

Article

The Storrs Lectures: Discovering the Constitution*

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LECTURE ONE: THE ECONOMY OF VIRTUE

A. *Founding Fathers and Rebel Children*

I begin with a passage from Alexander Bickel's classic work, *The Least Dangerous Branch*:

The root difficulty is that judicial review is a countermajoritarian force in our system. There are various ways of sliding over this ineluctable reality. Marshall did so when he spoke of enforcing, in behalf of "the people," the limits that they had ordained for the institution of a limited government Marshall himself followed Hamilton, who in the 78th *Federalist* denied that judicial review [was undemocratic].

"It only supposes," Hamilton went on, "that the power of the people is superior to both [the courts and the Congress]; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the Judges ought to be governed by the latter rather than the former."

But the word "people" so used is an abstraction. Not necessarily a meaningless or pernicious one by any means; always charged with emotion, but nonrepresentational—an abstraction obscuring the reality that when the Supreme Court declares unconstitutional a legislative act, . . . it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is

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what actually happens . . . and it is the reason the charge can be made that judicial review is undemocratic.¹

In starting with Alexander Bickel, I have been motivated by something more than filial piety. Bickel's presentation of the "countermajoritarian difficulty" both expresses and codifies the modern constitutional lawyer's ironical relationship to the Constitution. By taking its title from the *Federalist No. 78*,² *The Least Dangerous Branch* presents itself as a contribution to a constitutional tradition extending backward in time to the Founders themselves. But we are not halfway through Bickel's first chapter before the passage I have read announces a very different theme: If we are to make sense of our constitution, we must cut ourselves off from the Framers' theory of democracy. *The Least Dangerous Branch* opens with a second declaration of independence, not an effort at constitutional interpretation. The beginning of constitutional wisdom, apparently, is that Hamilton, Marshall, and the rest were utterly mystified by representative government.

The irony of the title page is raised to a higher power by Bickel's position among contemporary commentators. He is not typed as the radical iconoclast. Instead, he is revered as spokesman-in-chief for a school of thought that emphasizes the importance of judicial restraint. Time and again, this school has taught lawyers to resist the temptation to reject long-standing constitutional doctrine whenever they find it in conflict with their personal political philosophies. Indeed, this aura of restraint has, in large part, made Bickel's "countermajoritarian difficulty" what it has become—the starting point for contemporary analysis of judicial review. What to make, then, of the fact that Bickel's statement of the countermajoritarian difficulty advances the very argument that the partisans of constitutional restraint have taught us to condemn—inviting us to disdain the Framers' theory of democracy as "nonrepresentational"?

Whatever our ultimate answer to this question, one thing should be clear: Bickel's act of patricide could never have succeeded if he had been writing as an isolated scholar, removed from the main line of American political and legal thought. The countermajoritarian difficulty proclaimed in *The Least Dangerous Branch* achieved its ascendancy over the modern legal mind by expressing an opinion that, after two full generations, had become the prevailing wisdom in both scholarly reflection and legal practice. For judges and lawyers, the "countermajoritarian difficulty" recalled

1. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (1962).

2. "Whoever attentively considers the different departments of power must perceive that, . . . the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." *THE FEDERALIST* No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).

the Old Court's long, and ultimately futile, judicial struggle against the New Deal. For them, Bickel's warning reinforced the impropriety of using the Constitution as laissez-faire capitalism's ultimate weapon against popular control.

Similarly, *The Least Dangerous Branch* expressed the central legal conclusion toward which the American academy had been struggling for generations: that, somehow or other, we must transcend the Framers' vision if we are to make our Constitution fit the needs of a modern democratic society. Thus, academic political science, as we know it, begins in the 1880's with Woodrow Wilson's great book *Congressional Government*;³ academic constitutional law begins about the same time with the publication of James Bradley Thayer's early effort to reconceptualize judicial review.⁴ In these foundational texts of the modern American university, the dangerous tendency of our governmental institutions to act undemocratically is already established as a central source of scholarly anxiety.

This concern gained further academic force with the rise of Charles Beard's interpretation of the Founding.⁵ In Beard's familiar view, the Framers' masquerade in the name of the "People" is nothing but a bad joke. The historical truth is that the Constitution was a fundamentally anti-popular act by which a tiny minority of bond-speculators and the like successfully strangled our popular revolution. No wonder, then, the urgent need for heroic reconceptualization of the Constitution in general, the Supreme Court in particular. Since the document was not intended as a democratic charter in the first place, are not constitutional lawyers absolutely right to leap off *The Least Dangerous Branch* and see judicial review for what it truly is—a deviant institution in any self-respecting democracy? On this view, the task for constitutional law is to define a role for the Supreme Court that self-consciously recognizes its presumptively counter-majoritarian character, and yet reserves a legitimate sphere for the continued exercise of judicial review.

3. W. WILSON, *CONGRESSIONAL GOVERNMENT* (1885).

4. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

5. C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913). For characteristic Progressive era appraisals of *The Federalist*, see *id.* 158-88; C. MERRIAM, *A HISTORY OF AMERICAN POLITICAL THEORIES* 96-122 (1920); 1 V. PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* 284-88 (1927). For an elaborate discussion of Beard's views of the American Revolution in particular, and those of the Progressive historians in general, see R. HOFSTADTER, *THE PROGRESSIVE HISTORIANS* 167-346 (1968). Since Hofstadter's book was written, American historians have become increasingly skeptical of Beardian premises. For a thoughtful effort at rehabilitation, see Diggins, *Power and Authority in American History: The Case of Charles A. Beard and His Critics*, 86 AM. HIST. REV. 701 (1981). For an earlier critique of the Progressive characterization of *The Federalist*, see B. WRIGHT, *CONSENSUS AND CONTINUITY, 1776-1791*, at 40-60 (1958).

This, notoriously, has been no easy matter. Bickel's own scholarly life is, once again, emblematic. Increasingly dissatisfied with his effort to rationalize judicial review in *The Least Dangerous Branch*, Bickel's search was cut short by premature death before he could find an answer with which he might rest content. And in the decade since his death, we have been inundated with new answers to Bickel's question. Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficulty is insoluble.

This will not be the aim of the present Lectures. Rather than solving the countermajoritarian difficulty, I mean to dis-solve it, by undermining the vision of American democracy and American history that constitutional lawyers had developed by the Progressive era. In contrast to the image of the Founding inherited from the Progressive historians, this first Lecture seeks to recover the distinctively democratic foundations of our Federalist Constitution. The second Lecture argues that a neo-Federalist theory of democracy permits a deeper understanding of the distinctive problems of modern political life than does its Progressive competitor. It is only then that I shall turn, in the last Lecture, to consider the role the Supreme Court may legitimately play within a neo-Federalist constitutional system.

B. *Constitution and Revolution*

Just as the Progressive interpretation of the Constitution was the product of many statesmen and scholars, working in a complex series of related enterprises, so too the neo-Federalist vision can be enriched by the past generation's practical experience, as well as its academic achievements in American history, political science, and political philosophy. I shall, however, resist the temptation to make explicit use of these parallel discoveries. Instead of playing historian or political scientist, philosopher, or constitutional pundit, it will be enough if I can do justice to our sense of legal craft. Even after two full generations of academic law, the legal culture has not yet been purged of all texts that link constitutional lawyers to the Federalist past. The most notable text, of course, is the Constitution itself. But there is a second text that has not yet lost its hold on the legal mind: *The Federalist*. It is true, of course, that we are all too accustomed to using this text in the manner of *The Least Dangerous Branch*—citing it for a catchphrase while dismissing the larger conception of constitutional government that gives the slogan life. I believe, however, that a very different reading is well within the collective capacities of a profession whose business it is to breathe new life into old authorities.

1. *We the People?*

Let us begin the effort at constitutional commentary from the very beginning: “We the People of the United States.” We will get nowhere until we begin to appreciate the remarkable act of authority required to write these words. An observer at the scene, after all, would only see a smallish group of whiggish gentlemen huddled together in an unprepossessing room in Philadelphia. Nor can there be any doubt that these gentlemen were acting beyond their legal authority—especially in claiming the right to ignore both the Articles of Confederation and the state legislatures, by having their posturings on behalf of “the People” ratified by similar “conventions” posturing in some, but not all, of the States.⁶ What in the world

6. Two distinct elements of the Convention’s problematic claim to legality should be distinguished: The first involves its right to *propose* its new Constitution; the second concerns its right to *revise* pre-existing ratification procedures. On the first question, I do not wish to take a hard and fast line. While the Confederation Congress did explicitly limit the Convention to “the sole and express purpose of revising the Articles of Confederation,” see 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 14 (M. Farrand ed. 1966), there are at least plausible legal arguments to support the Convention’s decision to scrap the Articles altogether. On the one hand, one may follow *The Federalist* and argue that, appearances to the contrary notwithstanding, a deeper analysis reveals more fundamental continuities between the Constitution and the Articles. See THE FEDERALIST NO. 40, at 249–55 (J. Madison) (C. Rossiter ed. 1961). On this line, the fact that Congress, in calling for a Convention, had expressed the desire for a “firm national government” justified the Convention in rejecting a narrow interpretation of the “sole and express purpose” limitation.

On the other hand, one may follow an argument most forcefully developed by Julius Goebel, who seeks to justify the Convention’s action by diminishing the legal role of the Confederation Congress in authorizing the Convention. On this view, the decisive legal text is not the congressional call for a Convention but the legal acts taken by each of the individual states when authorizing delegates to the Convention. See J. GOEBEL, HISTORY OF THE SUPREME COURT 198–204 (1971). Even Goebel admits, however, that three states—among them the critical states of Massachusetts and New York—expressly referred to Congress’ limiting language in their own enabling acts; that a fourth state, Delaware, was even more restrictive; and that a fifth state, Rhode Island, refused to send any delegates at all to the Convention. *Id.* at 202. Given these concessions, I do not see why Goebel believes, as he plainly does, that he has laid to rest doubts about the legality of the Convention’s decision to scrap the Articles and propose a new Constitution.

I myself agree with those scholars who are unpersuaded by the strictly legal arguments, advanced by Publius and his later apologists, on behalf of the Framers’ right to scrap the Articles and propose a new Constitution. See, e.g., Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 4 (1979); Wright, *Introduction* to THE FEDERALIST at ii (B. Wright ed. 1961). Nothing in my larger project, however, depends on the assumption that the legal arguments on behalf of the Convention would be rejected as *clearly* erroneous by any self-respecting court. For it is precisely my point that no such court existed, and that, in scrapping the Articles, the Convention was perfectly aware that it had taken a step that many thoughtful citizens would find illegal. See H. STORING, WHAT THE ANTIFEDERALISTS WERE FOR 7 (1981). Given this fact, the Federalists could not suppose that their constitutional right to scrap the Articles could be adequately established merely by citing legal authorities. This, as we shall see *infra* pp. 1021–22, is precisely Publius’ view of the matter. I shall define a “Convention,” then, as an assembly whose right to propose a new constitutional solution is *open to substantial good-faith legal doubt*.

The second legal aspect of the Convention’s activities is a good deal less problematic. Given the explicit requirement of unanimous consent by all thirteen state legislatures to be found in Article XIII of the Articles of Confederation, the Convention’s assertion that nine state “Conventions” could adequately ratify on behalf of the People was plainly an extra-legal assertion of democratic authority. This point is explicitly conceded in the *Federalist Papers*, see THE FEDERALIST NO. 40, at 254 (J. Madison) (C. Rossiter ed. 1961). Even Goebel, the Convention’s most notable modern legal apologist,

justified the Framers in imagining that this charade gave them a better claim to speak in the name of the People than the legally constituted governments of the day?

It is the first great merit of *The Federalist Papers* that they do not allow us to view this assertion of authority as if it were the result of a counter-revolutionary coup d'état. Rather than confessing that the Philadelphia Convention suffered from an antidemocratic difficulty, Madison, Hamilton, and Jay—presenting themselves under the evocative name Publius—argue that their new constitution is best seen as the culmination of their generation's revolutionary experience in popular government.

It is this aspect of *The Federalist*, of course, that followers of Charles Beard look upon as blatant propaganda—a transparent effort to paper over the fact that we are witnessing the Ninth of Thermidor, not the Fourth of July. It is true, the Progressive historian must wryly concede, that the Federalists proved far more successful in damming the popular tide with their counter-revolutionary constitution than did their French and Russian counterparts. But this concession only leads the Beardian to doubt whether the assorted goings-on in eighteenth-century America added up to a genuine revolution at all. After all, we are by now familiar with the real thing: revolutions that devour their children in a sea of blood with the masses cheering on until, after popular passions exhaust themselves in an orgy of destruction, a Napoleon or Stalin emerges to rule the inert mass of his countrymen. If this is revolution, then surely the American Constitution is counter-revolutionary. To put the point in terms so perceptively developed by Hannah Arendt:

It is odd indeed to see that twentieth-century American thought . . . is often inclined to interpret the American Revolution in the light of the French Revolution, or to criticize it because it so obviously did not conform to the lessons learned from the latter. The sad truth of the matter is that the French Revolution, which ended in disaster, has made world history, while the American revolution, so triumphantly successful, has remained an event of little more than local importance.⁷

And yet, if there is any locale in which the revolutionary achievements of the Federalists are to be seriously entertained, surely *this* is the place.

fails to defend the Framers on this critical point, omitting all mention of the subject from his Holmes Devise history of the Supreme Court. I shall define a "Convention," then, as an assembly whose legal right to make constitutional proposals is open to good-faith legal doubt; but which, nevertheless, proposes to ratify these proposals by a procedure that *plainly departs* from pre-existing constitutional understandings. For further discussion of the historical foundations and constitutional implications of this definition, see *infra* pp. 1057–69.

7. H. ARENDT, ON REVOLUTION 55–56 (1963).

2. *The Problematics of Successful Revolution*

To do *The Federalist* justice, turn your mind's eye to revolutionary scenes that, through remorseless repetition, have become a part of our common heritage. I do not want you to begin your act of legal reconstruction, though, at the climactic moment at which you and your fellow revolutionaries triumphantly explore the wreckage of the old regime. Instead, begin the action at a point when this final victory seems a more doubtful matter.

Time One. You are surrounded by an ongoing regime—people occupying governmental offices, declaring themselves rightful rulers of the territory; others plotting and scheming to replace the present incumbents; the masses looking upon these goings-on with resigned indifference: politics as usual.

All this, so far as you are concerned, stinks. While the government *says* it represents the people, you think this claim is just plain wrong. Despite its undisputed mastery of established legal forms, you say that you—and your comrades—are the true representatives of the People. Now such a claim requires courage, no less spiritual than physical. Who, after all, do you think you are? The New Messiah?

It may be possible for religious zealots to stop the conversation at this point. But for secular democrats, things are inevitably more complicated. Predictably, democratic revolutionaries will respond to the question of their own legitimacy in three different ways. First, they will say that the established government is systematically *subverting the public good*. This requires, of course, an ideology that specifies the public good being subverted. Second, they will portray themselves as possessing *special virtues* that entitle them to the position of the People's true representatives over other applicants for the position. Third, the leadership's claims to legitimacy must be validated by the *concrete assent* given by faithful followers, who recognize them as the true representatives of the People despite the fact that their meetings lack the formal sanction of law. Without such validating conventions, you cannot be a revolutionary leader—only a leader in search of a revolution.

Time Two. The old regime has collapsed; the established forms of legal authority have disintegrated. You and your comrades have seized the commanding heights, and proceed with the business of government. Quite remarkably, you are now in control of the forms of legal authority. While this, in a way, was what the struggle was all about, victory brings its own embarrassments.

Revolution is a game any number can play. Just as you challenged established authority, so can the next fellow. He too can proclaim his superior virtue and your subversion of the public good before irregular con-

ventions who speak in the People's name. Vigilance, and the effective use of force, is a part of the successful revolutionary's answer to such rival pretensions. But there is another part too—an explanation of why it is wrong for others to usurp the usurper's crown.

There are two obvious answers to this obvious question of legitimacy. The first is "permanent revolution." Here, the revolutionary elite denies that anything really important has happened as a result of their accession to the legal forms of authority. After all, the elite did not require legal forms earlier to declare themselves the People's true representatives. It was enough to present themselves to irregular assemblies as people of special virtue in pursuit of the public good. And the "revolutionary legality" that was good enough for those great times of glorious victory is certainly good enough today. So hip-hip-hooray: onward in the People's service. Anybody who stands in the way is a counter-revolutionary, who must be consigned to the past or reeducated for life in a brave new world.

The other obvious answer is "revolutionary amnesia." Now that we have seized power, let us forget how we got there. The law is the law. If you do not like the law, then try to change it through the (newly) established forms. Anybody who ignores the forms and violates the law is a criminal. Criminals belong in jail.

3. *The Federalist Solution*

The most important reason why *The Federalist* is worth reading—not merely by lawyers but by all thinking people—is that it proposes a third way to solve the problem of revolutionary legitimacy. While rejecting the possibility or desirability of permanent revolution, *The Federalist* nonetheless places a high value on public-regarding forms of political activity, in which people sacrifice their private interests to pursue the common good in transient and informal political association. While rejecting revolutionary amnesia, *The Federalist* insists that the public-regarding form of politics should become preeminent only under certain well-defined historical situations. When these conditions do not apply, the claim of the legally established authorities to speak in the name of the People must be conceded by all thoughtful citizens.

For the moment, it is unnecessary to analyze the particular principles of Federalist constitutional science. The important points go deeper. According to Publius, the beginning of revolutionary wisdom is to recognize that the future of American politics will not be one long, glorious reenactment of the American Revolution. Rather than preparing the way for permanent revolution, *The Federalist's* task is to construct the constitutional foundations for a different kind of politics—where well-organized groups try to manipulate government in pursuit of their narrow interests. So far

as *this* kind of politics is concerned, the new constitutional arrangements should trump ordinary political outcomes. Yet the very decision to masquerade under the name Publius indicates that Madison, Hamilton, and Jay *do* believe in a kind of politics which, under certain conditions, justifies a change in preexisting constitutional principles.

