrangements. Consider, for example, the entrenching principles deployed in the modern West German Constitution, which explicitly declares that a long list of fundamental human rights cannot constitutionally be revised, regardless of the extent to which a mobilized majority of Germans supported repeal.29 Against this legal background, I would hope the German constitutional court would respond to a Christianity Amendment in a very different way. If they were faithful to their foundationalist legal tradition, the judges would issue a solemn opinion declaring the Christianity Amendment unconstitutional, and challenge the dominant political majority to use physical force to disband the Court if it were intent upon tearing the constitutional fabric apart.

But this only makes it clear how far dualist America is from foundationalist Germany. What meager constitutional experience America has had with German-style entrenchment should be sobering to foundationalist enthusiasts. When the Founders designed the original higher lawmaking system in 1787, they were perfectly aware of the entrenchment device. But rather than serving the cause of human freedom, the Founders used entrenchment to disable the American People from enacting a constitutional amendment banning the African slave trade until the year 1808.30 Since the Founding, no successful constitutional movement has sought to entrench its achievements against future constitutional—as opposed to normal—politics. This history of abuse and non-use of entrenchment suggests, to me at least, that the foundationalist interpretation is inconsistent with the basic premises of the American higher lawmaking system. The fact that We the People may constitutionally repeal many fundamental rights31 eloquently expresses the dualist idea that it is the People who are the source of rights, and not the other way around.

28. For a constitutionalist who may have the courage of his foundationalist convictions, see Murphy, Slaughter-House, Civil Rights, and Limits on Constitutional Change, 32 Am. J. Juris. 1 (1987).


30. A second entrenching provision stipulates that no state shall be deprived of equal representation in the Senate without its express consent. This effort to entrench federalism caused all sorts of trouble in the aftermath of the Civil War. See Discovering the Constitution, supra note 1, at ch. 6.

31. My purpose in the text has been to produce a hypothetical case which illuminates the difference between dualist and foundationalist views of constitutional rights. The Christianity Amendment
While there is much to be said for this dualist commitment, I do not mean to minimize its dangers. I myself would support a political movement that sought to lead the People of the United States to enact a modern Bill of Rights, and entrench it in the West German way against subsequent revision by some future American majority caught up in an awful neo-Nazi paroxysm.32

Such a decision would not, of course, be enough to safeguard American freedoms during future crises. To the contrary, our constitutional history is full of eloquent warnings against putting too much faith in one or another rule limiting the way that future Americans might legitimately alter their higher law. While constitutional entrenchment might marginally enhance the protection of rights, this is not the only—or even the principal—reason I advocate it here. What is truly important is that a collective effort to enact a modern Bill of Rights could only occur after a long period of debate and decision that would serve to reaffirm and to root more deeply the role of fundamental rights in the ongoing life of the American People.

My aim here, however, is hardly to anticipate the outcome of such an exercise in constitutional politics. It is to suggest that, unless and until it occurs, dualism captures the spirit of American constitutional life better than any foundationalist enterprise. In contrast to some other modern constitutions, we Americans hold that our rights are ultimately to be defined by the People acting through the higher lawmaking system, not by some group of philosopher-judges engaged in a deep inquiry into the nature of human rights. We are democrats first, though not democrats of the monistic persuasion.

serves this purpose well, because it involves a right that most foundationalists would consider fundamental but that almost all lawyers—and all dualists—would immediately recognize as repealable. While this suffices to distinguish dualism from foundationalism, the hypothetical does not allow us to consider whether dualist theory allows any conceptual room at all for entrenchment.

A hypothetical test of this question invites one to imagine that a fundamentalist movement managed to ratify a second amendment along with the one hypothesized in the text:

Any American advocating the repeal of the Christianity Amendment is hereby declared guilty of treason and will be subjected to capital punishment upon conviction.

This amendment, in contrast to the first, aims to make it impossible for the People to reconsider its commitment to Christianity, and so amounts to the repeal of dualist democracy itself. Would it therefore be constitutionally appropriate for judges to invalidate it? Or would it simply be best for all decent people to quit the regime and struggle to overthrow it?

Such questions are best left to the dark day they arise. For now, it is enough to beware easy answers. In particular, I do not believe that judges would be justified in asserting a general authority to protect the fundamental principles of dualist democracy against repudiation by the People. Suppose, for example, that the next round of our constitutional politics were dominated by a mobilized coalition of liberals who sought to entrench a modernized version of the Bill of Rights, guaranteeing a right to a minimum income along with other new rights unknown to our eighteenth-century Founders. This act of entrenchment, no less than the hypothetical Christianity amendments, would be inconsistent with the principles of dualist democracy, since it would try to make it impossible for the People to change their mind about certain constitutional values. Yet would the judges have the constitutional authority to force the People to keep these possibilities open?

32. My own views concerning the content of a modern Bill of Rights are suggested in B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 231-326 (1980).
D. Historicism

The clash between monists and foundationalists dominates the present debate about the American Constitution. This conflict is not only theoretically demanding but practically important. Courts in this country are obliged every day to mediate the tension between democracy and rights as they determine whether one or another statute satisfies the Constitution. The sharp split between the two schools mimics the split between plaintiff and defendant in the typical lawsuit—the plaintiff insisting that a statute has violated her fundamental rights, while the defendant insists that the court defer to the democratic authority of Congress. Little wonder, then, that thoughtful judges and citizens are drawn to reflections about democracy and rights, creating an audience for the work of the two competing schools.

Dualism suggests that this contest between plaintiff and defendant in the courtroom need not be taken as a sign of unremitting conflict between the democratic and rights-oriented aspects of our tradition. Instead, both normal statutes and the judicial protection of our higher law legacy are part of a larger practice of dualistic democracy. This abstract synthesis, of course, hardly suffices to decide concrete cases. But it points in a particular direction—toward a reflective study of the past to determine when the People have spoken with a higher lawmaking voice and what they have said on the relatively rare occasions of successful constitutional politics.

1. Lawyer's Historicism: The Paradoxes of American "Burkeanism"

This historicizing tendency allows the dualist to make contact with a third strand of constitutional thought. I call this tendency Burkean, since it has yet to find its modern Burke—though Alexander Bickel became an eloquent spokesman before he died prematurely.33 While it is certainly possible to isolate Burkean aspects of recent academic work,34 this literature only hints at its powerful influence on practicing lawyers and judges.

These professionals hardly require the services of brilliant theorists to cultivate a Burkean sensibility. They are already deeply immersed in a common law tradition that demands the very skills and sensitivities that self-conscious Burkeans commend. What counts for the common lawyer is not some fancy theory but the patterns of concrete decision built up by courts and other practical decisionmakers over decades, generations, centuries. Slowly, often in a half-conscious and circuitous fashion, these decisions build upon one another to yield the constitutional rights that modern

Americans take for granted, just as they slowly generate precedents that the President and Congress may use to claim new grants of constitutional authority.

The task of the Burkean lawyer or judge is to master these precedents, gaining a sense of their hidden potentials for growth and decay. As always, this basic conception can be elaborated in reformist or conservative directions. Reformist incrementalists try to keep the precedents abreast of the "evolving moral sense of the country." More conservative types may be more open to the incremental development of presidential power. Yet it is more important to focus upon the point that all these common-law Burkeans have in common—an emphasis on the ongoing cultivation of a concrete historical tradition sorely missing from the talk of the "high theorists," be they partisans of monistic democracy or rights foundationalism. So far as these common lawyers are concerned, there is more wisdom in the gradual accretion of concrete decisions than in the abstract speculations of our most brilliant academics. The only valuable "theory" is found in the opinions of judges responding to the facts of particular cases. Even these theories should not be taken too seriously; they will take on different meanings as they are tested over the generations by different judges confronting different cases. Given the pervasiveness of this common-law sensibility amongst the bar and bench, there is no need for a modern Burke to tell American lawyers that the Constitution of the United States cannot be understood by those who have failed to immerse themselves in the historical practice of concrete decision.

Such historicist sentiments contain important insights—so long as they are not confused with the whole truth about the American Constitution. To put the Burkean sensibility in its place, I shall begin by considering the aspect of dualist constitutionalism it entirely ignores. Only then will it be possible to isolate important points of convergence.

The common lawyers' blind-side can be summarized in two words: constitutional politics. Indeed, on those occasions that Burkeanism reaches self-consciousness—as in Bickel's later work—constitutional politics is aggressively disparaged. All that Burkeans see in such enterprises are the charismatic, but unscrupulous, leaders; the loud, but hopelessly ambiguous, ideological pronunciamentos; the excited, but ignorant, masses. At best, such eruptions of collective irrationality will quickly disintegrate amongst clouds of factional recrimination. Otherwise, a government seized by Utopian fantasies can degenerate into unspeakable tyranny with bewil-

---

35. Bickel did not get the chance to work out this view. It is easy to find eloquent advocates in allied disciplines. See D. BRAYBROOKE & C. LINDBLOM, A STRATEGY OF DECISION (1963); F. HAYEK, LAW, LEGISLATION AND LIBERTY (1978); B. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY (1981); M. OAKESHOTT, ON HUMAN CONDUCT (1975). For an outstanding recent example of this sensibility at work in the study of a particular doctrine, see Blasi, The Pathological Perspective and the First Amendment, 85 COLUM. L. REV. 449 (1985).
dering speed. Given this nightmare, could anyone of sound mind support a regime in which the sober and sensible Burkean did not have the final say?

It is precisely here where the dualist intervenes to disturb the Burkean’s self-congratulatory statement of the alternatives. While only a fool fails to recognize the dangers which so impress the Burkean, the dualist cannot allow herself to forget a very different possibility. In the dualist picture, a political leadership challenges the traditional wisdom on behalf of principles which, though inevitably open-ended, do have rational content. While these transformative initiatives inspire mass involvement, passionate commitment, great sacrifice, the result is not some unspeakable tyranny, but a deepening dialogue between leaders and citizenry that finally succeeds in generating broad popular consent for a sharp break with the received wisdom of the past. Constitutional lawyers would be wrong to view these successful exercises in popular sovereignty as if they were nightmarish eruptions. To the contrary: Most Americans have no trouble identifying such great popular struggles as culminating in the nation’s greatest political achievements. Thus, the original Constitution codified the Revolutionary generation’s defeat of monarchy on behalf of republican self-government; the Civil War Amendments codified the struggle of an entire generation to repudiate slavery on behalf of a new constitutional idea of equality; and so forth. Rather than wishing to forget such great achievements, our Constitution seeks to protect them against erosion during more normal times, when the People are less involved in affairs of state.

This dualist conclusion challenges the standard Burkean sensibility in at least four ways. First, it undermines the Burkean commitment to incremental constitutional development. While gradual adaptation is an important part of the story, the Constitution cannot be understood without recognizing that Americans have, time and again, successfully repudiated large chunks of their past, and transformed their higher law to express deep changes in their political identities. Perhaps these changes do not seem radical to those who long for a total revolution that (vainly) seeks to obliterate every trace of the old regime. But, when judged by any other standard, they were hardly incremental. If a label will clarify matters, American history has been punctuated by successful exercises in revolutionary reform, in which the protagonists struggled over basic questions of principle with ramifying implications for large areas of American life.

Which leads to a second dualistic challenge. The Burkean is suspicious not only of big breaks, but of the self-conscious appeals to abstract principles that accompany them. He prides himself in avoiding loose talk of Freedom, Equality, or Democracy. Even more modest theories dealing with limited subjects like “free speech” or “equal protection” may seem

36. As my discussion of interpretive synthesis in Part III will begin to suggest.
impossibly vague to him. Yet, for the dualist, an encounter with such abstract ideals is a crucial part of coming to terms with the American past. Whatever else may be said about the Founders, they were hardly content with the Burkean arts of muddling through crises. They were children of the Enlightenment, eager to use the best political science of their time to prove to a doubting world that republican self-government was no utopian dream.\textsuperscript{37} Otherwise they would never have tried to write down a Constitution whose few thousand words contained a host of untried ideas and institutions. If abstract ideals were important to the Founders and their successors in constitutional politics, how can we pretend to understand our legacy without confronting them?

Third, there is a particular abstraction that gives the Burkean special trouble: rule by the People. The People rule best, the Burkean may say with a broad wink, when they leave the business of government to a well-trained elite immersed in the nation's concrete constitutional tradition. Slowly but surely, this elite will sense the drift of popular sentiment and take the countless small steps needed to keep the tradition responsive to the present's half-articulate sense of its special needs. For the Burkean, however, the public dialogue accompanying ongoing adaptation is best kept to relatively small groups—judges talking to one another about the relationship of past decisions to present problems, statesmen telling one another that their constituents have not given them a mandate to accomplish particular goals but have selected them for their prudent capacity to make sensible changes in public policy.

Once again, it is not necessary for the dualist to belittle the importance of this Burkean enterprise in political adaptation. She refuses, however, to allow this elite conversation to obscure the even greater importance of a different dialogue—the one through which mobilized masses of ordinary citizens finally organize their political will with sufficient clarity to lay down the law to those who speak in their name on a daily basis in Washington, D.C. While competing elites play a critical role in this higher lawmaking dialectic, we shall see that it characteristically involves a conflictual and ideological politics that Burkeans disdain. This is all the more unfortunate because successful higher lawmaking also requires a kind of statesmanship to which the Burkean might otherwise make important contributions.

To sum up the dualist critique in a fourth point that presupposes the first three: The Burkean fails to recognize that he can easily become part of the problem, rather than the key to its solution. An enduring problem of dualist democracy is to prevent government from departing from the principles of higher law validated by the People during their relatively

rare successes in constitutional politics. From this vantage point, the Burkean’s elitist refusal to take seriously the principles elaborated by the People at past moments of constitutional politics may make him a potent engine in the erosion of these ideals over time. As they go about their business of particularistic adaptation, Burkeans may take advantage of the general public’s weak involvement in normal politics to muddle their way to “statesmanlike” solutions that undercut fundamental principles affirmed by the People in prior exercises of constitutional politics. In these cases, Burkean “prudence” degenerates, in dualist eyes, into obscurantist elitism that prides itself in ignoring the greatest constitutional achievements of the American people.

Burke himself understood this. While he is principally remembered today for the contrast he drew between the abstract and excited politics of the French Revolution and the concrete and incremental development of the British constitution, Burke recognized that the American revolutionaries eluded this easy dichotomy—and he tried, as best he could, to appreciate the distinctive character of the Americans’ experiment in revolutionary reform.88 Perhaps he would have been the first to protest the effort by American “Burkeans” to understand their constitutional tradition as if it were a caricature of Burke’s story of British development. However well Burkean incrementalism may fit the British experience, it falsifies the distinctive character of the American. If the American Burkean is to put his historicizing genius to good use, he must recognize that American history reveals the ongoing development of a politics of principle that results, when successful, in revolutionary reforms—whose meaning must be deeply understood if the tradition is to continue to renew itself.

Once this essential point is recognized, the dualist and the Burkean can begin to discover common ground. First, the Burkean’s emphasis on the demagogic pathologies of excited mass politics cautions us to exercise the greatest care in understanding our higher lawmaking system, both as it was originally conceived and as it has developed in response to the concrete challenges of American history. Not that this study can guarantee against outbursts of collective irrationality in the future. There can be no guarantees. Demagogy is an endemic risk in any democratic system that places real power in the hands of a mass public with limited time and energy for the great issues of politics. Nonetheless, these risks can be controlled: first, by cultivating the arts of citizenship in a wide variety of daily contexts, from the union hall to the school board to the Little League; and second, by developing constitutional structures which channel

88. See E. Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), in Selected Writings and Speeches 147, 158–62 (P. Stanlis ed. 1968) (enumerating distinctive aspects of American people).
the energies of transformative movements into a dialogue with the larger body of the American people.

This second task defines one of my central concerns. In reexamining the higher lawmaking experience of the Founding, Reconstruction, and New Deal, I will be on the lookout for distinctive features of the concrete historical process that allowed Americans to transform moments of passionate sacrifice and excited mobilization into lasting legal achievements—victories that might continue to inspire us today as we confront the challenges of the future. Indeed, the principal reason why my larger project has turned out to be so time-consuming is that I have been compelled to reexamine in detail many features of our history that the present professional narrative consigns to historical oblivion. This effort will remind the common lawyer of his own search into historical precedents. The constitutional precedents that will seem most important, however, are not those handed down by courts, making interstitial changes in one or another doctrine. Instead, the critical precedents have been established during moments of crisis, generated by leaders like Madison, Lincoln, and Roosevelt—who, in a complex interaction with other institutions and the people at large, managed finally to gain democratic authority to make fundamental changes in our higher law. We should never allow a lawyerly fascination with judges to divert us from the fact that, during moments of successful constitutional politics, the central foci of higher lawmaking energy have been Congress and the President, with the Supreme Court playing a secondary, though sometimes important, role.

A first link with the Burkean sensibility, then, will be a concern with the concrete historical process through which generations of statesmen have confronted and resolved the distinctive dilemmas of constitutional politics. This inquiry will lead us to glimpse a second point of commonality. The dualist joins the Burkean in insisting that the Constitution is best understood as an historically rooted tradition of theory and practice—an evolving language of politics through which Americans have learned to talk to one another in the course of their centuries-long struggle over their national identity.

It is this tradition of discourse that eluded the first two schools we have considered. The monistic democrat worships instead at the altar of the present; he supposes that he knows all he needs to know about democratic rule if he simply consults the last statutory word approved by Congress. The rights foundationalist seeks to escape the limits of time altogether; he hopes to define some ahistorical state of nature or original position to serve as a constitutional platform from which to pass judgment on history's passing show. In elaborating the constitutional will of the People, the dualist begins with neither the will of the present legislature nor the atemporal reason of some utopian assembly. Her aim is the kind of situated understanding one might reach after a good conversation. Only this
time the conversation is not between friends—or even enemies—who share the same moment and so can hear each other’s tone of voice, observe each other’s gestures, continue tomorrow what is left unsaid today. The challenge, instead, is to locate ourselves in a conversation between generations.

As today’s Americans come to political maturity, we enter upon a political stage already set with a complex symbolic practice charged with meaning by the thought and action of prior generations. There is, of course, no necessity for us to seek to understand these symbols. We may try, if we choose, to sweep them away in a grand gesture of disdain, or let them die a lingering death by refusing to hear the voices of those who came before us.

There is, however, wisdom to be gained from these voices, if we but try to hear them. They can teach us both how prior generations have managed, on occasion, to engage in great democratic achievements on a continental scale and how they managed to sustain democratic politics during those periods when citizen involvement was less constitutionally creative and the People spoke with a more equivocal voice. In seeking to engage these past voices in conversation, my aim is hardly to prostrate myself before their superior wisdom. A conversation with the past can only be a part of the process through which the present gains its own voice and thereby makes its own lasting contribution to the constitutional tradition. Surely the American People have not yet pronounced the last word on their constitutional identity? How best to continue the practice of dualist democracy into the third American century? How best to revise our higher law legacy so that it will be equal to the demands of the future?

I have my own answers—and so, I am sure, do you. Yet none of us can expect our own ideals to gain popular consent without passionate struggle and bitter disagreement. Do we not owe it to ourselves to understand how Americans have tested one another’s answers in the past? For all its historical contingency and moral imperfection, this constitutional language has set the terms within which previous generations have disagreed with one another, and sometimes has allowed them to move beyond disagreement to a transformed understanding of their political commitments. Is it wrong to suppose that it remains a crucial resource for us in our own struggles over national identity?

2. *The Republican Revival: Beyond Hartz and Pocock*

In considering historicizing approaches to the Constitution, I have begun with Burke, not because he is the world’s greatest philosopher of history, but because Burkeanism expresses a powerful current of opinion among the community of lawyers and judges who are charged with the daily task of interpreting the Constitution. Since these men and women
are steeped in the common law tradition, it seemed important to warn
them against extending certain Burkean preconceptions to the task of con-
stitutional interpretation, while inviting them to reinvigorate other more
fundamental historicist themes. Nonetheless, I hardly wish to make a fe-
tish of today’s professional law-talk, especially since I mean to challenge
many of the categories it uses to construct the prevailing constitutional
narrative. Just as American law has, in the past, shown a remarkable
capacity to assimilate a host of popular and academic critiques, there is
every reason to hope for similar revision in the future.

Indeed, if a recent wave of legal scholarship proves a reliable guide, this
process of narrative reconstruction has already begun. Over the past few
years, the law journals have been full of efforts to join in a larger process
of historical reinterpretation that has been a central preoccupation of the
last generation of American political scientists and historians. The object
of this generational critique, unsurprisingly enough, has been its par-
ents—historians like Richard Hofstadter,\textsuperscript{39} political scientists like Robert
Dahl,\textsuperscript{40} and sociologists like Daniel Bell,\textsuperscript{41} whose work dominated the ac-
ademic horizon of the 1960’s. This work, in the eyes of many, had en-
dowed modern American liberalism with a social solidity and pervasiv-
ness it did not in fact possess—and the recent critique rippling through
the social and historical sciences attempts to set the record straight.

The critical enterprise most relevant here is the effort to revitalize the
republican aspect of the American political tradition. The pathbreaking
work of Bernard Bailyn\textsuperscript{42} and Gordon Wood\textsuperscript{43} not only set an agenda for
many historians, but increasingly has provided legal scholars with a re-
source for normative reflection—with Frank Michelman,\textsuperscript{44} Suzanna
Sherry,\textsuperscript{45} Cass Sunstein,\textsuperscript{46} and Mark Tushnet\textsuperscript{47} opening a debate on the
contemporary constitutional implications of this “republican revival”
among historians. As the diversity of these initial legal explorations sug-

\textsuperscript{39} See R. Hofstadter, The Progressive Historians (1969); R. Hofstadter, The Para-

\textsuperscript{40} See R. Dahl, A Preface to Democratic Theory (1956); R. Dahl, Who Governs?

\textsuperscript{41} See D. Bell, The End of Ideology (rev. ed. 1962).


