Revolution on a Human Scale

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There are (at least) four ways of modeling change.

One appeals to the invisible hand: A bunch of actors, each pursuing his own interest, interacts with one another to produce an outcome that none, individually, desires or anticipates. The task is to elaborate the invisible hand processes that generate this surprising outcome—and to assess the outcome's desirability.

A second points to the visible hand of self-conscious elites. In presenting a model of elite management, the analyst eavesdrops on elite deliberations to determine and critique the way objectives are defined. She then considers the factors that facilitate and frustrate elite efforts to shape social reality, before reaching a final causal and normative assessment.[1]

A third studies the evolution of community folkways. In contrast to models of elite management, the accent is on ordinary people dealing with problems of ordinary life; in contrast to the invisible hand, the accent is on self-conscious change. In each sphere of life, existing patterns of behavior are subjected to an ongoing barrage of critical talk and experiment—countered by outraged condemnation and existential agony from those rooted in older folkways. Battered by this ongoing dialectic of reform and conservation, central norms of good behavior slowly change. The analytic task is to track the evolution of folkways (which may, of course, be different in different sub-communities) and consider how the law can and should interact with emerging patterns—supporting some, resisting others, in a dynamic interaction with social life.

And finally, there is the possibility of revolutionary transformation. This too is self-conscious, but it is the product neither of elite management nor community adaptation. The scene is dominated by mass movements mobilizing on behalf of grand ideals, and elites struggling for authority to speak in the name of their mobilized fellow citizens. The challenge is to

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1. The extreme case of elite management is the application of brute force by the military or secret police. But even here, the terroristic aims of elites are often deflected by subtle forms of popular resistance. *See* JAMES SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS (1990).

consider the ways in which these movements succeed and fail in transforming the basic premises of the political and legal system, and to assess the legitimacy of such efforts.

I am speaking of ideal types. An adequate causal account often draws from all four models, as will thoughtful efforts at normative assessment. But since human beings are very finite creatures, they beam their searchlights of understanding selectively, giving undue emphasis to one or another mix of models. In constitutional law, the emphasis has been on the model of elite management, with a tip of the cap to evolving folkways and the workings of the invisible hand. Even as such studies go, the project has been understood in an exceptionally elitist way. The constitutional understandings of political and social leaders have been given very short shrift, as scholars pore endlessly over the opinions of nine men and women on the Supreme Court.

The crucial normative and empirical questions have all been posed from the vantage of this small group: Should the Justices seek to elaborate fundamental principles of human dignity, or maximize the general welfare, or interpret the plain meaning of the text, or content themselves with very particular and contextualized judgments? To what extent is the entire elite enterprise inconsistent with the democratic ethos of America? Do judges actually affect social reality as much as they imagine?

This focus is not inevitable, and its dominance has been the subject of endless critique[2]—most recently from the partisans of the invisible hand, who cannot comprehend how constitutional law, the Queen of the Juridical Sciences, has somehow escaped their imperial grasp.[3] *We the People*[4] joins this critical chorus, but sings a different song. It aims to place the revolutionary experience of the American People at the center of constitutional thought. I do not deny that we have much to learn from the reflections of the juridical elite, the evolutions of communal folkways, and the workings of the invisible hand. But not if we isolate these forces from the ongoing efforts of the American people to mobilize their collective energies to revolutionize the foundations of their Union.

The twentieth century has not been kind to my proposal. On the level of popular consciousness, the American revolutionary tradition has been called into question by epochal historical events—most crucially, the Bolshevik power grab of 1917. As wave upon wave of revolution from abroad crashed against American interests and ideals, many began to doubt

2. For a recent notable example, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9-10 (1991).

3. *See, e.g.*, Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998).

4. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

whether our "revolution" was the real thing. Perhaps the Marxists and fascists were right in claiming that theirs were the genuine article?

This question marked a big shift from the nineteenth century, when America prided itself as a revolutionary haven from the decadent empires of England and Europe. And yet, as the twentieth century moved on, only a fool would deny that America was displacing England as the great status quo power, defending the so-called Free World against the forces of revolutionary change. Were we really the same People who had won the first great colonial revolution of modern times?

The academy had its doubts. From Beard and Dunning onward, professional historians have cut their teeth by debunking the revolutionary pretensions of the Founding Federalists and Reconstruction Republicans. So, more subtly, have generations of political scientists. Their main line of disciplinary inquiry has moved from pluralism to behaviorism to public choice, but it has systematically avoided one destination: a sustained engagement with America's revolutionary origins. So too have the philosophers, whose main focus has been individual rights, not popular sovereignty.

But perhaps the time is ripe for reappraisal? Since 1989, we have increasingly recognized that "revolution" is a complicated idea, requiring a good deal of intellectual discrimination. Skepticism is certainly appropriate when hearing news of some great upheaval in a foreign land—the proud promises of a revolutionary breakthrough may well be mocked in afteryears by a sad relapse into bureaucratic tyranny. But we no longer suppose that all revolutionary scripts are written in Moscow. They may instead lead to a genuine rebirth of freedom. The revolutionary heroes of our time are Nelson Mandela, Vaclav Havel, and Lech Walesa—for all their human imperfections, surely the most inspiring political figures of the age.

And in its own way, this Symposium carries a similar message. Walter Dean Burnham, for example, proffers a political science that broadly confirms my view of American constitutional history as a series of "punctuated equilibria."[5] The many contributions by historians seek to enrich my statement of the crucial facts more than to refute them. Several provocative pieces move beyond the Founding, Reconstruction, and New Deal and consider how other eras of American history, and developments abroad, enlighten the model of revolutionary change developed in *Transformations*.