It is, of course, the kind of politics exemplified by the Federalists themselves. A key paper is *Federalist No. 40*,⁸ where Madison confronts the fact that the Philadelphia Convention acted illegally in exceeding the authority granted to it by Congress and the States under the Articles of Confederation.⁹ After threading his way through several legal arguments, Publius drops his legalistic pose and asks how far “considerations of duty . . . could have supplied any defect in legal authority.”¹⁰ The answer is worth pondering:

Let us view the ground on which the Convention stood . . . They must have reflected that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence [to forms] would render . . . nugatory the transcendent and precious right of the people to “abolish or alter their governments . . .,” since it is impossible for the people spontaneously and universally to move in concert . . .; and it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable . . . citizens . . . [Indeed the Convention] must have recollected that it was by this irregular and assumed [method] that the States were first united against the danger with which they were threatened by their ancient government; . . . nor could it have been forgotten that no little ill-timed scruples, no zeal for adhering to ordinary forms, were anywhere seen, except in those who wished to indulge, under these masks, their secret enmity to the substance contended for. They must have borne in mind that as the plan to be framed and proposed was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities.¹¹

Hear the voice of the successful revolutionary. The highest form of political expression is to be found not in formal assemblies arising under preexisting law, but through an “irregular and assumed privilege” of proposing

8. See also THE FEDERALIST NO. 37, at 226 (J. Madison) (C. Rossiter ed. 1961) (describing “difficulties inherent in the very nature of the undertaking”).

9. See *supra* note 6.

10. THE FEDERALIST NO. 40, at 251 (J. Madison) (C. Rossiter ed. 1961).

11. *Id.* at 252–53 (quoting Declaration of Independence para. 2 (U.S. 1776)) (emphasis in original). While the central argument on this point is *id.* at 251–55, important ancillary texts include *id.* No. 39; *id.* No. 43.

“informal and unauthorized propositions.” If such proposals were accepted by irregular, but popularly elected, assemblies, we are to understand that *the people themselves*—the words are italicized in the original¹²—had spoken; and if the People approved the revolutionary elite’s considered proposals, this could “blot out . . . errors and irregularities.”

Strong stuff. At present, though, I am less interested in evaluating the Federalist theory of constitutional law than in presenting it to public view. From this perspective, the critical point is that *The Federalist* elaborates a dualistic conception of political life. One form of political action—I shall call it constitutional politics—is characterized by Publian appeals to the common good,¹³ ratified by a mobilized mass of American citizens¹⁴ expressing their assent through extraordinary institutional forms.¹⁵ Although constitutional politics is the highest kind of politics, it should be permitted to dominate the nation’s life only during rare periods of heightened political consciousness. During the long periods between these constitutional moments, a second form of activity—I shall call it normal politics—prevails. Here, factions try to manipulate the constitutional forms of political life to pursue their own narrow interests.¹⁶ Normal politics must be tolerated in the name of individual liberty;¹⁷ it is, however, democrati-

12. Are the italics significant? I do not know. Certainly if *The Federalist* were a 20th-century text, the distinctive patterns of typographic emphasis (which I have verified in the original editions) could fairly be said to have some significance. While I take note of the original italics in my discussion, I appeal to experts in 18th-century typography to tell me whether it is appropriate to take them seriously here. In any event, nothing important turns on the question—the italics merely give typographic emphasis to meanings already evident in the text itself.

13. See, e.g., THE FEDERALIST NO. 1, at 33 (A. Hamilton) (C. Rossiter ed. 1961); *id.* No. 46, at 299–300 (J. Madison); *id.* No. 49, at 316–17; *id.* No. 51, at 323–25.

14. Examples of *The Federalist*’s recurring affirmation of the Revolutionary past and its assertion of the ultimate need for mass mobilization may be found at *id.* No. 14, at 103–05 (J. Madison) (need to continue Revolutionary tradition); *id.* No. 28, at 181 (A. Hamilton) (separation of powers facilitates popular mobilization); *id.* No. 39, at 240 (J. Madison) (need for form of government to maintain fundamental principles of Revolution); *id.* No. 46, at 298 (division of powers permitting mass mobilization); *id.* No. 49, at 314 (necessity of keeping open “a constitutional road to the . . . people . . . for certain great and extraordinary occasions”); *id.* No. 60, at 367 (A. Hamilton) (revolutionary activity as a check).

15. The extra-legal character of the Convention has already been discussed, *supra* note 6, and will be elaborated further, *infra* pp. 1057–70. It will suffice here to note *The Federalist*’s recurring assumption that the People best express themselves through episodic and anomalous “conventions,” and not through regular sessions of ordinary legislatures. See THE FEDERALIST NO. 37, at 226–27 (J. Madison) (C. Rossiter ed. 1961); *id.* No. 39, at 243–44; *id.* No. 40, at 250–55.

16. These interests may, but need not, be narrowly materialistic. No less threatening were factions based upon narrow ideological ends—most notably the effort by sectarian groups to establish their own Church despite the dissenting beliefs of their fellow citizens. *Cf. id.* No. 10, at 84 (J. Madison) (“religious sect may degenerate into a political faction”). Indeed, Martin Diamond persuasively argues that, of all forms of partisan narrowness, *The Federalist* finds material narrowness the most readily controllable, and hence aims for a constitutional structure that seeks to channel factional politics into relatively harmless materialistic directions. See Diamond, *Ethics and Politics: The American Way*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 39, 52–56 (R. Horwitz ed. 1977).

17. This is the theme of the most famous paper in *The Federalist*: No. 10. While the brilliance of Madison’s analysis of factional politics is generally recognized, there is a tendency to approach *Feder-*

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cally *inferior* to the intermittent and irregular politics of public virtue associated with moments of constitutional creation.

C. *Federalist Political Science*

Having established this dualism,¹⁸ the next thing to ask is what *The Federalist* proposes to do with it. There are two conceptual possibilities. The first is fatalism. Here, the successful revolutionaries remain passive as they are engulfed by the tide of normal politics. There is nothing they can do during their moment of revolutionary triumph to prevent the future factional disintegration of the American polity. The cycle of constitutional politics/normal politics/constitutional politics will be played out endlessly to the end of human history. The second possibility is constitutional activism. Although there is no way to prevent the rise of normal

alist No. 10 as if it were a free-standing object, requiring relatively minor supplementation from other papers. For an example of this tendency, see D. TRUMAN, *THE GOVERNMENTAL PROCESS* 4–5 (2d ed. 1971). And yet the very definition of “faction” used by Madison in *No. 10* suffices to establish the self-consciously partial character of the paper’s analysis:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

THE FEDERALIST NO. 10, at 78 (J. Madison) (C. Rossiter ed. 1961). Rather than suggesting that all political groups are necessarily factional, this Publian formulation presupposes the reader’s capacity to distinguish factions from movements that *do* aim to further “the rights of citizens” or the “permanent and aggregate interests of the community.” While the genesis and character of these Publian groups are not elaborated in *The Federalist No. 10*, this shows only that *No. 10*’s argument is self-consciously incomplete, and cannot be treated independently of other papers in *The Federalist* that undertake to deal with the nature of Publian politics.

It is, of course, the object of this Lecture to begin the requisite textual synthesis. To minimize the inevitable controversy that such a reading will generate, this Lecture emphasizes papers that were also written by the author of *The Federalist No. 10*. While there are obvious differences between the Madisonian and Hamiltonian papers, see Mason, *The Federalist—A Split Personality*, 57 AM. HIST. REV. 625 (1952), I do not believe they involve the bedrock principles of dualistic constitutionalism developed here. Indeed, *The Federalist No. 9*, written by Hamilton, asserts its intimate connection with the subject of Madison’s *No. 10*, see THE FEDERALIST NO. 9, at 72–73 (A. Hamilton) (C. Rossiter ed. 1961), and seeks to locate the fear of faction within the larger commitments of Publian politics. Moreover, my dualistic reading of the text parallels some of the larger dualisms others have detected in Hamilton’s political aspirations. See Kenyon, *Alexander Hamilton: Rousseau of the Right*, 73 POL. SCI. Q. 161 (1958).

The best evidence of the fundamental unity of Publian thought is that the democratic argument in support of judicial review, developed by Hamilton in *The Federalist No. 78*, only becomes fully intelligible when viewed in the light of the Publian texts, largely written by Madison, that are discussed in this Lecture. See *infra* pp. 1030–31.

18. Indeed, Publius denies that he is developing a new conception but insists that he is building upon a thoroughly familiar principle: “The important distinction so well understood in America between a Constitution established by the people and unalterable by the government and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country.” THE FEDERALIST NO. 53, at 331 (J. Madison) (C. Rossiter ed. 1961). Recent historical work, moreover, tends to support Publius’ confidence in his audience’s mastery of this basic distinction. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 257–390 (1969).

politics,¹⁹ perhaps the Revolutionary generation can take steps that will palliate the most pathological aspects of the normal condition. The aim here is to use the resources of constitutional law to channel the ebb and flow of normal politics in ways consistent with Revolutionary principle.

1. *The Problem*

It is plain that *The Federalist's* Constitution takes this second path. It does not do so, however, in an optimistic spirit. Indeed, *The Federalist* is refreshingly free of claims that Americans are somehow immune to the diseases afflicting the rest of humankind.²⁰ Instead, there is a constant effort to reflect upon the lessons of modern and ancient political practice. And these lessons are anything but encouraging. European countries of American scale are veritable hothouses of despotism.²¹ Ancient Greek de-

19. *The Federalist's* pessimism on this matter is worth emphasizing. Publius' most elaborate treatment comes as part of an important paper explaining why not all constitutional disputes should be submitted to the general public for resolution:

Notwithstanding the success which has attended the revisions of our established forms of government and which does so much honor to the virtue and intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed do not present any equivalent security against the danger which is apprehended.

THE FEDERALIST NO. 49, at 315 (J. Madison) (C. Rossiter ed. 1961). Surely, one wants to say, Madison knows he is exaggerating both about the unity of the American people and the seriousness of the British threat. We must not permit doubts about Madison's historical report to obscure the basic theoretical point: Americans can be expected to transcend factional politics only "in the midst of a danger which repress[es] the passions . . ." *Id.* It is the old saw about the power of the hangman's rope to concentrate the mind wondrously, but raised to the level of collective political consciousness.

In case the point was missed, Madison devotes the next paper to variations on his theme. Since a *constant* appeal to the people on constitutional questions will permit the destruction of constitutional forms by self-regarding pressure groups, Madison next considers the merits of a *regularized* procedure under which the public may undertake the task of constitutional review: Every seven years, a group of Censors should be convened to discover and sanction all violations of the Constitution that have occurred since the People last assembled. Madison responds that the spirit of self-interested politics would simply degrade the constitutional forms of censorship, with the most powerful factions manipulating their amplified power to speak in the name of the People. Instead of using law to force a public-regarding politics into being, a collective effort to transcend faction should "be neither presumed nor desired, because an extinction of parties necessarily implies either a universal alarm for the public safety, or an absolute extinction of liberty." *Id.* No. 50, at 320 (J. Madison). The first possibility explains the success of the Revolutionary generation; the second possibility can be avoided only if the Revolutionary generation takes advantage of Federalist constitutional science to bequeath its successors legal forms equal to the challenges of factional politics.

20. A particularly eloquent assertion of this point may be found in *id.* No. 6, at 59 (A. Hamilton); see *id.* No. 31, at 196-97; *id.* No. 36, at 218-19; *id.* No. 42, at 268 (J. Madison).

21. See, e.g., *id.* No. 8, at 66 (A. Hamilton); *id.* No. 41, at 257-60 (J. Madison). The closest model is Great Britain. But, for obvious reasons, this is not a model that American Revolutionaries can follow with any great confidence. See, e.g., *id.* No. 69, at 415-23 (A. Hamilton).

mocracies were transparently unequal to the military and economic challenges of aggressive empires.²² Worse yet, they were notoriously unstable, constantly degenerating into turmoil and despotism as each group tried to seize exclusive power to oppress the others.²³

In trying to channel the flow of normal politics, *The Federalist* cannot indulge in the old trick of adapting a blueprint that has succeeded elsewhere.²⁴ Upon considering the materials at hand, the greatest political scientist of the age, Montesquieu, concluded that republican government could not survive without constant calls upon its citizens' public virtue.²⁵ Yet it is precisely *The Federalist's* insight that *constant* appeals to public virtue could not be expected to sustain the normal politics of the American people.

2. *The Scientific Solution*

Against all of this, *The Federalist* can only place one weighty factor on the other side of the balance: the peculiarly modern institution of political representation. It was this invention of modern political science, not any increase in the quantity of human virtue, which permitted the rational hope that Americans might succeed where both ancients and moderns had failed before them.²⁶ Representative institutions permit us to establish a regime encompassing millions of people with different religious and economic interests. Although each faction would gladly use political power to tyrannize over the others, their multiplicity permits the constitutional architect a new kind of political freedom. Rather than suppressing faction at the cost of individual liberty, the successful revolutionaries may hope to neutralize the worst consequences of faction by playing each interest off against the others.²⁷ Hence the supreme importance of constitutional law. By manipulating the forms of constitutional representation, Publius hopes to drive normal politics into directions that do not endanger the principles of the American Revolution—principles elucidated by the irregular methods of constitutional politics.²⁸

22. See *id.* No. 4, at 49 (J. Jay); *id.* No. 18, at 122–23, 124–25 (J. Madison & A. Hamilton).

23. It is this perception, of course, that generates the famous analysis of faction begun in *id.* No. 9, at 71–76 (A. Hamilton) and continued in *id.* No. 10, at 77–84 (J. Madison).

24. See *id.* No. 14, at 100–01 (J. Madison); *id.* No. 37, at 228.

25. C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 21 (R. Neumann ed. 1949) (“The politic Greeks, who lived under a popular government, knew no other support than virtue . . .”), which *The Federalist* cleverly attempts to parry by citing Montesquieu against himself. See *THE FEDERALIST* No. 9, at 73–74 (A. Hamilton).

26. See, e.g., *THE FEDERALIST* No. 9, at 72–73 (A. Hamilton); *id.* No. 10, at 77–84 (J. Madison); *id.* No. 51, at 320–25.

27. The classic statements here, of course, are *FEDERALIST* No. 10 and *FEDERALIST* No. 51.

28. The dualist hope expressed in this sentence is developed most systematically in the six papers beginning with *No. 46* and ending with *No. 51*. It is therefore essential to study these papers together in a single sitting, and resist the temptation to read them in one or another anthologized form.

How to do this is the master question of constitutional design. Only one thing is clear: Disappointment awaits all those who fail to understand the distinctive character of representative institutions and who strive instead to create a national government that resembles, as much as possible, the face-to-face democracy of ancient Greece.²⁹ The temptation is strong to simulate the ancient polis by calling together a few hundred people to "represent" the rest of us and reenact the ancient rituals of direct democracy. This congress, not the people as a whole, will gather together in one place, discuss the pros and cons, count heads, and declare the majority to be the winner in our name. The rhetoricians have a name for this solution to the problem of representation: synecdoche. In this figure of speech, the part (Congress) utterly displaces the whole (We the People of the United States) for which it stands in the representational system. But if we mistake Congress for the People Assembled, and give it supreme power, it will act in a way that belies its rhetoric. In the words of *The Federalist*:

"The concentrating of [all power] in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for" ³⁰

In short, political representation not only promises a solution to the ancient problem of democracy but provides the source of an entirely new problem—misplaced concreteness or reification. Once again, I quote: "The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter" ³¹

In contrast to the doctrine of legislative supremacy, *The Federalist* insists that *no* legal form can transubstantiate *any* political institution of normal politics into We the People of the United States. Madison is most explicit about this in *Federalist No. 63*. There, he rejects the popular belief that the ancient world was entirely ignorant of representative gov-

29. For express, and repeated, rejections of the polis as a model for American constitutional theory, see *id.* No. 9, at 72-73 (A. Hamilton); *id.* No. 10, at 78-84 (J. Madison); *id.* No. 14, at 100-01; *id.* No. 55, at 341-42; *id.* No. 63, at 384-85.

30. *Id.* No. 48, at 310-11 (emphasis in original) (quoting Jefferson with approval).

31. *Id.* No. 71, at 433 (A. Hamilton). Unlike the Publian texts quoted previously, this one is usually attributed to Hamilton. For another notable analysis of the problematic way in which legislatures represent the People, this time by Madison, see *id.* No. 58, at 357-61.

ernment. In doing so, he clarifies the distinctive conception of representation upon which *The Federalist* pins its hopes:

In the most pure democracies of Greece, many of the executive functions were performed, not by the people themselves, but by officers elected by the people, and *representing* the people in their *executive* capacity . . . [I]t is [thus] clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these and the American governments lies *in the total exclusion of the people in their collective capacity*, from any share in the *latter*, and not in the *total exclusion of the representatives of the people* from the administration of the *former*.³²

Compare this text with the revolutionary pronunciamiento, also written by Madison, that I have already read.³³ While Madison insisted there that the “irregular and assumed” procedures of constitutional politics provided access “*to the people themselves*,” here he italicizes the claim that it is “*the total exclusion of the people in their collective capacity*” which is the hallmark of the American Constitution during periods of normal politics. In short, we must systematically reject the idea that when Congress (or the President or the Court) speaks during periods of normal politics, we can hear the *genuine* voice of the American people. Under normal political conditions, the political will of the American people cannot be “represented” by means of any such naive synecdoche.

3. *Master Concept: The Problematics of Representation*

Yet, at the same time, Publius insists that his constitutional creations—Congress, President, Court—*do* “represent” the People in some other way. If we are to understand this claim, however, we must use a more general framework than that customarily employed in modern constitutional law. Too often, we address the problem of political representation as if it could be understood apart from a more general understanding of the problems involved in any and all efforts at representation—whether they be in politics, art, or everyday language. Unless we attempt a more general analysis of representation, however, we shall never come to grips with *The Federalist’s* hopes for American government.

Imagine, then, that you were planning a long and hazardous journey and wanted to commission a painting which would “represent” you to your loved ones in your absence. You have two choices. On the one hand,

32. *Id.* No. 63, at 386–87 (J. Madison) (emphasis in original).