\textsuperscript{43} See G. Wood, The Creation of the American Republic 1776-1787 (1969). The endur-
ing impact of this work is suggested by the decision of a leading historical journal to celebrate the
bicentennial of the United States by sponsoring a symposium on the book. Forum, The Creation of
the American Republic, 1776-1787: A Symposium of Views and Reviews, 44 Wm. & Mary Q.

\textsuperscript{44} See Michelman, Law’s Republic, 97 Yale L.J. 1493 (1988); Michelman, The Supreme

\textsuperscript{45} See Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L.
Rev. 543 (1986).

\textsuperscript{46} See Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988); Sunstein, Interest

\textsuperscript{47} See M. Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional
gests, the "republican revival" is no more a monopoly of a single political viewpoint than any of the other currents of constitutional thought we have been exploring.48 This diversity should not blind us to the common invitation implicit in all these works: In rethinking the reigning professional narrative, would it not be foolish for lawyers to blind themselves to debates occurring elsewhere among thoughtful historians?

I will record my own debt by engaging two books that repay several rereadings: Louis Hartz' *Liberal Tradition in America*49 and John Pocock's *The Machiavellian Moment*.50 These works are rightly seen as the most philosophically self-aware statements of the older "liberal" thesis and its more recent "republican" antithesis. Rather than enlisting on one side or the other of this debate, I propose to use the insights of both in a larger historical synthesis.

a. *Hartz*

I share with Louis Hartz an abiding skepticism about the power of European models to enlighten American politics. The particular model that concerned Hartz was the familiar Marxist view condemning all modern societies to a compulsory three-step march to Utopia: first Feudalism, then Capitalism, then (but only then) Socialism. Whatever the merit of this model for Europe, Hartz was clear that it did not apply to America for one basic reason: Americans never experienced anything like European Feudalism. Because the first term of the three-stage sequence was lacking, America also lacked the critical social ingredients necessary to spark the later movement from Capitalism to Socialism. America was a case of arrested development, permanently frozen at Stage Two. It was a land firmly in the grip of a "Lockean consensus" that trivialized politics and glorified the natural rights of isolated individuals to life, liberty, and the pursuit of property (or is it happiness?). Since Americans never were obliged to use state power to liberate themselves from Feudalism, they were "born equal,"51 and could afford to look upon the state as an unmitigated threat to natural liberty. The government that governs best governs least. Let the Europeans say otherwise.

While there certainly is some truth in this account, it also serves as a cautionary tale for those, like myself, who see something distinctive in the American political experience. No "exceptionalist" theory can be any better than the theory to which it takes exception. While Hartz was obsessed with the inadequacies of Euro-centered Marxism, his critique accepted far more of this theory than he appreciated. This is, at least, the way I diag-

48. Curiously, republicanism has not yet been mined by modern constitutional conservatives, despite their putative concern with the "intention of the Framers."
51. See L. HARTZ, supra note 49, at 5, 66.
nose the non sequitur at the heart of Hartz' theory. I agree with Hartz that the American revolutionaries, unlike their French contemporaries, were not in a life and death struggle with Feudalism (whatever that may mean when applied to the eighteenth, rather than the thirteenth, century).52 But it hardly follows that the Americans found nothing important to struggle about in politics. It is easy to see how an old-fashioned Marxist might reach this erroneous conclusion. By hypothesis, he believes that the only "really important" use of state power is to serve as the revolutionary mechanism for moving from Feudalism to Capitalism to Socialism. Consequently, the fact that Americans did not "need" a revolution to push them to the Capitalist stage means that the American Revolution could not have been about anything "really important." If, however, there is more to political life than a struggle over the timing of a compulsive three-stage sequence, the mere fact54 that Americans had escaped Old World Feudalism hardly implies that they could afford to relax and embrace a comfortable Lockeanism that denied any creative role for the state in social life. By embracing this non sequitur, Hartz remained in the thrall of the Marxist theory he sought to reject.

To put my criticism more affirmatively, Hartz' mistake has its source in the meaning he chose to give the Tocquevillian dictum that Americans were "born equal." I am happy to adopt this slogan—as long as it merely emphasizes the rich cultural, material, and geopolitical resources that enabled Americans to build a regime which, over time, has protected the liberties of an increasing proportion of its citizenry. If, however, Hartz meant that this "equality" could be sustained without ongoing political struggle over its meaning and its scope, or that Americans believed that they could "do without" a serious politics requiring great acts of creativity, he was simply wrong. Rather than supposing that Americans were "born equal," the Founding Federalists believed that the New World would soon become Balkanized into a host of petty military tyrannies unless they could mobilize their fellow citizens to join in unprecedented acts of constitutional construction—an ambition that their opponents warned would lead to resurgent monarchy. Rather than supposing that Americans were "born equal," Reconstruction Republicans were painfully aware of the disgrace of slavery, and successfully led the American People to commit the national government to serve as the guarantor of freedom for all American citizens—despite the passionate warning of conservatives that such a use of national power would lead to military despotism. Rather

53. "Old-fashioned" because, since Lenin, lots of Marxists have been trying to leap from feudalism to socialism, and lots more have been trying to liberate themselves from the economic determinism that Engels imposed on Marxist theory.
54. If it is a fact. After all, there were feudal, as well as capitalist, aspects of the Southern plantation system. But it is not necessary to quibble with Hartz' facts to make the points that really matter.
than supposing that Americans were "born equal," New Deal Democrats were convinced that modern economic conditions had made the so-called "natural rights" of property and contract the tools of mass oppression, and successfully led the American People to empower the national government to manage the economy for the general welfare—despite the passionate warning of conservatives that such a use of national power would lead down the path travelled by Hitler and Stalin. It is only as a result of these, and many other, political struggles that Americans enjoy whatever equality they have today; and there is every reason to believe that the nature and scope of American equality will be open to similar debate and redefinition in the future. Americans have not been "born equal" through some miraculous act of immaculate conception. To the extent that we have gained equality, we have won it through energetic debate, popular decision, and remarkable constitutional creativity. Once the American people lose this remarkable political capacity, it is only a matter of time before they will lose whatever equality they possess—and much else besides.

b. Pocock

Which leads me to John Pocock and his refusal to allow the Liberal Individualist's struggle against Feudalism to dominate his understanding of the modern predicament. Instead of admiring Hartz' "Lockean Consensus," Pocock elaborated a different historical understanding of the roots of the American experience. Building on the pathbreaking work of Bernard Bailyn and Gordon Wood, Pocock deemphasized Lockean liberalism and located the American Constitution against a different early modern background—one that ultimately gained its inspiration from the Greek polis. Within this classical republican tradition, the fundamental human challenge is not to lose oneself in the Lockean pursuit of life, liberty, and property, but to join with fellow citizens in a continuing project of political self-government. Pocock's magisterial study, The Machiavellian Moment, traces the revival and transformation of this classical ideal during the Italian Renaissance, before it was taken up by radical Commonwealthmen during the English Revolution of the seventeenth century. Defeated at the Restoration of 1660, the English Commonwealthmen gained a belated victory over the Crown during the American Revolution—providing the fundamental categories for the Revolutionary generation's diagnosis of the Crown's corruption and the republican cure.

When set against this intellectual background, the Founding Federalists seem something more than a bunch of Lockean social engineers, working out the implications of the "natural" freedom miraculously enjoyed by Americans. Pocock invites us to view them as confronting the classical ideal of republican self-government and seeking to define its enduring
place in the modern world. It is precisely this invitation that will, I hope to show, lead us to discover in the American Constitution a fund of dualistic theory and practice that has something distinctive to contribute to humanity’s enduring quest for self-government. Right now, though, I am more concerned to explain why Pocock’s work has not generally been read to invite this inquiry.

The problem is that it is impossible to deny Hartz’ basic point about America, especially as the country evolves through the nineteenth and twentieth centuries: Liberalism is central to American political identity. On the historiographic level, this perception occasions a dismal kind of dating game—in which the debate concerns the precise moment that the (neo-)classical republican ideal was conquered by the increasingly aggressive forces of liberalism. Perhaps it was the Founding Fathers themselves who killed the republican spirit with their new Constitution? Perhaps the Spirit staggered onward in a variety of nineteenth and twentieth century deviations? Whatever remains obscure about the precise location(s) of the corpus delicti, one thing seems clear enough: The ghost of republicanism has long since deserted the center of American life, and liberalism has now become hegemonic.

When this diagnosis becomes self-consciously normative, it leads in one of two directions. On the one hand, some despair at the thought of reviving republicanism and simply proclaim their estrangement from the dominant “liberalism,” others more hopefully seek to use republicanism as a tool for moving “beyond liberalism.”

56. Suzanna Sherry has a wonderful footnote that accurately summarizes the present state of historical perplexity concerning the putative death of the republican spirit in America:


57. This seems to be Pocock’s own view. See, for example, his poorly concealed outrage at the fact that a Marxist critic could confuse him for a “neoliberal,” or even for an American. Pocock, Between Gog and Magog: The Republican Thesis and the Ideologica Americana, 48 J. HIST. IDEAS 325 (1987). Within the law, this is the tack taken, by and large, in M. Tushnet, supra note 47. See the perceptive review essay by Fallon, What Is Republicanism, and Is It Worth Reviving?, 102 HARV. L. REV. 1695, 1703–15 (1989).
58. See, e.g., Sherry, supra note 45.
c. **Liberal Republicanism**

I choose to do neither. Instead, I mean to question the dichotomy between liberalism and republicanism, Hartz and Pocock, which makes a choice seem necessary.\(^59\) This requires, among other things, a redefinition of relevant terms. No synthesis will be possible so long as we allow two different currents of thought to masquerade under the liberal label. The first is better called libertarianism and has recently enjoyed something of a revival, among philosophers at least, in the work of Robert Nozick and David Gauthier.\(^60\) These writers come close to expressing the kind of "liberal" views that many "new republicans" seek to repudiate. Thus, Nozick and Gauthier outdo Locke in reasoning from a "state of nature" inhabited by isolated individuals who claim natural rights to property and contract and deny the authority of the state to disturb their peaceful enjoyment of the hard-earned fruits of their possessive individualism. Indeed, if these libertarian views exhausted the liberal tradition, I would agree that my effort to transcend the Hartz/Pocock dichotomy would be foolish and that the rise of "liber(tarianism)" in nineteenth- and twentieth-century America meant the death of republicanism.

We should not allow the polemical use of L-words, however, to divert attention from a second strand of liberal thought. This kind of liberalism does not look upon people as abstract individuals, divorced from their social contexts, nor does it embrace the notion of "natural rights" to property and contract, nor does it treat politics as if it were beneath the contempt of all but knaves and fools.\(^61\) Instead, it insists that the foundation of personal liberty is a certain kind of political life—one requiring the ongoing exertions of a special kind of citizenry. Rather than grounding personal freedom on some putatively prepolitical "state of nature," this kind of liberalism makes the cultivation of liberal citizenship central to its enterprise. Since this is the view of people like John Dewey, John Stuart Mill, and John Rawls,\(^62\) it seems odd to define liberalism in a way that makes the very possibility of liberal republicanism seem a contradiction in terms.

I am greatly encouraged, then, by the fact that others—most notably, Frank Michelman and Cass Sunstein—have recently emphasized the im-


\(^{61}\) Or "rent-seekers" as they are called in the economic jargon now fashionable in academic libertarian circles.

portance of transcending the sharp dichotomy between liberalism and republicanism that is threatening to become a banality of constitutional scholarship. Nor would it be right to treat liberal republicanism as some recent scholarly invention. To the contrary, it is possible to trace the origins of this kind of liberalism to the Founding itself. Thus, as I have argued elsewhere, a reader of the Federalist Papers will search in vain for an elaborate description of a “state of nature,” or a penetrating analysis of our “natural rights,” Lockean or otherwise. These matters simply do not gain the sustained attention of Madison, Hamilton, and Jay as they try to convince their fellow Americans to support the proposed Constitution. What does bulk large in the Federalist is a profound diagnosis of the prospects and pathologies of citizenship in the modern world. This is not because the Founders thought that citizenship was everything and private rights were nothing. It was because they believed that the fate of private freedom in America, and much else besides, were dependent upon a realistic appreciation of what could, and what could not, be expected of American citizens. The liberal idea of citizenship is not only central to my interpretation of the Founding; it is also crucial to my view of the subsequent course of American history.

The basic pattern of constitutional development presented here challenges both Hartzian and Pocockian paradigms. Against Hartz, I shall deny that America has been living for two centuries in some Lockean time-warp, without serious politics or significant ideological transformation. American history cannot be understood without confronting the revolutionary reforms that, over time, have reworked our constitutional identity as a nation in very fundamental ways. Against Pocock, I shall deny that the character of this centuries-long development can be most insightfully described as a decline from eighteenth-century republicanism to twentieth-century liberalism. Instead, American history has a cyclical pattern which we will learn to identify as the characteristic product of a liberal republican citizenry. One part of the cycle is characterized by normal politics, during which most citizens keep a relatively disengaged eye on the to-and-fro in Washington D.C. while they attend to more personal

63. This theme is explicit in Sunstein’s recent Beyond the Republican Revival, supra note 46, at 1566–71, and is, I believe, implicit in Michelman’s recent explorations as well. See supra note 44.

64. See Storrs, supra note 7, at 1020–31.

65. Perhaps I am being unfair to Pocock here. As Sherry indicates, Pocock has been more alert than most to the survival of republican forms and ideals in twentieth-century life. See Sherry, supra note 45. Nonetheless, I think it plain that he continues to number himself “among the intellectuals . . . [whose] mood is and has long been Tocquevillian; they accept the primacy of liberalism but proceed at once to turn that thesis against itself, asking pressingly whether a society which is liberal et præter a nihil can satisfy the deeper demands of the human (or the Western) spirit.” Pocock, supra note 57, at 337. Rather than inviting us to reflect on the possibility of synthesizing liberalism and republicanism into a holistic understanding of American political identity (as, pace Pocock, did Tocqueville), Pocock continues to insist that “the republican thesis is not part of a hypostasized liberalism but has been treated as an attack upon it.” Id.
concerns. While this relative passivity meets with the predictable disapproval of political activists who hope to transform the status quo, they find that their appeals to the People for a transformative politics are regularly rebuffed at the polls in favor of politics-as-usual. Then, for a wide variety of reasons, one or another transformative appeal begins to engage the attention of a wider audience. Often it requires a generation or more of preparatory work before a constitutional critique gains the mobilized support of enough citizens to push it onto the center stage of American political life. Even then, its success is hardly guaranteed. Long years of mobilization may serve only to reveal that a majority of American citizens reject a fundamental reworking of the status quo.

In contrast to these moments of failed constitutional politics, there have been times when political movements have mobilized popular consent to new constitutional solutions—most notably the periods of Reconstruction and New Deal discussed in the next Part. The important point here is to see how the cycle of normal politics/ constitutional politics/ normal pol . . . invites us to rethink competing paradigms of American history. Perhaps we have been premature in announcing the disintegration of the civic republican tradition in America? Perhaps the distinctive cycle of American constitutional development lives on to the present day? Perhaps liberal citizens have not yet abandoned that intermittent involvement with American politics which has sometimes led in the past to such great constitutional achievements?

Which is not to deny that the spirit of dualist democracy will die if today’s Americans fail to discover in their Constitution a living language for self-government.

II. PRACTICE: THE TRANSFORMATION IN HIGHER LAWMAKING

A. A New Professional Narrative

A living language: This is, at any rate, the way the dualist tradition appears to today’s lawyers and judges when they argue about the Constitution in court. These men and women are constantly speaking as if it were somehow self-evident that decisions made a century or two ago in the name of We the People should rightfully control the decisions of the most powerful officials in the land. The stories judges and lawyers tell themselves about this history have a pervasive impact upon constitutional government. The things that lawyers and judges allow themselves to see in our history affect, sometimes dramatically, what all of us can do in the here and now.

When we inspect the basic structure of this professional narrative, moreover, we will find that it makes a good deal of sense from a dualist perspective. Rather than treating each year in our constitutional history with equal importance, the professional narrative imposes a distinctive
shape on the American past—a shape which expresses the distinctive perspective of dualist constitutionalism.

1. The Structure of the Deep Past

To see my point, begin by reflecting on the shape of the deep past—a past so far away that no active lawyer or judge has actually lived through it. By reason of mortality, the line between deep past and living history is constantly shifting forward. As I write these words, darkness is beginning to settle over the interwar period. While there are still lots of legally active people who were young adults during the war against Hitler, those who were politically conscious during the Great Depression are moving off the stage with grim speed. The constitutional meaning of the New Deal will soon be determined exclusively by Americans whose first acquaintance with the facts was gained indirectly—in half-remembered conversations with elders; in tenth-grade civics; in books of history, political science, and law. If, then, we begin with the New Deal and look backwards, how does the modern professional narrative treat the first 150 years of constitutional struggle?

Very selectively: While 1887 is of legal interest to almost nobody nowadays, the meaning the Supreme Court gives to 1787 or 1937 colors its entire approach to constitutional law. Specifically, our professional narrative focuses on three great turning points in our constitutional experience—the Founding, Reconstruction, and the New Deal. It is true, of course, that the legal forms lawyers use to recall each of these great turning points differ from one another. In memorializing the constitutional politics of the Founding, we turn primarily to the text of the original Constitution and its early amendments, though cases like Marbury are also given considerable importance. In memorializing Reconstruction, the three great Amendments provide the central focus. In recalling the constitutional triumph of the national welfare state during the 1930’s, lawyers speak of the repudiation of Lochner by a set of transformative opinions issued in the wake of the “switch in time” of 1937. Yet, despite these differences in legal form, judges and lawyers take the meaning of all three pivotal constitutional solutions with high seriousness. Lochner, as interpreted through the lens of the New Deal, is a more potent constitutional symbol than many of the clauses left to us by the Fourteenth Amendment (think of the fate of the Amendment’s solemn guarantee of “privileges and immunities” to all citizens of the United States). Indeed, it is a fair question whether judges worry more about repeating the mistakes of the Lochner era than they do about enforcing the Fourteenth Amendment’s requirements of “due process” and “equal protection.” From Carolene
Products in 1938 to Bowers v. Hardwick in 1986, judges and lawyers have been constantly treating the "switch-in-time" in 1937 as the event separating the modern republic from earlier eras of constitutional law—just as the ratification of the Civil War Amendments marks a similar break between the law of the early republic and the law of the middle republic. If we look at the way practical people argue about the Constitution in courtrooms and assembly halls today, we find that they have invested the symbols emerging from the Civil War and the Great Depression with quite extraordinary jurisgenerativity, despite the different legal forms—case names like Lochner, textual phrases like "equal protection"—within which these transformative events are recalled.

If, however, we turn from legal practice to constitutional theory, the 1930's and the 1860's are treated as if they were very different kinds of events. Theorists have no trouble recognizing that the Reconstruction Republicans led the People to add new principles to the fund of our higher law. In contrast, the reigning official theory denies to the New Deal a similar kind of constitutional creativity. We use a myth of rediscovery to describe the switch-in-time—pretending that the constitutional foundations of modern activist government can be firmly rooted in decisions made in the Founding era, rather than in the struggles by twentieth-century Americans to rework the terms of their then-traditional constitutional identity. The next two Parts argue that this narrative turn fails to do justice to the facts of our higher lawmaking experience and mystifies the modern practice of judicial review.

2. The Bigger Picture

Before proceeding, it is best to put the present exercise in perspective. A critique and reconstruction of the myth of rediscovery can only serve as an initial stage of a larger project in narrative reappraisal. While Founding, Reconstruction, and New Deal are the three pivotal turning points in the modern legal understanding of the deep past, they are hardly the only historical exercises in constitutional politics that are important. To structure the bigger story, I shall say that the Founding, Reconstruction, and New Deal each inaugurated a distinctive constitutional regime of public values and institutional relationships that maintain a basic continuity until the next regime change. Each of the regimes, however, was importantly transformed by constitutional movements during its existence. Thus, the early Republic founded by the Federalists was modified significantly by

68. For all our other differences, this seems to be a crucial point I share with Morton Horwitz. See Horwitz, supra note 59, at 61–63.
the Jeffersonian and Jacksonian exercises in constitutional politics before it was shattered by the rise of the Republican Party in the 1850’s. The middle Republic established by the Republicans during Reconstruction experienced its greatest episode of constitutional politics during the 1890’s, climaxing in the decisive defeat of the Populists in the Bryan-McKinley election of 1896. While this election stands as a marker of a failed constitutional moment, the Progressive and women’s movements later did gain significant, if more limited, modifications in the pre-existing Republican constitution.

Jeffersonians, Jacksonians, Progressives: These movements, as well as others, have made enduring contributions to modern constitutional law—if not quite of the same pervasive and deep-cutting type as the Founding, Reconstruction, or New Deal. I defer them here because a serious assessment will overburden an article that is already ponderous enough.

So much for the deep past that lies on the other side of the New Deal. But what of the lived experience on our side of the historical divide? While the 1930’s witnessed the birth agony of the modern republic, there have been many efforts to mobilize the American people since then. As in previous eras, these exercises in popular sovereignty have had a checkered career. The single greatest triumph of constitutional politics has been the civil rights movement—whose successful mobilization of citizen energies in the 1950’s and 1960’s transformed the initial meaning of Brown (to be discussed at greater length later), into the constitutional symbol of a renewed American commitment to equality—which other subordinated groups have sought to extend and deepen. For the rest, the modern Republic has experienced a series of failed constitutional moments: Most obviously, the McCarthyites failed in the 1950’s, the New Left failed in the 1960’s, and the New Right failed in the 1980’s to gain the broad and considered support for their large transformative ambitions that the dual-

69. While more work will be required to put these two exercises in constitutional politics into dualistic perspective, the Holmes Devise histories usefully state many of the relevant constitutional facts. See G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-15, at 1-98 (1981); C. SWISHER, THE TANEY PERIOD 13-245 (1974).
71. Theda Skocpol’s forthcoming work casts important light on the relationship between the women’s movement and progressivism. See Skocpol, Soldiers and Mothers (unpublished manuscript on file with author).
72. See infra text accompanying notes 166-69.
73. I am speaking here of constitutional politics directed toward domestic affairs. There is another story concerning the rise of America as a world power—moving from McKinley and the Spanish-American War, Wilson and the League of Nations, Roosevelt and the post-War consolidation of the national security apparatus, Vietnam and the War Powers Act—that also must be given critical analysis to gain an overall view of the relationship between constitutional politics and constitutional law during the twentieth century.
74. My interpretation of this most recent failure may be found in Ackerman, Transformative Appointments, 101 HARV. L. REV. 1164 (1988).
ist tradition requires before a new constitutional solution gains the authority of We the People. While these, and other, movements have had a substantial impact on statutory law, their contributions to our higher law can be easily exaggerated.