I begin with some basic ideas. If we are to recapture the centrality of the revolutionary experience in American law, we had better clarify the meaning of this much-abused term. Part I, then, is an essay in retrieval; it

5. *See* Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's* We the People, 108 YALE L.J. 2237, 2237(1999).

seeks to extract a useable concept of "revolution on a human scale" from the totalitarian aspirations of the twentieth century, and to relate this concept to a distinctive form of American constitutional practice—I call it unconventional adaptation—that is at the center of *Transformations.* The need for conceptual clarification became plain to me as I read the outstanding contributions to this Symposium. The commentators often made powerful points with which I completely agree—but I was sometimes surprised to learn that they supposed they were undermining, rather than confirming, my basic argument. This could happen, I became convinced, only because I had failed to clarify my organizing ideas sufficiently.

In any event, my conceptual exercise in Part I will give a distinctive spin to my concrete discussions of the Founding, Reconstruction and New Deal in Parts II, III and IV: To what extent do the Symposiasts' critical insights confirm, rather than deny, the centrality of "revolutions on a human scale" to the American experience? To what extent do they represent genuine historical disagreement with my interpretation of events?

Part V concludes with some reflections on the relationship between constitutional theory and legal practice. Is it a mistake to hope that the revisionist account presented by *Transformations* might ultimately change the way constitutional law is actually practiced in this country? Or is such a practical aim misguided for serious legal scholarship?

I will use the recent Clinton impeachment as a vehicle for exploring these questions.

I. LAW AND REVOLUTION

I have been much influenced by Hannah Arendt's essay *On Revolution.*[6] As she points out, classical Greek thought is thoroughly unsympathetic to the notion of sudden change. But the followers of Moses, Jesus, and Mohammed had a different idea. The Semitic religions understood these leaders as bringing something genuinely new into the world—a truth that broke time into a Before and an After, and required all true-believers to revolutionize their preexisting beliefs and practices. In contrast to the views of Plato and Aristotle, a break in time heralded a new beginning for mankind.

Revolutions became more secular with the American and French experiences of the eighteenth century. Though it is a mistake to discount religious revivalism as a modern force, the dominant emphasis has been on the revolutionary possibilities of man-made change—with spokesmen for We the People claiming the authority to inaugurate a breakthrough in

6. HANNAH ARENDT, ON REVOLUTION (1963).

political meaning by constructing a new constitutional order. This idea, once unleashed, has been one of the great exports of the modern West, generating a host of abuses and achievements both in the world of ideas and in ordinary life.[7]

I aim to rescue the revolutionary idea from the totalitarian exaggerations of the twentieth century. For the Bolsheviks and Fascists, the essence of "revolution" was violence, and its ambition was nothing less than a total transformation of all areas of life. But this totalizing glorification of violence utterly distorts the distinctive features of the American revolutionary tradition. If we are to recapture the idea of revolution for serious analysis, we must scale it down to human dimensions, without obliterating its distinctive character.

A. *Some Definitions*

Call it *revolution on a human scale,* and define it as a self-conscious effort to mobilize the relevant community to reject currently dominant beliefs and practices in one or another area of social life. Such revolutions succeed when they reorganize dominant beliefs and practices in a fundamental way within a relatively short period of time. Radical reorganization in one domain may, but need not, lead to similar transformations in others.

1. *Self-Consciousness*

My definition gives pride of place to self-consciousness. You cannot be a revolutionary unless you present yourself as the bearer of some great and exigent truth that requires a break with currently dominant ideas and practices. Speaking generally, revolutionary reformers can tell themselves three kinds of stories to justify their claims. One is future-oriented—if only the People regain control of their government, they will push the historical process to a new stage and inaugurate a grand new era of human development. The second story gestures toward some atemporal principles of legitimacy that may be grasped by the pure light of reason (and/or revelation). We can no longer coexist peacefully with monarchy, or slavery, or poverty, or prejudice when these conditions offend principles of justice that are—or ought to be—rationally demonstrable to any thoughtful human being. No self-respecting person can settle for less than a sharp break with the injustices rooted deeply in the status quo. The third story looks backward to a golden age—there was a time, long ago, when Americans

7. I develop this theme at greater length in BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 5-24 (1992).

were on the right path, but then they declined into a slough of corruption and injustice. If we only returned to the old truths, we can break with the recent past, and regain the Golden Age.[8]

These revolutionary modes of self-presentation contrast with another familiar type: the *evolutionist* who denies that she is doing anything novel and modestly describes herself as proposing a few small alterations to the status quo. Of course, both revolutionists and evolutionists may be fooling themselves: The latter's "modest change" might ultimately generate far larger real world consequences than the former's "grand repudiation." But this only shows that there are lots of different ways of changing the world—including those described by models of elite management, evolving folkways, and the invisible hand. It does not show that revolutionists are invariably ineffective.

To be sure, failure *is* the most common revolutionary outcome—a tiny band of true-believers bitterly lives out its life at the edge of a society unmoved by its message. But constitutional politics, as I understand it, arises when such a movement begins to make major headway among ordinary Americans—who, predictably enough, will not accept or reject the movement's revolutionary proposals without a great deal of passionate debate and anxious indecision.

Throughout this period, the thing that makes the process "revolutionary" is not violence. It is the unabashed way in which change-agents describe themselves as replacing an old order with a new one that repudiates central elements of the status quo. Of course, this mode of self-presentation *can* cause violence—as those deeply invested in the old regime react with horror to what they understand as revolutionary ravings. With the two sides mobilizing their forces, it is only too easy for each to demonize

8. Professor Benedict comments perceptively on the prominence of this "golden age" theme in Anglo-American constitutionalism, but he treats it as if this were inconsistent with my ideas of revolution on a human scale. *See* Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L.J. 2011, 2032-34 (1999). To the contrary, so long as the *existing* regime is understood as representing a great decline from the hypothesized "golden age," the golden age myth can readily serve as a motivating force for a revolutionary break. *See* ARENDT, *supra* note 6, at 34-40.

"Golden age" revolutionary apologetics contrasts sharply with the Marxist genre—which posits a *future* utopia that may be reached by a revolutionary intervention in the historical process. But this does not make "golden age-ism" any less potent a form of revolutionary ideology. To suppose the contrary is to suppose that Marxist "revolutions" are the only ones worthy of the name.