33. See *supra* p. 1021.

you may find somebody with photographic aspirations, who might provide an image of you as you appear at the present moment. This mimetic kind of representation has familiar advantages and disadvantages. Precisely because it tries to present a realistic copy of your appearance, it is easy for others to read at a glance. Yet, for the very same reason, such a snapshot is unsatisfactory. Perhaps an artist who self-consciously appreciates that he *cannot* reduce your living reality to a piece of paper—that he is *only* providing a representation—will paint a portrait that, while less realistic, will nevertheless convey a deeper meaning to its audience. I will call this semiotic representation, because it is impossible to interpret the picture's meaning without self-consciously understanding that the picture is only a symbol, and not the thing which the symbol symbolizes.³⁴

It is in this semiotic way that Publius sets about representing the People of the United States by means of a written text—the Constitution of the United States. To understand this document, we must recognize that there can be *no* hope of capturing the living reality of popular sovereignty during periods of normal politics. Rather than trying for phony realism by supposing that Congress (or any other institution) *is* the People, the Federalist Constitution's first objective is to paint a picture of government which vigorously asserts that Congress is merely a "representation" of the People, not the thing itself.

The brilliant, but paradoxical, way that Publius makes this point is by proliferating the modes of representation governing normal politics. In Publian hands, the separation of powers operates as a complex machine which encourages each official to question the extent to which other constitutional officials are successfully representing the People's true political wishes. Thus, while each officeholder will predictably insist that *he* speaks with the authentic accents of the People themselves, representatives in other institutions will typically find it in their interest to deny that their rivals have indeed represented the People in a fully satisfactory way.³⁵

34. For purposes of gaining the broadest support for my argument, I have written this paragraph in a way that gives maximal credence to the mimetic aspiration. That is, by defining semiosis as requiring "the self-conscious understanding that the picture is only a symbol and not the thing which the symbol symbolizes," I have allowed the proponent of mimesis to suppose that *his* form of representation does not involve a similar form of symbolic self-consciousness. I do not believe, however, that this naively mimetic claim can withstand scrutiny, see A. DANTO, *THE TRANSFIGURATION OF THE COMMONPLACE*, 1-32, 54-89 (1981). In my view, the mimetic form of representation is best defined as the effort *to suppress* the interpreter's self-conscious recognition that the symbol is not really the same thing as the thing it symbolizes, while semiotic representation conveys meaning only by *provoking* the interpreter's self-conscious recognition of the representation's symbolic character.

35. This idea is succinctly presented in a famous passage of *THE FEDERALIST* No. 51, at 321 (J. Madison); see *id.* No. 60, at 366-67 (A. Hamilton). Even more importantly, it motivates the last part of *The Federalist*, beginning with No. 52—which seeks to show how the different branches of government will check each other's defects, and thereby yield a whole more "representative" than any of its constituent parts.

The result of the rhetorical interchange will be precisely the opposite of each partisan's hopes. Rather than allowing the House or Senate or the Presidency to beguile us with the claim that it, and it alone, speaks in the name of the People themselves, the constitutional separation of powers deconstructs all such naive synecdoches. As it works itself out in practice, the system emphasizes that no legal form can enable any small group in Washington, D.C. to speak unequivocally for We the People during normal politics. The House and Senate and Presidency merely represent the People in a manner of speaking; each is a metaphor that should never be confused with the way the People expresses its will during those rare periods of successful constitutional politics—when the mass of American citizens mobilizes itself in a collective effort to renew and redefine the public good.

Yet, while Publius begins his constitutional sketch by affirming its character as semiotic representation rather than living reality, he does not end there. So long as normal politicians are revealed as mere “stand-ins” for the People, the Constitution also allows them to “stand for” the People in a more straightforward way—by making its principal officials responsible, directly or indirectly, to popular election.³⁶ There is no inclination to deny the fundamental importance of recurring popular elections,³⁷ only an effort to establish that the pushings-and-shovings of normal politics are not the highest form of political expression.³⁸ Indeed, *The Federalist* tries to assure us that the new Constitution will encourage the selection of political representatives who, even during normal times, will rise above the parochialism of special interests.³⁹

Nonetheless, the very effort to create institutions that will reward statesmanship during normal periods only emphasizes the difficulty of the task, the precariousness of the achievement. In the absence of a mobilized mass of virtuous citizens, there can be no guarantee that the constitutional machine will invariably produce tolerable results: “It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.”⁴⁰

This sober recognition drives *The Federalist* to a final institutional expedient. Given the danger that normal government will be captured by partisans of narrow special interests, Publius proposes to consolidate the

36. See *id.* No. 39, at 241–42 (J. Madison).

37. See *id.* No. 53, at 331–36.

38. See, e.g., *id.* No. 46, at 294–95; *id.* No. 48, at 308–13; *id.* No. 65, at 397 (A. Hamilton).

39. See, e.g., *id.* No. 10, at 79–81 (J. Madison); *id.* No. 35, at 214–17 (A. Hamilton); *id.* No. 62, at 379–82 (J. Madison); *id.* No. 63, at 384–89. For a recent elaboration of this theme, see G. WILLS, *EXPLAINING AMERICA 177–264* (1981).

40. THE FEDERALIST NO. 10, at 80 (J. Madison).

Revolutionary achievements of the American people through the institution of judicial review. When normal representatives respond to special interests in ways that jeopardize the fundamental principles for which the Revolutionaries fought and died, the judge's duty is to expose them for what they are: merely "stand-ins" for the People themselves.

Not that Publius expects the Constitution to remain forever unchanged. To the contrary, *The Federalist* explicitly recognizes "that a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions."⁴¹ There will be future crises, new calls by future statesmen to put aside the quarrels of factional politics. If all goes well, the People will, in its irregular way, prove equal to the challenge.⁴² Rather than trying to immobilize the People, the Supreme Court's task is to prevent the abuse of the People's name in normal politics. The Court's job is to force our elected representatives in Washington to engage in the special kind of mass mobilization required for a constitutional amendment if they hope to overrule the earlier achievements of the American Revolution.⁴³ In the famous words of *Federalist No. 78*, the *democratic* case for judicial review does not

by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.⁴⁴

The problem with a Supreme Court, however, is obvious enough. What prevents it from misusing its constitutional authority to further one or another factional interest rather than to interpret the meaning of the past constitutional achievements of the American People?⁴⁵ Indeed, is it even possible to suppose any longer, as *The Federalist* plainly does, that something called judicial interpretation is an intellectually respectable activity?

I shall return to these questions in my last Lecture. My concern here has not been with the possibility of constitutional interpretation, but with the idea of representative government presupposed by modern constitutional lawyers. A good test of my success is whether you have gained a new perspective on the reading from *The Least Dangerous Branch* with

41. *Id.* No. 49, at 314.

42. *Id.* at 314-17.

43. *Id.* No. 78, at 469-70 (A. Hamilton).

44. *Id.* at 467-68.

45. Publius himself plainly believes that the courts are "the least dangerous branch," *id.* at 465, and that the greater danger is judicial subservience to factions that have managed to gain a momentary ascendancy in the other branches. *Id.* at 471.

which this Lecture began. For recall that in his classic statement of the countermajoritarian difficulty, Bickel focuses upon the very passage from *The Federalist* that I have just recited. Rather than dismissing *Federalist* No. 78 as, in Bickel's words, "nonrepresentational," we have used the concept of representation itself to give the text renewed meaning. This effort has permitted us to locate judicial review as part of a larger theme that distinguishes the American Constitution from other, less durable, frameworks for liberal democracy. In response to the perception that public-regarding virtue is in short supply, *The Federalist* proposes a democratic constitution *that tries to economize on virtue*.⁴⁶ The first great economy is purchased, of course, by the distinction between constitutional and normal politics. The second is gained by a scheme of constitutional separation of powers that normally gives elected officials powerful incentives to question the success with which rival "representatives" have embodied the political will of We the People of the United States. The third economy is obtained by designing an institution of judicial review that gives judges special incentives to uphold the integrity of earlier constitutional solutions against the pulling and hauling of normal politics.

In proposing a constitutional economy of virtue, however, Publius does not take a simple Hobbesian view of the human condition. To the contrary, the entire machine presupposes a dualistic psychology: "The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence."⁴⁷

The task is to create a structure of government that, in both normal and extraordinary times, will permit us to make the most of what virtue we have.⁴⁸ What more could constitutional law, or constitutional lawyers, promise We the People of the United States?

46.

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

Id. No. 57, at 350 (J. Madison). The entire *Federalist* No. 51 is, of course, the most eloquent and profound statement of this theme.

47. *Id.* No. 76, at 458 (A. Hamilton).

48. This is the root of my objection to the most influential modern interpretation of *The Federalist*, to be found in R. DAHL, A PREFACE TO DEMOCRATIC THEORY 4-32 (1956). Dahl reads Publius as if he were seeking to solve the problem posed in B. MANDEVILLE, FABLE OF THE BEES (F. Kaye ed. 1924) and design a system of government that could produce tolerable results without *any* appeal to the political virtue of its citizens. Unsurprisingly, Dahl finds Publius unequal to this challenge. His essay brilliantly examines each of the weak links in the Federalist argument when viewed as an effort to build a republic-without-virtue. Since Dahl's argument deserves serious consideration, I shall defer a detailed examination to another time. For now, though, it will suffice to say that I reject Dahl's guiding interpretive premise: *The Federalist* is not a failed solution to *The Fable of the Bees*, but a

LECTURE TWO: WE THE PEOPLE?

A. *From Successful Revolutionary to Private Citizen*

The last Lecture presented Publius as the epitome of the successful revolutionary—whose immersion in politics is rewarded not by a lifetime of failed hopes, but by an ongoing exchange with the People that culminates in the collective affirmation of principles of national identity. For such a one as this, the good life is the political life; the paradigm of virtue is somebody, like George Washington, who gains his greatest fulfillment in sacrificing private interest for public good. And yet, despite this profoundly gratifying starting point, Publius transcends his historical situation to glimpse another possibility: a world of private virtues inhabited by men and women who gain their deepest satisfactions in activities far removed from the public forum. Needless to say, Publius views this possibility with something less than complete enthusiasm. From his vantage point, these private people spell public trouble—factional indifference to the public good. But it is a mark of Publius' greatness that he does not try to suppress forms of life he finds distasteful, but uses constitutional law to reach an accommodation with civic privatism in the name of human freedom. It is this act of self-transcendence that makes the Publian conception of dualist democracy relevant to people living in vastly different historical circumstances.

Notably ourselves. Putting aside all the obvious social and economic differences that separate us from Publius, the hard fact is that we do not live in the triumphant afterglow of the most successful revolution of all time. When we say virtue, we do not immediately think of George Washington or his living equivalent (and who might that be?). I do not wish to deny, of course, that we have had our political successes—and failures. My point, rather, is that the political domain, as such, does not presently dominate our moral consciousness. For the contemporary American, the life of political commitment is only one of many paths to value. Virtue and vice—meaning and meaninglessness—may be found in a bewildering variety of lives. For us, a person who manages to preserve his integrity and make his mark in politics is, doubtless, a person who merits great praise—but any more so than the person who contributes to art, science, or the less exalted business of decency, love, and thoughtfulness?

In a sense, the ease with which we raise this question only makes the Publian economy of virtue more relevant to our political situation. If politics is not the preeminent path to virtue, it is all the more important for the Constitution to make the most of what little public virtue we can

profound effort to solve a different problem.

expect. Yet, on a more superficial level, the very fact that Publius takes public-regarding virtue *so* seriously is a stumbling block for those moderns whose moral consciousness assigns it a more peripheral place. The principles of dualist democracy will be far more accessible if we show how they make sense within our own problematic of virtue.

This Lecture, then, starts from a point very different from the one from which Publius began. Rather than the successful revolutionary trying to find a place for private life, I shall look at the Constitution from the vantage point of the private citizen trying to locate the rightful demands of public life. In shifting interpretive field, I do not mean to suggest that Publius' vision is somehow obsolete. My aim is to show that, even if one changes starting points dramatically, he can reason his way to the same dualistic conclusions that constitute our Publian heritage.

B. *The Dilemmas of Private Citizenship*

In taking the part of the private citizen, I hope to avoid easy caricature. The democratic dilemmas I shall elaborate do not arise in a cartoon world inhabited by privatistic zombies in search of the latest cheap thrill. Indeed, the best way to begin is by distinguishing the private citizen from someone I shall call the perfect privatist. The defining mark of the latter is his utter incapacity to take seriously the Publian effort to define a public policy that best fulfills the "rights of citizens and the permanent interest of the community."⁴⁹ Thus, when confronting the question, "What is good for the country?," the perfect privatist acts as if this inquiry can be reduced to the question, "What is good for me?" While there are indeed Americans who take this strongly reductionist approach to political life, I will not try here to persuade them to abandon perfect privatism's manifold seductions. Instead, this Lecture proposes to elaborate an alternative stance toward public life which remains accessible to most Americans. For most of us, our natural involvement with our personal destinies does not preclude self-identification as private citizens, capable of responding in a distinctive voice on questions involving the political community. Thus, in defending the views I announce as a private citizen, I cannot observe that a proposal will be to my personal advantage and leave the matter at that. When challenged, I must at least *say* that I have done more than consider my self-interest. Otherwise, I lose my standing as a private citizen and appear to my fellows as a selfish person bent solely on egoistic self-aggrandizement.

And yet, while most Americans answer to the name of private citizen,

49. Cf. THE FEDERALIST NO. 10, at 78 (J. Madison) (C. Rossiter ed. 1961) (defining faction, discussed *supra* note 17).

they have learned not to take their protestations of civic virtue *too* seriously. Indeed, even gaining a rudimentary empirical understanding of a national problem often requires a lot of work. While we may occasionally make this effort, an ongoing commitment to informed citizenship may unduly deflect our energies from the innumerable struggles of everyday life. Beyond the problem of information, moreover, tower the moral dilemmas of American citizenship. A sober consideration of the national interest may well lead one to conclude that local interests must be sacrificed to the general good. Yet this message will be met with bewilderment, or worse, by friends and neighbors who fail to look beyond their parochial interests. It is little wonder, then, that few of us voluntarily shoulder the full burden of Publius.

However understandable his limited engagement in public life, though, the thoughtful private citizen must recognize that it generates three inter-related problems for a democratic polity. The first is apathy. The existence of many *private* citizens may demoralize those who otherwise would be attracted to invest greater energy into private *citizenship*: If so many others give only a passing concern to national politics, isn't it silly of me to maintain the struggle? The second problem is ignorance. Given their limited engagement, most people will not be in a position to make a considered judgment on most—sometimes all—of the issues that seem so important to the few who follow the pulling and hauling in Washington, D.C. And finally there is the problem of selfishness. Without undertaking a serious examination of "the rights of citizens and the permanent interests of the community," isn't it all too likely that one's first political impressions will give too much weight to narrowly selfish interests?

C. *Coercive Democracy*

Apathy, ignorance, selfishness—without belittling these misfortunes, consider the disaster that would follow upon a serious effort at their eradication. Call the cure *coercive democracy*. If most people don't take national politics seriously, simply force them to pay attention. Every day or so, each adult citizen should be compelled to spend an hour or two discussing the issues of the day. Over time, this ongoing confrontation with the issues will induce citizens to form considered political judgments. And if the discussions reveal that the masses are caught up in the protection of their petty local interests, doubtless we can train specially conscientious Public Citizens who will lead their fellows to a genuinely national and public-regarding view of the nation's problems.

It is easy, of course, to find this chilling vision of coercive democracy entirely unacceptable. Today's private citizen joins Publius in condemning

coercive democracy as a “remedy . . . worse than the disease.”⁵⁰ Doubtless there are times when a liberal democracy may rightly call upon its private citizens to die in the defense of their country.⁵¹ The demands imposed in times of crisis are not to be confused, however, with the normal place that citizenship occupies in the ordinary American’s self-understanding. Generally speaking, it is up to each American to decide how much time and energy he will devote to private *citizenship*, how much to *private* citizenship. If this means that liberal politics will often suffer from apathy, ignorance, and selfishness, we will have to learn to grin and bear it.

D. *Levelling Democracy*

While few ordinary Americans question these harsh political truths, American lawyers fail to struggle with them as they puzzle out the meaning of constitutional government in a liberal democracy. Instead, modern constitutional wisdom begins from a very different starting point—one derived from the Progressive, as opposed to the Federalist, tradition. Instead of distinguishing between the constitutional conclusions reached by a mobilized citizenry and the ordinary outcomes of normal politics, the modern lawyer implicitly uses a model of the democratic process that precludes the self-conscious recognition of the ebb and flow of political involvement. This levelling approach to the Constitution sweeps aside the dualist’s persistent anxiety about the problematic way in which democratic government “represents” the People during normal times. Instead, the leveller advances a single-track conception of lawmaking that drives the dualist’s preoccupation with mass apathy, ignorance, and selfishness to the periphery of constitutional thought. In this single-track view, there is only one place in which the political will of the American people is to be found: the Congress of the United States. If the Congress enacts a law, the People have spoken; if not, not. It’s that simple, and no talk about the problematics of representation should be allowed to obscure this fundamental reality.

Not that levellers necessarily insist upon an utterly simplistic view of single-track lawmaking. They may, for example, remark upon the ease with which incumbent politicians can place their competitors at an unfair electoral disadvantage. Indeed, an elaborate concern with this problem can even reinforce the levelling ideal. It is almost as if the entire point of fair

50. *Id.*

51. Doubtless, too, there are occasions upon which citizens, when faced with this demand, may conscientiously refuse to comply in the name of some ideal that is higher than democratic citizenship. My own views on this matter may be found in B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* § 62, at 293-301 (1980).

electoral ritual is to preclude any inquiry into the depth and breadth of the popular participation that lies behind a particular ballot count. If, in a formally free and fair contest, every voter chooses between the candidates on the basis of the winsomeness of their respective smiles, the leveller would treat this result no differently from another election in which every voter chose between the candidates on the basis of their position on black slavery. In each case all the leveller knows—and all he needs to know—is that by a vote of fifty-one to forty-nine, the People chose Candidate *A* over Candidate *B*; it is therefore Representative *A* who is *fully* empowered to rule in the name of the People until the next election.