I defer these crucial matters, however, because I think that our failure to come to terms with the birth agony of the modern republic in the 1930’s has deprived us of an adequate vocabulary to discuss these failed moments in dualist terms. The New Deal, like Reconstruction before it, transformed not merely the structure of normal politics but the methods of constitutional change as well. In sharp contrast to movements ranging from progressivism to prohibitionism in the middle republic, none of our modern exercises in constitutional politics has successfully completed the higher lawmaking track laid down by the Federalists. Instead, post-New Deal attempts at fundamental reform have been structured through a higher lawmaking process that owes more to Franklin Roosevelt’s initiatives than to James Madison’s. Under this process, a transformative movement’s claim to speak for the People is not defined and tested through a Federalist dialogue between assemblies sitting on the national and state levels of government like the one described in Article Five of the original Constitution; instead, the movement is required to run the gauntlet of a more nationalized process in which President, Congress, Court, and voters interact with one another over time to test the constitutional credibility of the movement’s mandate to speak for the People on behalf of its transformative initiative. As we shall see, this more centralized process has its historic roots in Republican Reconstruction.\(^75\) Nonetheless, in response to the crisis of the Great Depression, it was the New Deal Democrats who adapted these Republican precedents in a way that enhanced the role of the presidency. It seems wise, then, to study these New Deal precedents in their own right before we begin to consider how they have been used over our lifetimes, and how we should use them in the future.\(^76\)

3. **Beyond Formalism**

Begin by considering how far the legal profession has allowed its story about the New Deal to diverge from those told by other serious students of the subject. Rather than endorsing a myth of rediscovery, political scientists and historians have had no trouble confronting the “constitutional revolution” of the 1930’s. Nobody supposes, of course, that the New Deal was a “total” revolution comparable to the Bolshevik upheaval of 1917. Rather than aiming for the utter annihilation of the *ancien régime*,

\(^75\) Indeed, the roots of the process go even deeper—to the higher lawmaking exercises of Jefferson and Jackson. See Discovering the Constitution, *supra* note 1, at ch. 3. But we can ignore these early precedents in this abbreviated sketch.

\(^76\) For some preliminary reflections, see Ackerman, *supra* note 74.
it was a characteristic American effort at revolutionary reform, mixing new and old together to lay the foundation for the constitutional order we take for granted today. Even when one gives full measure to the way in which the New Deal creatively adapted older traditions, however, the professional narrative now dominant among lawyers is anomalous. In any other field but law, it would be laughable to assert that Alexander Hamilton and John Marshall did all the really tough work in elaborating the constitution of the modern welfare state, and that Franklin Roosevelt and the New Deal Congress were basically acting out a vision of active national government already fully established by the People in the aftermath of the American Revolution. Instead, the important scholarly enterprise in history and political science is to understand how the new structures and values of the 1930's interacted with older elements of the American tradition to form the modern constitution.

How, then, to account for the persistent tendency of legal narrative to deny the obvious and to suppress the creative side of the New Deal? The answer in two words is Article Five. For reasons never elaborated, modern lawyers suppose that there is only one way the New Dealers could have added something new to the fabric of our constitutional law, and that is to enact constitutional amendments by strictly following the rules laid down by the Philadelphia Convention in the fifth Article of their Founding text. On this formalist view, the question of the New Deal's constitutional creativity can be assessed definitively with the flick of an eye. Just quickly scan the familiar series of Article Five amendments: Behold, in 1933, the Twenty-first Amendment repealed Prohibition; in 1951, the Twenty-second Amendment forbade the President from seeking a third elected term in office. Apparently, not much constitutional creation going on during the central decades of the twentieth century!

Given this formalist view, there seems to be only one way to express the transformative character of the New Deal: the myth of rediscovery. Since, by formalist hypothesis, the New Dealers failed to create anything really new, we must rationalize their achievements by pretending that they were acting out constitutional lines authorized by the Founders, and that it was merely the perversity of Peckham & Co. that had allowed these Ancient Truths to be obscured for so long.

If, then, we are to consider our present narrative in a critical spirit, it is clear where we should begin: with the formalist view of Article Five that makes the present myth of rediscovery seem the only plausible way to mark the birth of modern constitutional law. Where did we get this view of Article Five anyway?

77. See supra text accompanying notes 36–37.
Not from the Supreme Court. Indeed, the principal message of this Part is that the enemy is us, and that we are entirely free to rethink the formalist premises that have led us to embrace legal fictions that might make old-time common lawyers blush. My argument will be in two stages. The first consists of a study of the Supreme Court’s landmark 1939 decision in Coleman v. Miller.79 Rather than providing authoritative support for the view that all constitutional change must be governed in strict accord with the rules of Article Five, the Court’s remarkable opinion expressly repudiates the formalist preconceptions that nevertheless hold sway over the legal mind a half-century later.

The second stage of my argument uses Coleman in a more constructive way—by building on some of its remarkable insights into our higher lawmaking experience. These insights, if pursued energetically, lead to a very different view of our higher lawmaking history. We will follow the Court’s lead in discovering that it was the Reconstruction Republicans who, in their great Amendments, first ran off the higher lawmaking tracks laid down by the Federalists in Article Five. After describing the more nationalistic way in which the Republicans proposed and validated their great Amendments, we shall be in a position to consider how this new Republican process allows for a reinterpretation of the Democratic transformation of the 1930’s. Rather than disguising this transformation with a myth of rediscovery, we shall explore the ways in which the New Deal Democrats creatively adapted higher lawmaking precedents from Reconstruction in their own effort to speak for We the People. The results of all this work will be a view of Reconstruction Republicans and New Deal Democrats that makes them seem more like the Founding Federalists than the traditional narrative allows. All three exercises in constitutional politics creatively adapted higher lawmaking procedures, no less than substance, in winning constitutional authority to speak in the name of We the People. The Federalist rules in Article Five should continue to serve as the first word on the subject of higher lawmaking; but they are not the last word, and it is past time for us to recognize this.

B. The Court’s Rejection of Formalism

1. Coleman v. Miller

Coleman could hardly have come before the Court at a more illuminating moment. It was initially argued in October 1938, little more than a year after the Supreme Court’s “switch in time.” It was decided by a bench composed of Justices with very different views of the New Deal achievement. When the opinions came down in June of 1939, four of the Justices who had weathered the court-packing crisis had left the bench,

allowing Roosevelt to replace them with partisans of the New Deal revolution—Black, Reed, Frankfurter, and Douglas. Of the remaining Justices, three were judicial moderates who had been at the very center of the court-packing crisis—Hughes, Stone, and Roberts. This left only two conservatives—Butler and McReynolds—to recall the constitutional principles of the Republican era. Each of these three groups contributed a substantive opinion:80 Butler’s dissent is joined by McReynolds; Black’s concurrence, by his fellow New Dealers Frankfurter and Douglas, as well as Justice Roberts; Chief Justice Hughes provides an “opinion of the Court.”81

The facts of the case dramatized the higher lawmaking problems left in the wake of 1937. The dispute concerned the status of a Child Labor Amendment proposed by Congress in 1924 in response to two landmark Old Court decisions: *Hammer v. Dagenhart*82 and *Bailey v. Drexel Furniture Company.*83 In these decisions, the Court denied that Congress had the constitutional power to eliminate one of the most obvious abuses of an unregulated market economy: the exploitation of child labor. While the Court did not bar individual states from banning this practice, its commitment to federalism and limited national government led it to invalidate congressional efforts to eliminate child labor on a national basis. Thus, the majority opinions in these cases exemplified the constitutional jurisprudence of the *Lochner* era. When the second of these opinions was handed down in 1922, Calvin Coolidge was in the White House and the partisans of the activist state were hardly in a political position to threaten the conservative justices with court-packing. In 1924, however, they did manage to convince two-thirds of both Houses to propose a Child Labor Amendment that appealed to the People to override the Court’s conservative jurisprudence.

Not that this Amendment proposed to sweep away the fundamental principles of reigning judicial doctrine, in the manner of the New Deal revolution. Nor did it even aim to put the People on record as committed to a ban on child labor; instead, it merely granted Congress the “power to limit, regulate, and prohibit the labor of persons under eighteen years of age.”84 Even this modest proposal met an overwhelmingly hostile reception from the states. By mid-1927, no fewer than twenty-six states, includ-

---

80. In addition, Justice Frankfurter wrote an opinion, joined by three other Justices, denying that the petitioners had standing to bring the case in the first place. Since these four did not gain a majority for their effort to head off judicial consideration, they proceeded to consider the merits, in a concurring opinion by Justice Black which we shall be considering shortly.
81. While Hughes is officially described as presenting “the Opinion of the Court,” *Coleman*, 307 U.S. at 435, Black’s “concurrence” only announces his agreement with the “result reached, but for somewhat different reasons.” *Id.* at 457. As we shall see, the point at which Black marks his disagreement is highly significant.
82. 247 U.S. 251 (1918).
83. 259 U.S. 20 (1922).
84. 43 Stat. 670, 670 (1924).
ing Kansas, had formally rejected the Amendment, while only five had ratified it.\(^{85}\) Beginning in 1933, a new ratification movement was begun, yielding 14 affirmations in 1933 alone, and eight more by 1937.\(^{86}\) When Kansas voted to join this list in January 1937, state legislators who opposed ratification challenged this decision all the way to the Supreme Court. In their interpretation, Article Five did not allow the Kansas legislature of 1937 to rethink its rejection of the 1920’s; nor did the Article permit a valid ratification by any state a decade after it had been so decisively repudiated by twenty-six states.\(^{87}\) The Court, in short, should declare the proposed Amendment dead and require Congress to propose it another time if it hoped to legitimate this particular activist measure.

When the Kansans began their lawsuit in January of 1937, there was nothing odd about these demands. At that time the Court had given no indication that it was abandoning the constitutional principles elaborated in cases like *Hammer* and *Drexel*. Indeed, these principles had been ringingly reaffirmed very recently.\(^{88}\) So long as the Court held firm, an Article Five amendment was a necessary condition for the national abolition of child labor. The Court’s “switch” in the Spring of 1937, however, had transformed *Coleman’s* meaning. If the Court agreed with the Kansans that Congress had to pass a valid constitutional amendment to prohibit child labor, it would be casting doubt on the seriousness of its “switch” two years before.

So far as Butler and McReynolds were concerned, this was hardly a reason for treating the Kansans’ complaint lightly. Since these two conservatives never recognized the legitimacy of the “switch in time,” the Kansans’ complaint raised a live issue: The *Lochner* era decisions invalidating activist national interventions on such “local matters” as child labor remained good law until Congress and the states managed to enact a valid Article Five amendment. Moreover, the two holdovers had little trouble finding that Congress’ proposed Child Labor Amendment had lapsed after its massive repudiation in the late 1920’s, and that Article Five required its reapproval by two-thirds of Congress before it could again be considered open to the states for ratification.\(^{89}\)

---

86. *Id.* at 451.
87. The case also raised other, more technical, issues, which can be ignored for present purposes.
89. For Butler and McReynolds, the governing precedent was *Dillon v. Gloss*, 256 U.S. 368 (1921), decided by a unanimous Court only 16 years previously. According to *Dillon*, the mere fact that Article Five was silent on the question of how long a proposed amendment can remain alive was “not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed.” *Id.* at 373 (citations omitted). In language worth repeating, *Dillon* then called upon fundamental dualistic principles to elaborate the Article’s meaning:

We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated
Perhaps more surprisingly, the seven Justices who endorsed the "switch in time" could not bring themselves explicitly to disagree with the conservatives' contention that the New Dealers were playing fast and loose with Article Five in reviving a constitutional initiative that had been so roundly rejected a decade earlier. At the same time, they were entirely unwilling to join the two conservatives in insisting that Congress would have to start the formal Article Five process again if it ever hoped to gain regulatory authority over child labor. Rather than make any such demand, these seven Justices had been working hard over the past two years reassuring the nation that they would no longer defend the Republican vision of limited government expressed in cases like *Hammer v. Dagenhart*.

Despite these steps, the Court remained on probation. It was not yet absolutely clear to the President, Congress, or the nation at large whether the Court's switch of 1937 was merely a tactical retreat or the beginning of a serious effort by the Justices to build solid constitutional foundations for activist national government. These doubts about the Court would have surfaced if three of the seven New Deal justices had joined Butler and McReynolds in reopening the question of congressional power to eradicate child labor.\(^9^0\) How, then, were the members of the majority to avoid joining the conservatives in casting a cloud on the legitimacy of the New Deal without offending their legal consciences by declaring that the New Dealers had been playing by the rules in resuscitating Congress'...
1924 initiative after its emphatic rejection by the People during 1925 and 1926?

Much to the Court’s credit, this question provoked the deepest judicial consideration of the law of higher lawmaking in American history. In returning to first principles, the New Deal majority challenged the formalist approach to Article Five that modern lawyers somehow manage to take for granted today. Speaking for the Court, Chief Justice Hughes explicitly denied that constitutionalists should look upon the rules of Article Five in the same legalistic way they approach other parts of the constitutional text. Instead, he declared that the central issues in the Kansans’ case raised “political questions” most appropriately resolved by the political branches, not by judges.

This judicial declaration was entirely unprecedented. For the first 150 years of its history, the Court had approached Article Five in the same way it dealt with other parts of the Founding text—reading the rules in light of its best interpretation of their underlying principles and giving the normal juridical effect to these textual interpretations. In calling the Article “political,” the Court was not mindlessly repeating a traditional formula. Instead, the Kansans’ effort to force the New Deal to conform to the rules of Article Five prompted an agonizing reappraisal of formalist presuppositions.

But the Court did more than agonize. It placed its present predicament in historical perspective, by recalling some facts about an earlier constitutional transformation. Hughes’ act of recollection did not, moreover, implicate some incidental feature of the constitutional tradition. Instead, it involved the greatest act of higher lawmaking since the Founding itself. For the first (and only) time in judicial history, the Court brought some of the harsh truths involved in the legitimation of the Fourteenth Amendment to the very surface of the United States Reports: that the then-existing Southern governments rejected the Fourteenth Amendment when it was first proposed; that Congress responded by destroying these dissenting governments and gaining the assent of new ones to the Fourteenth Amendment; that, when these new Southern governments sought to withdraw their predecessors’ rejections, Secretary of State Seward first issued a Proclamation expressing “doubt and uncertainty” whether the Amendment had been ratified; and that it was only upon the express demand of Congress that Seward finally issued a second Proclamation unequivocally pronouncing the Amendment valid. As Walter Dellinger puts it: “From Hollingsworth v. Virginia in 1798 through United States v. Sprague in 1931, the Court proved quite capable of resolving issues arising under article V.” Dellinger. The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 HArv. L. REV. 386, 416–17 (1983) (citations omitted).

After reciting these extraordinary facts, the Chief Justice refused to af-
firm that the Reconstruction Republicans played by the rules of Article Five in validating the Fourteenth Amendment. All the Court was willing to say was this:

This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.  

Guided by its rediscovery of the formally problematic aspect of the Republican past, the Court proceeds to make short work of its Democratic present. As in the 1860’s, so in the 1930’s, the Court refused to channel the revolutionary shift in opinion about the welfare state through a formalistic interpretation of the rules of Article Five. Instead, it left to the “political departments” the decision whether the People of Kansas in 1937 might properly announce that they had changed their mind about the Child Labor Amendment.

Indeed, even this understates the extent to which Coleman repudiates a formalistic approach to the law of higher lawmakersing. In writing his “opinion of the Court,” Chief Justice Hughes followed the familiar practice of restricting himself to the narrow questions94 raised by the facts of the Kansans’ case, leaving it open for future Courts to decide that other aspects of Article Five allowed for a more legalistic approach. It was precisely this lawyerly caution that provoked New Dealers Black, Frankfurter, and Douglas, together with Owen Roberts (who had played the key role in the 1937 switch) to write a special concurrence. Speaking for this group, Black issued a sweeping declaration that the amendment process is “‘political’ in its entirety. . .and is not subject to judicial guidance, control or interference at any point.”95

2. Taking Up the Challenge

For fifty years now, Coleman has served as the “leading case” on Article Five, the first place a well-trained lawyer should look in her search for enlightenment. Despite the New Deal Court’s remarkable insights, modern lawyers have used Hughes’ invocation of the “political question” doc-

93. Id. at 449-50.

94. In particular, how long may a proposed amendment remain open for ratification before it lapses, and whether a state like Kansas can change its mind and ratify an amendment it had previously rejected.

95. Coleman, 307 U.S. at 459.
trine as an excuse from further thought. Worse yet, this intellectual vacuum has given rise to a formalism that would have embarrassed even Butler and McReynolds. 96

The question is whether we will continue to remain deaf to the voices of our constitutional past or begin to take seriously the questions that Coleman poses. I propose to build upon Chief Justice Hughes' suggestion that Reconstruction serves as the "historic precedent" most likely to illuminate the higher lawmaker situation confronted by Americans in the 1930's. My difference with Hughes lies only in the scale upon which I propose to elaborate his insight. Though criticized by New Dealers like Black, Hughes refused to make Coleman into a vehicle for some broad pronouncement on our higher lawmaker tradition. Instead he did no more than was strictly necessary to decide the narrow issues raised by the Kansans, mining the precedents of the 1860's only as they were relevant to the particular case before him. Fifty years later, there is no need for us to be bound so tightly to the Kansans' litigation strategies. The challenge is to reflect as deeply as we can about the parallels that Hughes had begun to discern between the constitutional transformations of the 1860's and the 1930's.

This is easier said than done. To do the job right, we will have to interrogate a host of decisions in the same spirit with which I have revisited Coleman—seeking, above all, to listen to the actors as they struggle, often with great self-consciousness, to define and redefine the principles of dualist theory as they justify their constitutional practice. In attempting this exercise in rediscovery, we cannot allow decisions by the courts to occupy too much of our field of constitutional vision. During both Reconstruction and New Deal, the crucial decisions were often made elsewhere—by Congress, the Executive, and the people at large. As we enlarge our field of vision, we will find Americans in these non-judicial fora struggling to reconcile constitutional principle and practice with an insight equalled only rarely in the United States Reports. Listening to these voices, we will come to grasp the remarkable ways in which nineteenth-

---

96. Even these jurists did not commit the modern mistake of supposing that the law of higher lawmaker could be discovered simply by repeating the rules contained in Article Five. Instead, they rightly insisted that lawyers could not make sense of Article Five without interpreting it in the context of the Founders' theory of popular sovereignty. Like the members of the majority, they did not imagine that they could respond to the Kansans' complaint by complacently observing that the Article did not contain an explicit rule saying how long a Congressional proposal could remain alive before it lapsed. Instead, they followed a line of cases, including Dillon, which sought to answer such questions by considering what was necessary for a political movement to earn the authority to speak in the name of We the People. See supra note 89. Moreover, as a general matter the dissenters seem absolutely right to have insisted that "as ratification is but the expression of the approbation of the people..., there is a fair implication that it must be sufficiently contemporaneous... to reflect the will of the people in all sections at relatively the same period." Coleman, 307 U.S. at 471-72. What they failed to see, and what the majority so clearly grasped, is that the People had given their approbation to the New Deal vision of activist government, albeit through institutional mechanisms more like those first elaborated during Reconstruction than those established in the Federalist period.
century Republicans and twentieth-century Democrats built new higher lawmaking procedures step-by-step out of older constitutional traditions. Only after undertaking this comprehensive interrogation of the sources can we hope to rewrite the professional narrative we presently use to trivialize the constitutional creativity of Reconstruction Republicans and New Deal Democrats.

Obviously, this is not a task for a single article; while I am now finishing a book-length report, it has become apparent to me that the job, if it is to be done at all, cannot be the work of a single hand. The professional narrative can be rewritten only by the profession at large, as the result of a collective debate over the meaning of the documentary legacy left to us by the 1860's and 1930's. To get the ball rolling, I will sketch some of the broad patterns I have found, leaving the crucial process of detailed reconstruction to later work.

C. Reconstruction and New Deal

My argument proceeds in three steps. I begin by following Hughes in exploring “the historic precedents” surrounding the Civil War Amendments. This will provide us with compelling reasons to believe that the Reconstruction Republicans refused to follow in the higher lawmaking tracks set out by the Founding Federalists in 1787. The second step involves describing the “historic precedents” for higher lawmaking left in the wake of the Republicans’ success in validating their Amendments.

This, in turn, will allow us to take a third step, and challenge the myth of rediscovery that makes the New Deal seem entirely uncreative simply because it did not issue in Article Five amendments. For if, as the second step suggests, the Reconstruction Republicans provided new models for constitutional creation, then it is not enough to dismiss the creative aspect of the New Deal by remarking, with the formalist, that the New Dealers failed to play by the rules of Article Five. Instead, we must confront a new interpretive possibility: Just as the Reconstruction Republicans broke with the rules of Article Five to play new institutional variations on higher lawmaking themes, perhaps the New Deal Democrats played new variations on the higher lawmaking themes initially developed by the Reconstruction Republicans?

The third stage of the argument begins to give reasons for answering this question in the affirmative. Having rediscovered the institutional processes by which the Reconstruction Republicans defined, debated, and finally gained legal authority for their new constitutional solutions of the 1860's, we shall find that these “historic precedents” bear a host of uncanny similarities to the institutional mechanisms through which the New Deal Democrats gained a similar triumph in the 1930's. Not that the twentieth-century Democrats were content to follow the nineteenths-
century Republicans in all particulars. But it is only after glimpsing the basic similarities between the higher lawmaking processes of the 1860’s and the 1930’s that we can begin to define the New Deal innovations with any clarity.