One of my central aims is to repudiate this notion. It is only by recovering the idea of revolution from Marxism that we can usefully deploy it in the study of American constitutional development—in which the role of hard-line Marxist movements has been minor or nonexistent. While the content of each of the three revolutionary story-lines, as well as their relative importance, changes during the Founding, Reconstruction, and New Deal, all of them can serve to justify the key revolutionary claim: We the People must break with some of the fundamental principles of the recent past if they are to redeem the promise of America.

the other, generating a cycle of incivility that can lead to disaster if left unchecked.

This is why the study of constitutionalism is especially important: How, if at all, do preexisting institutions channel the raging debate? Does the Constitution provide the contending parties with a common language they can use to define the crucial issues in ways that *both* sides find intelligible, or does it disorganize debate, leaving the parties to blind combat? Does it provide procedures for resolving the crucial issues that are (minimally) acceptable to both sides or does it merely authorize one to crush the other? At the end of the day, does the constitutional order give the losers reason to recognize that, however much they may detest the outcome, *the People have spoken*?

Maybe. Maybe not. My point is that "constitutional revolution" is not an oxymoron, but a serious possibility, warranting sustained historical investigation in America and elsewhere.

2. *Efficacy*

Self-consciousness is not enough for revolution. A movement must actually succeed in fundamentally reorganizing one or another area of social life. Call this the efficacy requirement, which raises some obvious questions: How *big* a difference must be achieved before a successful reorganization counts as "revolutionary"? How *large* an "area of social life"?

Once again, some bad totalitarian ideas can get in the way of sensible answers. For familiar sorts of Fascists, Marxists, and more recently Islamicists and other religious revivalists, nothing less than total revolution will suffice. No revolution worthy of the name can cease before each and every domain of life has been radically transformed: Not only politics and economy, but the bourgeois family and even "bourgeois science" must be smashed in the light of great revolutionary truths.

This is a crazy idea. Only God could so transform the world; it is utterly impossible for any group of human beings to attempt such a radical break with the past—and the effort to do so will turn them into monsters. If we insist on total revolution, no real-world transformation will seem sufficiently revolutionary—and a good thing too.

Conservatives would like us to adopt this silly idea of total revolution because it makes it easier for them to persuade all sane people to concentrate only on evolutionary changes. But if we wish to retrieve the idea from its totalitarian excesses, we must take a different path: We must explicitly insist that all revolutionary changes are and ought to be partial, and we should frame criteria of revolutionary achievement with this in mind. For example, I would not deny the term "revolutionary" to the

transformations wrought by Albert Einstein, even though his theory of relativity directly affected only a relatively small sector of social life constituted by professional physicists. It is enough that Einstein and his associates self-consciously sought to repudiate established paradigms of scientific thought and practice, and that after a relatively short time, they succeeded in transforming the way their fellow practitioners understood themselves. Seventy-five years later, this great scientific transformation has still failed to have a profound impact on the way ordinary folk think about time and space: $E=mc^2$ remains a cryptic formula to the overwhelming majority. But this should not lead us to deny that Einstein was a revolutionary within his limited, but important, domain of thought and action.

The same is true of the constitutional revolutions achieved by Americans during the Founding, Reconstruction and New Deal. None led to a total change in the dominant principles and practices of political life in America, let alone a complete transformation of the economy, family, religion, or what-have-you. Despite the Founders' break with the Articles of Confederation, their new Constitution bore many resemblances to the previous regime, and after twelve short years, the presidential victory of Thomas Jefferson began to propel American constitutional development down a path that increasingly mocked Founding hopes for a strong, if limited, national government.[9] The Radical Republicans met a similar fate: sixteen years of ascendancy, and then a gradual unraveling of some of their central aspirations. Compared to its predecessors, the New Deal revolution has shown more staying power—it is only today that some of its fundamental commitments are being seriously questioned by self-described revolutionaries like Newt Gingrich, and none has been fundamentally revised thus far.[10] But like the Founding and Reconstruction, the New Deal did not aim for anything like a total revolution.

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9. Some of these changes are suggested by Joanne Freeman's essay in this Symposium. *See* Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959, 1989-93 (1999). I discuss the constitutional implications of the Jeffersonian Revolution at great length in my forthcoming book, *The Roots of Presidentialism*, in terms that are broadly consistent with Freeman's account. BRUCE ACKERMAN, THE ROOTS OF PRESIDENTIALISM (forthcoming 2001) (manuscript on file with author).

10. I agree with Professor Benedict's skeptical treatment of David Kyvig's claim that constitutional changes marked by Article V amendments are necessarily more enduring than those marked in other ways. *See* Benedict, *supra* note 8, at 2026-28 (addressing DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 (1996)). As we approach the year 2000, we reach the sixtieth year of the New Deal era and can compare its staying power with the comparable revolution in race relations attempted by the Republicans in the 1860s. If we look at that revolution 60 years down the line, and consider its fate in the 1920s, it seems plain that the New Deal's transformation of the scope of national government remains far more entrenched in 2000 than was Reconstruction's revolution in race relations in 1920. Yet the Republicans managed to package their legal revolution in the form of Article V amendments, while the Democrats did not. We must, in short, investigate the question of the endurance of

And yet, as mere mortals understand things, the rapid shifts that occurred during these three periods—from confederacy to federal union, from slavery to freedom, from limited government to the activist welfare state—represent big and wrenching changes. Call them *revolutionary reforms.*

3. *Speed*

How rapidly must change occur before it counts as revolutionary? Here is a thought-experiment. Imagine you could travel backward in a time-machine to any year since 1776. You emerge from your vehicle to conduct a conversation with a thoughtful constitutional lawyer of the day. You ask him to look forward a decade and speculate about the likely paths that constitutional law might take if it proceeded along an evolutionary course—one small step at a time. Then drive ahead ten years and consider whether existing doctrines actually remain within this evolutionary envelope of possibility. If they do, you have witnessed a decade of normal evolutionary development; but if they have moved far beyond the envelope on many doctrinal fronts, there has been a juridical revolution on a human scale. Call this the "ten-year" test.