This emphatic conclusion may be rendered rhetorically plausible by two diametrically opposed characterizations of the American electorate. On the one hand, the leveller may mythologize the citizenry, and treat each and every voter at each and every election as if he were Publius, preeminently concerned with the “rights of citizens and the permanent interests of the community.” On the other hand, the leveller may adopt the stance of the hard-boiled realist and treat each voter as always out for himself.⁵² The leveller may even flip back and forth between these very different images of the American voter. The critical point, however, is not the particular picture of the voter used by each leveller. Rather, it is the leveller’s failure to discriminate between those rare occasions on which many people are investing heavily in their role as citizens and those frequent occasions of diminished political attention and concern. Thus the leveller’s treatment of the voter as citizen parallels his treatment of Congress as lawmaker. In neither case does the levelling constitutionalist provide a vocabulary that allows the private citizen or the politician/statesman to signal that he is taking his public-regarding responsibilities with special seriousness.⁵³

Despite the reductionist character of the levelling approach, however, I do not wish to deny that it *does* offer a solution to the problem of civic privatism which is vastly superior to that of coercive democracy. Indeed, I shall be using the levelling conception of single-track democracy as a conceptual baseline in my efforts to assess the dualist alternative. Thus, I shall first emphasize the very important contributions that levelling makes to the theory of liberal democracy, and only then consider whether dualism can do even better.

52. While the classic work in levelling political philosophy takes a hard-boiled view of modern citizenship, see J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 250-83 (1942), the levelling tradition in American constitutional law sometimes adopts loftier, more Publian, characterizations. This is the general tendency, for example, in J. ELY, *DEMOCRACY AND DISTRUST* (1980) discussed *infra* pp. 1047-49.

53. For a recent essay that emphasizes this tendency from a more empirical point of view, see A. HIRSCHMAN, *SHIFTING INVOLVEMENTS* (1982).

1. *The Leveller's Contribution to Liberal Democracy*

Begin, then, with the symbolic and substantive contributions levelling makes to the *liberal* democrat's concern with the right of citizens to pursue a private life far removed from politics. On the side of symbol, the leveller assures each of us that our standing as full-fledged citizens is secure so long as we are willing to spend a few minutes at the polls once in a while. Even if we cast our ballots in ignorant or selfish ways, our votes are counted as if they were the product of the most conscientious examination of the nature of the common good. So far as the fundamental ritual of a mass democracy is concerned, the private citizen is allowed to reaffirm his citizenship without the need to ask himself any embarrassing questions about the quality of his commitments.

And then there is the matter of substance. The leveller *has* managed to avoid the transparent dangers involved in forcing people to be good citizens. Nobody is obliged to spend time tediously discussing the fate of the Republic when he would rather be doing something else. Nobody is given the dangerous job of leading exercises in coercive consciousness-raising. While avoiding coercive democracy may seem too modest a goal for some, the liberal finds it an achievement of fundamental importance.

Now turn the coin to consider the liberal *democratic* arguments in favor of levelling. Beginning this time with substance, the levelling system makes it hard for a political clique to monopolize political control. While "ins" may beat "outs" in one, two, or three elections in a row, a democratic electorate remains a notoriously fickle beast. In time, the ballot box will yield a victory to the outs—if only because the opposing candidates have managed to convince the voters of the superior brilliance of their smiles or the greater profundity of their advertising copy. The most trivial levelling election, then, does serve important—indeed fundamental—functions. Even if elites are destabilized by almost-random electoral shocks, the system of levelling democracy does give reality to the notion of popular rule, and makes it harder for a closed circle to govern forever.

Levelling also promises the liberal *democrat* symbolic rewards. Rather than emphasizing the problematic character of the citizenry's engagement, the leveller can view each Election Day as yet another unambiguous triumph for the democratic ideal. Behold: Millions upon millions of citizens have once again played their appointed part in the ritual of democracy. After all, nobody forced them to turn off their T.V. sets for the time it takes to go to the polls!

I do not wish to deny the important truth attached to the leveller's democratic symbolism. It *is* significant that so many of us have come together at the polls to show that we have not forgotten that we *can* speak as We the People of the United States.

2. *Levelling and Its Inadequacies*

Yet, for all its advantages, there is a darker side to the liberal democratic compromise that is levelling democracy. Begin, once again, with the liberal side of the story. True, the leveller does guarantee each private person his standing as a citizen even though he lives his life with only a passing glance at politics. Nonetheless, levelling democracy can be a very risky business. While most of us are focusing our concerns upon other matters, some of our fellow Americans work full-time at the business of government. And they may well use their heavy political investments to maximize their advantage at our expense. By the time private citizens wake up to the threat to their fundamental interests, it may be too late for effective political action. The full-time politicians may have entrenched themselves on the commanding heights—all the while exercising the full legislative authority of the People, as is their right in a single-track democracy. At this point, it may be impossible for political mobilization to undo the consequences of earlier neglect. Moreover, even if counter-mobilization proves successful, the effort required will divert the private citizen from his most precious goals. By definition, these aims are not to be achieved in the public forum and will not be nourished by an all-consuming commitment to citizenship. In short, what the private citizen finds wanting in levelling democracy is adequate insurance against a political landslide engineered by well-organized special-interest groups speaking with the full authority of the People.

Although his diagnosis is very different, the liberal *democrat* can sympathize with his twin's dissatisfaction. However grateful he is for the leveller's real contributions to the symbol and substance of popular rule, there is more to democracy than the leveller will allow. Sometimes the private citizenry is trying to do more than simply express its displeasure with the ins by replacing them with the outs. Sometimes it is trying to work out a *considered judgment* on a matter of principle—a judgment reached only after years of popular mobilization and far-reaching debate. It is just this affirmative conception of democracy that transcends the limits of levelling theory. For, by definition, the leveller treats all acts of political participation as if they were accompanied by the same degree of civic seriousness. As a consequence, he cannot mark those rare occasions on which the American people do more than replace one set of ins with another and instead announce a fundamental change in the constitutive principles of the republic.

The problem, perhaps unsolvable, is this: Can we design a regime which retains the very fundamental achievements of levelling but which somehow ameliorates its liberal democratic disadvantages?

E. *The Promise of Dualist Democracy*

This is the promise of the dualist constitution. For the present, I want to defer all the vital detail required to make two-track lawmaking a credible constitutional reality. My aim here is to show how a dualist constitution—if it could be made to work in a legally credible fashion—would be superior to the levelling form of single-track democracy. And for this purpose, the simple concept of two-track lawmaking will suffice.

Begin, then, with the two-track system's promise to provide the *liberal democrat* with some political insurance for the millions of people who have better things to do than follow the goings-on in Washington, D.C. Most of the daily political action will predictably take place on the lower lawmaking track. And, by definition, nothing on this track can disturb the fundamental principles previously hammered out on the higher track. Thus, the private citizen is insured against a change in fundamental political principles—at least so long as no new political movement is making great progress in enacting its new principles into higher law.

At the same time, the dualist promises to satisfy the liberal *democrat* by institutionalizing the very distinction that is obliterated by the leveller's impoverished constitutional vocabulary. As in a levelling constitution, the democrat may continue to find meaning in the fact that Americans regularly go to the polls and sometimes replace one set of leaders with another. Yet he may find deeper meaning on those rarer occasions when the American people do even more—when, after sustained debate and struggle, they hammer out new principles to guide public life. For it is the very purpose of the higher lawmaking track to mark these occasions as possessing special and abiding significance in the life of the political community.

The existence of a higher lawmaking track, in short, has a liberal democratic value both on those rare occasions when a new mass movement succeeds in enacting new constitutional principles *and* during those frequent periods when no profound constitutional transformation is being seriously considered. When the higher track is empty, the liberal obtains insurance; when it is crowded, the democrat has a means of amplifying the voice of the People in a way that will arrest attention for a long time to come.

Despite its distinctive achievements, however, I do not pretend that dualism will magically dissolve all the difficulties that may be raised against it. Quite obviously, it will not satisfy the perfect privatist who demands an absolute right to ignore politics whenever he finds something better to do. Similarly, it will not satisfy the strong democrat who wants to have the People resolve all important questions all the time. More significantly, dualism does not even promise perfect satisfaction to the thoughtful private citizen. On the contrary, once a new political movement begins suc-

cessfully to negotiate the obstacle course established on the higher law-making track, each of us will be faced with a hard choice. Either we may continue as relatively passive participants and run the risk of grave political defeat, or we may increase the level of our public involvement and sacrifice our more personal interests. Rather than deprecating the difficulty of this choice, the dualist seeks to create a system in which each of us can make our decision in a self-conscious and deliberate way.

F. *What Does the Constitution Constitute?*

Until now, I have emphasized the extent to which a dualistic lawmaking system may reconcile competing aspects of the liberal democratic ideal. There is, however, a second way of approaching dualism's promise. Here, we move from the grand abstractions of political theory to the more particular difficulties that people encounter in the effort to communicate the ebb and flow of their public involvements. To grasp the problem, put yourself in the typical position of the *private* citizen. So far as you are concerned, the victory of one or another political party in the next election will not typically transform the shape of your world. In contrast, your world *will* be shattered if your wife leaves you, or your job loses its attraction, or you embarrass yourself before your friends in some shameful way. These are the things the private citizen normally takes with high seriousness; politics is a sideline, competing for attention with countless other activities.

And yet you know that this sideline is different from others. Indeed, the ordinary irresponsibilities of normal politics sometimes begin to offend in a special way. Don't our so-called representatives recognize that there is something serious going on? Can't they see that business as usual won't suffice any longer?

Even as the private citizen says this, however, he must recognize a difficulty in rendering his heightened concern credible to his fellow Americans. For even now, he is not willing to sacrifice everything that makes his private life worthwhile in order to give his all for the Republic. More abstractly, while the private citizen is categorically distinct from the perfect privatist, he is no less distinct from someone I shall call the perfectly public citizen, who insists upon the single-minded pursuit of the public good no-matter-what-the-private-sacrifice. This means that the private citizen confronts a special problem in engaging in political communication: How can he signify his concerns as a private *citizen* without undertaking the all-consuming commitment characteristic of a perfectly public citizen?

It is here that the American system of two-track democracy makes its signal contribution. The manner in which it does so, however, is rather complex. Call it the strategy of differential sacrifice. To see how it works,

consider that a political movement takes to the higher lawmaking track only at a high cost. For in fixing its sights upon a higher lawmaking victory, it diverts its energy from the lower lawmaking track, passing up the chance for cheaper victories that may further the more immediate interests of its followers. While this fact discourages most political groups from ever taking seriously to the higher track, it also gives those who do make the sacrifice a way to signal their heightened civic concern—without, however, requiring them utterly to abandon their private lives. By allowing the movement ostentatiously to sacrifice lower lawmaking opportunities for the chance at higher lawmaking victory, a political movement can represent the concerns of a mass of private *citizens* with a credibility that cheap talk of virtue can never bring. The sacrifice implicit in higher lawmaking gives private citizens a credible way of saying to one another: “*This* time, we really mean it!”⁵⁴

To forestall predictable misunderstanding, I am not suggesting that when a political movement actually succeeds in clearing all obstacles on the higher lawmaking track, a glimpse inside the innermost psychic recesses of the movement’s partisans would reveal hearts entirely purged of self-interest and minds fully focused upon the “rights of citizens and the permanent interests of the community.” Indeed, if it *were* possible for us to experience—and reveal to others—a pristine purity of motive, we could dispense not only with the strategy of differential sacrifice but also with the dualist constitution itself. Instead of the complex legal rituals of higher lawmaking, we might simply display the purity of our motives and get on with the public business at hand. It is precisely because we are psychologically complex creatures, however, that such “sincere” protestations of simon-purity seem naive ways of establishing our claims to private *citizenship*. The strategy of differential sacrifice, in contrast, provides a credible way in which psychologically complex private citizens can mark out those occasions when they mean to invest a certain aspect of their personality with heightened significance.

The symbolic uses of differential sacrifice may be illuminated by a glance at the way it works in more intimate spheres of life. Imagine, for example, that we lived in a place where the legal institution of marriage was unknown. In such a world, couples would still agonize over their decision to live together, and devise countless subtle mechanisms to signal

54. Indeed, sometimes the added credibility gained by higher lawmaking may actually put the movement in a stronger position in the *lower* lawmaking system than it would have occupied had it concentrated exclusively upon lower-track lawmaking. This result is not inconsistent with the argument in the text; all that it suggests is that the credibility purchased by a group’s willingness to bear the differential costs of higher lawmaking may sometimes prove an exceedingly valuable political investment—so valuable that its payoff in lower-lawmaking efficacy offsets the costs in time and money previously diverted to the higher lawmaking track.

to one another the special meanings they attach to their relationship. Yet this ongoing effort at communication would be immeasurably enhanced by the legal form of marriage—through which parties self-consciously expose themselves to heavy costs if they later act inconsistently with their protestations of love and affection. The point of such a costly ceremony is not primarily to serve as a snapshot of the love and hate that attract and repel the parties to the ongoing relationship; rather, it is to provide a symbolic system through which psychologically complex people can give a special meaning to a form of interaction and thereby *constitute* it as a special kind of community, distinct from the ordinary relations of everyday personal existence.

Constitutional dualism provides a similar symbolic system in the public realm. By providing a higher lawmaking system, the American Constitution succeeds in constituting something more than a government in Washington, D.C. It constitutes a system of political meanings that enable all Americans to indicate the rare occasions when they mean to present themselves to one another as private *citizens*, and mark them off from the countless ordinary occasions when they are content to understand themselves as merely *private* citizens—for whom political life is but one of many diversions in the ongoing pursuit of happiness.⁵⁵

Not that every effort at establishing our claim to private *citizenship* is fated to meet with Publian success. Instead, we must expect that most of our fellow citizens will look upon most political efforts at national renewal with the apathy, ignorance, and selfishness characteristic of normal life in a liberal democracy. And yet, from time to time, some would-be Publans begin to strike a resonant chord; their strong appeals to the public good are no longer treated as if they were the ravings of fringe elements in American society. Instead of encountering ignorance or contempt, the new

55. This formulation extends the original Publian insight into the semiotic character of representation, *see supra* pp. 1027–28, to the one subject which somehow escaped Publius' attention—the representative pretensions of Publius himself. However much he insisted upon the merely representative character of normal politicians, Publius claimed a very different kind of status for the Federalist effort to represent We the People. So far as Publius is concerned, the Federalists were not mere representatives. They were the real thing: *the People themselves* (to recall Madison's italics).

And yet we cannot allow Publius to exempt himself from his own insight into the semiotic character of representation. Indeed, if we do so, we shall only succeed in providing grist for the neo-Beardian debunkers who aim to destroy the Publian tradition. For if the Framers are viewed as representing what was "really" going on in America in the 1780's, it is child's play to develop other snapshots that will place their depiction of We the People in a very different light. Not only will countless historians enumerate the countless patriotic folk who rejected the Federalist program, in our privatistic age we would be downright disappointed if some psychoanalyst could not elaborate the darker impulses that "really" accounted for Madison's decision to take on the pseudonym Publius. It is only when we understand the Federalist exercise in higher lawmaking as a contribution to a semiotic, rather than a mimetic, system of representation that we may grasp its enduring significance. Rather than providing a snapshot of any reality beyond itself, higher lawmaking provides Americans with a vastly enriched vocabulary through which they can express the necessarily complex character of their relationship to the ebb and flow of political life in a liberal democracy.

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movement is taken seriously by more and more Americans—even when they find its message deeply repugnant. In turn, the movement's success in penetrating political consciousness provokes a general effort to assess its ultimate significance: Is it a passing fad or something of genuine public significance? Slowly the half-remembered rituals of higher lawmaking begin to take on a deeper meaning, for it is through these rituals that we may test the seriousness of our fellow Americans' effort at national renewal and redefinition. Needless to say, most movements will fail to generate the kind of widespread support for their Publian pretensions that is required before they can constitutionally speak, once more, in the special accents of We the People of the United States. But that, in a sense, is just the point. If it *were* cheap and easy for higher lawmaking to succeed, we would be debasing the remarkable collective achievement involved when millions of Americans do manage, despite the countless diversions of liberal democratic society, to engage in an act of self-government with a seriousness that compares to the most outstanding constitutional achievements of the past.

Constitutional lawyers do their fellow Americans an injustice, then, when they adopt a levelling attitude to the dualist theory of democracy affirmed at the Founding. Rather than treating Publius as if he were an antique irrelevancy from a bygone age, we should recognize the Federalist constitution as offering a distinctive solution to an ongoing problem of self-definition—one generated by two, quite distinct, traditions out of which the modern West emerges. The first, recalling the grandeur of the Greek polis, insists that the life of political involvement serves as the noblest ideal for humankind. The second, recalling a Christian suspicion of the claims of secular community, insists that the salvation of souls is a private affair, and that the secular state's coercive authority represents the supreme threat to the highest human values. When faced with this ongoing struggle for ascendancy in Western thought and practice, the American Constitution does not seek an easy victory of one part of ourselves at the cost of suppressing the other. Instead, it proposes to use the conflict to provide the energy for a creative synthesis.

As Americans, we are neither perfectly public citizens nor perfectly private persons. The Constitution of the United States constitutes us as private citizens equipped with a language and process that may, if intelligently used, allow for liberal democratic self-government of a remarkably self-conscious kind. And it is the use of this language by the Supreme Court that will concern us in the final Lecture.

LECTURE THREE: THE PEOPLE AND THE COURT

A. *From Private Citizen to Constitutional Lawyer*

My last Lecture took the view of the modern American struggling to make sense of his relationship to political life. For such a person, a key question is whether our constitutional tradition significantly enlightens the distinctive dilemmas of American citizenship. The answer is not to be found in some superficial introduction to the doctrinal mysteries of constitutional lore, but in an explanation of the ways in which dualist democracy expresses the characteristic perplexities of modern life in a liberal democratic society.