The end result of this three-stage exercise in rediscovery will be a sketch of the promised revision of our professional narrative. We will come to see Founding Federalists, Reconstruction Republicans, and New Deal Democrats as engaged in enterprises that look much more like one another than conventional wisdom allows. Having laid the foundation for a constitutional narrative that self-consciously recognizes the high creativity of three generations of constitutional politics, the essay concludes, in Part Three, by considering the implications of this narrative revision for the modern Supreme Court’s effort to make sense of the Constitution in the aftermath of the New Deal.

1. Refuting the Formalist

I begin my three stage argument by elaborating on Chief Justice Hughes’ gesture toward the dark clouds surrounding the ratification of the Fourteenth Amendment. As the Coleman court intimates, ten of the existing state governments of the South, along with three border states, solemnly rejected the Republicans’ initiative during the months following its proposal in June, 1866.\(^{97}\) If the Reconstruction Congress had accepted these rejections, it would have been obliged by the rules of Article Five to conclude that its proposed Amendment was dead. Thirteen rejections is a lot more than the nine then required to invoke the veto formally accorded one-quarter of the states by the rules of Article Five.\(^{98}\) The Reconstruction Republicans in control of Congress, however, refused to accept this outcome. Instead, they passed a series of Reconstruction Acts that sought

---

97. See E. McPherson, The Political History of the United States of America During the Period of Reconstruction, (from April 15, 1865, to July 15, 1870), Including a Classified Summary of the Legislation of the Thirty-Ninth, Fortieth, and Forty-First Congresses. With the Votes Thereon; Together with the Action, Congressional and State, on the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and the Other Important Executive, Legislative, Polanco-Military, and Judicial Facts of That Period 194 (2d ed. 1875). McPherson details the vote count in the ex-Confederate states: Texas (Senate, not voting; House, Oct. 13, 1866, 5 yeas, 67 nays); Georgia (Senate, Nov. 9, 1866, 0 yeas, 36 nays; House, Nov. 9, 1866, 2 yeas, 131 nays); Florida (Senate, Dec. 3, 1866, 0 yeas, 20 nays; House, Dec. 1, 1866, 0 yeas, 49 nays); Alabama (Senate, Dec. 7, 1866, 2 yeas, 27 nays; House, Dec. 7, 1866, 8 yeas, 69 nays); North Carolina (Senate, Dec. 13, 1866, 1 ye, 44 nays; House, Dec. 13, 1866, 10 yeas, 93 nays); Arkansas (Senate, Dec. 15, 1866, 1 ye, 24 nays; House, Dec. 17, 1866, 2 yeas, 68 nays); South Carolina (Senate, not voting; House, Dec. 20, 1866, 1 ye, 95 nays); Virginia (Senate, Jan. 9, 1867, unanimous; House, Jan. 9, 1867, 1 for amendment); Mississippi (Senate, Jan. 30, 1867, 0 yeas, 27 nays; House, Jan. 25, 1867, 0 yeas, 88 nays); Louisiana (Senate, Feb. 5, 1867, unanimous; House, Feb. 6, 1867, unanimous). Three border states also rejected the Amendment at the time: Kentucky (Senate, Jan. 8, 1867, 7 yeas, 24 nays; House, Jan. 8, 1867, 26 yeas, 62 nays); Delaware (Senate, not voting; House, Feb. 6, 1867, 6 yeas, 15 nays); Maryland (Senate, Mar. 23, 1867, 4 yeas, 13 nays; House, Mar. 23, 1867, 12 yeas, 45 nays).

98. See id. at 194.
nothing less than to destroy the dissenting governments of the South and
to reconstruct them on a basis that would make ratification of the Amend-
ment more likely— instructing the Union Army to register freed blacks as
well as whites in the reconstructed state electorates (note that this was
before the Fifteenth Amendment).99

The obvious question this raises is whether congressional reconstruction
could be justified under the clause making the United States a guarantor
of the republican form of government in all the states.100 Even if this diffi-
cult problem is solved satisfactorily, it only prepares the way for a truly
unresolvable dilemma. The impossible question arises when we see how
the Reconstruction Act treated the new black-and-white Southern govern-
ments even after they had organized themselves in complete compliance
with Congress’ demands. Section Five of the first Reconstruction Act de-
nied these new democratically elected states the authority to send senators
and representatives to Congress on an equal footing with the other states
until they ratified the Fourteenth Amendment!101 Now there is simply no
way that this demand can be reconciled with the rules of Article Five. If
these rules mean anything, they deny Congress the authority to bootstrap
its amendments to validity by destroying dissenting governments and then
denying congressional representation to the new ones until they accept the
constitutional initiatives that the preceding governments found unaccept-

99. For good overviews of the process of Reconstruction, see M. BENEDICT, A COMPROMISE OF
PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, at 210–43 (1974);
E. FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877 (1988); E. McKi-
rick, ANDREW JOHNSON AND RECONSTRUCTION 448–504 (1960). Section 4 of the Second Recon-
struction Act, passed on March 23, 1867, sought to transform the Union Army into a congressional
mechanism for reconstructing governmental authority in the South. See Second Reconstruction Act, ch.
6, § 4, 15 Stat. 1, 3 (1867).

100. For a good overview of the Reconstruction debate, see W. WIECZER, THE GUARANTEE

And be it further enacted, That when the people of any one of said rebel States shall have
formed a constitution of government in conformity with the Constitution of the United States
in all respects, framed by a convention of delegates elected by the male citizens of said State,
twenty-one years old and upward, of whatever race, color, or previous condition, who have
been resident in said State for one year previous to the day of such election, except such as may
be disqualified for participation in the rebellion or for felony at common law, and when such
constitution shall provide that the elective franchise shall be enjoyed by all such persons as
have the qualifications herein stated for electors of delegates, and when such constitution shall
be ratified by a majority of the persons voting on the question of ratification who are qualified
as electors for delegates, and when such constitution shall have been submitted to Congress for
examination and approval, and Congress shall have approved the same, and when said State,
by a vote of its legislature elected under said constitution, shall have adopted the amendment
to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as
article fourteen [emphasis added], and when said article shall have become a part of the Con-
stitution of the United States, said State shall be declared entitled to representation in Con-
gress, and senators and representatives shall be admitted therefrom on their taking the oath
prescribed by law, and then and thereafter the preceding sections of this act shall be inoper-
tive in said State: Provided, That no person excluded from the privilege of holding office by
said proposed amendment to the Constitution of the United States, shall be eligible to election
as a member of the convention to frame a constitution for any of said rebel States, nor shall
any such person vote for members of such convention.
able. Can it be thought surprising that Secretary Seward's first Proclamation concerning the Fourteenth Amendment expressed doubts about the Amendment's validity when state consent had been procured under ground rules at such variance with those specified by Article Five?102

As if this were not enough, the formalist should be on notice that the Republican decision to play fast and loose with the rules of Article Five did not begin in 1868. Instead, the chain of "historic precedents" that mark the break with the Federalist rules begins with the Emancipation Proclamation of 1863.103 For present purposes, I restrict myself to a single additional problem, which I will call the Thirteenth-Fourteenth Amendment Paradox. The problem can be introduced with a single fact: The very governments Congress destroyed in response to their veto of the Fourteenth Amendment played a critical role in the ratification of the Thirteenth Amendment.104 How, then, could it be that these governments were legitimate enough to validate the Thirteenth but not legitimate when they refused to validate the Fourteenth?

The Paradox deepens when we introduce another fact about the months between February and December 1865—the period during which the states were considering whether they would ratify the Thirteenth Amendment. As the first set of post-War governments in the South were considering ratification, they were also selecting Senators and running elections for Representatives to the House. By early December, then, the Southerners were sending two legal signals to Washington: The first consisted of ratifications of the Thirteenth Amendment; the second, senators and representatives to the Thirty-ninth Congress, scheduled to convene on December 4, 1865.

These two communications were treated very differently when they were received in Washington. On December 18, Secretary Seward proclaimed the Thirteenth Amendment valid, explicitly citing the Southern ratifications in his official Proclamation.105 Two weeks earlier, the Republicans in Congress refused to seat any of the Southern representa-

---

102. Seward's First Proclamation of July 20, 1868, expresses doubts about the validity of the Fourteenth Amendment on two scores. First, the Proclamation notes that two Northern states had sought to withdraw their previous assent to the Amendment. Second, Seward calls into question the legitimacy of the six Southern assents in his possession by listing them in a separate paragraph and describing them as the product of "newly constituted and newly established bodies avowing themselves to be and acting as the legislatures, respectively, of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama." Proclamation of William H. Seward No. 11, 15 Stat 706, 707 (1868) (emphasis added).

103. I present a detailed account of the entire process from the Emancipation Proclamation to Seward's final Proclamation on the Fourteenth Amendment in a forthcoming book. See Discovering the Constitution, supra note 1, at chs. 7-11.

104. Seward counted seven of the newly elected southern legislatures among the 27 states that had signified their assent to the Thirteenth Amendment (Virginia, Louisiana, Arkansas, South Carolina, Alabama, North Carolina, Georgia). See Proclamation of William Seward No. 52, 13 Stat. 774, 775 (1865).

105. Id.
tives, and continued to deny the Southern states representation throughout the entire period during which the Fourteenth Amendment was proposed and "ratified."\textsuperscript{106} Southern exclusion, moreover, was a necessary political condition for the Republicans to gain the two-thirds vote required by Article Five for the proposal of a constitutional amendment.\textsuperscript{107} How, then, can the formalist explain the legitimacy of the proposal of the Fourteenth Amendment by the Rump Republican "Congress" without simultaneously delegitimizing Secretary Seward's Proclamation validating the Thirteenth Amendment?

2. \textit{Reconstructing Reconstruction}

We have reached the first stage in our critique of the reigning professional narrative. On this familiar account, the Civil War Amendments are like all the other "amendments" conveniently listed at the end of the original Constitution. Just like the First or the Twenty-first in the series, Thirteen and Fourteen owe their validity to their enactment in strict conformity with the rules laid down by the Founding Federalists in Article Five. However often this point is presupposed in normal legal discourse, it is belied by Chief Justice Hughes' opinion in the "leading case" on the subject—and by the facts of the matter.

Most fundamentally, the Republicans constitutionalized their initiatives in a more nationalistic way than that contemplated by the Federalists' Article Five. The rules laid down in 1787 envisioned an equal partnership between the national government and the states in the process of higher lawmaking: While national actors dominate at the proposal stage, constitutional dialogue moves to the state level during ratification. During the 1860's, the Republicans used national institutions to call into question, ever more profoundly, the equal status of the states in our higher lawmaking system. During the constitutional debate over slavery, the Presidency served as the principal vehicle for the Republicans' assault on Federalist premises. Not only did Abraham Lincoln's Emancipation Proclamation shift the constitutional status quo in 1863 before the Thirteenth Amendment was even formally proposed; Andrew Johnson's role in the ratification of the Thirteenth Amendment was, in many ways, even more remarkable. Johnson did not allow the Southern states to suppose that they could determine the fate of the Thirteenth Amendment with the kind of independence presupposed by the original Federalist idea of an equal na-

\textsuperscript{106} See M. Benedict, \textit{supra} note 99, at 131.

\textsuperscript{107} The likely voting behavior of Southern representatives in Congress is suggested by overwhelming votes in Southern legislatures rejecting proposals to ratify the Fourteenth Amendment. See E. McPherson, \textit{supra} note 97. (Recall that this was a time when state legislatures selected federal senators). Even without the South, Congressional Republicans encountered enormous difficulty in coming up with a proposal that would gain the support of two-thirds of the rump Congress. See M. Benedict, \textit{supra} note 99, at 150–53, 160, 162–87.
tion-state partnership. As Southern legislatures met for the first time in the aftermath of the Civil War, Johnson used his military governors to place extraordinary pressures on them to ratify the Amendment. While these unprecedented pressures violated original Federalist principles, they fell short of pure military coercion. They did not, for example, deter Mississippi from formally rejecting the Thirteenth Amendment—though they significantly contributed to the ratification by other states of the former Confederacy. The process is best described, I think, as a *presidentially-led* ratification effort that elaborated a new form of state-subordination which stood between equal partnership and pure coercion. Andrew Johnson took a great deal of pride in this artful mix, and he claimed a great deal of public credit when it resulted in Secretary Seward’s Proclamation of December 1865, declaring the Thirteenth Amendment part of our higher law.

The higher lawmaking process was nationalized yet further in the struggle over the Fourteenth Amendment. After taking unprecedented steps to gain ratification of the Thirteenth Amendment, Johnson opposed the congressional Republicans’ demands for further aggressive action. His resistance led to a dramatic struggle between the Rump Congress and the Accidental President for the mantle of national leadership left in the wake of Lincoln’s assassination.

The interbranch conflict evolved in four distinct stages. During most of 1866, Rump Congress and Accidental President struggled to an impasse from their citadels on either end of Pennsylvania Avenue. Each issued an escalating series of official messages which not only questioned the other’s substantive vision of the Union, but also challenged the competitor’s very right to speak on fundamental matters in the name of We the People of the United States.

This first period of constitutional counterpoint and institutional impasse induced the contending parties to transform the next regular election into one of the great higher lawmaking events of American history. The Consti-

108. Seven Southern states ratified in time to be formally noticed by Secretary Seward in his Proclamation declaring the Thirteenth Amendment valid, see *supra* note 104. Only Mississippi actually rejected the Amendment. See E. McKitrick, *supra* note 99, at 169; E. Foner, *supra* note 99, at 199. I describe the remarkable presidential intervention in the ratification process in Discovering the Constitution, *supra* note 1, at ch. 7.


110. For the defense of Republican Reconstruction advanced by the Joint Committee on Reconstruction, see The Reports of the Committees of the House of Representatives, Made During the First Session Thirty-Ninth Congress 1865–66, at VII–XXI (1866). For Johnson’s assault on the legitimacy of the Rump Congress, including his February 19 veto of the Freedmen’s Bureau bill, his March 27 veto of the Civil Rights Act, his May 15 veto of Coloradan statehood, and his July 16 veto of the second Freedmen’s Bureau bill, see The Miscellaneous Documents of the House of Representatives for the Second Session of the Fifty-Third Congress 1893–‘94, at 398–427 (1895). For a general discussion, see M. Benedict, *supra* note 99, at 134–61.
gressional leadership proposed the Fourteenth Amendment as the platform on which they called upon the American people to renew the Republican mandate. Andrew Johnson used all the resources of the Presidency to mobilize constitutional conservatives, railroading around the country to denounce the legitimacy of the Rump Congress and to call upon the People to repudiate the proposed Fourteenth Amendment by returning solid conservatives to Congress.111

The result of these exercises in popular mobilization was a decisive electoral victory for the party of constitutional reform.112 This inaugurated the second stage of the constitutional debate. The returning Republicans claimed a mandate from the People for the Fourteenth Amendment; the conservatives, led by Johnson, refused to accept the idea that the People had spoken decisively on the libertarian, egalitarian, and nationalistic themes advanced by the Republican text. Johnson encouraged the Southern governments to reject the Fourteenth Amendment, generating the formalist predicaments we have already canvassed.113

The Republicans' decision to reject the validity of the Article Five veto inaugurated the third stage in the ratification process, which began with the enactment of the Reconstruction Act of March 2, 1867114 and continued through the impeachment of Andrew Johnson one year later. Here, Congress claimed a mandate from the People to destroy the autonomy of dissenting institutions—including the Southern governments, the Presi-

111. The Fourteenth Amendment was the centerpiece of the Republican campaign in 1866, while opposition to it helped Johnson rally his supporters around the "National Union" platform. In Foner's words:

For the first time in American history, civil rights for blacks played a central part in a major party's national campaign. . . . More than anything else, the election became a referendum on the Fourteenth Amendment. Seldom, declared the New York Times, had a political contest been conducted "with so exclusive reference to a single issue." And the result was a disastrous defeat for the President. Defying the usual pattern whereby the party in power loses strength in off-year elections, voters confirmed the massive Congressional majority Republicans had achieved in 1864. In the next Congress, Republicans would outnumber Democrats and Johnson conservatives by well above the two-thirds majority required to override a veto.

E. Foner, supra note 99, at 267; see also M. Benedict, supra note 99, at 188–209; E. McKitterick, supra note 99, at 448–49.

112. See M. Benedict, supra note 99, at 188–243; Discovering the Constitution, supra note 1, at ch. 9.

113. See M. Benedict, supra note 99, at 210–22; Discovering the Constitution, supra note 1, at chs. 8-9.

114. There were four Reconstruction acts, each building on its predecessors in Congress' escalating struggle with the President for authority over the process of Southern reconstruction. The first (Mar. 2, 1867) established military government in the South, required Southern states to ratify the Fourteenth Amendment and to institute constitutional provisions for black male suffrage before they would be allowed to participate fully in the Union again, and mandated the eligibility of those disqualified under the Fourteenth Amendment to vote for or participate in either the state constitutional conventions or the new state governments. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428. The Supplementary Reconstruction Act of Mar. 23, 1867, detailed the procedures the Union Army should use in reconstructing new multi racial governments in the South. Act of Mar. 23, 1867, ch. 6, 15 Stat. 2. The third Reconstruction Act was an attempt by Congress to overrule Andrew Johnson's obstructionist behavior. Act of July 19, 1867, ch. 30, 15 Stat. 14–16. The fourth Reconstruction law allowed a simple majority of participating voters to ratify new Southern constitutions regardless of the proportion of registered voters who boycotted the election. Act of Mar. 1, 1868, ch. 25, 15 Stat. 41.
dency, and the Supreme Court—that remained under control of constitutional conservatives, if these dissenting institutions did not recognize the validity of the Fourteenth Amendment. 115 During this period—call it the challenge to dissenting institutions—it remained open for the dissenters to continue resistance in the hope that they could return to the American People in the next round of national elections and gain the decisive victory at the polls that had thus far eluded them.

And resist is precisely what the dissenters continued to do until they confronted their moment of truth in March of 1868, 116 when the voters in the South, the constitutional conservatives on the Supreme Court, and, most crucially, President Andrew Johnson faced some of the most pivotal decisions in our constitutional history. 117 The central event was the President's impeachment trial, precipitated by Johnson's effort to slow down the ratification of the Fourteenth Amendment so that its propriety could remain a campaign issue in the upcoming 1868 elections. Would the President continue to resist the Republicans' vision of the Union at the cost of grievously injuring the Presidency by allowing the Republicans to convict him of high crimes and misdemeanors? Or would he try to save the Presidency by changing course and indicating to the Senate and the country that he would no longer resist Reconstruction on the basis of the Fourteenth Amendment? 118

The President chose the latter course, inaugurating the final stage—which I shall call the "switch in time." He called a halt to his efforts to obstruct Congress' attempt to replace the all-white governments that had rejected the Amendment with black and white governments willing to ratify it. No longer did he use his power as Commander-in-Chief to frustrate Congressional demands for a speedy reconstruction. It was only after Johnson began to allow the reconstructed legislatures to ratify the Amendment that he gained sufficient Republican support at his impeachment trial to avoid conviction by a single vote in the Senate. 119 Virtually

115. See Discovering the Constitution, supra note 1, at chs. 9-10. For published accounts of particular aspects of the complex constitutional struggle, see M. Benedict, supra note 99, at 210-314; C. Fairman, Reconstruction and Reunion, 1864-1888, at 253-618 (1971).

116. See Discovering the Constitution, supra note 1, at ch. 10. For a published account, see M. Benedict, The Impeachment and Trial of Andrew Johnson 26-60 (1973).

117. See Discovering the Constitution, supra note 1, at ch. 10. For more accessible accounts, see M. Benedict, supra note 99, at 210-314; C. Fairman, supra note 115, at 233-618.

118. The best modern account of the trial and its constitutional context is provided by M. Benedict, supra note 116. Happily, it is broadly consistent with the presentation presented here and in Discovering the Constitution, supra note 1, at ch. 10.

119. There is substantial evidence suggesting that Johnson's "switch in time"—allowing reconstruction and Southern ratification of the Fourteenth Amendment to go forward—was instrumental in obtaining the crucial votes of acquittal from several of the seven Republican Senators who together provided his one-vote margin of victory at the impeachment trial. For example, Senators William Pitt Fessenden and James W. Grimes urged one of the President's attorneys, William Maxwell Evarts, to recommend the presidential appointment of conservative Gen. John M. Schofield, military commander of Virginia, as Secretary of War. See 3 G. Welles, Diary of Gideon Welles 364-65 (May 21, 1868), 409-10 (July 21, 1868) (J. Morse, Jr. ed. 1911). Schofield accepted the President's
simultaneous "switches" by the other dissenting institutions also allowed
them to preserve their institutional autonomy so long as they unequivocally called off their resistance to the higher lawmaker claims of the Repub-

clican Rump Congress and recognized that We the People demanded a 
reconstructed Union on the basis of the Fourteenth Amendment.\textsuperscript{120} As a consequence of all these switches, a new institutional situation emerged in the months after the impeachment trial. Instead of escalating the constitutional conflict yet further, all the previously dissenting parts of the government—the Presidency, the Court, the Southern states—now accepted (however reluctantly) the higher lawmaker pretensions of the Recon-
struction Congress and allowed the ratification of the Amendment to pro-
ceed. This new \textit{unanimity among the branches} gained its formal express-


ion in the remarkable story we have already told about Secretary of State
Seward's two July Proclamations concerning the Fourteenth Amendment. After using his first Proclamation to express the Johnson Administration's continuing legal doubts about ratification, the second Proclamation dramatized the fact that, after the four-stage process we have reviewed, the Executive was no longer prepared to deny that the Reconstruction Con-
gress spoke for the People in nationalizing the process of ratifying the Fourteenth Amendment.