For present purposes, it will be enough for you to drive your time-machine to the years 1781, 1860, and 1932. In 1781, our constitutionalist would undoubtedly talk a lot about the chances of gaining unanimous state consent for a federal excise tax of five percent on all imports; in 1860, about the possibility that Congress might ban slavery in the territories; in 1932, about the extent to which the economic emergency might enhance the federal government's limited powers to regulate the economy.

Now move on ten years and consider how far reigning constitutional doctrine has moved beyond this evolutionary envelope of possibility. Our hypothetical constitutionalist of the previous decade would be staggered to learn of the vast expansion of federal power exercised in 1791, or the constitutional rights guaranteed former black slaves in 1870, or the plenary power over the economy exercised by the federal government in 1942. Without the dramatic successes of constitutional politics in the interim, there was no way that the normal processes of legal evolution would have generated such large results over such a short period.

In contrast, many other decades do not add up to a revolution on a human scale. The constitutional law of 1999 is, generally speaking, well within the evolutionary envelope of possibility of 1989, and the same

different constitutional solutions as a serious historical and institutional issue without the aid of formalist prejudices that stipulate a strong link between Article V and great longevity. For further discussion, see Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519 (1997).

relation holds between 1989 and 1979. We will see what happens between 1999 and 2009, but I am betting on continued evolution.

The ten-year test strikes a mean between two extremes. On the one hand, it rejects the idea that wrenching change should occur suddenly, and all at once. This is a formula for the Second Coming, not for revolutions on a human scale. On the other hand, it distinguishes revolutionary reform from garden-variety evolution. Really big constitutional changes do not generally occur in such a short time without lots of people setting their sights on some big ideas, and working hard and long to make them into realities (though, of course, the actual results may well fall short of activists' dreams). In contrast, when evolutionary processes add up to big differences, they generally achieve this result only in the longer run. By 2030, for example, one might look back to the 1990s and see the five-four decision in *Lopez*[11] as the seed of a vast new development in the law of federalism; similarly President Clinton's acquiescence in "welfare reform" may, from this distant vantage, appear as the beginning of the end of the entire welfare state inaugurated by the New Deal.[12] But then again, they may not—*Lopez* could readily go the way of *National League of Cities*;[13] welfare reform may be reformed again after the next economic downturn, and in a very different direction.

4. *A Test Case: The Gingrich Revolution*

Only one thing is clear: If the repudiation of New Deal constitutionalism is to occur over *the next decade*, it will be through a more revolutionary scenario. Consider Professor Burnham's hypothesis that we may be on the verge of a successful Republican Revolution of sweeping proportions.[14] I remain doubtful, but suppose he is right. Imagine, for example, that the Republicans' failed impeachment of Bill Clinton does not lead to the electoral disaster confidently predicted by establishment pundits, but finally generates the kind of popular outrage that Kenneth Starr and Henry Hyde have been dreaming about. Much to the delight of the Republican Right, polls begin to reveal that the voters are responding—however belatedly—to the ongoing campaign against Bill Clinton and the moral rot he represents. As the millenium approaches, it becomes clearer that public opinion in general, and Republican voters in particular, are turning their backs on warmed-over moderates like George W. Bush, and

11. United States v. Lopez, 514 U.S. 549 (1995).

12. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (to be codified as amended in scattered sections of 42 U.S.C.).

13. National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

14. *See* Burnham, *supra* note 5, at 2269.

are yearning for a leader who will bring the culture war to a successful conservative conclusion. Sensing his opportunity, Newt Gingrich returns from the political wilderness to sweep the Republican presidential primaries with the aid of a fifty million dollar fund collected from his rich admirers.

Despite cries of outrage from *The New York Review of Books*, Gingrich goes on to score a decisive triumph over a stunned Al Gore and to lead his fellow Republicans to a substantial victory in Congress. The accelerating pattern continues in 2002 and 2004—by which point President Gingrich not only wins in a landslide, but Republican representation in both houses reaches New Deal levels—with fewer than twenty Democrats remaining in the Senate, fewer than 100 remaining in the House.

These escalating victories, in turn, generate a dramatic change in the character of Supreme Court appointments—instead of political ciphers like David Souter and compromising moderates like Stephen Breyer, President Gingrich nominates hard-edged ideologues like Richard Epstein and readily wins their confirmation by the Senate. (Indeed, by this point, Epstein's emphatic libertarian commitments may seem "moderate" compared to the rising tide of constitutionalists of a more moralistic and authoritarian persuasion.) With the Scalia faction expanding to a majority of the Court, the new Chief Justice, Clarence Thomas, proceeds to hand down near-unanimous opinions dispatching the substantive principles of New Deal constitutionalism into the dustbin of history. By 2009, *Lopez*[15] will come to seem the first shot in a mighty constitutional revolution—though some doctrinal continuities will remain despite the immense amount of creative destruction.

This is not, to put it mildly, my favorite daydream. But one of the great tasks of constitutional theory is to awake the juridical elite from its dogmatic slumbers—and consider the possibility that the People may yet give them new marching orders for a new age. Indeed, if *Transformations* is to be believed, my hypothetical scenario would yield the repudiation of the New Deal through the very model of presidential leadership by which New Deal constitutionalism was born.

Irony of ironies—and I was not unaware of them when, as Professor Levinson reports,[16] I recently volunteered as a foot soldier in the legal army defending President Clinton in the impeachment wars. To the contrary, it was clear to me that a successful campaign to remove the President could have readily served as a prelude for my nightmare scenario. Suppose, for example, that the Republicans' campaign to impeach the President had not led to a setback in the November elections, but had yielded impressive

15. 514 U.S. at 549.

16. *See* Sanford Levinson, *Transitions*, 108 YALE L.J. 2215, 2233-36 (1999). See Part V for a more elaborate discussion of the issues raised by the Clinton impeachment.

gains in both the House and the Senate. As the impeachment trial opened in January, public opinion polls reported that Clinton's popular standing had plummeted to Nixonian lows, forcing the remaining Democrats in the Senate to retire for some anxious soul-searching. Despite their hypothesized defeat in November 1998, there were still enough of them to acquit the President. But given the level of popular revulsion at the Lewinsky affair, hadn't the President lost the moral authority to lead? Wasn't it in the best interest of the nation, and the party, to remove the President for obstructing justice?