This democratic defense of dualism, however, is hardly sufficient for the more specific needs of the constitutional lawyer. What is required here is a well-developed explanation of the way in which constitutional dualism clarifies a host of familiar doctrinal predicaments. While I hope to produce a book responsive to these professional needs, my aim here is to isolate pervasive anxieties that presently block a sustained effort at doctrinal reconstruction. These professional anxieties take two related, but distinct, forms: one on the level of democratic theory, the other on the level of juridical technique. While both combine to cast grave suspicion over the modern practice of judicial review, they do so in ways that will require different dualist diagnoses.

The earlier Lectures make an analysis of the first anxiety, provoked by democratic political philosophy, the less intractable part of our problem. Here we need only complete the neo-Federalist critique of the “countermajoritarian difficulty” that is said to deprive judicial review of its legitimacy in the American democratic system. Since we addressed this claim in the first Lecture’s discussion of *The Federalist Papers*, our task here is to translate the Federalist argument into a more contemporary political idiom—one that builds upon the vision of liberal democracy and private citizenship developed in the last Lecture.

Even if this effort to dissolve the “countermajoritarian difficulty” proves successful, however, we shall have only taken a first step toward an understanding of the modern legal profession’s discontents. Our collective anxiety about the Supreme Court is not exhausted by doubts about its democratic legitimacy; no less significant is the uneasy feeling that the juridical tools at the Court’s disposal are radically unequal to the challenges of judicial review. Sometimes these perplexities find expression in attacks on the very idea that constitutional interpretation could be anything more than a screen concealing the raw facts of political power and

personal predilection.⁵⁶ No less significant, however, is the desperate energy with which more lawyerly types have sought to move beyond interpretivism in the search for a credible conception of juridical technique. This quest, needless to say, has led in many different directions—from lofty appeals to the methods of philosophy⁵⁷ or economics⁵⁸ or even prophecy,⁵⁹ to more down-to-earth efforts to apply common law techniques to constitutional problems.⁶⁰ While these trans-interpretive enterprises differ from one another, they all proceed from a common supposition—that classical conceptions of constitutional interpretation are so radically deficient as to be beyond hope of lawyerly reconstruction.

In confronting this pervasive suspicion, I am not searching for a magical cure that will suddenly restore the profession to a robust condition of interpretive self-confidence. What is required instead is a lengthy process of recuperation, during which we reflect upon the peculiar historical conditions that have made the very possibility of a lawyerly interpretation of the Constitution seem so professionally problematic. It is here where dualist theory can make its most immediate contribution by suggesting a new view of our constitutional past that may allow us both to understand, and ultimately to transcend, the current interpretive impasse.⁶¹

B. *The Intertemporal Difficulty*

Before we can build on solid ground, however, we must reconsider the levelling opinion that indicts the Supreme Court as a “deviant institution

56. See Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

57. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 131-49, 223-39 (1978); Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

58. See, e.g., Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49; Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

59. See, e.g., M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 97-100 (1982); Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984).

60. See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

61. This effort complements the renewed scholarly engagement with the concept of interpretation revealed in the recent literature. See, e.g., Fish, *Fiss v. Fish*, 36 STAN. L. REV. (1984) (forthcoming); Fiss, *Conventionalism*, 57 S. CAL. L. REV. (1984) (forthcoming); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); *Law and Literature*, 60 TEX. L. REV. 373 (1982). Thus far, the questions raised by this literature tend to be formulated in ahistorical and abstract ways: “What, in general, is the nature of legal interpretation?” “How is it similar to, and different from, other kinds of interpretive activity?”

While these questions are important, I do not believe that they get to the heart of our present difficulties with legal interpretation. In large part, these perplexities do not grow out of some abstract failure to appreciate the nature of the interpretive enterprise, but out of a particular series of historical conjunctions which have deprived the legal community of confidence in its traditional hermeneutic devices. This, at any rate, is the hypothesis that has motivated the present Lectures as well as much of my other work. See B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984); B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

of American democracy," doomed forever to bear the stigma of the "countermajoritarian difficulty." To put this familiar charge in dualistic perspective, consider the obvious sense in which it is false. When the Court invokes the Constitution, it appeals to legal enactments that *were* approved by a whole series of majorities—namely the majorities of those representative bodies that proposed and ratified the original Constitution and its subsequent amendments. Rather than a countermajoritarian difficulty, the familiar platitude identifies an intertemporal difficulty.

As befits a platitude, the truth on which the intertemporal difficulty stands is both simple and basic: Courts are generally expected to follow the last word enacted into law. Judicial review, however, requires the Supreme Court to reverse this rule and insist upon its reading of the Constitution despite contrary instructions by later, popularly elected representatives. It is this reversal of the ordinary temporal priority that lies at the core of the charge of "deviance."

And surely the problem is a real one. Indeed, if taken with the usual *ceteris paribus* clause, the intertemporal difficulty is irrefutable. Call this the *principle of the last word*: Other things being equal, it *would* be anti-democratic for the courts to reject a later decision of a representative government simply because it was inconsistent with an earlier one. The People must reserve the right to change their minds—otherwise we have ancestor worship, not democracy.

But are other things always equal? It is this, of course, that the dualist emphatically denies.⁶² In his view, our Constitution is one great effort to distinguish between those rare acts of representative government backed by the considered judgments of the mass of mobilized citizens and the countless actions based on something less than this. By contrast, the conventional wisdom of modern constitutional law takes a very different view of the intertemporal difficulty—one that is consistent with the levelling, or single-track, conception of democracy described in the last Lecture. In contrast to the dualist's picture of constitutional peaks and statutory valleys, the leveller levels constitutional history to a single plane of legal significance. So long as our legislators gain their seats through a process of fair and free democratic election, the leveller refuses to consider the quality of citizen involvement that supports a particular enactment. On this view, political decisions reached by one democratically elected assembly can never have greater legitimacy than those reached by another. It is, moreover, precisely this levelling premise that is required before the inter-

62. Indeed, I understand the last three paragraphs to restate the point initially made by THE FEDERALIST NO. 78, at 468-70 (A. Hamilton) (C. Rossiter ed. 1961).

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temporal difficulty may be translated into the countermajoritarian difficulty by a straightforward, four-step argument:

- (1) *Ceteris paribus*, courts should follow the last word enacted into law by a popularly elected assembly. This is the principle of the last word.
- (2) But, under the levelling principle, political solutions reached by a democratically elected assembly can never have greater legitimacy at one time rather than another.
- (3) Therefore *ceteris* must be *paribus*, and a democratic court should always follow the last legally enacted word on the subject.
- (4) Since judicial review violates this rule, it is presumptively antidemocratic.

Though it is rarely made entirely explicit, this bare-bones argument plainly motivates much of the most distinguished contemporary writing on the Constitution. To take an especially fine example, two features of John Ely's book, *Democracy and Distrust*, serve to mark it out as an archetypical product of the levelling approach.⁶³ The first is Ely's determined effort to trivialize the substantive principles that have, as a result of past generations' successful efforts in higher lawmaking, gained the status of constitu-

63. While it is useful to concentrate on a single example, it is important to emphasize the extent to which levelling premises are accepted by a wide range of commentators who would reject Ely's substantive conclusions. On this level, Ely's book is one of the most distinguished products of a legal generation, now gaining academic ascendancy, that seeks to rationalize the fundamental doctrinal conclusions of the Warren Court. These doctrinal conclusions will, predictably, be challenged by commentators of two different persuasions: those who believe the Warren Court went too far, and those who believe it did not go far enough. The most thoughtful spokesmen for *both* these tendencies, however, are no less emphatic in their levelling than is Ely. Thus, while Robert Bork's doctrinal views are far more restrictive than Ely's, his work presupposes the same model of levelling democracy from which Ely's work proceeds. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); see also Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

Similarly, those who find Ely's substantive doctrine unduly conservative have been no less assiduous in grounding their judicial activism on levelling premises. On the one hand, some emphasize the extent to which the levelling ideal of free and fair elections is inconsistent with American social realities. On this line, the Court may well be required to move beyond Ely's moderate interventionism if it hopes to clear the way for a truly democratic electoral process. See Parker, *The Past of Constitutional Law—and Its Future*, 42 OHIO ST. L.J. 223 (1981). On the other hand, some scholars elaborate a more legalistic form of activist levelling by positing the existence of a broad congressional power over the Supreme Court's jurisdiction. This allows the activist to read deep meaning into the fact that Congress has refused to strip the Court of its review functions despite the provocations of judicial interventionism. On this line, so long as Congress continues to grant the Supreme Court jurisdiction over constitutional issues, the answer to the question of democratic legitimacy is quite straightforward: Since, on levelling premises, Congress is the People's best representative, the congressional grant of jurisdiction is equivalent to the People's endorsement of activist judicial review. See, e.g., C. BLACK, *DECISION ACCORDING TO LAW 37-39* (1981); M. PERRY, *supra* note 59, at 128-39.

Of course, this route to activism comes at a heavy price for the dualist—for it would permit a single Congress to eliminate the practice of judicial review in a single statute. But this conclusion only serves to emphasize the extent to which judicial activists, no less than conservatives, may adopt levelling presuppositions.

tional principle. Indeed, so far as Ely is concerned, the history of our Constitution reveals that the very effort to guarantee substantive rights through higher lawmaking is a misconceived adventure.⁶⁴

This first conclusion prepares the way for a second. For Ely does not propose to respond to his impoverished conception of higher lawmaking by abolishing judicial review. Instead, he seeks to give the Court a new mission by directing its attention to the machinery of lower-track lawmaking. In his view, private citizens can legitimately expect that the courts will protect only those constitutional rights which keep our regularly elected representatives electorally accountable and suitably broad-minded in the exercise of their lower-track functions.⁶⁵

No less remarkable than these conclusions is Ely's effort to present them as the most mature product of an "ultimate interpretivism" based upon the constitutional text itself.⁶⁶ After all, Ely asks, doesn't our Constitution devote far more of its language to matters of process than it does to matters of substance? Doesn't this textual concern with process gain its fulfillment in Ely's image of a Supreme Court bent upon assuring the democratic legitimacy of an electorally responsive and broad-minded Congress?

It is here where the dualist must raise the cry of *non sequitur*. Granted, the Constitution speaks elaborately about democratic process. But the very complexity of the text belies Ely's interpretation of its overriding intent. Rather than reinforcing the democratic pretensions of our normal politicians in the manner of Ely, our Constitution makes their claim to speak for the People problematic—setting House against Senate, President against both, and staggering terms of office to make it extremely difficult for a single group of politicians to dominate all lawmaking organs on the basis of a single election. Rather than trying to make sense of all this textual and institutional complexity, Ely "reads" our Constitution as if the elaborate lawmaking relationships created by Articles I, II, IV, and V somehow established a stripped-down version of British parliamentary government—in which plenary lawmaking authority was vested in a single House of Commons that renewed its electoral mandate periodically in a free and fair democratic contest.

Constitutional lawyers, however, can no longer allow Anglophile sentiments, inherited from the Progressive Era, to blind them to the distinctive dualistic logic of their own democratic system.⁶⁷ While we may devoutly

64. J. ELY, *supra* note 52, at 99.

65. *Id.* at 73-104, 135-180.

66. *Id.* at 88.

67. For some further reflections on the British model, see Ackerman & Charney, *Canada at the Constitutional Crossroads*, 34 U. TORONTO L.J. 117 (1984).

hope for the day when the Congress of the United States is dominated by men and women with the democratic values and broad vision of John Ely, we may never forget that *our* Constitution, unlike that of the British, does not repose final lawmaking authority in any small group of representatives sitting regularly in the nation's capital. Nor, as *Federalist No. 10* warns us, is it premised on the expectation that "enlightened statesmen will . . . always be at the helm."⁶⁸ Only if our representatives move beyond normal politics and sustain a broad popular movement on behalf of their principles on the higher lawmaking track does our Constitution allow them to make law with the full authority of We the People of the United States.⁶⁹

C. *A Dualist Defense of Judicial Review*

Rather than fixating upon the mechanics of single-track democracy, American lawyers must learn to take a less threatened view of the past higher lawmaking achievements of the American people. Quite simply, we are neither the first generation of Americans to confront the ignorance, apathy and selfishness of normal politics, nor the first to hope for a system of government that will represent the People despite the problematic character of their political involvement. Once we reflect upon the difficulties of this project, moreover, the fact that our predecessors are dead may come to seem less important than the fact that, on occasion, they did succeed in solving the very same problem we confront today in establishing a credible form of public-regarding discourse.

Of course, even the statesmen who created our Constitution or wrote its Civil War Amendments hardly convinced *all* their fellow Americans of the Publian character of their concern with the "rights of citizens and the permanent interests of the community." Universal consensus is not to be found this side of Final Judgment. The most a flesh-and-blood political movement can hope is that years of higher lawmaking activity finally generate a grudging, often bitter, recognition that it *has* earned the right to present itself as representative of a majority of private *citizens* on a few matters of basic principle, and that We the People have therefore spoken in a particularly authoritative way. It is upon these rare achievements of democratic politics that the dualist proposes to rest the democratic case for judicial review. Before our present politicians can convincingly establish

68. THE FEDERALIST NO. 10, at 80 (J. Madison) (C. Rossiter ed. 1961).

69. Not that Ely's concerns with the democratic fairness of normal politics have no place in our constitutional law. Indeed, I think that some of Ely's own principles will survive dualistic reinterpretation. My point is that only Ely's fixation upon a levelling conception of American democracy allows him to imagine that perfecting the democratic legitimacy of normal politics could possibly serve as the alpha and omega of constitutional law.

that they are doing more than representing the judgments of perfect privatists or thoughtlessly *private* citizens, should we not test their claims against the paradigmatic higher lawmaking successes of the past?

When the Court tests some recent congressional initiative against its interpretation of past constitutional solutions, it is not engaged in an anti-democratic form of ancestor worship. By declaring a statute unconstitutional, the Court is discharging a critical dualistic function. It is signaling to the mass of private citizens of the United States that something special is happening in the halls of power; that their would-be representatives are attempting to legislate in ways that few political movements in American history have done with credibility; and that the moment has come, once again, to determine whether our generation will respond by making the political effort required to redefine, as private *citizens*, our collective identity. In short, the Court's backward-looking exercise in judicial review is an essential part of a vital present-oriented project by which the mass of today's private citizenry can modulate the democratic authority they accord to the elected representatives who speak in their name from the heights of power in Washington, D.C.

It is true, of course, that when faced with the Court's challenge, our elected representatives may find themselves unable or unwilling to overcome judicial resistance by successfully taking to the higher lawmaking track to speak, once more, in the accents of We the People of the United States. Yet, once we begin to question levelling presuppositions, the mere fact that the People cannot be persuaded to overrule the Court hardly suffices to stigmatize the Court as undemocratic. Instead, the recurrent inability of normal politicians to succeed in higher lawmaking serves to express the hard Publian truth about the difficulty of mobilizing a majority of private *citizens* in a liberal democracy.

Nor will it do for levellers to respond to this dualist defense of judicial review by trading epithets and denouncing the Court as unduly conservative, if not downright undemocratic. For this easy condemnation ignores the extraordinary consequences that follow when, after years of long and hard struggle, a political movement *does* gain the right to speak in the name of We the People on the higher lawmaking track. Once a movement has succeeded in enacting a constitutional amendment, it will no longer be obliged to call so extravagantly upon the political energies of the American people. Its legal achievements will remain intact even when most private citizens find, as they inevitably will, that they have better things to do with their time than continue the political struggle at fever pitch. Despite the inexorable return of normal politics, the movement's legal achievements will remain at the center of the consciousness of America's constitutional lawyers, who should recognize a high responsibility to test the re-

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sults of normal politics in the name of constitutional principle. From this point of view, the American Constitution is hardly a conservative friend of the status quo, but an implement of revolutionary questioning during the lengthy periods of apathy, ignorance, and selfishness that mark the political life of a liberal democracy.

The fact that judicial review can seem both conservative and revolutionary at the same time only serves to belie the easy liberal/conservative dichotomies that make up so much of the Progressive legacy of constitutional interpretation. However odd it may sound to Progressive lawyers within the levelling tradition, the constitutional dualist is willing to assert that the Supreme Court does not act undemocratically when it looks backward to the legal principles enacted into our higher law by successful constitutional movements of the past. To put the point more directly: The *democratic* task of the Supreme Court is to interpret the Constitution of the United States.

D. *The Structural Amendment*

This is a view more frequently expressed by the millions of Americans who stagger through life without the benefit of a modern legal education. In reasserting its relevance in polite legal conversation, I hope to do more than reaffirm the lay understanding. For dualist theory also helps explain why the layman's view is so threatening to the modern legal mind.

In remarking upon a pervasive professional unease with traditional techniques of constitutional interpretation, I do not wish to overstate my case. Especially when we look to the practice of constitutional argument in the courts, we do not find the leveller's lack of concern with the meaning of the constitutional past. To the contrary, events of fifty or two hundred years ago are re-presented daily in the courtrooms of this country as if they did indeed provide vital starting points for the constitutional solution of today's problems. Despite two full generations of levelling democratic theory and Progressive history, the practice of constitutional argument has not yet liberated itself from its deep connections with the higher lawmaking achievements of the American People.

The problem of interpretive credibility arises only when we inspect the general outlines of the story lawyers tell themselves as they search for a usable past that will enlighten the constitutional present. Speaking schematically, this historical story is dominated by three peaks of high importance that tower over valleys full of more particular meanings. The first peak, of course, is the Founding itself: the framing of the original Constitution and the Bill of Rights, *Marbury v. Madison* and *McCulloch v. Maryland*. The second peak is constituted by the legal events surrounding the Civil War: the judicial failure in *Dred Scott* and the constitutional

affirmations of the Civil War Amendments. The third peak centers around the legitimation of the activist welfare state: the long Progressive struggle against judicial resistance and the dramatic capitulation by the Old Court before the New Deal in 1937. Time and again, we return to these moments; the lessons we learn from them control the meanings we give to our present constitutional predicaments.