3. \textit{Reconstruction as a Precedent}

So much for a (bare-bones) summary of the higher lawmaker process that looms behind every legal citation to the Thirteenth and Fourteenth Amendments. Rather than consigning these facts to the hidden recesses of the legal mind, isn't it time for us to confront them? To recall Chief Jus-

\footnote{120. One of the most fascinating parts of this story will require us to piece together the relationship between the President's "switch" in response to the impeachment trial, the Court's "switch" in \textit{Ex parte} McCordale, 74 U.S. (7 Wall.) 506 (1869), and the "switch" by a minority of Southern white voters that permitted the successful reconstruction of state governments in the South willing to ratify the Fourteenth Amendment. See Discovering the Constitution, supra note 1, at ch. 10.}

offer conveyed by Evarts, on condition that Johnson desist from obstructing Reconstruction. When the Senate received the Schofield nomination on April 24, it sparked obvious interest. Fessenden and Grimes also told Evarts they would feel more comfortable voting to acquit Johnson if the President promised to refrain from seeking revenge against Republicans and to stop obstructing Reconstruction. \textit{See M. Benedict, supra note 99, at 310.} Johnson personally reassured Grimes. \textit{See id. at 310-11; J. Sefton, Andrew Johnson and the Uses of Constitutional Power 180 (1980).} On May 4, Senator Edmund G. Ross of Kansas told acting Attorney General Orville H. Browning that he wanted the President to forward the Arkansas and South Carolina constitutions to the Senate, thereby demonstrating his acquiescence to congressional Reconstruction. On May 5, Johnson complied. \textit{See 2 O. Browning, The Diary of Orville Hickman Browning 195 (May 5, 1868) (J. Randall ed. 1933); G. Welles, supra, at 347 (May 5, 1868); 6 A Compilation of the Messages and Papers of the Presidents, supra note 109, at 632.} For a general overview, see \textit{M. Benedict, supra note 99, at 310.}

By May 16, when the Senate voted to acquit on the critical eleventh article of impeachment (with the help of Fessenden, Grimes, and Ross), six ex-Confederate states (Florida, Louisiana, Georgia, North Carolina, South Carolina, and Virginia) had ratified Reconstruction constitutions in a period of a little over a month and without much strenuous opposition from the President. \textit{See M. Benedict, supra note 99, at 311; E. McPherson, supra note 97, at 328-34.}
tice Hughes, they provide us with "historic precedents," which we are no more justified in ignoring than *Marbury v. Madison*. When we look closely at the actual path travelled by the Reconstruction Republicans, instead of trying to force their higher-lawmaking experience to fit the pattern specified in Article Five, we can see that their innovations add up to a legitimating process that is far more nationalistic than any authorized by the Federalists.

This nationalized process relied on two structures set in place by the Founders, but given new meaning during Reconstruction. First, the Republican pattern involved the rise of the *separation of powers* to prominence in higher lawmaking. Under the original Federalist Constitution, the basic building block for higher lawmaking was the division of powers between the national government and the states. While the separation of powers between Congress, President, and Court was central in normal lawmaking on the national level, it played no comparable role in the Federalist understanding of higher lawmaking. In the aftermath of Civil War, however, the contending constitutional movements transformed the national separation of powers into a process through which the protagonists might test each others' claims to a decisive "mandate" from the People on behalf of their rival visions of the reconstructed Union.

Second, the rise of the separation of powers led the contending movements to give a new meaning to the *national elections* that are a regularly scheduled part of the constitutional calendar. While the ideological meaning of these elections is normally diffused by a host of local and regional issues, a prolonged period of constitutional conflict in Washington may induce the protagonists to try to break their impasse by mobilizing their forces across the country in an effort to oust their opponents from positions of strength in the national government. When this leads to a clear and decisive victory for one side, as in 1866, the terms of the struggle for higher lawmaking authority shift: The winners claim a mandate for their constitutional initiative from the People and may demand that the dissenting branches reconsider their previous patterns of resistance. When faced with threats by the victorious branch(es) to their normal operation in the separation of powers, the dissenting branch(es) may find it more appropriate to recognize that the victors *do* speak for the People than to continue resisting in the hope that the voters will come to their assistance at the next election.

These two institutional structures—the separation of powers and national elections—interacted to form the process of constitutional debate and decision first elaborated during Reconstruction. As we saw in the struggle between Johnson and the Rump Congress, this process has four characteristic stages. During the first stage—constitutional impasse—the constitutional protagonists contend with one another on relatively equal terms from different citadels of strength in the separation of powers. The
effort to break the impasse is the second stage: a triggering election in which the contenders mobilize their forces in the country for a decisive political victory. While such victories often prove elusive, occasions do arise when one contender can plausibly claim a "mandate" from the People on behalf of its constitutional initiative. If, as will often happen, the electoral losers in the other branches remain skeptical of the breadth and depth of their opponents' popular support, the electoral victors may provoke a third stage in the transformative process by challenging the normal institutional independence of dissenting branches. During this third stage—the challenge to institutional legitimacy—the incumbents of the challenged branches are faced with a hard choice. As in the impeachment trial of Andrew Johnson, they must decide whether they should continue to resist the victors in the hope that the People will vote the reformers out of office at the next regularly scheduled national election or whether they should protect the autonomy of their office by conceding that the People had indeed given their opponents a mandate for decisive constitutional change.

The final stage of the process—the "switch in time"—is reached if the dissenting branches decide that further resistance will only lead to institutional destruction rather than electoral vindication. As a consequence, they retain institutional autonomy in the system of separation of powers—but only on the understanding that they recognize that the People have indeed decisively supported the reformers' vision of the Republic. If a simple schema will help:

Constitutional Impasse → Triggering Election → Challenge to Institutional Legitimacy → Switch In Time

It is this four part schema, more than the one sketched by the rules of Article Five, that structured the higher lawmaking process by which the American people defined, debated, and ultimately legitimated the Republicans' Fourteenth Amendment. Rather than contenting ourselves with a professional narrative that consigns it to oblivion, constitutional lawyers should learn to see these changes in higher lawmaking process as part of the very same act of national reconstitution expressed by the new substantive principles introduced by the Republicans. Reflect on the opening words of the Fourteenth Amendment. This great text begins by reversing Dred Scott's state-centered definition of national citizenship: Henceforward Americans would be citizens of the nation first, and automatically citizens of any state in which they chose to reside. This new primacy of national citizenship could not have gained a place through the traditional higher lawmaking process that gave the states an equal partnership with the nation in defining the terms of our constitutional identity. Instead, it won its place only through a lawmaking process that gave a new primacy to our national institutions—notably, the separation of powers and the system of national elections. The transformations in our higher lawmak-
ing process and higher law substance went hand-in-hand. Both expressed the new nationalistic sense of ourselves as We the People of the United States that Americans won in the aftermath of the bloodiest struggle for national self-definition of the nineteenth century.

4. From Reconstruction to New Deal

We have reached the final step in our critique of the reigning professional narrative. The first step recalled the Supreme Court's remarkable refusal, in Coleman v. Miller, to endorse the view that the Reconstruction Republicans ran down the higher lawmaking tracks providentially laid down by the Founding Federalists in Article Five. The second step reported the results of my effort to take up Chief Justice Hughes' invitation to examine the "historic precedents" surrounding the Civil War Amendments. This investigation suggested that the Republicans were no less creative in their adaptation of the higher lawmaking process than they were in their transformation of the higher law substance of our constitutional identity. Having seen how their nationalizing use of the separation of powers, supported by their successful appeal to the People in the 1866 elections, unfolded in a four-stage process of constitutional debate and decision, we can take the final step. This involves grasping the remarkable ways in which the New Deal Democrats' struggle to constitutionalize activist national government in the 1930's tracked the four-stage process through which the Reconstruction Republicans constitutionalized the Fourteenth Amendment. 121

Roosevelt's first term culminated in a constitutional impasse between the branches similar to the one that set constitutional reformers and constitutional conservatives at loggerheads in 1866. Once again, the separation of powers provided a key mechanism for constitutional articulation—allowing the conservatives institutional space within which they might raise basic questions of legitimacy and challenge the reformers to go to the People if they hoped for ultimate success. As in 1866, this confrontation led the reformers to use the next regularly scheduled election to

121. In contrast to Reconstruction, contemporary scholarship exploring the constitutional dimensions of the New Deal remains weak. Professors Freund and Leuchtenburg have contributed useful articles. See Freund, Charles Evans Hughes as Chief Justice, 81 Harv. L. Rev. 4 (1967); Leuchtenberg, FDR's Court Packing Plan: A Second Life, A Second Death, 1985 Duke L.J. 673; Leuchtenburg, Franklin D. Roosevelt's Court "Packing" Plan, in Essays on the New Deal 69 (H. Hollingsworth & W. Holmes eds. 1969); Leuchtenburg, The Origins of Franklin D. Roosevelt's "Court-Packing" Plan, 1966 Sup. Ct. Rev. 347. The standard accounts dealing with the constitutional climax—the "court-packing" crisis—provide a sense of drama and chronology, but little more. See J. Alsop & T. Catledge, The 168 Days (1938); L. Baker, Back to Back: The Duel Between FDR and the Supreme Court (1967). R. Jackson, supra note 13, is important, but more as testimony by an engaged participant than as an effort at comprehensive analysis. P. Irons, The New Deal Lawyers (1982) provides some useful insights. But, considering its importance, the subject remains incredibly underresearched. I have no doubt that my own understanding has been greatly disadvantaged as a result. See Discovering the Constitution, supra note 1, at chs. 12-13.
break the constitutional impasse. When the New Dealers gained a crushing victory in the presidential and congressional elections of 1936, they claimed a mandate from the People in support of their new activist vision of American government.

As with the Reconstruction Republicans, the New Deal Democrats made their claim of a popular mandate concrete by threatening the leading preservationist branch with rapid personnel change if it continued to resist the substance of the reformers’ constitutional initiative. Because the principal branch opposing the Fourteenth Amendment was the Presidency, the Republicans used the impeachment process to back up their demand for the constitutionalization of their reforms. Because the leading preservationist branch in the 1930’s was the Court, the Democrats threatened court-packing if the Old Court continued to defend traditional principles of freedom of contract and limited national government. While impeachment and court-packing differ in legal form, their constitutional function was the same. In both cases, the reformers’ threat of personnel change obliged the leading conservative institution to confront a distinctive, and fundamental, question: Should it continue supporting the older constitutional tradition at the risk of permanent damage to its institutional autonomy, or had the time come to recognize that We the People had given considered support to the initiatives elaborated by the party of constitutional reform, and that further resistance would be counterproductive?

In both cases, the decision of the conservative branch was the same. Just as President Johnson responded to the threat of impeachment by ending his resistance to the Fourteenth Amendment and allowing formal ratification to proceed, so too did the Old Court make its famous “switch in time.”

During both Reconstruction and the New Deal, the victorious reformers responded to the “switch” by allowing the conservative branch to retreat without permanent damage to its institutional position within the separation of powers. Both impeachment and court-packing narrowly failed in the Senate after the dissenting branch made it clear that it had ended its principled resistance. The constitutionalization of fundamental reform ends with all three branches now prepared to conduct normal politics on the basis of the revised constitutional vision that had been so bitterly controverted during the preceding period of supercharged debate, mobilization, and decision.

5. What Was New About the New Deal?

If I am right, the way the American people defined, debated, and finally affirmed the legitimacy of the Democratic vision of activist government in the 1930’s is best seen as a variation on the “historic precedents”
established by the Republicans in the 1860's. It was the Reconstruction Republicans, not the New Deal Democrats, who first combined the separation of powers with decisive electoral victories to gain the constitutional authority to speak in the voice of We the People of the United States—a voice distinct from, but no less authentic than, the voice of We the People of the United States expressed through the Federalist rules of Article Five. A basic complaint about the myth of rediscovery is that it prevents us from confronting these more nationalistic processes of constitutional self-definition in a lawyerly way. It is one thing to speak in broad generalities about the "constitutional revolution" of the 1930's. But can we be more precise than that? How, in particular, did the Democrats' twentieth century exercise in higher lawmaking differ from their Republican predecessors? 

Most fundamental, perhaps, is the different way Reconstruction Republicans and New Deal Democrats subordinated the states in nationalizing the higher lawmaking system. As we have seen, the Republican Congress of the 1860's went so far as to destroy state governments that vetoed the Fourteenth Amendment and to bar reconstructed Southern governments from sending representatives to Congress until they had complied with the Congressional demand for ratification. From one point of view, this Republican nationalization of higher lawmaking was far more traumatic than anything attempted by the Democrats. In contrast to the 1860's, a profound constitutional transformation occurred in the 1930's without the shattering use of the national army to destroy dissenting state governments.

From another point of view, however, the Democratic variation may seem more nationalistic. At least the Republicans accepted the need to gain—if in decidedly un-Federalist ways—the formal assent of three-fourths of the state governments to their constitutional initiative. Indeed, the extremity of their measures testify to the importance they placed on inducing state shows of consent to the new vision of the Union articulated in Washington D.C. In contrast, the New Deal version of the four-stage process of constitutional debate and decision cut the states out of the higher lawmaking process entirely. Rather than submit a constitutional proposal for ratification by the states, the New Dealers finally prevailed on the Supreme Court to constitutionalize their new vision of activist national government without the need for formal amendments.

At the same time they were acting independently of the states, the Democrats were ringing new changes on the Republicans' innovative uses of the separation of powers. The first, and most important, innovation involves the role of the Presidency in the higher lawmaking system. While the Republicans used the Presidency to play crucial and unprecedented roles in the constitutionalization of Emancipation, they were obliged to cope with the constitutional implications of Andrew Johnson's defection
from the reformist coalition. Having lost control of the Presidency, the Reconstruction Republicans could not try to constitutionalize their vision of the Union by seeking to pack the Court. Indeed, with the conservative Johnson in the White House, they moved in the opposite direction from the one that Roosevelt would take—enacting a remarkable "court-shrinking" bill to prevent the President from filling vacancies with constitutional conservatives who would give new vitality to the President's struggle to block ratification of the Republican constitutional initiative.  

In contrast, the New Deal Democrats did not have to cope with the assassination of their sitting President and his replacement by a conservative at a crucial point in their struggle to constitutionalize a reformist vision of the Union. With the Democrats in control of the Presidency as well as Congress, they did not have to follow the example of the Republican Congress and threaten state governments with destruction if they sought to invoke their formal Article Five veto over the Democrats' activist constitutional initiatives. Instead, they could develop a model of presidential leadership, in which Roosevelt put together his increasing support in Congress, along with a series of electoral victories, to win the Supreme Court's support for a transformation of constitutional doctrine.  

As we have seen, this effort climaxed in Roosevelt's use of the New Deal's overwhelming electoral triumph of 1936 to claim a mandate from the People for activist national government. Since reformers were domi-

122. The Act of July 23, 1866, shrunk the Court to seven as sitting Justices retired, making it impossible for Johnson to fill vacancies with constitutional conservatives intent on declaring congressional Reconstruction unconstitutional. Act of July 23, 1866, ch. 210, 14 Stat. 209. (Indeed, Johnson had already nominated his conservative Attorney General to a vacancy that was eliminated by the Act. See C. FAIRMAN, supra note 115, at 169.)  

Once Johnson was replaced by Grant, the Congress immediately re-expanded the Court to nine. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44. This enabled Grant to appoint Justices Strong and Bradley, who immediately voted to overrule the seven-man Court's 4–3 decision invalidating paper money, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870), by casting the deciding votes in the Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1872). This remarkable story is in many respects analogous to the "switch in time" of 1937, with the crucial difference that the leading reformist institution in the Reconstruction drama was Congress, not the presidency. For a good blow-by-blow account, see C. FAIRMAN, supra note 115, at 677-775.  

123. I should emphasize that Roosevelt finally became very explicit about the character of his transformative effort. Consider, for example, this speech given just before the Senate hearings on his court-packing proposal:  

In this fight, as the lawyers themselves say, time is of the essence. In three elections during the past five years great majorities have approved what we are trying to do. To me, and I am sure to you, those majorities mean that the people themselves realize the increasing urgency that we meet their needs now. Every delay creates risks of intervening events which make more and more difficult an intelligent, speedy, and democratic solution of our difficulties. Roosevelt, If We Would Make Democracy Succeed, I Say We Must Act—NOW!, in 1937 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 113, 120 (1941); see also Roosevelt, A "Fire-side Chat" Discussing the Plan for Reorganization of the Judiciary, id. at 122–33, for similar rhetoric, and for a fascinating defense of court-packing as a transformational device superior to Article Five amendments. During the opening days of the Senate hearing, Assistant Attorney General Robert Jackson elaborated on the President's public speeches in a remarkable formal presentation, Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary, 75th Cong., 1st Sess. 37–51 (1937), which is well worth careful study.
nant both in the White House and on Capitol Hill, this demand took a
very different form from the one made by congressional Republicans two
generations earlier. Rather than trying to replace a conservative President
with a committed reformer, the Democrats would try to add six reform
Justices to the conservative Court.

This demand, in turn, led to a final New Deal innovation. When the
Justices responded to the reformers' challenge to the Court's legitimacy
with a Johnson-like “switch in time,” they obviated the need for the
Democrats to frame constitutional initiatives in the crisp terms we associ-
ate with Article Five amendments. Instead, the Court signaled its willing-
ness to join the New Deal coalition in the late 1930's with a series of
**transformative opinions** codifying the doctrinal principles of the constitu-
tional revolution. Thus, when modern lawyers seek to memorialize the
constitutionalization of activist national government in America, they turn
not to formal Article Five amendments, but to opinions of the New Deal
court decisively rejecting the landmarks of the *Lochner* era. Despite the
difference in legal form, however, these opinions have the weight and
staying-power associated with Article Five texts. Modern judges take the
charge of *Lochnerizing* as seriously as they take the charge of misinter-
preting the meaning of “equal protection.” Of course, jurists disagree
about the precise meaning of the repudiation of *Lochner*, just as they dif-
fer as to the best theory of the First Amendment. But there is one thing no
judge would ever think of doing: seriously consider whether he or she
should *overrule* the transformative opinions of the 1930's that make *Loch-
ner* such a powerful antiprecedent in modern constitutional law. These
ringing validations of activist national government are a fundamental part
of our constitutional scheme—and cannot be repealed short of a higher
lawmaking process comparable to the one led by President Roosevelt in
the 1930's.

To sum up: The New Deal model is nationalistic in a different way
from its Reconstruction predecessor. It relies on the Presidency, not the
Congress, as the principal institution claiming a transformative mandate
from the People. Partly as an institutional consequence, it authorizes the
Supreme Court to codify the precise legal implications of this popular
mandate in a series of transformative opinions which, even in an age not
otherwise known for its respect for *stare decisis*, have a juridical authority

124. If impeachment had been successful, Johnson's successor would have been the Radical Re-
publican President of the Senate, Benjamin Wade.

125. The key provision of Roosevelt's plan created a new position on any federal court if the
incumbent judge did not resign upon reaching the age of 70 years and 6 months. Since there were
then six Supreme Court Justices older than this, it was up to them whether they would remain on an
expanded bench or resign and keep the Court's size below 15. In either event, the President
could—with the approval of the Senate—make six transformative appointments. See Senate Comm.
on the Judiciary, Reorganization of the Federal Judiciary, S. Rep. No. 711, 75th Cong.,
1st Sess. 1–2 (1937).
equal to the most important legal formulae enshrined in our formal constitutional texts.

D. Conclusions

I hope this sketch raises three kinds of questions. The first is historical, and involves more than simply filling details in the Reconstruction and New Deal patterns I have summarized. Beyond thick description is the question of constitutional self-consciousness: To what extent did the leading actors, and the People more generally, recognize that they were changing the rules of higher lawmaking as they sought to revise the substantive principles of American government? The only way to find out is to confront the documentary legacy left to us by Americans of these two periods: Do they reveal that Reconstruction Republicans and New Deal Democrats knew what they were doing, and that it is only the modern professional narrative that obliterates their achievement?

The second question is normative. Once we grasp the remarkable ways that Reconstruction and New Deal created new forms of higher lawmaking that supplement the Federalists’ effort in Article Five, we should ask how well the revised system serves the basic principles of dualist democracy. This is a good time to take this question seriously—since, as I have argued elsewhere,\textsuperscript{126} the failed nomination of Robert Bork has dramatized important weaknesses in the presidentially-led system of constitutional-change-by-transformative-judicial-appointments that we have inherited from the New Deal.

The final Part of this essay, however, takes up a third task. Here I shall assume, arguendo, that you have been convinced by my effort to retell our constitutional past in a way that dispenses with the myth of rediscovery that obscures the creative character of the New Deal. What follows from this act of narrative revision so far as the modern Supreme Court is concerned?

III. Doctrine: The Necessity of Synthesis

A. The Interpretive Turn

The last Part challenged the official story lawyers tell about the Founding, Reconstruction, New Deal. The reigning narrative arrays these transformative periods in descending order of constitutional creativity: The Founding was constitutionally creative both in higher lawmaking process and in higher law substance; Reconstruction was creative only substantively; and the New Deal was not creative at all. I have called this a two-solution narrative, because it recognizes only the Founding and Reconstruction as the source of new constitutional solutions and disparages the

\textsuperscript{126} See Ackerman, \textit{supra} note 74, at 1182–84.
New Deal through a myth of rediscovery. My aim has been to lay the foundation for a three-solution narrative—in which we come to recognize both Reconstruction Republicans and New Deal Democrats as equals of the Founding Federalists in creating new higher lawmaking processes and new substantive solutions in the name of We the People of the United States.

This Part, in turn, suggests how the three-solution narrative provides new resources for understanding the modern Supreme Court’s effort to make sense of the Constitution left to us after the New Deal. My argument proceeds by inviting you to reflect on a central interpretive problem raised by the old two-solution narrative—the problem of synthesis—and then consider the ramifying implications of your solution to this problem within the new framework of a three-solution narrative. This effort, I hope, will allow you to place some of the most important modern opinions written by the Supreme Court in a new, and more comprehending, light. My test cases will be Brown and Griswold; but, if I am at all successful, you will ask yourself whether a similar approach enlightens other landmarks.