Basking in the glow of applause from the moral majority, Democratic Senators begin to desert the President and vote for conviction—leading to a precedent-shattering removal of Clinton from office. With the nation recoiling from the display of 1960s morality in the Lewinsky affair, can there be any doubt that a triumphant Speaker Gingrich would be the leading candidate for the Presidency in the year 2000?

To be sure, things did not turn out this way. The Republicans' use of impeachment may even boomerang, discrediting the radical right for quite some time. As I look into my crystal ball, all I see is an extended period of normal politics—punctuated by more failed efforts of would-be revolutionaries to shift the system into transformative mode.

Nevertheless, it is only a matter of time before the People *do* succeed in setting American government on a course of revolutionary reform—though I am not intrepid enough to guess at its most likely direction. As the next wave of popular debate and mobilization reaches a crescendo, the legal elite will once again be confronted with a host of wrenching organizational and interpretive challenges. While it would be silly to suppose that lawyers and statesmen can master these challenges in advance, it would be equally foolish to ignore the ways our predecessors confronted similar crises in the past.

B. *The Discipline of Interdisciplinary Dialogue*

Yet the legal profession will remain intellectually unprepared if it contents itself with the standard accounts of the Founding, Reconstruction, and New Deal rehearsed daily in the nation's courtrooms and classrooms. The prevailing professional narrative does not even try to confront the real-world processes by which the American Constitution mediated our history's greatest periods of revolutionary redefinition. It presents a just-so story supposing that American history has never run off the tracks laid out in Article V by our omniscient Framers. This narrative framework makes it impossible to glimpse the unconventional ways in which constitutional law has interacted with revolutionary movements as the People have repeatedly

reworked the fundamental principles of the Union. Having blinded themselves to the remarkable story of rupture and adaptation that is American history, constitutional lawyers set the stage for a more sedate account. Their casebooks and commentaries present legal development as if it were dominated by judges talking to one another about the most appropriate ways of adapting constitutional principle to evolving community folkways and the workings of the invisible hand.

While it may be easy for political scientists and historians to scoff at this provincial narrative from the outside, *We the People* attempts an internal critique. It seeks to demonstrate that the professional narrative does not do justice to *the legal materials* it purports to summarize. *Transformations* focuses principally on standard legal sources like *The Federalist*, the *Congressional Globe*, and *Presidential Messages*, with the aim of inviting my fellow lawyers *actually to read* the remarkable debates they contain. James Madison and Patrick Henry, John Bingham and Andrew Johnson, Franklin Roosevelt and Burton Wheeler do not appear on these pages as genteel conservatives disguising their innovations with polite talk of elite-guided evolution. They denounce one another's efforts to seize the revolutionary initiative and self-consciously struggle with the problem of legitimating sharp breaks from the status quo. Once exposed to the repeated acts of constitutional creativity revealed by standard legal sources, is the legal profession really prepared to stagger onward in ignorant worship of Article V?

Only time will tell—this is not the sort of issue that will be resolved by a single issue of *The Yale Law Journal*. (Should we be applying a ten-year test?) But I do think this Symposium increases the likelihood of serious legal debate. After all, many of the contributors are leading historians and political scientists who have spent lifetimes studying the matters that I hope to bring to legal attention. And they have no particular professional interest in the fate of my ideas. While certain adjustments may be needed in translating their contributions into the distinctive frameworks of constitutional lawyers, their assessments deserve a lot of weight, both negatively and positively.

To begin with the negative, suppose the contributors had denounced my history and political science as bogus—the typical product of a dilettantish legal academic who has failed to notice that he is out of his disciplinary depth. Well then, *Transformations* would deserve to be tossed into the trash can. Too bad for me: a few years of my life down the drain, a personal embarrassment, but that's the way the cookie crumbles. My point, after all, is that lawyers have divorced themselves from the revolutionary truths of real-world constitutional development, and if I have gotten my facts wrong, then the book does not deserve a serious professional reception. I am not a post-modernist: If I'm wrong, I'm wrong.

But happily, the Symposiasts do not take this negative view—all things considered, their critical remarks are remarkably few, and as we shall see, they do not affect my central arguments. This makes their positive contributions all the more important. As their essays make clear, my book presents an extremely fragmentary account of constitutional change.

First, it deals with only three out of twenty-two decades since 1776. How about the other nineteen?

Second, I have focused almost exclusively on the processes of constitutional change, not their substance. This obviously leaves a lot of important constitutional questions unanswered.

Third, even my treatment of process is oddly truncated. Since my primary target is the professional narrative of lawyers, I have focused on texts that already have a secure place in the legal canon and have tried to show that they tell a very different story from that supposed by my colleagues. But this traditional focus on standard legal materials means that the voices of ordinary men and women are oddly muffled in the book. Given all my talk of We the People, isn't it wrong to allow the sayings and doings of the Madisons, Lincolns, and Roosevelts to monopolize our constitutional vision?

Finally, lots more must be said about the normative dimensions of my enterprise: Why all this attention to the profession's understanding of constitutional history, rather than its philosophical grasp of our traditional ideals? What's so great about revolutionary exercises of popular sovereignty?

Many of the Symposiasts spend most of their time filling one or more of these yawning gaps. I applaud these efforts, and I plan to consider them in subsequent work.[17] But I cannot take them up within the space of this essay without risking egregious superficiality. I propose, then, to focus on those aspects of the Symposium that are central to the more limited arguments actually presented in *Transformations*. This will permit a certain sense of closure in dealing with the Founding, Reconstruction, and New Deal, and will allow me to proceed, in good conscience, to other dimensions of my larger project in the future.