While professional historians may greet this egregiously selective use of the past with a mix of dismay and jubilation, I will not add my voice to this particular chorus of condescension. Indeed, it is precisely because I think that this peak-and-valley pattern *does* make constitutional sense that a certain oddness in the modern pattern takes on a special significance. Quite simply, the stories we tell ourselves to build up the constitutional significance of the first two peaks—surrounding the Founding and the Civil War Amendments—differ dramatically from the story we tell to remind ourselves of the constitutional vindication of the activist welfare state. When we look back upon the first two great constitutional solutions, we tell a tale of constitutional creation. So far as we are concerned, something profoundly new came into being as a result of the ratification of the Federalist Constitution or the Civil War Amendments.

In contrast, we interpret the rise of the activist state with a different framework. Here we tell ourselves a myth of rediscovery rather than a tale of constitutional creation. This view of the matter is obtained by postulating a Golden Age in which Marshall got matters right for all time by propounding a broad construction of the national government's lawmaking authority. The half century between 1880 and 1930 can then be viewed as a (complex) story about the fall from grace—wherein some of the Justices (not Holmes, of course) sinfully strayed from the path of righteousness and imposed their antidemocratic *laissez-faire* philosophy upon We the People of the United States. Predictably, these acts of judicial usurpation increasingly set the judges at odds with the more democratic institutions, which acutely perceived the failure of *laissez-faire* to do justice in an increasingly complex and interdependent world. The confrontation between the New Deal and the Old Court appears 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,⁷⁰ permitted the Court to expiate its countermajoritarian sins without permanent institutional damage. If only the Justices had not forgotten about the countermajoritarian difficulty and strayed from Marshall's path, all this unpleasantness could have been avoided!

70. The process began with Mr. Justice Van Devanter's resignation in the midst of the court-packing crisis. See J. ALSOP & T. CATLEDGE, *THE 168 DAYS* 108-09 (1938).

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It is with this exclamation that we come to the ultimate source of the levelling tradition's power over the modern legal mind. Whatever else it may accomplish, talk of the "countermajoritarian difficulty" has served as a solemn professional vow to refrain from invoking the Constitution in a last-ditch defense of laissez-faire capitalism against the modern activist state. I have no doubt, moreover, that this pledge of self-restraint is entirely appropriate. The struggle between the Old Court and the New Deal *did* settle the question of the constitutional legitimacy of the activist welfare state—at least until some future generation of Americans struggles successfully to make laissez-faire capitalism part of the higher law of the United States.

My problem instead is with the superficial myth lawyers presently use to explain the process by which modern activist government gained its constitutional legitimation. It is time to see through some bad Progressive history that depicts the triumph of the welfare state as if it were somehow foreordained, as if it were only some antidemocratic elite machination that prevented the all-out repudiation of laissez-faire capitalism during the long period of Republican ascendancy between the Civil War and the New Deal. In calling for a fundamental reinterpretation, moreover, I do not imagine myself a prophet crying in the wilderness. The seeds have already been planted by a scholar who achieved his insights independently of a self-consciously developed neo-Federalist theory. In a few brilliant pages written nearly a quarter century ago,⁷¹ Charles Black presents a revisionist account of the constitutional struggle of the 1930's. Rather than looking upon the Old Court's resistance to the New Deal as if it were conceived in original sin, Black emphasizes the positive way in which a sustained period of extraordinary institutional conflict can contribute to the legitimacy accorded to the final constitutional resolution.

Let me put Black's point in explicitly dualistic terms. During the New Deal's first term, the President and Congress were no more entitled to pretend that they were speaking for We the People of the United States than any normal set of incumbents sitting in Washington, D.C. Moreover, the hard truth is that the New Deal *did* raise fundamental questions of constitutional legitimacy when viewed against the background of the individualistic principles enunciated after the American Revolution and the Civil War.

Thus, by resisting the initial New Deal experiments in the name of traditional principles, the Supreme Court did *not* act in a constitutionally illegitimate fashion. Rather than permitting elected politicians to evade the fundamental questions of political principle raised by the New Deal,

71. C. BLACK, *THE PEOPLE AND THE COURT* 56-67 (1960).

the Court's resistance in the name of the Old Constitution performed two vital higher lawmaking functions. Call the first the *signalling function*. Just as, under Article V, the affirmative vote of two-thirds of Congress signals the rise of a new constitutional proposal for sustained consideration by the People, the Court's constitutional resistance during the New Deal's first Term discharged an analogous function. The Old Court's opposition made it abundantly plain to the mass of private citizens that a fundamental constitutional initiative was being seriously entertained by their representatives in the nation's capital. If they did not approve of the new things that were being said in their name in Washington, D.C., the time had come to mobilize, as private *citizens*, on behalf of the Old Constitution.

Second, the Old Court's resistance served a vital *translation function*—one that may be analogized to Article V's requirement of a formal written text for a constitutional amendment. While the clarity of legal purpose exhibited by such writings can be easily exaggerated, the collective effort to write down a few legal formulae does serve an important function: It forces the movement to shape its excited political rhetoric into language amenable to long-run legal development. It is precisely this sense of legal direction that the Old Court helped the American people achieve in the 1930's. Like any reformist movement recently come to power, the New Deal's first term revealed congeries of conflicting tendencies, embodied in different statutory initiatives that were often frankly labelled as experimental. By resisting the initial experiments that most offended traditional principles, the Old Court forced the New Deal to clarify the nature of its reformist purposes: Would the New Deal coalition retreat before initial judicial resistance and wait patiently for the invisible hand to rescue the American people from the Great Depression? Or would it focus its efforts on those innovations that exemplified its determination to transform the laissez-faire norms which previously shaped the national government's approach to economic and social issues?

By Election Day in 1936, the New Deal looked very different from the way it appeared on the eve of balloting in 1932. At that time, nobody could say whether Roosevelt's first term would be very different from Hoover's term in office.⁷² But by 1936, a fundamental question of principle had been raised so decisively as to be obvious even to private citizens whose principal concerns were far removed from the daily struggles of Washington, D.C. It was not only that, after four years, the New Deal had emerged as a concrete political reality. Thanks to the Supreme

72. The uncertainties surrounding Roosevelt's political orientation at the time of the first inaugural are thoughtfully discussed in F. FREIDEL, *FRANKLIN D. ROOSEVELT: LAUNCHING THE NEW DEAL* 60-82 (1973).

Court's discharge of its signalling and translation functions, the constitutional status of the new reality was still in doubt. The New Deal was not to be viewed as a *fait accompli*, but as a serious proposal to redefine the nature of American government's relationship to the larger society. How, then, would the People respond to the competing visions of constitutional government offered by the Old Court and the New Deal as they proceeded to the polls in November of 1936? Would this election, like so many others in American history, yield an inconclusive outcome, permitting competing groups of normal politicians to continue battling indecisively from the competing centers of authority established by the separation of powers? Or would the People react in the manner of the election of 1896, for example, and give a decisive victory to the party defending the vitality of the Old Constitution? Or, finally, would the People respond, as they had last done after the Civil War, by giving the party of constitutional re-vision a decisive electoral victory?

In short, I propose to reject the prevailing myth of constitutional rediscovery and interpret the 1930's as a process of constitutional creation. Rather than acting under the explicit procedures established by Article V, however, We the People of the United States expressed its will through a higher lawmaking process that relied primarily upon the structural interaction of Articles I, II and III of the Constitution. Through their careful regulation of the terms of office held by representatives, senators, presidents, and Justices, these Articles process deep shifts in popular opinion very differently from a single-track constitution. Within our dualist structure, a single electoral victory by a new popular movement typically generates a highly charged dialogue among branches of government, rather than a straightforward victory for the new order. Those officials who gained office before the most recent election do not lightly accept the suggestion that their principles have been consigned by the People to the dustbin of history. So far as they are concerned, their rivals are transparent demagogues whose nostrums will only exacerbate the evils they profess to cure. Given the separation of powers, moreover, *both* sides are encouraged to appeal to the People in the hope that their own views will emerge victorious in succeeding elections. If this process is managed well, it will lead the adversaries to clarify the nature of the constitutional alternatives being proffered to the American People.

Thus, while the separation of powers operates in normal times to make representation problematic, it can operate very differently during constitutional moments—refining the issues of high legal principle involved in the political conflict and thereby allowing Americans to place a constitutional meaning upon a sustained series of electoral victories and legislative successes that is very different from the meaning ordinarily attached to any

single episode of normal politics. The democratic struggle over constitutional principle will not end, moreover, until a series of decisive victories at the polls permits the newly triumphant spokesmen of the People to proclaim their new higher law from *all three* of the branches constituted by the first three Articles. It is only at this point that a structural amendment, as I shall call it, achieves its legitimate ratification under our dualist Constitution as it has evolved over the past two centuries.⁷³

It is within this context that I want you to view the great judicial retreat of 1937. Rather than a confession of legal sin, the dualist sees the Court's capitulation as the final point in the process of structural amendment. It is the moment at which the judges recognized that a new constitutional principle had indeed been ratified by the People, and that the time had come for the serious work of judicial interpretation and implementation to begin.

Since, in this case, there was no written constitutional amendment to interpret, the courts did the next-best thing—and promoted a case name to the status of a constitutional text. Thus, when today's lawyers invoke the name of *Lochner v. New York*, they are dealing with a constitutional symbol with all the potency of a formal amendment under Article V.⁷⁴ Moreover, they are right to insist that *Lochner v. New York* is the very opposite of good constitutional law today. The reason, however, has very little to do with the intention of the Framers or the work of the Marshall Court. It has much more to do with the long process by which twentieth

73. While this explicit formulation is new, it builds upon two insights familiar to modern political scientists. The first, having its source in Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957), looks upon the Supreme Court as part of the governing coalition and interprets sustained judicial resistance to legislation as an unusual event, symptomatic of a shift in the composition of the dominant political coalition. The second insight, having its source in Key, *A Theory of Critical Elections*, 17 J. POL. 3 (1955), emphasizes the extent to which certain electoral struggles—"critical elections"—provoke a fundamental redefinition of political commitments by large groups of American citizens. For students of "critical elections," the rise of New Deal democracy is nothing less than a paradigm case for their larger theories. See J. SUNDKVIST, *DYNAMICS OF THE PARTY SYSTEM* 183-274 (1973). It is possible to put my point within these scholarly vocabularies: By virtue of its life tenure, the Supreme Court will characteristically be the last institution to be dominated by a new governing coalition. This systematic lag is not, however, dysfunctional within the larger constitutional scheme. Instead, it plays an essential role in the process by which the American Constitution determines whether a "critical election" has occurred and what changes in legal principle it has appropriately authorized.

Although his analysis is different from mine, David Adamanyi was the first scholar to grasp the relevance of these themes in political science to the central problems of constitutional theory. See Adamanyi, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790.

74. Indeed, like some of our most important formal amendments, *Lochner* is a symbol of such potency that it has generated a host of meanings far removed from the concrete problems raised by New York State's effort to improve the health of its bakers by limiting their work week. While these disparate meanings badly require systematic elaboration and discriminating evaluation, this is not the place to begin the effort. For the present, I will be content to use the case in the traditional way—as an omnibus term of opprobrium, condemning all that was evil in the Old Court's substantive doctrine and judicial methodology.

century Americans rejected the higher law handed down by the Supreme Court in the name of their predecessors, and insisted that they too had something to contribute to the higher law of the American people.

E. *Text, History, Structure*

The immediate consequence of accepting a revisionist view of our legal past is not, then, some revolutionary transformation of standing constitutional doctrine. Instead, it is the hope of understanding the existing system of legal principles in a new, and historically deeper, way. Despite this lawyerly mission, it would be naive to expect a single Lecture to dislodge the Progressive myth of constitutional rediscovery from its central position in our legal universe. While I am presently completing a book-length development of the arguments sketched here, my present aim is merely to convince you that the current myth can stand some agonizing reappraisal. Given this purpose, a heap of legal detail is not as important as a sense of the way my sketch of the structural amendment proceeds from a larger reinterpretation of the higher lawmaking process. This reexamination must begin, of course, with the text of Article V itself—a text that has been drained of its higher-law meanings as a consequence of the levelling tradition's intellectual ascendancy.

So far as the leveller is concerned, Article V enters into the argument about judicial review only as an afterthought, after the undemocratic character of judicial review has been established through a chain of reasoning similar to the four-step argument presented at the beginning of this Lecture.⁷⁵ Even when Article V is allowed to enter the field of dispute, moreover, the leveller's principal object is to dismiss the text as an obviously inadequate answer to the countermajoritarian difficulty. Granted, the familiar refutation runs,⁷⁶ the Supreme Court's judgment may be overruled by constitutional amendment. But this process is so cumbersome that it can serve as a safety valve only under the most extreme conditions. In the more typical case, the judiciary's political antagonists will fail to generate the support necessary for a new higher-law solution, and the Court's constitutional repudiation of Congress will stand as a valid exercise of power—a result the leveller views as antidemocratic. Since he views Article V as a patently inadequate safety valve, the leveller does not approach the text in an expectation that it will illuminate the most fundamental principles of American government. Instead, he regards it as a set of tech-

75. See *supra* pp. 1045–46.

76. In J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 4–60 (1980), the levelling conception of the “countermajoritarian difficulty” is given its most comprehensive development. The significance of constitutional amendment is dismissed in a single paragraph appearing toward the end of a 55-page chapter. *Id.* at 49.

nical rules, similar in kind to, and probably less interesting than, those regulating the passage of ordinary legislation.⁷⁷

It is these low expectations that must be challenged if we are to rediscover our Constitution. So far as the dualist is concerned, Article V is *the* most fundamental text of our Constitution, since it seeks to tell us the conditions under which all other constitutional texts and principles may be legitimately transformed. Rather than treating it as a part of the Constitution's code of good housekeeping, we should accord the text of Article V the kind of elaborate reflection we presently devote to the First and Fourteenth Amendments.

When approached in this way, the very surface of the text seems instilled with deeper meanings. First, the text is patently inconsistent with the leveller's vision of Congress. Even if Congress were composed entirely of broad-minded statesmen elected by the fairest democratic suffrages, Article V insists that normal acts of legislation are not to be confused with the considered judgments of We the People of the United States. Instead, an extraordinary majority of Congress is merely given the right to propose amendments, not approve them. Moreover, a rival institution may displace Congress even from this role. I am speaking, of course, of the mysterious "Convention" that Article V explicitly endorses as an alternative vehicle in the formation of the popular will.

It is this textual endorsement of the "Convention" that provides a textual bridge to a second fundamental theme: the Founders' profound recognition of the limited extent to which they could legitimately specify the higher lawmaking procedures to be followed by succeeding generations of Americans. The Federalists were, you will recall,⁷⁸ perfectly aware of the problematic relationship of their own "Convention" to the preexisting constitutional law of their time, and that, especially in their decision to appeal to nine state "Conventions" for ratification, the Founders were designing a higher lawmaking procedure that was plainly illegal under the Articles of Confederation.

77. A recent *Harvard Law Review* features a spirited debate on Article V. See Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446 (1983) [hereinafter cited as Dellinger, *Constitutional Politics*]; Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983); Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983). See also Note, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106 (1979) and sources cited *infra* note 82. While I hope that the Dellinger-Tribe controversy inaugurates a new level of scholarly engagement, we have a long way to go before we generate a literature as rich as the one provoked by Congress' effort to maintain "legislative veto" over administrative rulemaking—which continues energetically despite the Supreme Court's best efforts to put an end to the discussion. See, e.g., Elliott, *INS v. Chada: The Administrative Constitution, The Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125; Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789.

78. See *supra* pp. 1020–23.

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Given their own breach of preexisting higher lawmaking procedures, the Convention's choice of language in Article V takes on a special interest. After all, the Convention could have written a text that tried to limit the precedential effect of their own extraordinary effort to redesign the higher law track. For example, after explicitly authorizing nine state "Conventions" to ratify its own handiwork, Article V could have explicitly denied that any future "Conventions" might legitimately play a role in future efforts at higher lawmaking.⁷⁹ Or it could have avoided all mention of a "Convention," leaving the process of subsequent amendment to normal institutions, like the Congress and state legislatures, or to a specially designed institution, like the Electoral College, that was plainly a creature of the instrument that it proposed to revise. Rejecting such expedients,⁸⁰ Article V explicitly endorsed the possibility that future "Conventions" might once again be *properly* called upon to take the center of the constitutional stage. Moreover, the Article V procedure for calling a "Convention" is obviously modelled upon the process by which the 1787 Convention was called into being. To put it mildly, the text generates the greatest possible confusion about the precise constitutional status of the Article V forms: If the original Convention could assume the constitutional right to revise the preexisting formal ratification procedures, could future "Conventions" assert a similar right to modify the formalities of Article V?

One may, of course, avoid this obvious question by building an unbridgeable conceptual gap between the original Convention of 1787 and any subsequent "Convention" held under Article V. On this formalist view, the founding Convention must *necessarily* be an utterly different creature from any subsequent Convention convened under Article V. For that assembly was attempting to create, rather than bring about change under, the provisions of the Constitution. Instead of taking the meeting in Philadelphia as a model, any subsequent Convention should conceive of itself as essentially similar in kind to Congress and the other federal institutions created by the Constitution. Just as it would be unthinkable, say, for a simple majority of Congress to enact a valid law over a presidential

79. Indeed, in two particular areas, the Convention did seek to limit the force of its own precedent. Article V explicitly forbids *any* amendment—by convention or otherwise—of the sections of Article I dealing with the taxation of, or trade in, southern slaves. While this entrenchment clause was given an explicit expiration date of 1808, a second guarantees forever that "no State, without its consent, shall be deprived of its equal Suffrage in the Senate." Ironically, it was just this clause that was arguably violated by the Reconstruction Congresses after the Civil War. *See infra* p. 1066.