B. The Problem of Synthesis

I shall introduce the problem of synthesis by going back to a time when it did not exist. The time was 1803; the case was Marbury v. Madison. Whatever problems John Marshall had in reaching his decision, he could suppose that “We the People of the United States” referred to a relatively concrete group of historical actors—the generation of Americans who fought the War of Independence and proceeded to codify its political meaning in the 1787 text and its early constitutional amendments. Even at this early stage, interpreting the Constitution as the deliberative product of a collectivity as vast as “We the People” was a tricky business. The Americans who supported the Federalist experiment notoriously disagreed on important matters. Any effort to elaborate the constitutional principles that animated the Founding generation’s political practice—the intent of the Framers, if you will—necessarily involved a great deal of insight and judgment. Nonetheless, the fact that only a single generation of Americans had contributed to the proposal and ratification of the Constitution and its early amendments greatly simplified the interpretive problem confronting men like Marshall and Story. However tricky the task of interpreting the constitutional text, at least the early Federalist justices could locate it against the background of a relatively concrete political culture—one in which they themselves were born and had reached political maturity.

This focus on the higher lawmaking achievement of a single generation was shattered beyond repair by the Reconstruction Republicans. Since the Republicans had repudiated some, but not all, of the Founding genera-
tion's Constitution, the Supreme Court could no longer rest content with
the Marshallian mission of elaborating the constitutional vision of the
Americans who had fought and won the War of Independence. Instead,
the Justices were called upon by history to undertake a distinctive task of
multigenerational synthesis. This not only required them to identify the
aspects of the Federalist Constitution that had survived the Republican
critique. It also called upon them to synthesize these Federalist fragments
into a constitutional order that contained the new constitutional ideals af-
fermed by the Republicans in the aftermath of the Civil War.

Easier said than done. Only one thing is clear. The Supreme Court has
been acutely aware of the problem for a very long time. The very first
judicial opinion interpreting the Reconstruction Amendments opened with
an eloquent statement of the problem;127 over the succeeding 125 years,
we have accumulated an enormous amount of experience with the ways
the task of synthesis may be confronted, evaded, resolved. To take up the
question in one of its more familiar doctrinal guises, consider the problem
posed by the relationship between the Founders' Bill of Rights (time one)
and the Reconstructers' Fourteenth Amendment (time two). Nobody de-
nies that, before the Civil War, the Founding generation's commitment to
states' rights trumped their commitment to the Bill of Rights; even Mar-
shall agreed that the Bill applied only to the national government and not
to the states.128 The synthetic question is whether, and how, the Republi-
cans' achievement during Reconstruction requires us to reinterpret the
meaning of the Founding Bill. Clearly, the People of the nineteenth cen-
tury broke decisively with Founding premises—importing new nationalis-
tic, egalitarian, and libertarian strains into our higher law. How, if at all,
should our interpretation of time two's transformation alter the way we
read time one's Bill of Rights? For example, should we read the Republi-
can Amendment in the manner of Hugo Black,129 and insist that it "incor-
porated" all the rules of the first eight Amendments (but not the
Ninth?)130 and imposed them rigidly on the states?

1. The Synthetic Triangle

Now I have my own answers to such questions—and so, I am sure, do
you. For the moment, I want to suspend our interpretive disagreements to
see how our understanding of the problem of synthesis informs a host of
different issues once we take the narrative turn suggested in the preceding

127. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67 (1873) (original Constitution, and
first 12 Amendments, are now "historical and of another age," and must be synthesized with "three
other articles of amendment of vast importance [that] have been added by the voice of the people to
that now venerable instrument.").
130. See Black's inadequate discussion in Griswold v. Connecticut, 381 U.S. 479, 518-20 (1965)
(Black, J., dissenting).
part of this essay. As soon as we recognize that the New Deal Democrats, no less than the Reconstruction Republicans, successfully led the People of the United States to transform crucial elements of the constitutional status quo, we must confront the impact of this event on the constitutional principles announced during earlier episodes of constitutional politics. This three-dimensional synthetic problem is more complex than the two-dimensional inquiry suggested by a narrative that only recognizes the Founding (time one) and Reconstruction (time two) as jurisgenerative events of the first magnitude. In addition to a flow of cases raising (1) one-two problems, modern litigants are also advancing legal arguments that constantly require courts and commentators to define the doctrinal implications of the relationships between (2) the Founding and the New Deal; and (3) Reconstruction and the New Deal.

To appreciate the challenges raised by these new synthetic questions, consider how the New Deal transformed the status of economic regulation. For the first 150 years of our history, few doubted that the Founding Federalists placed a high (if not the highest) value on private property and market freedom in their general scheme of constitutional values. Since the New Deal transparently revised this Founding commitment, modern courts have had to find a way of preserving those fragments of the Founding ideal that have survived the popular repudiation of the property-oriented conception of limited government. How has the Court reinterpreted the Founding in a way that did justice to the transformation in constitutional values validated by the People in the 1930's? Call this the problem of one-three synthesis, because it involves the interpretive harmonization of the first and third great turning points in our higher lawmaking experience.

Analytically at least, this is a different problem from two-three synthesis. In reconciling Reconstruction and the New Deal, the central difficulty is posed by the Republicans' emphasis on property ownership and free contract in their own transformative effort. The Thirteenth Amendment, after all, did not guarantee suffrage to blacks; nor did the American people ever accept Thaddeus Stevens' demand for redistribution of property from rebel whites to emancipated blacks. 131 Instead, the Emancipation Amendment worked a fundamental change in the black slave's relationship to property. No longer could a person of color be treated as if he or she could be owned by others; instead, freed blacks would be constitutionally endowed with the right to acquire and transfer property in the same way that whites had long taken for granted. 132 Of course, this was a very formal and abstract freedom for blacks who had been remorselessly sup-

pressed for centuries. Moreover, the Fourteenth and Fifteenth Amendments promised blacks more than this. Nonetheless, given the place of (self-)ownership in the Republican constitutional transformation, it was hardly arbitrary for courts of the *Lochner* era to emphasize market freedoms as they set about synthesizing the meaning of the Founding and Reconstruction.

This meant that the modern Court had its work cut out for it in developing a credible two-three synthesis. No longer could the Court's interpretation of the meaning of the Reconstruction Amendments center on protecting each American's right to own and transfer private property. Instead, the Court would have to restate the meaning of Reconstruction's guarantee of "equal protection" and "due process of law" for a world in which the ownership and exchange of private property were far less central components of constitutional liberty than they had been when the Reconstruction Republicans sought to define the constitutional difference between slavery and freedom. How was this act of interpretive synthesis to be accomplished?

This two-three question is analytically distinct from the one-three question raised by a judicial effort to preserve Founding values of liberty in a post-New Deal world. It also requires a judicial confrontation with nineteenth-century legal sources that expressed political presuppositions and concerns quite distinct from those of the eighteenth-century Americans who participated in the Founding. For all their analytic and substantive differences, however, the two questions cannot be answered in isolation from one another. Important cases tend to raise both these questions, as well as those of the classic one-two variety. Of course, no Court can try to confront all the synthetic issues lurking in the background of any single case. Even the greatest opinions will isolate an aspect of the synthetic problem for intensive deliberation, leaving the rest to other courts and other cases. Nonetheless, if the process of synthetic interpretation is proceeding apace, we should expect to see modern courts grappling with the effort to triangulate a Constitution that has been transformed, and transformed again, since the Founding.

2. *The Communication Gap: A Preliminary Diagnosis*

Having defined the modern problem of synthesis, we are now in a position to glimpse the remarkable way in which the reigning two-solution narrative has operated to obstruct communication between the Court and its commentators. To define the difficulty, assume for a moment that the modern Court *has* been struggling to confront the triangular problems of synthesis generated by the discordant principles of the New Deal, Reconstruction, and Founding. If this were true, professional commentators would be the last to recognize it, for their two-solution narrative does not
allow them to define the triangular problem, let alone to assess the Court's efforts to deal with it. Instead, the professional commentators would turn a blind eye to those parts of the Court's opinions in which the Justices struggled to define the synthetic dimensions of their interpretive problem. Rather than trying to assist in the resolution of the triangular problem the Court identified, the two-solution commentators would systematically misread these passages in a variety of ways—all of which, however, would allow them to ignore the Court's ongoing effort at synthetic triangulation. Rather than engaging in a constructive dialogue, courts and commentators would suffer an odd dialectical estrangement—in which each side's questions go unanswered by the other.

However implausible this description may seem, I mean to establish its reality by rereading the Court's opinions in Brown and Griswold. Before pressing onward, personal conversation suggests the wisdom of confronting a preliminary objection: "If, Bruce, the two-solution narrative is as pervasive in the profession as you say it is, how did it ever occur to the Justices, of all people, to take on the burden of three-solution synthesis?"

I do not pretend to have gotten to the bottom of this one, but my answer comes in two parts. First, the Justices are, by and large, practical people who do not disdain the obvious with the nonchalance of the academic commentator or political ideologue. And it is perfectly obvious that the wide-ranging activist national government established in the 1930's has had a pervasive impact upon the daily operation and operative premises of American government. If the Justices take seriously the preservationist mission described by dualist principles, they will not need others to point out a need to reconcile the new activist vision decisively supported by the People during the 1930's with the earlier constitutional affirmations of the eighteenth and nineteenth centuries. Instead, in their effort to make sense of cases pressing for decision, they will point repeatedly to salient dimensions of the modern problem of synthesis.

My second answer is to refine my thesis. While we shall see the Justices struggling self-consciously with salient dimensions of the modern problem of synthesis, I do not suggest that they have launched a full scale assault on the two-solution narrative that lies at the core of their problem. Instead, their insights into its inadequacy have been intermittent and framed by the particular facts of particular cases. If the Justices are to go further than this, they should not be expected to travel on their own steam. Only if the rest of us take the synthetic questions raised by the Court with the seriousness they deserve, and contribute to a dialogue con-

133. For a brilliant analysis bearing on this problem, see Shapiro, Fathers and Sons: The Court, the Commentators, and the Search for Values, in The Burger Court: The Counterrevolution That Wasn't 218 (V. Blasi ed. 1983).

134. See supra text accompanying notes 20–21.
cerning their character, can we expect the Justices to confront the threesolution problem of synthesis with increasing insight over time.

To get the ball rolling, think harder about the single synthetic problem that our present narrative allows us to confront self-consciously—the one-two problem exemplified by the "incorporation" debate. I shall argue that some of the lessons we may learn from this debate will give us a useful perspective on the synthetic questions raised by the modern Court in opinions such as Brown and Griswold.

C. The Character of Synthetic Interpretation

Begin with a skeletal statement of the synthetic problem raised by juxtaposing the Bill of Rights with the Fourteenth Amendment. At time one, the Founding generation announced X as higher law; at time two, the Reconstructers enacted Y—where Y is partly, but not entirely, inconsistent with X. How then to put X and Y together into a meaningful whole?

1. The Lessons of the Incorporation Debate

There are two easy ways. While they seem different on the surface, both share a reductionist ambition. Rather than encouraging us to reflect upon the tension between the different visions expressed by two different generations of Americans, they wish to persuade us to solve the problem of one-two synthesis by adopting a simple rule, which promises a quick, easy, and final solution to the task of doctrinal integration.

The first reductionism solves the problem by exaggerating what was decided at time two. It would have us believe that the Reconstructers themselves seriously considered the question of synthesis and led the American People self-consciously to embrace a clear rule that authoritatively answered the question. This, most famously, is Hugo Black’s position on the incorporation issue.\textsuperscript{135} In Black’s view, the Republicans did not merely amend the Constitution (Y) in ways inconsistent with the original understanding of the Bill of Rights (X). They also led the People self-consciously to endorse something I will call a \textit{synthetic rule}—an S that explained precisely how the new Republican Y should be harmonized with the old Federalist X. According to Black, the Republicans’ S said that the Federalist Bill of Rights, which had formerly applied only to the national government, would now apply in its entirety against the states.

But there is a second way of characterizing the Republican achievement that will also yield an easy—if radically different—answer. This involves an inversion of Black’s claim: While Black looks upon the Fourteenth Amendment as if it were a \textit{comprehensive restatement} of the commitments made during both the Federalist and Reconstruction periods, this compet-

\textsuperscript{135} See Adamson \textit{v.} California, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting).
ing characterization treats the Amendment as a relatively minor change in constitutional course—something I shall call a superstatute. Superstatutes do not seek to revise any of the deeper principles organizing our higher law; instead, they content themselves with changing one or more rules without challenging basic premises. Consider, for example, our last successful effort on the Article Five track: The Twenty-sixth Amendment, enacted in 1971, commands that the voting rights of citizens who are "eighteen years of age or older...shall not be denied or abridged by the United States or any state on account of age." This Amendment did not serve as the organizing focus of the turbulent constitutional politics of the late 1960's. Instead, it was treated as a side-issue, engendered by the Supreme Court's 1970 decision in Oregon v. Mitchell. Mitchell invalidated an effort by Congress to require states to allow eighteen-year-olds to vote. Within a year, this holding was countered by the Twenty-sixth Amendment. The speed of this response was a tribute to its proponents' success in assuring all participants that the Amendment had a very narrow object: simply to overrule the Supreme Court decision and guarantee eighteen-year-olds the vote that Congress had sought to provide with its original statute. It is this kind of amendment, I think, that is rightly interpreted as a superstatute. All it did was to change the voting age from twenty-one to eighteen. Nobody looked upon it as the culminating expression of a broad-based effort to revise the foundational principles of our higher law.

While this seems pretty straightforward in the case of the Twenty-sixth Amendment, it is quite another thing to treat the Fourteenth Amendment as just another superstatute. However, many have sought to trivialize the Amendment in just this way—the most influential being Raoul Berger. In his view, the Fourteenth Amendment, like the Twenty-sixth, had a very narrow aim: to constitutionalize a single statute, the Civil Rights Act of 1866. Unfortunately for Berger, the text of the Amendment does not even mention this Act; nor does it, like the Twenty-sixth, affirmatively state, in relatively clear and operational terms, the specific rules that it wishes to constitutionalize. Instead, its first paragraph speaks the language of fundamental principle. Moreover, my own review of the documents suggests that both the Republicans in Congress, and the people in the country, were emphatically aware that these pregnant phrases legitimated a radical break in the nation's constitutional vocabulary. For the

moment, however, my concern is not with Berger's bad history, but with the merits of his abstract constitutional logic.

On this level, Berger, like Black, has an easy answer to the problem of synthesis. Once he has trivialized time two by characterizing its constitutional amendments as superstatutes, Berger has cleared a logical path for himself to insist that the comprehensive vision enunciated by the Federal-

139. By "bad," I mean really bad. One example should be enough to encourage you to treat Berger's use of sources with extreme caution. Given Berger's premises, Justice Washington's famous opinion in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) is a matter of great importance. As Berger recognizes, Washington's definition of "privileges and immunities" was quoted repeatedly in and out of Congress to define the meaning of the new clause proposed by the Fourteenth Amendment. It is therefore understandable that Berger wishes to establish that Washington's opinion is consistent with Berger's view that the Republicans in Congress understood the Amendment as a superstatute, constitutionalizing only a fixed list of rights previously enacted in the Civil Rights Act. Unfortunately, he achieves this end by selective quotation and italicization so egregious that it shokes confidence in his reliability. Here is what Berger says (I place in brackets parts of Washington's opinion that Berger conceals from the reader by the simple expedient of replacing Washington's words with ellipses):

We feel no hesitation in confining [italics not in original] these expressions to those privileges and immunities which are, in their nature, fundamental [italics not in original] . . . . They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. [These, and many others which might be mentioned, [my italics] are, strictly speaking privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." But we cannot accede to the proposition . . . . that . . . . the citizens of the several states are permitted to participate in all [emphasis not in original] the rights which belong exclusively to the citizens of any other particular state. Compare R. Berger, supra note 137, at 31–32 with Corfield, 6 F. Cas. at 551–52. Now the great abstraction and sweep of Justice Washington's statement is itself not very hospitable to Berger's view of the clause as a superstatute. But I am not concerned here with matters of good-faith dispute. I am concerned with Berger's basic ethics as an historian: Why did he stop quoting just at the point where Justice Washington explicitly says that he is not presenting an exhaustive list of the rights protected by the concept of "privileges and immunities"? Obviously, including this sentence would have hurt Berger's case, for it would suggest that every time the participants quoted Corfield they repeated Justice Washington's express warning that "privileges and immunities" could not, as Berger suggests they could, be reduced to some closed list of rights susceptible to codification in a superstatute. But this is hardly a reason that should persuade a responsible historian to mislead his readers by an act of selective quotation.

I am also very disturbed by Berger's use of italics to suggest that Washington is emphasizing the limited character of his construction of "privileges and immunities" at the same time he is excising parts of the text which explicitly endorse a more expansive interpretation. This kind of shoddy work on a source as crucial as Corfield is inexcusable.

I make this point here only because I fear that otherwise the interest I take in Berger's methodological views might help enhance the influence of a book that, even by the standards of lawyers' history, seems to me exceptionally narrow and tendentious in its treatment of the sources. For correctives (that are not free of opposite exaggerations), see the sources cited supra at note 138.
ists at time one survived the Civil War essentially intact. While this argument leads him to take very different substantive positions from Black, Berger has more in common with his great antagonist than he supposes. He, no less than Black, asserts that the People at time two self-consciously adopted a particular set of S-rules that once and for all resolved the tensions between time one and time two. They differ only on their characterization of the S-rules. Black believes that the People authoritatively adopted a rule incorporating all the guarantees of the Bill of Rights, while Berger believes that the People looked upon the Fourteenth Amendment as a superstatute that changed the Founding only in the "precise" ways enumerated in the Civil Rights Act.

2. Transformative Amendments—And How to Synthesize Them

Now I hasten to add that I have absolutely nothing against easy answers. Life and law are complicated enough without needlessly complexifying them. My problem with both Black and Berger is that their competing answers, while easy enough, are false to the historical character of Republican Reconstruction. The Civil War Amendments were popularly understood during Reconstruction as much more than the series of narrow superstatutes Berger imagines; at the same time, they represented a good deal less than the comprehensive restatement Black invokes to solve the one-two problem.\(^{140}\) Rather than restricting ourselves to Black-Berger extremes, we require a richer set of intermediate categories to express the kind of constitutional break effected by the Republican amendments.

a. Transformative Amendments

This is my aim in characterizing them as transformative amendments. In contrast to superstatutes, such amendments do not contemplate a change in a few higher-law rules; they are the product of a generation's principled critique of the constitutional status quo—a critique that finally gains the considered support of a mobilized majority of the American people. In contrast to a comprehensive restatement, the leaders of the constitutional movement have not made a sustained and self-conscious effort to define how their new principles relate to the full array of older constitutional ideas. While the transformative constitutional movement obviously aims to repudiate some of the fundamental principles of the older constitutional order, the impact of its new ideals on a host of other traditional

\(^{140}\) A recent student of the debates summarizes the matter well: "The debates on the Fourteenth Amendment were, in essence, debates about high politics and fundamental principles—about the future course and meaning of the American nation. The debates by themselves did not reduce the vague, open-ended, and sometimes clashing principles used by the debaters to precise, carefully bounded legal doctrine. That would be the task of the courts . . . ." W. Nelson, supra note 138, at 63. For the classic, narrowly-focused critique of Black's thesis, see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949).
principles has not yet been worked out in a thoroughgoing and considered way. Perhaps one or another reform politician has ventured one or another opinion on these synthetic issues. But even leading reformers do not feel themselves obliged to resolve their synthetic differences before proffering their transformative amendments to the People. While adoption of the amendments certainly signifies mobilized support for the transformative principles expressed by the new amendments, it cannot be said to suggest decisive support for a particular synthetic rule.

All very well and good, but where does this leave the problem of synthesis? If easy answers, of the Black or Berger type, mischaracterize the transformative aspirations of Reconstruction, how to harmonize time one and time two into a doctrinal whole?

b. *Principled Synthesis*

By an ongoing judicial effort to confront the tensions between Founding and Reconstruction in a self-conscious way, and then to elaborate doctrinal principles that do justice to the deepest aspirations of each. Fancy talk? An impossible dream?

Perhaps. But consider the way that the structure of constitutional litigation invites the judges to take seriously the ideal of *principled synthesis*. When rules are clear, few have the incentive to bear the costs of litigation; it is principally when good lawyers are themselves uncertain that they will find it impossible to settle disputes without pressing the matter to a final judgment by the Supreme Court. This means that the Court will be fed a steady diet of cases raising the problem of one-two synthesis. For it is precisely these cases that will seem peculiarly unsettleable without judicial guidance. By hypothesis, lawyers on both sides will find a rich lode of principle to support their side of the argument: One side, call it the plaintiffs, will predictably assert that the principles of the 1860's should be read in an expansive way—for that is the way they will win their lawsuit; the defendants, for the same strategic reasons, will insist on an expansive reading of the principles established at the Founding. Moreover, since the relationship between time one and time two has so many facets, Justices never try to resolve the entire problem in one massive stroke. Instead, we can expect a dialogue over time, in which early efforts at judicial synthesis serve as precedents in a continuing legal conversation seeking a deeper understanding of the tension-filled relationship between time one and time two.