C. *Trichotomizing Legal Change*

Transformations focuses upon a distinctive kind of lawmaking practice that is obscured by a simple but tenacious dichotomy often used to classify

17. At present, I am working on two historical projects that I hope will enrich the story—one, focusing on the Jeffersonian Revolution of 1800, already exists in manuscript form; the other, which is in the research stage, analyzes the status of the Civil Rights Revolution of the 1950s and 1960s as a constitutional moment.

legal change. On this familiar view, some new initiative, *X*, can become law in one of two ways. Either *X* is enacted in strict compliance with all the rules, principles, and practices regulating legislative and constitutional revision—in which case it counts as an *ordinary* change in municipal law—or it becomes effective despite its breach of these norms, in which case it is part of a *revolutionary* change in the entire legal system.

I have no problem with the idea of ordinary legal change, but I do challenge the implicit notion that all revolutions are sufficiently alike to justify legal analysts putting them into a single conceptual box. Just as one may distinguish revolutions on a human scale from those of the totalizing variety, I propose an analogous distinction when considering a revolution's relationship to the preexisting legal order. Totalizing revolutions aim for nothing less than a complete break with *all* the rules, principles and practices that previously governed legal change. But revolutions on a human scale may aim for a more discriminating relationship. While they may reject key elements of the preexisting legal mix, they may also seek to retain others unchanged, while adapting yet others into the new system of revolutionary legality they seek to establish. I call this *unconventional adaptation*, and it is my principal aim to emphasize its importance in American constitutional development. Indeed, the Constitution of 1787 would never be higher law today without its repeated unconventional adaptation by later generations of Americans at moments of great crisis.

This thesis is hard to state, let alone evaluate, within the traditional conceptual dichotomy between ordinary and revolutionary legal change. Since both unconventional adaptations and total breaks involve a rejection of at least some of the old elements defining valid legal change, neither counts as an *ordinary* legal revision. As long as we are content with the old dichotomy, both kinds of revolution get thrown into the same conceptual box. Worse yet, legal analysts may easily lose sight of the significance of unconventional adaptation as their attention is arrested by the more melodramatic gestures of the totalizing revolutionary. To guard against this danger, I propose to replace the received dichotomy with a clarifying trichotomy—ordinary change, unconventional change, and totalizing change.

I do not deny that totalizing legal change is possible. The Bolshevik Revolution of 1917 provides a case in point. Before the Communists seized power in October, the previous provisional government scheduled elections for a Constituent Assembly whose task was the framing of a new constitution. The Bolsheviks allowed these elections to proceed only to find themselves gaining a minority of the seats. It was at this point that the question of total revolution was raised in dramatic fashion: Would the

Bolsheviks disband the Constituent Assembly and thereby break their last institutional links to the past?[18]

The question provoked much anxious indecision. Nonetheless, Lenin persuaded his comrades to use the Red Army to disband the assembly and to make a clean break with the existing legal order.[19] Rather than adapting preexisting constitutional ideas and institutions to broaden support and to gain consent, the Bolsheviks took a different path. The new regime's fate would depend on institutions—most notably the Red Army and Communist Party—that had *no* constitutional relationship, however remote, to the old regime.

But this is not what happened in America during each of its great periods of revolutionary reform. While the participants were perfectly aware that they were violating certain basic legal norms, they did not take this point as a license for destroying the entire preexisting system. Instead, they extracted many traditional elements from the mix in their effort to make new higher law in the name of the People. My book's first aim is to follow each generation of revolutionary reformers down this unconventional path, describing how one unconventional adaptation generated others in the ongoing struggle for popular legitimacy, until the entire higher lawmaking system had been reorganized on principles different from those of its predecessors.

While sensitive historical reconstruction of these revolutionary transformations is obviously important, *Transformations* tries for something more, and different. It treats the unconventional adaptations achieved at the Founding, Reconstruction, and New Deal as great constitutional precedents deserving the same kind of careful legal analysis we devote to those established by judges. To be sure, these precedents require us to give the sayings and doings of Presidents, congressional representatives, and other popular leaders the same kind of respectful consideration we typically reserve for the juridical elite. But putting this difference to one side, the book's aim is ultimately similar to that of the standard treatise on constitutional law. Just as the ordinary treatise interprets the constitutional doctrine elaborated by judges over time, *Transformations* interprets the law of higher lawmaking based on the great precedents elaborated by the Founders, Reconstructors, and New Dealers in the name of the People of the United States. Just as the traditional treatise attempts an authoritative statement of the doctrinal baseline for future legal development, *Transformations* makes an identical effort, elaborating the

18. *See* EDWARD HALLETT CARR, 1 THE BOLSHEVIK REVOLUTION, 1917-1923, at 109-20 (1950).

19. *See id.* at 115.

principles and practices that lawyers should use to evaluate future efforts to make higher law in the name of the American People.

As Rogers Smith suggests,[20] there may seem something paradoxical about such an effort: How can there be such a thing as *law* when the subject is the revolutionary transformation of the higher lawmaking system itself? The paradoxical quality of this question dissolves once one distinguishes between total breaks and unconventional adaptations. Law does break down in the interpretation of total breaks—since, by hypothesis, there is absolutely nothing linking the lawmaking system before and after the revolutionary breakthrough. But there is no similar paradox involved in the legal attempt to study the prevailing patterns of unconventional adaptation achieved during the Founding, Reconstruction, and New Deal. Despite the revolutionary character of these periods, certain basic continuities manage to maintain themselves. Perhaps, then, we will be in a position to identify the systemic imperatives shaping key decisions to transform some basic principles and practices *but not others*? To be sure, the constitutional meaning of the surviving elements may themselves be transformed as a result of the emergence of new principles and practices. Nonetheless, the reflective study of patterns of legal continuity within the context of revolutionary change may yield insights into the most durable elements of our constitutional language and practice.

Even these elements are not immune from challenge in the future. But before we can assess their claims to our continuing respect, we had better consider more carefully how, and whether, they may be identified.