80. While I believe that constitutional interpreters should place very little weight on the secret notes that Madison compiled during the Constitutional Convention, these do reveal that the Framers considered, and self-consciously rejected, alternatives to Article V that did not envision a legitimate role for "conventions" in future constitutional revision. The relevant materials are thoughtfully reviewed by Gunther, *supra* note 6, at 11–16.

veto, so too it would be unthinkable for a constitutional Convention to propose the ratification of an amendment in a way that did not involve the consent of three-fourths of the states. Despite the remarkable act of self-reference on the surface of Article V, this formalist reading treats the Philadelphia Convention as if it existed on a different ontological level from "Conventions" convened by future generations of Americans. The mere fact that the Philadelphia Convention asserted its own right to revise preexisting higher ratification procedures, and that Publius sought to justify it,⁸¹ is dismissed by the formalist as entirely irrelevant to a proper reading of Article V.

It has been an aim of these Lectures to undermine the view of the Founders presupposed by this formalist reading. Rather than looking upon the Philadelphia Convention as an assemblage of demigods, inhabiting a constitutional plane closed to subsequent generations, I have tried to approach the Framers as if they might serve as the paradigmatic example of a continuing constitutional possibility—that despite the countless diversions of *private* citizenship, we may, once again, speak in the higher law accents of We the People of the United States. Given this effort to rediscover the democratic foundations of our Constitution, the founding Convention's departure from preexisting forms of higher lawmaking cannot be treated as if it were an anomaly from a bygone age. Instead, by explicitly allowing future Conventions to regain the center of the constitutional stage, the Founders themselves caution future generations of Americans against assuming that the last act of the American Revolution was played out by the first Constitutional Convention.

This conclusion is reinforced by modern historical research into the development of eighteenth-century constitutional discourse. Contemporary historians have taught us to view the transformation of the meaning of the "Convention" as one of the more remarkable political contributions of the Revolutionary era.⁸² So far as the English were concerned, the "Conven-

81. See *supra* pp. 1020–22.

82. The following paragraphs rely principally on G. WOOD, *supra* note 18, 306–43. Wood's book remains the historiographic starting point for current work on Revolutionary constitutionalism, though, of course, it has provoked a great deal of debate. See Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982) (summarizing debate). A systematic review of the literature, however, reveals no sustained critique of Wood's account of the "Convention"; nor is Professor Wood aware of any scholarly dispute on this point. Telephone conversation with Professor Gordon Wood (Mar. 13, 1984).

Historical scholarship by lawyers, as opposed to professional historians, has been much more narrowly focused. Research here has been provoked by contemporary efforts to convene a "limited constitutional convention" whose lawmaking competence is narrowly restricted to a specific constitutional issue or proposal. In response to this effort, there has been the usual resort to "law-office" history of uneven quality. See Charles Black's devastating critique of the ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974) in Black, *Amendment by National Constitutional Convention: A Letter to a Senator*, 32 ORLA. L. REV. 626, 632–43 (1979). In addition to Black's essay, Gerald

tion” was a name for a legally imperfect body, such as one or both Houses of Parliament meeting without the consent of the King. While such Conventions might accomplish wonders, their legally anomalous character rendered their actions of doubtful legality.⁸³ Thus, while the Convention/Parliament of 1688–89 could oust one king and call another to the throne, the English thought that the Convention’s work required ratification by a *legally perfect* Parliament, with William and Mary sitting in their proper place.⁸⁴

This formalistic view of the Convention was transformed by the Americans who fought and won the Revolution. To them the legally anomalous character of the “Convention” was a sign not of defective legal status, but of Revolutionary possibility—that a group of patriots in a Freedom Tavern might speak for the People with *greater* democratic legitimacy than any assembly whose authority arose only from its legal form. Within this cultural setting, it became appropriate to deny that mere legislatures could legitimately revise constitutional law, and to insist that the People were represented most appropriately by bodies whose very name—“Convention”—denied that legal forms could ultimately substitute for the engaged participation of American citizens. Thus, by 1787, the received English view of the “Convention” had been reversed in American constitutional practice: It was the act of a *legally anomalous* “Convention”—not one of a legally perfect king-in-parliament—that paradigmatically expressed the higher-lawmaking will of the American People.⁸⁵

Yet it is precisely this Revolutionary transformation in the higher-law meaning of the “Convention” that the formalist reading of Article V

Gunther has also contributed a thoughtful survey of the scanty materials that record the Convention of 1787’s deliberations concerning the “convention” mode of amendment under Article V. See Gunther, *supra* note 6, at 11–16. The most sustained contemporary discussion can be found in Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 *YALE L.J.* 1623 (1979), which makes good use of historical sources to support the claim that Article V only allows for a “convention” with plenary authority over its own agenda. Dellinger does not consider, however, the extent to which his particular findings are linked to a more fundamental assertion by the “convention” of its right to revise pre-existing legal forms in the name of the People. It is this latter question that is of central concern here.

83. G. WOOD, *supra* note 18, at 310–11.

84. Thus the Parliament of 1690 enacted “an act for recognizing King William and Queen Mary, and for avoiding all questions touching the acts made in the parliament assembled at Westminster, the thirteenth day of February, one thousand six hundred eighty eight,” which explicitly declares “[t]hat all and singular the acts made and enacted in said parliament were and are laws and statutes of this kingdom, and such as ought to be reputed, taken and obeyed by all the people of this kingdom.” 2 *W. & M.*, ch. 1, § II (1690), reprinted in E. WILLIAMS, *THE EIGHTEENTH-CENTURY CONSTITUTION, 1688-1815: DOCUMENTS AND COMMENTARY*, 46–47 (1960). Recent work has only emphasized the extent to which the members of the Convention/Parliament were aware of, and struggled with, a sense of their legally anomalous status. Miller, *The Glorious Revolution: ‘Contract’ and ‘Abdication’ Reconsidered*, 25 *HIST. J.* 541 (1982); Slaughter, *‘Abdicate’ and ‘Contract’ in the Glorious Revolution*, 24 *HIST. J.* 323 (1981).

85. G. WOOD, *supra* note 18, at 342.

threatens to reverse. No less than the pre-Revolutionary Englishman, the modern formalist views a "Convention" held in violation of preexisting constitutional forms as necessarily possessing lesser authority than a legally perfect assembly whose title under preexisting constitutional law was unchallengeable. Yet, in making this move, the formalist blinds himself to the very historical context that gave Article V's validation of the Convention its distinctive meaning. Not only does a reading of *The Federalist* make plain the Convention's self-conscious breach with preexisting constitutional forms, but it was *this very breach* with the standing forms that served as the paradigmatic act distinguishing "Conventions" from other assemblies in the constitutional language of the Federalists' contemporaries. Rather than ignore the remarkable way that the idea of a Convention operated in the eighteenth century constitutional lexicon, the modern lawyer's task is to reflect upon the Federalists' reaffirmation of the popular symbolism associated with the "Convention." Rather than insulating Article V from the precedent of the Philadelphia Convention, sensitive readers of the text must alert themselves to the possibility that future generations of Americans might, like the Federalists themselves, be called upon to elaborate the higher law of We the People of the United States through legally anomalous lawmaking forms.⁸⁶

And it is upon this textual ground that I propose to build my case for the structural amendment. For it is precisely my claim that Article V's affirmation of constitutional change through "Convention" has not merely remained a textual possibility, but that the best interpretation of our constitutional history requires the legal conclusion that We the People of the United States have indeed amended our Constitution through "Conventional" means.

This legal conclusion cannot, of course, even be entertained so long as

86. The way the constitutional convention lost its Revolutionary meaning for American lawyers has yet to be adequately described. It would appear, however, that the Civil War was a turning point. During the crisis of the Union, the use of the "convention" form was tainted by southern secessionists. Not only did each of the Confederate states use the "convention" form to leave the Union, but Northern efforts to appease Southern demands were often expressed in proposals for extraordinary "conventions" that would include representatives from both North and South. See H. HYMAN, *A MORE PERFECT UNION* 41-49, 119-23 (1973). In response to the threat of these proposed "conventions," strong Unionists sought to discredit the very idea that "conventions" might legitimately revise preexisting constitutional procedures. See *id.* at 122. The most influential of these efforts was by Judge John A. Jameson of Illinois. In J. JAMESON, *THE CONSTITUTIONAL CONVENTION* (1867), he explicitly recognizes the extent to which the South used the Revolutionary precedent of the Philadelphia Convention. *Id.* at 2-3. It is the object of Jameson's massive work to do battle with this "misconception," which he concedes to be "common among even the well-informed, that the Constitutional Convention is above the law, the Constitution, and the government, all of which it may . . . respect and obey or not at its discretion . . ." *Id.* at 15. In contrast, Jameson seeks to demonstrate that the "Constitutional Convention [has been] . . . so transformed as to have become an essentially different institution from what it was as a Revolutionary Convention." *Id.* at 15. Thus far, I have been unable to locate any pre-Civil War text that remotely resembles Jameson's elaborate effort to de-revolutionize the "convention" form.

we cling to a purely formalist reading of Article V. Indeed, the formalist history of the Constitution's "Convention" clauses is remarkably easy to write. While Congress has once directed the States to ratify an amendment by "Convention,"⁸⁷ no federal "Convention" has ever in fact been convened under formal Article V procedures. As a consequence, the formalist treats the history of this clause as if it were a perfectly blank page from 1788 on.

Once we move beyond the formalist reading of Article V, however, a very different approach to its legal history appears. First, we must reexamine the procedures that generated each and every written amendment that good lawyers presently recognize as validly enacted. In each case, we must candidly ask ourselves whether these procedures did in fact satisfy the formal demands of Article V, or whether some other set of institutional mechanisms played an important role in the process by which the amendment was received into our higher law. Second, we must reconsider the constitutional transformations that we have previously interpreted through myths of rediscovery rather than through tales of constitutional creation. Can we understand one or another constitutional transformation in a deeper and more rigorous way by viewing it as the product of a rare act of "Convention"—in which We the People expressed new higher-law principles through the legally anomalous operation of lawmaking institutions?

The structural reinterpretation of the 1930's is, of course, part of my own answer to this question. It is, however, only a part, and one that gains greatly in legal persuasiveness when viewed in the context of the larger historical inquiry sketched in the preceding paragraph. For when we begin to consider the legal history of Article V since the Founding, we shall discover a certain oddness about it long before we reach the 1930's. This has to do with a curious reticence on the subject of Article V's relationship to the Civil War Amendments in general, the Fourteenth Amendment in particular. The mountains of scholarship that overwhelm every other aspect of this subject contrast oddly with the scholarly void encountered by the student of the process by which the Civil War Amendments were proposed and ratified. Indeed, one searches in vain for a legally rigorous and dispassionate analysis of the lessons this great nineteenth-century exercise in constitutional lawmaking has to teach us about Article V.⁸⁸

87. The Twenty-first Amendment, repealing Prohibition, was ratified by state "conventions." See A. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 110 (1978).

88. J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956), provides a scholarly factual account. Twenty years later, James returned to his subject to find that the Fourteenth Amendment "was incorporated into law by a series of highly irregular and questionable procedures," which culminated "in the most amazing proclamation of its kind in American history." James, *Is the Four-*

A similar void appears when one shifts focus from scholarly literature to judicial opinion. Since *Coleman v. Miller*,⁸⁹ decided in 1939, the Supreme Court has virtually abdicated its interpretive responsibilities under Article V. In deferring to Congress, moreover, the *Coleman* majority relied heavily on the extraordinary powers assumed by Congress during Reconstruction in connection with the ratification of the Fourteenth Amendment. In the Court's view, these historical precedents endowed Congress with special constitutional authority over the higher lawmaking process.⁹⁰ Although *Coleman*'s dicta certainly could be narrowly confined,⁹¹ Congress has, in fact, been the primary forum for the development of the "law" under Article V since the case was decided.⁹² The result has been

teenth Amendment Constitutional?, 50 SOC. SCI. 3, 4 (1975). Rather than using these findings as the basis for a reappraisal of the law of Article V, James' brief essay ends by treating the question as one involving "only a matter of historical interest." *Id.* at 8. Other contemporary writings on this subject were generated by the passions of the civil rights movement of the 1950's and 1960's. While some of these papers make important legal points, they are presented in the manner of advocates' briefs, and do not use the passage of a century to gain a deeper constitutional perspective on the legal struggles dividing North and South during Reconstruction. Nonetheless, they are worth reading. For the South, see Call, *The Fourteenth Amendment and Its Skeptical Background*, 13 BAYLOR L. REV. 1 (1961); McElwee, *The 14th Amendment to the Constitution of the United States and the Threat that It Poses to Our Democratic Government*, 11 S.C.L.Q. 484 (1959); Suthon, *The Dubious Origin of the Fourteenth Amendment*, 27 TUL. L. REV. 22 (1953). For the North, see Fernandez, *The Constitutionality of the Fourteenth Amendment*, 39 S. CAL. L. REV. 378 (1966). For some early discussions, see Note, *Was the Fourteenth Amendment Adopted?*, 30 AMER. L. REV. 761 (1896); Note, *The Fourteenth Amendment Was Adopted*, 30 AMER. L. REV. 894 (1896).

89. 307 U.S. 433 (1939).

90. *Id.* at 448-50.

91. *Coleman* itself involved a writ of mandamus sought by Kansas state legislators against their own legislative leaders and the state's Secretary of State. The legislators aimed to prevent the official certification of Kansas' assent to the proposed Child Labor Amendment contending, inter alia, that Kansas had already officially rejected the amendment and that the amendment was no longer a live proposal thirteen years after its proposal by Congress. Given this procedural setting, the *Coleman* Court was perfectly right in refusing to resolve the constitutional issues authoritatively. Quite apart from the awkwardness of judicial intrusion into intra-Kansas legislative relations, a mandamus at this stage might have entirely preempted Congress from any role in the interpretation of Article V: If the Court had barred Kansas from forwarding its assent to Washington, Congress would never have had the opportunity to pass on the Article V questions raised by the state's action.

Surely it is better to reserve judicial review for a far later stage in the Article V process. As in the case of the Child Labor Amendment involved in *Coleman*, most proposals will never come close enough to ratification to warrant plenary constitutional consideration; moreover, *Coleman* was right to find in the Reconstruction Congress' treatment of the Fourteenth Amendment—now entrenched by fifty years of modern practice—a significant precedent for congressional involvement in the higher lawmaking process. In short, judicial review of Article V issues should come only after a considered congressional judgment on a fully mature Article V question. This familiar principle of judicial restraint was especially salient in a case like *Coleman*, where the proposed amendment's principal goal was to overrule the prior Supreme Court decision of *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Reading *Coleman* in this procedural way permits its reconciliation with earlier Supreme Court decisions, stretching back to *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), in which the Court displayed no similar inhibition in resolving Article V issues. Cf. Dellinger, *supra* note 77, at 412 (noting that standing of *Coleman* plaintiffs was "dubious at best" and that "a good argument could have been made that the case was not ripe for adjudication").

92. On this basic point, I am in entire agreement with Walter Dellinger in his recent controversy with Laurence Tribe. See Dellinger, *Constitutional Politics*, *supra* note 77, at 392-96, 411-16. Dellinger and I part company, however, on the way the Court should exercise its reclaimed interpretive

predictable: Though no permanent damage has yet been done, the law of constitutional amendment has increasingly been dominated by short-term considerations of factional advantage rather than a long-run sense of constitutional development. Instead of a deepening sense of the way the Reconstruction precedents might illuminate the legal understanding of Article V, *Coleman v. Miller* has given us a half-century of increasingly partisan congressional "interpretation" on the one hand, scholarly and judicial silence, on the other.⁹³

It is just this silence that must be broken if we are to regain a sense of the living meaning of Article V. A candid reappraisal of the use made of Article V by the victorious Republican Party in the aftermath of the Civil War will reveal a series of serious legal problems for any thoughtful formalist. In urging a reconsideration of these "forgotten" legal difficulties, however, my aim is not to relitigate the War Between the States.⁹⁴ Instead, by rediscovering the formal Article V difficulties raised by the Civil War Amendments, we may glimpse another possibility: that the Framers of the Fourteenth Amendment, no less than those of the original Constitution, were exercising the full powers of a "Constitutional Convention" in the way they proposed to make their constitutional amendment a part of our higher law.⁹⁵

In saying that the Thirty-Ninth Congress may best be viewed as a Constitutional Convention, I have not, of course, ignored the fact that Article V explicitly contemplates such a "Convention" only after the petition

authority. Dellinger's reading of Article V is self-avowedly formalistic, *id.* at 389, 417-18, and aims to reduce higher lawmaking to a fixed and stable system of clear rules. Given this reductionist aspiration, it is hardly surprising that Dellinger entirely ignores the textual and historical arguments presented in this section. Thus, Dellinger does not even try to make sense of the Reconstruction Congress' actions within his own theory; these are to be dismissed, apparently, as "extraordinary," *id.* at 401, or "self serving," *id.* at 405. Dellinger's earlier study of the "convention" clauses of Article V suffers from a similar deficiency. See Dellinger, *supra* note 82.

This is not to say, of course, that Dellinger is wrong in asserting the utility of clearly established rules in regulating standard instances of constitutional amendment. He is wrong only in making this the whole truth about Article V. The relationship between rule and principle in the law of Article V will be elaborated further in my book-length treatment.

93. The prevailing judicial silence was rudely broken by the Utah Supreme Court in *Dyett v. Turner*, 20 Utah 2d 403, 439 P.2d 266 (1968), which elaborately asserted the Amendment's unconstitutionality in dicta, concluding that it was only because of the Supreme Court's "superior power [that] we must pay homage to it though we disagree with it." *Id.* at 415, 493 P.2d at 274. For a characteristic reaction, see Firmage, *The Utah Supreme Court and the Rule of Law: Phillips and the Bill of Rights in Utah*, 1975 UTAH L. REV. 593.

94. The sources cited *infra* notes 88 and 93 raise many of the narrower legal issues that must be confronted. In considering these issues, however, my book will not aim to treat them as if they could, at this late date, be authoritatively resolved once and for all. Instead, my aim is to suggest that, in the light of the serious legal doubts raised by a formalistic reading of Article V, our understanding of the Civil War Amendments will be greatly enriched by supplementing a formalist analysis with the structural perspective sketched in the text that follows.