This, at any rate, is the way I think the courts have gone about their synthetic exercise over the last 125 years. While the principled effort to synthesize time one and time two has taken many revealing twists and turns, at no point have the Justices supposed that some simple rule of the Black-Berger variety authorized them to escape the burden of synthesis.
One pressing task, then, is to analyze the strengths and weaknesses of the different approaches to one-two synthesis that have competed with one another through judicial history. For the present, I will rely on the synthetic sensibilities you have developed in your own efforts at constitutional understanding. This will allow us to proceed immediately to the main question: Can we detect, in the half-century since 1937, interpretive activity analogous to one-two synthesis when it comes to integrating the transformative revision of constitutional principle achieved during the New Deal into the older affirmations inherited from the eighteenth and nineteenth centuries?

c. **Synthetic Triangulation**

An affirmative answer allows a new perspective upon today’s Constitution, as it has been elaborated by the Supreme Court during the half-century since the New Deal. Speaking broadly, this judicial effort has been subjected to two very different forms of popular and academic appraisal. The first school of thought is historicist: Do the great modern decisions comport with the original understanding with which the American people enacted one or another principle into higher law?\(^{141}\) The second is more present-oriented. It does not (necessarily) disdain the effort by modern judges to look backward into the past and interpret the higher law decisions made by earlier generations of Americans; but it does deny that this backward-looking interpretive exercise is the alpha and omega of judicial method. Instead, advocates of the “living constitution” assert that the Court legitimately supplements backward-looking interpretations with a self-conscious effort to express the moral aspirations of *today’s* Americans.\(^{142}\) Needless to say, the debate between the historicists and the partisans of the living constitution can be pursued on any number of levels—from philosophy to television punditry.\(^{143}\)

When dealing with lawyers, however, it is always a mistake to ignore the practical stakes. On this level, the organizing anxiety seems plain enough. However much historicists differ from one another, their methods quite regularly lead them to question—sometimes ostentatiously, sometimes quietly—the greatest cases of the modern period: *Reynolds v. Sims*\(^{144}\) guarantee of equality in the political process, *Griswold v. Connecticut’s*\(^{145}\) guarantee of procreative freedom, even *Brown v. Board of Education’s*\(^{146}\) assertion of equality between the races. It is these anxieties


\(^{143}\) The philosophical side of the debate has been reinvigorated recently by the publication of R. Dworkin, *Law’s Empire* (1986).

\(^{144}\) 377 U.S. 533 (1964).

\(^{145}\) 381 U.S. 479 (1965).

\(^{146}\) 347 U.S. 483 (1954).
about the interpretive foundation of modern law that fuel advocates of the living constitution: If Reynolds or Griswold, or even Brown, is threatened by an exclusive emphasis on historicist methods, perhaps it is historicism that should be jettisoned rather than one or more of these great decisions? Aren’t these decisions great precisely because they appeal to, and help shape, the moral aspirations of Americans of today, regardless of their connection to decisions made the day before yesterday?

I believe that the historicizing interpretivist has many more resources available to her than this anxiety-provoking question implies. The reasons why historicists have failed to sympathize with the modern Court have more to do with their unthinking acceptance of a two-solution narrative than with the Court’s repudiation of historicism. This will be the point of the interpretations of Brown and Griswold which follow. If we make the effort to listen to the Justices in these cases, we will hear lots of things that neither of the traditional schools has noticed. In both cases, the Justices are not engaging in the aggressive moralizing favored by advocates of a living constitution. Nor are they incompetently playing the two-solution game presupposed by the typical historicist. Instead, they are asking the kinds of synthetic questions that all of us should raise as we try to integrate the constitutional achievements of the Founding, Reconstruction, and New Deal into a principled doctrinal whole. To put my thesis in a single line: Brown represents a fundamental act of two-three synthesis—beginning the long effort to understand the Republicans’ requirement of equality in a post-New Deal world of activist government; Griswold represents an analogous act of one-three synthesis—initiating an effort to understand the Founding Bill of Rights in a post-New Deal world in which property and contract no longer serve the libertarian functions presupposed by the eighteenth century.

D. Brown as Interpretive Synthesis

Surely, if the opinion of the Court in Brown was intended to breathe new vitality into our “living constitution,” it was a weak rhetorical performance. The opinion conspicuously failed to make use of the Declaration of Independence, or the other great texts of the Western tradition that make out compelling moral arguments for racial equality. Still less did Chief Justice Warren present an inspiring image of a future America freed at last from the crippling historical burdens of racial hatred and subordination. Brown took the form of a standard judicial opinion (stripped of some, but hardly all, of the ordinary legalisms out of courtesy

147. For a revealing struggle by a leading historicist with the limits of the two-solution narrative, see Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 732 (1988) ("I doubt whether any acceptable conception of original understanding can provide a satisfactory account of the New Deal.").
for its wider-than-usual readership). So far as Warren was concerned, the
key to his problem was the legalistic matter of stare decisis: Should the
Court think itself bound by its 1896 decision in *Plessy v. Ferguson*?\(^{148}\)
Indeed, even this question was too broad for the Court. Rather than de-
nouncing *Plessy*‘s “separate but equal” as an unacceptable cover-up for
racial subordination, Warren limited himself to the particular case of pub-
lic education. The opinion refused to ask whether *Plessy* should be over-
ruled, but only whether it “should be held inapplicable to public educa-
tion.”\(^{149}\)

The legalistic caution of the Court’s question is mirrored by the con-
ventional way in which the Court framed its answer. To justify its conclu-
sion “that in the field of public education the doctrine of ‘separate but
equal’ has no place,”\(^ {150}\) the Court turned to the standard legal sources: the
intention of the Framers of the Fourteenth Amendment, the course of its
case law after *Plessy*. Perhaps the biggest surprise is the Court’s use of
social-scientific evidence about the impact of school segregation on black
children. Even this was hardly novel a half-century after the Court ap-
plauded then-counsel Louis Brandeis for his presentation of social-sci-
entific evidence.\(^{151}\) Moreover, the “scientific” evidence offered in *Brown*
only supported a premise the Court considered obvious: that segregation
has a “detrimental effect upon the colored children.”\(^ {152}\)

All in all, *Brown* stands at the opposite pole from the documents we
shall be rediscovering in the course of our confrontation with the Found-
ing, Reconstruction, and New Deal. When we review the *Federalist Pa-
pers* of the 1780’s,\(^ {153}\) the *Congressional Globe* of the 1860’s,\(^ {154}\) or the
*Public Papers and Addresses of Franklin D. Roosevelt* in the 1930’s,\(^ {155}\)
we will find the protagonists making impassioned appeals to the People
for support against predictable legalistic resistance by conservative oppo-
nents. In contrast to these populist/prophetic efforts to heat up support in
the country, *Brown* was a legalistic effort to cool the debate—to assert
that the time had come to comply with the legal principles already af-
ffirmed by the People in their past exercises in constitutional politics.

*Brown*’s blandness has, I think, been a secret source of disappointment
to many activist partisans of the living constitution—who would have pre-
ferred it if Earl Warren had somehow anticipated the great “I Have A

---

148. 163 U.S. 537 (1896).
150. Id. at 495.
154. See supra note 110.
155. See Roosevelt, If We Would Make Democracy Succeed, I Say We Must Act—NOW!, in 1937
PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 113 (1941); Roosevelt, A “Fireside
Chat” Discussing the Plan for Reorganization of the Judiciary, id. at 122; Roosevelt, The Consti-
tution of the United States Was a Layman’s Document, Not a Lawyer’s Contract, id. at 359.
Dream Speech" made by Dr. Martin Luther King a decade later, under vastly different political circumstances. More curiously, Warren's opinion has proved equally unsatisfactory to the legalistically inclined. A decisive point in the opinion's reception was the Holmes Lecture given at the Harvard Law School by Professor Herbert Wechsler in 1959. A leading scholar of his time, Wechsler had devoted much of his prodigious energy to progressive law reform. And yet he could not find a principled way of justifying Brown: "I should like to think there is [a way], but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases."\(^{166}\) The expression of such anxieties by such a scholar from such a podium generated a host of responses by Brown's defenders—with a number of inspired efforts to offer an alternative to Warren's opinion that would better survive Wechsler's search for a secure foundation in constitutional principle.\(^{167}\)

Paradoxically, the very vigor of this response served to confirm Wechsler's low opinion of Warren's opinion. Apparently, even Brown's defenders were obliged to move far beyond Warren's feeble effort if they hoped to justify the Court's decision in the eyes of thoughtful lawyers. This is not the approach I will be taking here. Far more than many of its defenders, the Court was alive to the distinctly interpretive reasons why it was not only legally appropriate, but legally required, to repudiate the rule of "separate but equal" in public education.

Warren's opinion is remarkable precisely in its self-conscious insistence on the need for synthesizing the meaning of two distinct periods in our history in order to understand the way in which the modern Constitution speaks to the problem of segregated schools. The first historical period is, of course, Reconstruction—in particular, the fact that the Republicans managed, despite the fierce opposition of constitutional conservatives, to convince the American People to commit themselves to the "equal protection of the laws." Warren's opinion is distinctive, however, in denying that a satisfactory solution to the interpretive problem is possible if we focus exclusively on the 1860's. Instead, we must seek to integrate the constitutional meaning of a second period before coming to a proper interpretive judgment: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."\(^{168}\)

---

This self-conscious movement beyond the 1860's has often been taken as an embrace of present-oriented jurisprudence. It is here, if anywhere, that the Court confesses that it finds the effort to interpret the constitutional past too confining, and insists on its authority to impose on the American people new values that do not have a deep historical relation to earlier achievements of constitutional politics.

Yet this interpretation seems required only so long as one accepts the traditional two-solution narrative. To see my point, consider that no historicist, however legalistic she may be, believes that a Court should always adhere to stare decisis. There is at least one reason everybody recognizes for refusing to follow a prior decision like *Plessy*. This classic exception involves the effect of a subsequent constitutional amendment. Consider, for example, the status of the *Dred Scott* case\(^{159}\) at the time Warren wrote *Brown*. Whatever the merits of Taney's opinion barring free blacks from citizenship in 1857, it was enough for a lawyer in 1954 to point out that Taney's decision was discredited in 1868 when the Reconstruction Republicans managed to ratify the Fourteenth Amendment. The question Warren's dictum raises is whether we can locate an analogous constitutional transformation between 1896 and 1954 that makes it equally appropriate for Warren to reject the binding force of *Plessy*. Did We the People speak in a new way in the first half of the twentieth century which decisively undercut *Plessy*'s interpretation of the Constitution?

It is at this point that the standard two-solution narrative impoverishes our response to the Court. Once the validity of the myth of rediscovery is conceded, the answer to the crucial question seems obvious: No, the American people made no new higher law during the course of the twentieth century that would require a lawyer to recognize that *Plessy*'s interpretation of the Fourteenth Amendment was no longer valid. After all, the formal amendments enacted during this period seem very far removed from the present subject. What possible relevance does the enactment of the Income Tax Amendment (1913) or the Woman's Suffrage Amendment (1920) have on the continuing vitality of *Plessy*'s interpretation of the Fourteenth Amendment? Little wonder that the legal community has not taken Warren's dictum as an invitation to consider seriously the problem of multigenerational synthesis. Once we revise our narrative to recognize the constitutionally creative aspect of the New Deal, however, Warren's dictum seems more suggestive. Is the Court struggling against the current of the official narrative and trying to tell us that new principles of activist government have decisively undercut the legal force of *Plessy*'s interpretation of "equal protection"? Has the New Deal's affirmation of activist government undermined *Plessy* just as surely as the Reconstruction's affirmation of national citizenship undermined *Dred Scott*?

To state my thesis more affirmatively: A revised three-solution narrative will allow the profession to place Warren's opinion in a much more comprehending light than it has managed thus far. Rather than looking upon the opinion as an inept effort to breathe new life into the living constitution, lawyers may find in it a compelling synthetic argument explaining why \textit{Plessy} had become inconsistent with the foundational principles of the new constitutional order established in the aftermath of the struggle between the New Deal Presidency and the Old Court.

To test this hypothesis, I propose first to rehearse \textit{Plessy}'s arguments more elaborately than Chief Justice Warren does in his opinion. Once we have set the stage, we will see more clearly why the Court was right to insist that \textit{Plessy}'s interpretation of the Constitution had become untenable in the modern republic.

1. \textit{Plessy's Premises in An Activist State}

An oddity: The opinion for the Court in \textit{Plessy} was written by Justice Henry B. Brown. The question I mean to ask is whether \textit{Brown} is right in finding that the course of twentieth-century history had provided the Court with overwhelming legal grounds for rejecting Justice Brown's approach to the interpretation of the Fourteenth Amendment. Stripping \textit{Plessy} to its essentials, Brown gives two basic reasons for the Court's decision. The first:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but \textit{in the nature of things} [emphasis supplied] it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.\textsuperscript{160}

There are two kinds of things to be said about this. One is that this paragraph was wrong at the moment that it was written. This is the position taken by Justice Harlan in his famous dissent.\textsuperscript{161} In contrast, Chief Justice Warren says something very different: He believes that constitutional developments of the twentieth century have given him reasons that Harlan lacked for rejecting Justice Brown's interpretation.

Once we allow ourselves to reflect on the constitutional achievements of the 1930's, Warren's confidence seems justified. For the great constitutional debate of the 1930's was defined precisely by the Old Court's effort to insist that twentieth-century Americans could not legitimately use state power to pursue "social, as distinguished from political equality" by requiring the payment of a minimum wage, or the recognition of a labor

\begin{footnotes}
\footnote{160}{Plessy v. Ferguson, 163 U.S. 537, 544 (1896).}
\footnote{161}{\textit{Id.} at 552–64 (Harlan, J., dissenting).}
\end{footnotes}
union, or the guarantee of a retirement pension. Given the New Deal Court's embrace of activist government in the late 1930's, the Warren Court could hardly respond to the petitioner's complaint about school segregation in Brown by reaffirming Justice Brown's assertion that "the nature of things" precluded a reading of "equal protection" that demanded something more than a thin political equality.

Nor could Justice Brown's second defense of "separate but equal" survive the constitutional affirmation of the activist state:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. 162

If Plessy's first rationale rejected government intervention on behalf of social equality, this second one elaborates a similar theme on a deeper—one might even say, metaphysical—level. Not only does the state have no responsibility to remedy social, as opposed to political, inequality. It should not even be understood as contributing significantly to the construction of racist reality. Jim Crow laws stigmatize blacks only because "the colored race chooses to put that construction upon it." The government, apparently, cannot be held responsible for these "choices." Rather than participating actively in the construction of public understandings, the state stands to one side and allows social groups to give any meaning they "choose" to the state's treatment of them. Note the extreme way in which Justice Brown makes his point: It is not as if public meaning is produced through an interactive process between government decisions and the "choices" of social groups; the stigma is "solely" a product of private "choices"—the state simply has nothing to do with it.

Once again, whatever the legal plausibility of this claim in 1896, such a view was judicially untenable after the New Deal. It is precisely the Old Court's insistence that the state must not intervene to alter the result of private "choices" in the economy that precipitated the constitutional struggle of the 1930's that decisively legitimated activist government. In repudiating Lochner, the modern Court recognized that the government was an important actor in the process by which groups made their "choices" in American society.

If the role of the state in shaping "choices" was now recognized in the "free market," is it really thinkable that the Warren Court might have repeated Plessy's analysis of the "underlying fallacy of the plaintiff's argument"? Compulsory public schooling had always challenged the rhetoric

162. Id. at 551.
of choice in two ways. The free public school was one long protest against the idea that the choices of individual parents ought to be the exclusive determinants of the conditions under which the next generation was educated or left in ignorance. Further, the state’s requirement of compulsory education was premised on the idea that children were not informed enough to choose whether they should go to school or seek learning elsewhere. What is a public school but a place where government employees are paid to educate children into the “truth” about social reality, whether they choose to be there or not?

Despite the deep tensions between compulsory public schooling and the *Lochner* era’s rhetoric of choice, the public education movement had made great strides during the early decades of the twentieth century. As Warren rightly emphasizes, the public school movement was still in its infancy at the time *Plessy* was decided in 1896. In few states was the education offered to every child minimally adequate; in a southern state like Louisiana, even the principle of universal education was incompletely recognized. By the 1920’s, the public education movement had made progress toward its goals. But so long as the middle republic remained committed to the rhetoric of free “choice” in vast domains of economic life, public education remained a constitutional anomaly: accepted by the courts within its own domain, but treated as a limited exception to more general constitutional principles developed under the contract, takings, and due process clauses.

With the constitutional repudiation of *Lochner* in the 1930’s, however, what had been an anomaly became a paradigm. Public schools exemplified the newly-legitimated claims of the activist state to shape the conditions under which individual citizens ultimately come to make their mature choices. If the state could now constrain the “free” choices of adults concerning their wages and hours, surely its claims to educate the young were constitutionally unquestionable.

Within this activist setting, it was absurd to accept Justice Brown’s assurance that the meaning of segregated schools was up to the “choices” of “the colored race.” Was not the state in the business of public education precisely because children were in no position to make an informed “choice” about the meaning of social reality? Rather than standing passively to one side, the activist state was now intimately involved in the way children—both black and white—would interpret the fact that they were being bussed to different schools on the basis of race. Given its rec-

165. Even in *Wisconsin v. Yoder* the Amish did not question the authority of the state to guarantee a minimal education. 406 U.S. 205, 224 (1972) (holding compulsory school attendance law for young adults as violating free exercise clause).
ognition of activist state involvement even where adults were concerned, no modern Court could possibly accept either of Justice Brown’s rationales in the case of public education. As a matter of two-three synthesis, Justice Brown’s effort to interpret “equal protection” in the light of his anti-activist understanding of “the nature of things” had been discredited at its very foundations.

2. Brown on Brown

From this perspective, Chief Justice Warren’s opinion for the Court looks much better than many of the alternatives that have been offered over the years as “improvements.” The opinion turns on the crucial synthetic point: Twentieth-century developments since Plessy have undermined the interpretive premises that informed Justice Brown’s reading of “equal protection.”

Warren does not make this point, however, by reflecting directly upon the meaning of the New Deal’s legitimation of activist government. Perhaps he thought the Court had enough on its hands in Brown without engaging in such an innovative reconceptualization of the 1930’s. Perhaps he did not consciously think of the New Deal at all, since the academic commentary of the time had done very little to prepare the way for a full-scale critique of the myth of rediscovery.166

In any event, the important thing is to emphasize what the Court did accomplish, not what remains to be done. Without rethinking the New Deal directly, Warren found an alternative way to express his insight that the meaning of the nineteenth century’s affirmation of “equal protection” could no longer be properly cabined by Lochner-like commitments to the nightwatchman state. He marks the crucial shift from laissez-faire to the activist welfare state by telling a story that focuses on the concrete institution in the case before him: the public school. In his opinion, the public school no longer appears as an anomalous exception to the nightwatchman premises of the middle republic. Instead, it is presented as a paradigmatic expression of the modern republic’s activist commitment to the general welfare of its citizens:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the

166. Thus, the most remarkable academic publication of the early 1950’s was W. Crosskey, Politics and the Constitution in the History of the United States (1953), which presented the myth of rediscovery in its most luxuriant form. While Crosskey’s work was subjected to harsh critique by leaders of the academic establishment, these reviews do not suggest that the critics were prepared to move beyond Crosskey’s particularly extreme views to challenge the very idea of interpreting the New Deal through a myth of rediscovery. See Brown, Book Review, 67 Harv. L. Rev. 1439 (1954); Goebel, Ex Parte Clio, 54 Colum. L. Rev. 450 (1954); Hart, Professor Crosskey and Judicial Review, 67 Harv. L. Rev. 1456 (1954).
importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.  

Moreover, this now-paradigmatic context for activist government had slowly risen to prominence during the period between Plessy and Brown, and so could serve to express the Court’s intuition that something crucial had changed in the twentieth century that must be taken into account by modern interpreters:

An additional reason for the inconclusive nature of the Amendment’s history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold . . . . Even in the North, the conditions of public education did not approximate those existing today. . . . [C]ompulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.  

The rise of public education provided a perfect symbolic representation of the need to detach the nineteenth century’s affirmation of “equal protection” from its implicit commitments to the nightwatchman state. Whatever Justice Brown in Plessy might have thought, it was now absurd to dismiss the “badge of inferiority” imposed by state officials as they shunted black children to segregated schools as if it were “solely” the product of a “choice” by the “colored race . . . to put [a degrading] construction upon it.”

It is precisely on this point that Brown explicitly confronts Justice Brown: The state, not the children, must bear responsibility for the fact that school segregation “generates a feeling of inferiority as to their status . . . in a way unlikely ever to be undone. . . . Any language in Plessy v. Ferguson contrary to this finding is rejected.”  

168. Id. at 489–90.
169. Id. at 494–95.
child's sense of inferiority had become a public responsibility which must be judged by the constitutional standards of "equal protection" is not only correct, but obviously so.

E. Interpreting Griswold

1. From Brown to Griswold

I choose Griswold as my second case study because the Court's initiative seems to have met a very similar fate at the hands of the legal community. In both cases, the Justices asserted that the Constitution obliged them to destabilize government support for traditional values that had deep roots in the folkways of the country. In both cases, critics charged that the Court had used its authority to interpret the Constitution as a smokescreen for imposing Eastern establishment values on the country at large. In both cases, many of the Court's champions implicitly conceded the noninterpretive character of the Court's decisions by proclaiming the Justices' prophetic authority to serve as the nation's conscience. In both cases, even legalistically inclined defenders greeted the Court's opinions with a mixture of condescension and anxiety; rather than trying to defend and deepen the texts written by the Justices, academics tended to give the opinions very low grades and to search for different legal arguments that might provide these contested decisions the constitutional support they initially lacked.

Yet the voices of the Justices in Griswold, no less than in Brown, deserve more serious attention than we have given them. Once again, they direct us to the problem of interpretive synthesis. But this time the Justices explored a different side of the synthetic triangle. Brown, as we saw, was a two-three case, focusing on the meaning of the Republican demand for "equal protection" in a Democratic world of activist institutions. The Court's answer to this two-three question predictably opened up a host of other synthetic issues; but, as in all concrete cases, the Justices allowed a host of issues to remain in the background to allow focused reflection on the crucial two-three question they had identified. Griswold displayed dif-

170. Thus, Michael Perry treats it as so obvious that Griswold represents the kind of noninterpretive review he champions that he dismisses the Court's protestations to the contrary in a footnote containing a single sentence. See M. Perry, supra note 142, at 172 n.18.


172. A particularly important class of issues involves integrating the Court's answers to two-three questions into a larger framework that includes an interpretation of the Founding. Call these one-two-three cases. It is of the first importance to consider how the Court has confronted such issues over time, and whether its responses have made sense. Compare, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963) with McCleskey v. Kemp, 481 U.S. 279 (1987).
different synthetic priorities. The fact that Estelle Griswold was suing Connecticut meant, of course, that the Fourteenth Amendment was involved in the litigation as a formal matter. But the Court did not use the case to consider more deeply the relationship between Reconstruction and the other turning points in the American constitutional experience. It was content to rely on earlier cases holding that the Fourteenth Amendment makes applicable to the states the fundamental principles of the Founders’ Bill of Rights, leaving other possible synthetic relationships unexplored.178 Placing Reconstruction in the background allowed the Court to focus on another side of the synthetic triangle: the relationship between the Founding concern with individual freedom and the modern affirmation of activist government.