II. THE FOUNDING

Professor Rakove's essay serves as a useful beginning, since it struggles with the same conceptual problems that have led me to trichotomize legal change into ordinary, unconventional, and totalizing varieties. Though my claims about the illegality of the Founding have proved controversial in the legal academy,[21] Rakove tells us that professional historians have no trouble accepting them.[22] Only he cautions

20. *See* Rogers M. Smith, *Legitimating Reconstruction: The Limits of Legalism*, 108 YALE L.J. 2039, 2052-53 (1999). For another effort that erects an overly dichotomous understanding of the relationship between law and revolution, see PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 69-74 (1997).

21. *See, e.g.*, Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 462-63 nn.12-14, 497 n.157 (1994).

22. *See* Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 YALE L.J. 1959, 1964, 1966 (1999). He tends to downplay the point, however, by asking "on what basis would any delegate to Philadelphia . . . have been charged for participating in this process? Who would have brought the charges? In what court would they have been tried?" *Id.* at 109. Though Professor Rakove seems to treat these questions as unanswerable, my response is rather straightforward. All the signers of

against an exaggeration of their significance. In embracing illegality, the Federalists were not endorsing a total break with their recent past, or engaging in brutal *realpolitik*. The Founding illegalities are "only half . . . of the story."[23] The more interesting half involves the Federalist effort "to ground their Constitution on foundations that were better designed and sturdier than those available in 1776."[24]

I agree. To put Rakove's point in terms of my trichotomy, the Founding illegalities did not transform the Federalists into totalizing revolutionaries. They served instead to frame a classic case of unconventional adaptation. Despite the Federalists' break with fundamental and well-established legal norms established by the Articles of Confederation, they succeeded in adapting other elements of their preexisting constitutional vocabulary and practice in ways that ultimately enabled a big breakthrough in American political self-understanding.

One of their key moves involved a revolutionary reconceptualization of the nature of constitutional "conventions." As I explained in the first volume of *We the People,* the English tradition defined "conventions" as legally defective parliaments and treated them as inferior in authority to normal parliaments. Though the Convention of 1688 placed a new King on the throne under fundamentally new conditions, the nature of its authority to define the terms of the Glorious Revolution was very much in doubt—so

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Constitution were undoubtedly guilty of the crime of sedition by attempting to destroy the basis of established authority in each of the states and the United States. Under the contemporary English definition, any person speaking or writing words against the government, "cursing or wishing [the government] ill, giving out scandalous stories concerning [the government], or doing any thing that may . . . weaken [the] government" was guilty of sedition. 4 WILLIAM BLACKSTONE, COMMENTARIES *123. The common law was adopted by all of the American states either by their Constitutions, acts of the legislatures, or the opinions of their courts. *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 797-800 (1951). Although some states' Constitutions also declared the right of freedom of speech, trials for seditious activities continued throughout the post-independence period. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 184-86 (1985).

There is some question as to whether, under the common law, a state could have prosecuted citizens who committed sedition extraterritorially, as did the delegates to the Constitutional Convention. See Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1163 (1971). But at the very least, Pennsylvania could have prosecuted all delegates, as their seditious assembly occurred in its jurisdiction. And each signatory to the Constitution continued his seditious activities in his own state after the Convention disbanded.

Looking back at these events during the next decade's controversy over the Federalist Sedition Act, Madison asked: "Had Sedition Acts . . . been uniformly enforced against the press, might not the United States have been languishing, at this day, under the infirmities of a sickly Confederation?" THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 259 (Marvin Meyers ed., 1981). This rhetorical question comes from Madison's famous Virginia Report, passed by the state's general assembly in 1800, to protest both the Federalist's Sedition Act and the application of the English common law of sedition in America. Madison's views have happily won the day over the course of centuries, but it would be anachronistic to suppose that they reflected the law as generally understood in 1787.

23. Rakove, *supra* note 22, at 1935.

24. *Id.*

much so that the provisions of the constitutional settlement were reenacted later by a legally perfect Parliament. Against this background, the later practice of the American revolutionaries stands in sharp contrast: "The Federalists asserted that an illegal convention could be a source not only of law, but of higher law."[25]

In suggesting that I was unaware of the Federalists' remarkable transformation of the English precedents,[26] Professor Rakove seems to have missed my earlier treatment. (The perils of reviewing the second volume in a series!) But no matter, his essay adds valuable subtlety and historical depth to my earlier discussion.

I am puzzled, however, by Professor Rakove's implication that his contribution is inconsistent with my interpretation of the Founding. To the contrary, it supports all of my basic claims. Like Rakove, I see the Federalists taking a third path between perfect legality and total revolution. Like Rakove, I consider their use of constitutional conventions to be a decisive break from the English precedent of 1688. Like Rakove, I see the Federalists building on the revolutionary experience of the previous decade to construct a very distinctive understanding of the relationship between illegality and popular sovereignty. Like Rakove, I believe that part of the Federalists' genius lies in using *legally problematic* bodies as vehicles for *super-legality*, to use his term.

This is why I would have liked to use the word "conventional" to describe similar exercises by the Reconstruction Republicans and New Deal Democrats. But the passage of two centuries has stripped the word "convention" of its eighteenth-century connotations of formal illegality, and so I have been obliged to use *unconventional* to describe the third-way practice that the Federalists set in motion. Putting verbalisms to one side, Rakove and I are at one in understanding the Federalists as revolutionizing the mainline of Anglo-American constitutional theory and practice—and revolutionizing it in the direction of popular sovereignty.

I emphasize this convergence because it stands in sharp contrast to the relationship between legal and historical views that has prevailed during most of this century. If *Transformations* had been published half a century ago, professional historians would have scoffed at my presentation of the Federalists as serious revolutionaries bent on the unconventional design of constitutional forms expressive of popular sovereignty. Historical wisdom was then shaped by Charles Beard and the other great Progressive historians, who treated the Federalists' revolutionary pronunciamentos as

25. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 216 (1991).
26. *See* Rakove, *supra* note 22, at 1937-38.

mere propaganda disguising their deeply reactionary aims.[27] Professor Rakove's essay builds on a half-century of revisionist scholarship that enables us to see men like Washington and Madison as they saw themselves—genuine revolutionaries, if not of the totalizing persuasion.