95. While a structural study of all three Civil War Amendments would prove rewarding, the following sketch will focus exclusively upon the central historical event, the enactment of the Fourteenth Amendment.

of two-thirds of the state legislatures. I mean to insist, however, on the question-begging character of this formalist objection.⁹⁶ While the Article V form might serve as an appropriate vehicle for many new constitutional proposals, there is a paradox in insisting upon a state-originated "Convention" in the aftermath of the Civil War. For it was a principal point of the Reconstruction Congress/Convention to insist that We the People were emphatically *more* than a confederation of states. To recognize the binding force of Article V's state-oriented "Convention" form, then, would have undermined the nationalistic foundation of the Congress/Convention's claim to constitutional authority.⁹⁷

The Thirty-Ninth Congress took a far more appropriate course, given its historical circumstances. Indeed, it was the very first action of Congress during Reconstruction that signalled its extraordinary claims to constitutional authority. When it first assembled in December of 1865, senators and representatives from southern governments reconstructed by President Johnson stepped forward for recognition on equal terms with those of all other states. Rather than accepting the formal validity of these claims, however, "Congress" excluded the southern representatives from its ongoing deliberations. In so acting, the rump "Congress" was, of course, perfectly aware that it was taking an action that rendered its constitutional authority legally problematic in the eyes of many Americans, in the North as well as in the South.⁹⁸

96. For my own working definition of a "constitutional convention," see *supra* note 6.

97. For this reason, postwar calls for a "constitutional convention" sometimes came from Southern sympathizers in search of a forum that would free them from the domination of Republican nationalists. See H. HYMAN, *supra* note 86, at 442. There is, of course, an historical irony here: Just when the word "convention" had been tainted in Republican eyes by its association with Southern secession, see note 86, the Republicans themselves were holding a "Congress" that, with a century's hindsight, is most suitably viewed as a continuation of the higher lawmaking tradition best exemplified by the Philadelphia Convention.

98. It is, moreover, wrong to gloss over the legal dilemma with a broad citation to *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). While this case does, of course, reveal the Taney Court deferring to congressional actions under the guarantee clause, it hardly ensured similar deference from the Chase Court. See 1 C. FAIRMAN, *RECONSTRUCTION AND REUNION 1864-1868*, at 494 (1971) (reporting Chase's opinion that the *McCardle* Court would "doubtless have held that [McCardle's] imprisonment for trial before a military commission was illegal" if it had been willing to reach the merits, though Fairman believes that the basic principles of congressional reconstruction would have survived judicial review). In any event, Congress' anxiety over the legalities of its position is best evidenced by its refusal to allow the Supreme Court to decide *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868), 74 U.S. (7 Wall.) 506 (1869), at a time when an adverse judicial determination might well have jeopardized the Congress/Convention's effort to reconstruct the South in a way that would assure enactment of the Fourteenth Amendment.

Rather than unequivocally validating congressional activities, the Court's abdication in *McCardle* only emphasized their anomalous character. The uncertainty prevailing at the close of the Civil War about the constitutional status of the "seceded" states is discussed in H. BELZ, *RECONSTRUCTING THE UNION* ch. 10 (1969); H. HYMAN, *supra* note 86, at 433-45. A brief summary of the competing constitutional positions may be found in E. MCKITTRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 93-119 (1960), which also contains a perceptive account of the way in which the 39th Congress' need for plausible constitutional authority gave prominence to the theories of Samuel Shellabarger. *Id.* at

But, as in the case of the Philadelphia Convention,⁹⁹ this breach with unproblematic legality could not conclude the issue. For the admission of southern “representatives,” many of whom had played leading roles in the late Rebellion,¹⁰⁰ would have radically transformed the nature of “congressional” debate and decision. The enactment of the Thirteenth Amendment, moreover, paradoxically threatened to increase the role Southerners could play in defining the constitutional meaning of the War. While the Constitution previously counted only three-fifths of the black population in determining Southern representation, the newly enacted Thirteenth Amendment meant that *all* black freedmen would be fully counted. So far as Congressional Republicans were concerned, this was simply intolerable: An assembly overwhelmed by traitors would only stifle the voice of the People.¹⁰¹ Rather than grounding its claim to legitimacy on an unquestioning acceptance of legal formality, it was the Republican Party’s assertion of Publian virtue—its central part in the struggle to preserve the Union—that provided the principal source of the rump Congress’ constitutional authority.

But it was one thing for the Congress/Convention to indulge in its extraordinary assertions of authority in the name of the People; quite another for it to earn the constitutional legitimacy required before its principles could be enacted into higher law. Ratification of the Congress/Convention’s constitutional pretensions, however, was not exclusively achieved through the forms contemplated by Article V. Instead, it was the separation of powers between the President and Congress that provided a key mechanism for testing the legitimacy of the Republican Party’s claim to speak for the People. From President Johnson’s point of view, the Republican leaders of the Congress/Convention were not public-spirited Publans but narrow partisans seeking to use a momentary advantage to

113. The Congress’ ideological predicaments only gain greater saliency against the background provided by Michael Les Benedict’s recent work on the conservative character of Republican constitutional thought. See Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65 (1974).

99. See *supra* note 6 (discussing Philadelphia Convention’s problematic legality).

100. On John Hope Franklin’s reckoning, the would-be congressional delegation from the South contained “[t]he Vice-President of the Confederacy, four Confederate generals, five Confederate colonels, six cabinet officers, and fifty-eight Confederate congressmen.” J. FRANKLIN, *RECONSTRUCTION: AFTER THE CIVIL WAR* 43 (1961). The preoccupation of the Congresses of the Civil War and Reconstruction era with civic virtue and its opposite—treason—is elaborated by H. HYMAN, *ERA OF THE OATH* (1954).

101. See REPORT OF THE JOINT COMM. ON RECONSTRUCTION, 39th Cong., 1st Sess. xii (1866). The congressional concern with this problem ultimately gave rise to §§ 2 and 3 of the Fourteenth Amendment—defining the terms of future southern representation in Congress. Any reader of the *Congressional Globe* can attest to the great significance these issues had in contemporary debate over the Fourteenth Amendment, see J. JAMES, *supra* note 88, at 55–66, though my interpretation of this concern differs greatly from views presented by others, see R. BERGER, *GOVERNMENT BY JUDICIARY* 15–16 (1977).

assure their long-run political ascendancy.¹⁰² Consequently, the President not only used the normal powers of his office to struggle against what he viewed as a patently unconstitutional effort to deprive the South of its rightful congressional representation,¹⁰³ but also sought to mobilize conservative Northerners politically in an effort to defeat his Republican rivals at the next congressional election.¹⁰⁴ As the rigidly conservative character of the presidential challenge became apparent, Congress' decision to propose a Fourteenth Amendment became central to the Republican struggle for political supremacy. The proposed amendment served as the central plank in the Republican confrontation with the President that reached its climax in the congressional elections of 1866.¹⁰⁵

It was the results of these elections that decisively shifted the balance of authority between the President and Congress. Despite the unprecedented effort by President Johnson to generate a new political party in support of conservative Unionist principles, the Republicans emerged from the 1866 elections with an overwhelming victory throughout the North.¹⁰⁶ Rather than isolating Congress, President Johnson's conservative appeal had had precisely the opposite effect. The newly elected Congress/Convention had gained the popular mandate necessary to repudiate the constitutional

102. The struggle between the Reconstruction Congresses and President Johnson serves as one of the great battlegrounds of American historiography. Compare W. DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC (1907) (classic pro-Southern interpretation) and H. BEALE, THE CRITICAL YEAR (1930) (classic Progressive interpretation) with W. BROCK, AN AMERICAN CRISIS (1963) ("revisionist" account) and L. COX & J. COX, POLITICS, PRINCIPLE AND PREJUDICE, 1865-66 (1963) (same). More recent work has renewed our appreciation of the conservative features of "Radical" Republicans. See M. BENEDICT, A COMPROMISE OF PRINCIPLE (1974). For present purposes, however, I do not think it is necessary for me to take a position on many of the matters in heated dispute. These largely concern an evaluation of the ideological position and social interests served by the different participants. In contrast, my concern is to elaborate how the constitutional separation of powers served to organize the constitutional debate. Given this purpose, any of the books cited above will provide an adequate factual background for the discussion that follows in the text. Indeed, I have found it quite enlightening to juxtapose writers with very different sympathies, in an effort to gain an insight into the structural processes involved—though Beale's reductionist treatment of the constitutional issues, see H. BEALE, *supra*, at 147, makes it a relatively unilluminating source.

103. The unconstitutionality of proceeding in the absence of Southern representation is a constant *leitmotif* of Johnson's messages to Congress. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 3349 (1866) (message on proposed 14th Amendment); *id.* at 917 (veto of First Reconstruction Act); CONG. GLOBE, 40th Cong., 1st Sess. 313-14 (1867) (veto of Second Reconstruction Act).

104. H. BEALE, *supra* note 102, at 113-38; M. BENEDICT, *supra* note 102, at 188-96; W. BROCK, *supra* note 102, at 160-68; L. COX & J. COX, *supra* note 102, at 172-232; E. MCKITRICK, *supra* note 98, at 364-420.

105. See, e.g., W. BROCK, *supra* note 102, at 198; W. DUNNING, *supra* note 102, at 68, 71; E. MCKITRICK, *supra* note 98, at 449-50.

106. "The proportions of the Republican victory were quite astonishing: they won every northern state legislature, won every northern gubernatorial contest, and gained more than two-thirds majorities in both houses of Congress." K. STAMPP, THE ERA OF RECONSTRUCTION 117 (1965). The overwhelming victory in Northern state legislatures noted by Stampp was crucial for the subsequent success of the Amendment's formal ratification by the states. For other discussions emphasizing the critical importance of the 1866 elections, see H. BEALE, *supra* note 102, at 376-406; M. BENEDICT, *supra* note 102, at 208-09; W. BROCK, *supra* note 102, at 153-60; W. DUNNING, *supra* note 102, at 82-83.

pretensions of Johnson's provisional Southern governments—governments which rejected the Fourteenth Amendment. Despite continued southern resistance, and presidential obstruction, the Congress/Convention's sweeping electoral mandate gave it the democratic authority needed to reconstruct the South on a new constitutional foundation. And it is only because this congressional struggle was successful that the Fourteenth Amendment could ultimately gain the assent of three-fourths of the states.¹⁰⁷ To put the point more generally, the separation of powers—here the conflict between a conservative President and reformist Congress—supplemented Article V in a way that permitted our institutions to process the struggle over the constitutional meaning of the Civil War in an organized and democratic fashion.

And it is this conclusion that provides a critical historical bridge between the eighteenth-century textual affirmation of the "Convention" and the twentieth century's practice of structural amendment. The separation of powers served the nation well not only during Reconstruction but during the New Deal. Of course, in the later episode, it was the President, not the Congress, who played the principal role of constitutional innovator; the Court, not the President, that provided the principal source of institutional resistance. Nonetheless, on both occasions, these inter-branch struggles served to signal the existence of a profound constitutional debate, to refine its meaning, and to provide the People with the means of expressing a rare determination to transform the character of our most fundamental political commitments as a nation.

Thus, the structural amendment that culminated in the 1930's is not entirely unprecedented in the nation's constitutional history. Instead, the struggle between the New Deal Presidency and the Old Court represents a variant on institutional themes that revealed themselves at earlier moments of extreme constitutional stress and great legal achievement—notably those that gave rise to the original Constitution and to the Civil War Amendments. Rather than content ourselves with a formalist recital of Article V, our task, as constitutional lawyers, is to see the Article for what it is: the beginning, not the end, of the history of constitutional transformation in this country. It is only after we have reflected upon this history that we can hope to do justice to our constitutional future. For doubtless there will again be moments when political movements will try to change our Constitution without strictly complying with Article V. Given the ease with which such a step can be abused, no political move-

107. "The truth may be put in this arresting proposition, where latter-day readers may look at it squarely: one must believe that if Congress had failed to bring the weight of its authority to bear upon the ten states as then organized, there would have been no Fourteenth Amendment." C. FAIRMAN, *supra* note 98, at 509-10.

ment should be conceded such a right lightly. Nonetheless, our past history does reveal movements that have, after great institutional resistance, *earned* the right to make this extraordinary higher-lawmaking claim. And it behooves constitutional lawyers to understand these precedents with as much depth as they can if they are to elaborate the nature of our existing constitution in a legally compelling way.

F. *The Possibility of Interpretation*

This is, quite plainly, no small task. Since I very much want you to join me in it, I should at least try to explain why all this effort might prove worthwhile. And so let me close by explaining why I believe that a structural reinterpretation of our past is a vital preliminary for the reassertion of the very possibility of a lawyerly interpretation of today's Constitution.

To see the connection, consider that our Constitution's explicit commitments to the institutions of contract, private property, and states' rights remain textually intact despite the retreat of the Old Court before the New Deal in the 1930's. This fact, moreover, must be taken seriously by any lawyer who believes in the possibility of interpretation. After all, if the interpretivist is *serious* about interpretation, he cannot refuse to read a text simply because he finds its message inconvenient. Yet there is only one way to avoid revealing these classic constitutional texts as hostile to the pretensions of the nationalistic welfare state of the last half-century—and that is by playing so fast and loose with the traditional disciplines of legal interpretation as to make the entire notion of interpretation seem utterly fraudulent.¹⁰⁸ In doing so, of course, the interpretivist plays into the hands of the legal nihilist. By trivializing constitutional texts he finds inconvenient, he confirms the legal nihilist's loud insistence upon the inevitably arbitrary character of judicial value imposition.

Moreover, so long as he fails to recognize the structural amendment, there is no way the interpretivist can respond convincingly to the nihilist critique. At the very best, he may desperately try to retain interpretive rigor only when confronting those bits and pieces of the text that seem to have survived the repudiation of laissez-faire capitalism in the 1930's more or less intact. This selective interpretivism inevitably degenerates into clause fetishism. Thus, modern interpretivists constantly speak of the establishment clause while anxiously averting their eyes from the contract clause; they look with awe upon fragments of the Fifth Amendment but

108. While leading commentators do not give this point elaborate discussion, it is not difficult to find evidence of its recognition. Thus, according to Dean Ely: "[T]he few attempts the various framers *have* made to freeze substantive values by designating them for special protection in the document have been ill-fated, normally resulting in repeal, either officially or by *interpretative pretence*." J. ELY, *supra* note 52, at 88 (emphasis supplied).

trivialize the Fifth Article; and so forth. Until, of course, they find they want to say something that none of their authorized fetishes will allow them to say—in which case they invoke the awful oxymoron of substantive due process to signify their collective perplexity.

It is only the structural reinterpretation of the 1930's, I believe, that will allow us to transcend this familiar conflict between nihilism and fetishism in the interpretation of our Constitution. For once we explicitly recognize that laissez-faire capitalism was *legitimately* repudiated by a process of structural amendment culminating in the 1930's, we are no longer obliged to save the welfare state at the cost of trivializing the process of legal interpretation. Instead, we can explain why it is *right* for modern lawyers to reject the particular conceptions of freedom of contract, private property, and states' rights dominant in the aftermath of the American Revolution and Civil War. We refuse to elaborate these themes for the same reason we refuse to listen to the Philadelphia Convention's opinions on race relations. On *these* matters, preexisting principles have been repealed, or at least profoundly revised, by successful constitutional solutions enacted into higher law by later generations of Americans.

Having cleared away the historical rubble with the theory of structural amendment, constitutionalists may then proceed, in the manner of these Lectures, to develop the founding principles that *do* remain vital parts of our higher law—exploring the complex ways in which even these themes have been transformed by the new constitutional principles proclaimed in the name of the People during the nineteenth and twentieth centuries. Rather than retreating to nihilism or fetishism, the dualist seeks to advance toward a holistic interpretation of our Constitution. We must organize into a coherent whole *all* the higher-law principles enacted by the People in the course of two centuries of constitutional politics—most notably those advanced in response to the very different constitutional crises engendered by the American Revolution, the Civil War, and the Great Depression. From this holistic point of view, the master interpretive questions we confront today are these: How can we make sense of the Federalist Constitution's affirmation of individual rights, given the Civil War generation's guarantee of equality and the New Deal's legitimation of the activist bureaucratic state? How may we give constitutional meaning to each American's equal right to insist on personal freedom *without* embracing discredited notions of private property, free contract, and states' rights?

To do these questions justice, we will require nothing less than a dualistic reinterpretation of every significant event in our constitutional history—from the American Revolution to Watergate, from *Marbury* to *Roe*. Rather than rushing headlong into this project, these Lectures have tried

to convince you of its necessity—by undermining the levelling premises that bar the way to its active pursuit. I will count it a success if you successfully resist the temptation to condemn the Supreme Court as a “deviant” or “countermajoritarian” force in the American constitutional system. Rather than serving as a ritualistic bow to the god of judicial restraint, this levelling credo prevents us from attempting the pressing work of dualist reinterpretation that is the proper mission of constitutional law.

Of course, not even a generation’s efforts at dualist interpretation will reveal that the American People have, over the course of two short centuries, managed to establish an ideal society for themselves and their posterity. Indeed, so far as I am concerned, our generation should count itself a failure if it does not move beyond interpretation to make its own positive contribution to the constitution of a society that is both freer and fairer than the one we have inherited.

And yet, as a dualist reading of our past will only emphasize, such contributions to a better America will not come cheaply. None of us can expect our personal utopias to be greeted with loud hosannahs and universal approval. If the past is any guide, nothing much of permanent value will be achieved without a great deal of passion, debate, and conflict. Indeed, as I review the first two centuries of our history, only one thing is clear: While established constitutional law did *not* always resolve America’s deepest crises, it has always provided us with the language and process within which our political identities could be confronted, debated, and defined—both during the long periods of normal politics, like the one we presently endure, and on those occasions when Americans found themselves called, once again, to undertake a serious effort to redefine and reaffirm their sense of national purpose.

I cannot believe, moreover, that constitutional lawyers will do anybody any good if they finally succeed, after a great deal of effort, in levelling the collective understanding of the distinctively dualistic discourse built up by preceding generations of Americans. Instead, all they will have done is destroy a democratic political tradition that—for all its historical contingency and manifest imperfection—may fairly be claimed as one of the few profound American contributions to the fund of Western thought.