To define the one-three problem, reflect on the aspect of the Founding most obviously undermined by the New Deal.174 This was the Federalist effort to link the eighteenth century’s affirmation of individual liberty with the rhetoric of contract and private property. Thus, the Federalists valued market “freedom” so highly that they forbade the states from “impairing the obligation of Contract” in the original 1787 Constitution, at a time when they believed an elaborate Bill of Rights unnecessary. In response to the popular demand for a Bill, the Fifth Amendment contained an explicit guarantee against governmental takings of property without just compensation. This Founding effort to express the American commitment to individual liberty within the language of contract and property was emphatically reinforced at Reconstruction before it was called into question during the New Deal.178 One large task for one-three synthesis was to define what, if anything, remained of the Founding values of individual self-determination that had formerly been expressed in the lan-

173. Thus, the fact that Estelle Griswold was a woman did not lead the Court to consider the possible application of equal protection doctrine. Cf. MacKinnon, Roe v. Wade: A Study in Male Ideology, in ABORTION: MORAL AND LEGAL PERSPECTIVES 45–54 (J. Garfield & P. Hennessey eds. 1984). Similarly, there was no effort to reflect on the libertarian side of Reconstruction, exploring the implications of the Republicans’ concern with self-ownership expressed by the Thirteenth and Fourteenth Amendments. See, e.g., Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion 84 NW. U.L. REV. (forthcoming 1990) (applying Thirteenth Amendment’s concern with liberty to woman’s interest in control over her body).

174. A second aspect of one-three synthesis involves the constitutional definition of government powers rather than individual rights. The legitimation of the activist state overwhelmed the decisional capacities of the three branches envisioned in 1787, leading to the elaboration of a host of new relationships between these branches and the burgeoning administrative apparatus. Compare, for example, the Court’s focus on 1787 in INS v. Chadha, 462 U.S. 919, 946–59 (1983) with the dissent’s focus on 1937, id. at 968–74 (White, J., dissenting). See also Note, A Two-Tiered Theory of Consolidation and Separation of Powers, 99 YALE L.J. 431 (1989) (analyzing Chadha as response to New Deal constitutional transformation delegating power to administrative agencies). While this aspect of the synthetic problem has engaged increasing amounts of judicial energy over the last decade, the Justices seem to have despaired (temporarily?) at the possibility of a cogent judicial contribution to the second fundamental structural question left in the aftermath of the New Deal: the relationship between the states and the nation in an era of activist government. Compare Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 995 (1985) with National League of Cities v. Usery, 426 U.S. 833 (1976).

175. See supra text accompanying notes 131–132.
guage of property and contract, now that the People had repudiated this rhetoric in the constitutional struggles of the 1930’s.

So understood, the interpretive challenge in *Griswold* was isomorphic to the one confronted in *Brown*. Just as Warren sought to detach Reconstruction’s affirmation of equality from nineteenth-century premises concerning the limited role of government, so too a synthesizing Court would be obliged to detach the Founders’ affirmation of personal liberty from the property/contract framework within which it had been previously expressed. My thesis is that *Griswold* is best understood as a critical stage in this process of *Brown*-like detachment from the abandoned premises of the *Lochner* era.

To make this analogy persuasive, I must compensate for the fact that the judicial record of the *Lochner* era does not contain an opinion, like *Plessy*, in which the Supreme Court squarely confronted a birth control problem. *Plessy* gave us a concrete target that allowed us to locate quite precisely the premises that *Brown* correctly saw had been rendered untenable by the twentieth-century triumph of activist American government. Since no similar opinion exists that speaks directly to the *Griswold* problem, my argument will begin with a thought-experiment. Try to imagine what the Supreme Court from the *Lochner* era would have said if it had been obliged to confront Griswold’s plea for constitutional protection. Once we have constructed our hypothetical target, we can assess the extent to which Douglas’ opinion in *Griswold*, like Warren’s in *Brown*, is responsive to the distinctive needs of interpretive synthesis in the aftermath of the New Deal.

2. *Griswold* and Freedom of Contract

Suppose that Planned Parenthood had not waited until the late 1930’s to begin its long series of court challenges to the Connecticut statute, but had instead begun in 1923—when Margaret Sanger first urged the Connecticut legislature to repeal its anti-contraception statute in the name of the Connecticut Birth Control League.176 Were there constitutional arguments available at the time that her lawyers might have used to her advantage?

Absolutely. But they would have looked different from those that Justice Douglas elaborated in his opinion of 1965. In 1923, the forensic challenge would have been to persuade the Court to extend *Lochner’s* affirmation of freedom of contract to the effort by the doctors of Planned Parenthood to prescribe and sell contraceptive devices. From this perspective, it would have been critical that Planned Parenthood was offering its services only to willing buyers. This, after all, was the point that im-

pressed the *Lochner* court in invalidating New York's effort to restrict bakers to a sixty hour work week. So far as *Lochner* was concerned, the bakers and their bosses had freely decided that a long work week was in their mutual interest; unless New York came up with a specially persuasive reason for second-guessing this choice, the contracting parties had a constitutional right to make their own decisions.\(^{177}\) So too here: Just as the bakers had a constitutionally protected liberty to contract with their employers, married couples should be accorded the same constitutional liberty to contract with doctors or the Birth Control League. At least, this is what Sanger's hypothetical lawyers would have argued.

Not that her lawyers would have had a sure winner on their hands. Courts of the *Lochner* era did hedge their libertarian principles with a number of important exceptions, one of them being the protection of "public morals."\(^{178}\) Given the role of chastity in then-traditional morality, a majority might well have been persuaded that the anti-contraception statute should be sustained under a "police power" exception. Even here, however, certainty is by no means warranted. Indeed, when Planned Parenthood began its litigation campaign in 1939, its citations to *Lochner*-like cases\(^{178}\) sufficiently impressed a lower Connecticut court that it declared the statutes unconstitutional—before a 1940 decision of the Connecticut Supreme Court upheld, by a vote of 3 to 2, the statute as a legitimate regulation of public morals.\(^{179}\)

It took a quarter of a century, however, before Planned Parenthood convinced the U.S. Supreme Court to hear the merits of its complaint. By 1965, Griswold's lawyers had completely reconceptualized their arguments to emphasize the synthetic problem left in the wake of the popular repudiation of laissez-faire constitutionalism during the 1930's. Rather than relying on *Lochner*, Griswold's lawyers tried to distinguish it. Most of their brief consists of an effort to persuade the Court that the New Deal's repudiation of substantive due process in the 1930's involved only matters of economic regulation and did not undermine *Lochner*-like protection for "rights of a fundamental individual and personal character."\(^{180}\) Talk of a constitutional right of "privacy" only comes at the end of the brief, almost as an afterthought.\(^{181}\) Confronted by Griswold's arguments, the Supreme Court could hardly escape an encounter with the synthetic question: How sweeping was the New Deal transformation? Should it be


\(^{181}\) See *id.* at 79–89.
interpreted as completely obliterating the Founding affirmations of private ordering previously expressed in the rhetoric of freedom of contract? Or should the courts continue to re-present the Founding concern for personal liberty by marking off for special protection areas of life that seem far removed from the New Dealers’ demand to regulate “free” markets for the general welfare?

3. Griswold’s Approach to Synthesis

With such questions raised by the litigants themselves, it is not surprising that the Griswold Court struggled with its problem of synthesis even more self-consciously than the Brown Court had done a decade previously. Though Warren was emphatic about the need to interpret the nineteenth century’s demand for “equal protection” in the light of the twentieth century’s validation of activist government, he did not explicitly pinpoint the role of the constitutional struggle of the 1930’s in legitimating this change in interpretive perspective. Instead, he discussed the rise of activist government in terms of the particular problem before him: public education. So far as Warren was concerned, it was enough to emphasize the central place universal public schooling had won in the modern welfare state and to contrast this position with public education’s peripheral status at the time the Fourteenth Amendment was first proclaimed in 1868. To adopt a term from literary criticism, the public school functioned in Brown as a metonymic placeholder: Just as one might use the history of the White House as a trope to express the rise of the Presidency, Warren used the history of public education to express the rise of the activist welfare state in modern constitutional interpretation.

In contrast, the Court in Griswold self-consciously began its discussion by focusing on the decisive event in the constitutionalization of the activist state: “Overtones of some arguments suggest that Lochner v. New York should be our guide. But we decline that invitation as we did in West Coast Hotel Co. v. Parrish [one of the great transformative opinions of 1937].”182 This opening sentence defined the crucial judicial task as one-three synthesis: How to interpret the Founding commitment to a Bill of Rights in a way respectful of the New Deal’s affirmation of activist government? Speaking for the Court, Justice Douglas answered by distinguishing between those constitutional protections designed to protect private ordering in economic relations and those designed to protect private ordering in more intimate spheres of life:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not

political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.\footnote{Id. at 486.}

A "bilateral loyalty, not [a] commercial or social project[]": While the New Deal gained the support of the People to regulate these "projects" for the general welfare, the Court denied that the transformation of the 1930's had to be read so broadly as to imply that marriage could not serve as an appropriate context for re-presenting the continuing constitutional value of liberty inherited from the Founding.

To make its case, the Court proposed a more discriminating view of the 
{
\textit{Lochner}}
\textit{era.} While Douglas left in the shadows those laissez-faire precedents—such as 
{
\textit{Lochner}}
\textit{itself}—that insulated market actors from intrusive governmental intervention, the Court revalorized decisions which could be interpreted as insulating more intimate relationships: It "\textit{reaffirm[ed]}" two 
{
\textit{Lochnerian}}
\textit{decisions of the 1920's}, describing one as protecting the family's "\textit{right to educate a child in a school of the parents' choice—whether public or private or parochial,}" another as according "the same dignity . . . [to] the right to study the German language in a private school."\footnote{Id. at 482-83. The two cases the Court reaffirmed are 
{
\textit{Pierce v. Society of Sisters}}, 268 U.S. 510 (1925), and 
{
\textit{Meyer v. Nebraska}}, 263 U.S. 390 (1923), respectively.}

\footnote{116 U.S. 616 (1886).}

\footnote{Griswold, 381 U.S. at 484.}

\footnote{Id.}

Similarly, the Court made much of its 1886 decision in 
{
\textit{Boyd v. United States}},\footnote{Id. at 482-83.} describing the Fourth and Fifth Amendments as protecting "\textit{against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'}"\footnote{Id. at 484.} Building on this newly-rediscovered sense of continuity with Justices of an earlier time, Douglas found that the constitutional value of privacy had served as a leitmotif in the modern Court's ongoing effort to make sense of the Founders' Bill of Rights. Looking in particular at the First Amendment and at the Bill's multiple commands regulating the criminal process, Douglas reported the Court's use of the idea of privacy to give these specific provisions "\textit{life and substance.}"ootnote{Id. at 485.} This recurring concern with privacy motivated, in turn, a generalizing interpretation of the Founding text itself:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "\textit{in any house}" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "\textit{right of the people to be secure in their persons, houses, papers, and effects, against unreasonable}
searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

At the heart of Griswold is the act of synthetic interpretation—an effort to integrate the Founding text with the New Deal transformation in a way that makes sense of the interpretive effort of previous generations of Justices to give meaning to these texts. Rather than looking upon the Bill of Rights as a series of disjointed rules, the Court invites us to view them as grounded in Founding values that can still be expressed in a legally meaningful way despite the transformations and contingencies of two centuries of constitutional history. Once we do so, we will find that “[t]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand . . .”

4. Interpreting the Chorus: the Concurrences and the Dissents

The distinctive character of the Court’s opinion is displayed by contrasting it with the others entered in the case. In all, there were three concurrences and two dissents, and I cannot hope to examine them fully here. So far as the concurrences are concerned, suffice it to say that none of them focused on the synthetic aspect of the problem with the same intensity as did the Court. None begins with Lochner and asks whether, despite its repudiation, the Court may find a way to re-present the Founding commitment to personal freedom using concepts and contexts distinguishable from those repudiated in the 1930’s. Nor do any seek to ground their decision on a reinterpretation of the Founding text which emphasizes the extent to which the Bill of Rights recognized the constitutional value we now identify with the concept of privacy. Instead of emphasizing the centrality of one-three synthesis, the concurrences sketch more open-ended inquiries that roam broadly without any clear sense of interpretive constraint.

In contrast, the two dissenters, Justices Black and Stewart, take on the

188. Id.
189. Id. at 485 (emphasis in original).
190. For those arithmetically inclined, the fact that there were three concurrences and two dissent did not deprive the Court’s opinion of a majority—the Justices who joined Justice Goldberg’s concurrence also joined the opinion of the Court.
synthetic challenge raised by Douglas. Like the Court, they too recognize that they must define the meaning of the 1930's to decide Griswold's case. But they offer a much broader interpretation of the New Deal struggle than does the majority. For the dissenters, the Court's "switch in time" did not merely demote the constitutional value of private ordering in "commercial or social projects." It amounted to a rejection of the very idea that the Court should insulate some spheres of life from pervasive management by the newly-empowered activist state. On this statist interpretation, the People not only decisively authorized their government to regulate sweatshops in the 1930's. They also authorized management of individual choice in any and all areas of life when such regulation seemed in the public interest. Any judicial effort to construe the New Deal more narrowly and to assert that the exercise of freedom in some domains of life remained presumptively beyond the control of normal politics was tainted by "the same natural law due process philosophy found in Lochner v. New York. . . [and] other discredited decisions." 191

Of course, if taken to its extreme, this statist interpretation of the New Deal implies the end of all constitutional limitations on normal government. But the dissenters do not treat the repudiation of Lochner as the only significant historical moment in the nation's constitutional history. No less than the majority, they too recognize the need to synthesize their understanding of the New Deal into a broader narrative that also includes Founding and Reconstruction. Only they propose to read the constitutional solutions generated during these earlier periods in a very different spirit from the Court's. As we have seen, the Court reads these older texts as the source of constitutional principles that may be applied to new contexts that remain beyond the legitimate concerns of the activist state. In contrast, the statist dissenters read the Bill of Rights as Raoul Berger reads the Fourteenth Amendment—as a "superstatute," containing a series of "specific prohibitions"192 with relatively straightforward meanings. So long as the newly empowered activist state does not violate any of these "specifics," its actions should be sustained. In this approach to one-three synthesis, the meaning of time one has been reduced to a series of narrow legal rules, while the meaning of time three is stated in terms so broad that they verge on the ontological. The constitutional revolution of the 1930's not only empowered government to remedy economic and social injustice. It amounted to nothing less than the repudiation of something called a "natural law" philosophy—whose taint, apparently, can be detected in any suggestion that the Founders had not merely tried to codify a

list of rules but to formulate principles of personal liberty that modern Americans may still find relevant in a host of non-market contexts.

This difference between the Court and the dissenters on synthetic method is, of course, of the greatest importance—both practical and theoretical. But there is something even more important than deciding who is right. It is recognizing that both sides are talking about the same issue: the problem of one-three synthesis.

5. From Brown to Griswold to . . .

In presenting the exchange in Griswold, I have challenged the familiar view of this case as a paradigmatic example of an “activist” Court seeking to keep the living constitution up to date by imposing its own idea of “fundamental values.” At the very least, this is not how the Court defined the crucial issues. Instead, the majority and the dissenters are debating very fundamental interpretive questions that all of us must face in trying to make sense of a Constitution that has been transformed, and transformed again, by Americans of the nineteenth and twentieth centuries.

Moreover, when we compare Griswold to Brown, it appears that the Court was even more self-conscious about the character of its interpretive problem in 1965 than it had been in 1954. While Brown was emphatic about the need to synthesize the twentieth century’s affirmation of the activist welfare state with the nineteenth century’s guarantee of equal protection of the laws, the Court did not identify the role of the great transformation of the 1930’s in legitimating its synthetic point of view. Instead, it made this transformative point within the terms suggested by the concrete problem—public education—raised by the facts of the case. In contrast, the Griswold Court reached the heart of the matter as it struggled to integrate the language of the Bill of Rights into a modern doctrinal synthesis. It squarely identified the problem posed by the popular repudiation of free-market constitutionalism in the 1930’s and asked how modern Americans can make sense of the Founding texts once we recognize that we are no longer constitutionally committed to the strong protection of property and contract. From this point of view, Griswold’s reinterpretation of the Founding texts in terms of a right to privacy, rather than a right to property and contract, is to be viewed as a serious interpretive proposal: Granted, when the Founders thought about personal freedom, they used the language of property and contract; but given the New Deal deflation of the constitutional status of this language, isn’t the most meaningful way we can interpret these Founding affirmations through the language of privacy?193

193. From this point of view, the common charge, see, e.g., McKay, The Right of Privacy: Emanciations and Intimations, 64 Mich. L. Rev. 259 (1965); Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 740 (1989), that Douglas’ use of the concept of privacy was light-years removed
A satisfactory answer must, of course, confront the challenges raised by
the very different approach to one-three synthesis advocated by Black and
Stewart—a view which has been reinvigorated by the appointment of a
surprisingly large number of statists to the courts by an Administration
that, on the surface, seemed to be full of individualistic rhetoric.\(^\text{194}\) As
with \textit{Brown}, however, my aim here has been to begin a story, not to end
it.

\section*{Conclusion}

It is time to take stock—to suggest how the three parts of this essay fit
together in a general reinterpretation of the Constitution.

Part I began by seeking to recover a distinctive aspect of the American
constitutional tradition which is lost in Europeanizing accounts. This is
our Republic's evolving commitment to dualistic democracy: its recurring
emphasis on the special importance of those rare moments when political
movements succeed in hammering out new principles of constitutional
identity that gain the considered support of a majority of American citi-
zens after prolonged institutional testing, debate, decision.

Guided by this dualistic understanding, Part II challenged the present
legal account of the greatest transformative moments in American consti-
tutional history. The modern professional narrative invites us to think of
the Founding, Reconstruction and New Deal as very different kinds of
events: The first was creative both in its higher lawmaker process and in
its substance; the second, only in its substance; the third, not at all. This
myth cannot stand a serious confrontation with the constitutional materi-
als left to us by earlier generations of Americans. Rather than telling our-
selves a story of declining constitutional creativity over the eighteenth,
nineteenth, and twentieth centuries, we should see ourselves as part of an
ongoing process of constitutional revision and renewal that continues
through the 1930's and beyond.

Part III suggests how this redefinition of our professional narrative will
allow new insight into the interpretive problem that gives modern consti-
tutional law its distinctive shape: the task of synthesizing the higher law-
making achievements of the many generations of Americans who have
managed to rework the terms of constitutional identity since the
Founding. As in the preceding parts, I have done no more than scratch
the surface. Nonetheless, I have tried to suggest that, during the half-

\footnotesize{from the version contemplated by Warren and Brandeis in their great article could not be further
from the truth. For the very point of this classic article is to convince its readers to use the concept of
privacy to carve off certain values—then often protected by property doctrine—to enable their preser-
vation despite increasing regulation by activist government of other dimensions of property. See War-

194. The recent rise of a statist form of synthesis is marked most stunningly by the majority
opinion in Bowers v. Hardwick, 478 U.S. 186 (1986).}
century since the New Deal, the Justices have been more self-conscious than most of us in emphasizing the centrality of multigenerational synthesis in modern constitutional law.

*   *   *

Think of the American Republic as a railroad train, with the judges sitting in the caboose, looking backward. What they see are the mountains and valleys of our dualistic constitutional experience, most notably the peaks of constitutional meaning elaborated during the Founding, Reconstruction, and New Deal. As the train moves forward in history, it is harder for the judges to see the traces of volcanic ash that marked each mountain’s emergence onto the legal landscape. At the same time, a different perspective becomes available: As the more recent eruptions move further into the background, it becomes easier to see that there is now a mountain range out there that can be described in a comprehensive way.

As this shift is occurring, lots of other things are happening. Most obviously, old judges die, and new ones are sent to the caboose from the front of the train by those who happen to be in the locomotive. These newcomers’ view of the landscape is shaped by their own experiences of life and law—as well as the new vistas constantly opened up on the mountains by the path that the train takes into the future. The distinctive thing about the judges, however, is that they remain in the caboose, looking backward—not in the locomotive arguing over the direction the train should be taking at the next crossroads, or anxiously observing the passing scene from one of the passenger cars. Despite their rearguard position, they are not without a certain power over the course of events.

Each time the train stops at a station, the passengers are faced with a choice. They may, of course, instruct the engineers to continue driving down the main line that points ahead. But at every station, there is at least one other track, pointing obliquely toward a mountain range on the horizon.

Most of the time, most of the passengers do not give this second track a second thought. After a perfunctory discussion, they send people to the locomotive who promise to steam down the mainline. At other times, there is greater controversy as the passengers descend to the platform to debate their next destination. Sometimes the debate ends in the selection of new engineers who promise (often vaguely) to take the train down a new track.

In either event, when the train leaves the station, the passengers may be in for a surprise. The view from the observation cars may be very different from the one they imagined on the platform. Even more alarming, it may become increasingly difficult for the judges on the caboose to keep sight of the familiar mountain ranges. At this point, the folks on the caboose begin to apply the brakes.
The train travels more slowly; the distance between stations shortens. When the engineers come down from the locomotive, they have two choices. They may be apologetic about their poor service. Or they may bitterly accuse the old-timers in the caboose of slowing down progress. If they take the latter course, the passengers have more than the usual amount of thinking, arguing, deciding, to do. It's their train, isn't it?

The moment of truth comes, and goes. The train begins to move more quickly into the unknown. As the smoke clears, the folks on the caboose look back and begin to see familiar mountains from a different angle; new mountains come into view for the first time.

But the effort to make sense of the landscape remains.