At the same time, *Transformations* goes beyond the existing historical literature in one particular. The last generation of historians has rediscovered the cultural context for the Federalists' revolutionary ideas, but there has been no similar body of outstanding work exploring the Federalists' practice of constitutional statesmanship. After all, it was no small thing for the Founders to break free of the bonds of perfect legality in the name of popular sovereignty. What is more, their Convention in Philadelphia met in secret, and their Constitution proved so controversial that only thirty-nine of fifty-five delegates actually signed on September 17.[28] If the Federalists had not carefully prepared the ground beforehand, they would never have gained a respectful hearing for their new Constitution, let alone for their revolutionary call to short-circuit the state legislatures and win ratification through another round of legally anomalous conventions. How did they manage to carry off their revolutionary initiative?

While this is a question of independent historical interest, it is absolutely crucial for constitutional lawyers. For us, the Constitution is not only an idea or some words on a piece of paper, but an ongoing practice of thought *and* action—a distinctive tradition of statecraft that it is our high calling to sustain into its third century. In looking back to the Founding achievement, it is not enough for us to interrogate the constitutional text the Federalists left behind; we must examine the constitutional precedent they provided as they gained the consent of We the People for their revolutionary initiative.

This is the central ambition of *Transformations*. The book tries to correct the soundbite understanding of my theory that takes the notion of a "constitutional moment" very literally and imagines that the People speak at a *single* moment in time. To the contrary, the Federalists only succeeded in gaining credibility for their claims to speak for the People by organizing a temporally extended, and institutionally complex, process that gave their opponents abundant opportunities to challenge their revolutionary project at a series of deliberative assemblies and popular elections. My aim was to follow the Federalists as they stretched traditional constitutional ideas and institutional mechanisms into new patterns *to signal* their constitutional

27. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

28. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 11-12 (1913).

ambitions, then *to propose* their sweeping reorganization, then *to trigger* a revolutionary process of ratification, then *to ratify* their Constitution despite their failure to win unanimous consent from all thirteen states, and finally *to consolidate* their victory by inducing the dissenting states of North Carolina and Rhode Island to abandon the Articles of Confederation, and join their revolutionary redefinition of "a more perfect Union." At each phase of this five-stage process of engaged deliberation and decision, traditional constitutional ideas and structures both constrained, and yielded to, the Federalists' transformative practice—thereby setting up a benchmark for the legal understanding of analogous precedents in revolutionary reform, and unconventional adaptation, at later turning points of American history.

Whatever else lawyers might say of my analysis of the Founding, they would have been right to dismiss it as worthless if the Symposiasts had roundly condemned it as bad history. But in fact, the historical accuracy of my account of the constitutional statecraft of the Federalists goes completely unchallenged, with all three distinguished historians of the period directing their attention to other themes. Their silence is worth a million words; rest assured, they would not have been shy about correcting my historical blunders![29] Instead, we are witnessing something quite

29. The only exception is Professor Rakove's challenge to my reading of *The Federalist*. While he agrees that the revolutionary sentiments expressed by Madison in *The Federalist No. 40* supports my view of him as a dualist democrat, he believes that Madison's arguments in *The Federalist Nos. 49, 50* point in a very different direction—to the "radical conclusion . . . that *no* extraordinary appeal to public opinion to resolve constitutional disputes should ever be attempted." Rakove, *supra* note 22, at 1955.

I agree with Professor Rakove that the arguments of these two papers deserve much more careful treatment than they have been given. Indeed, whenever I teach a course in advanced constitutional theory, I devote a two-hour class to their analysis in the context of the larger argument Madison presents in the four Federalist papers beginning with 48 and ending with 51. My many encounters with these papers have convinced me that they serve as one of the most striking textual confirmations of dualist theory. Imagine my surprise, then, upon learning of Professor Rakove's opinion that when "[r]ead literally, Madison's analysis seems to suggest that no subsequent constitutional dispute could ever be safely referred to the people." *Id.* at 1957

I couldn't disagree more. Before proceeding with some "literal" readings, it is best to keep in mind the general structure of the argument in the two papers. *The Federalist No. 49* considers Jefferson's proposal for a constitutional convention whenever two of the three branches of government should see the need for calling one. *The Federalist No. 50* considers instead the desirability of a constitutional provision that called a convention into session every decade or so on a fixed schedule—as, for example, was suggested by the then-current practice in Pennsylvania, New Hampshire and Massachusetts. The first thing to note, then, is that these papers are not directed to Rakove's general question whether any "constitutional dispute could ever be safely referred to the people." *Id.* They consider the narrower, but fundamental question, whether it makes sense to suppose that some *legal gimmick* could be devised that would reliably go off when the conditions for constitutional politics are ripe. Madison says no, and the two papers do indeed serve as a series of profound reflections on the limits of legal form in structuring constitutional politics. Madison's basic thesis is this: The kind of constitutional politics that deserves credibility cannot be summoned up through the invocation of a legal formalism: It is the mobilized People themselves who create the conditions for legitimate constitutional articulation, and the law is powerless to create these political conditions by legal fiat. Indeed, Madison persuasively argues that the very effort to create a legal form that would allow two branches of government to

remarkable. Rather than looking upon the Founders as genteel conservatives from another age, both lawyers *and* historians are converging on a new understanding of the Federalists as revolutionary reformers, legitimating their change by unconventional adaptation of their preexisting constitutional traditions.

III. RECONSTRUCTION

"Who cares?" I can hear my hard-line lawyer friends respond. Even if one grants that the Federalists acted illegally under the Articles in proposing and ratifying their Constitution; even if one grants that, in making their revolutionary appeal to the People, they engaged in a complex practice of constitutional statesmanship; even if one grants that this five-stage exercise in unconventional adaptation was essential in gaining broad credibility for their claim of popular sovereignty, why should this precedent

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summon a "constitutional convention" into existence, or command the regular convocation of such a convention every few years, would be counterproductive. All that would happen is that the trappings of a "constitutional convention," and its pretensions to higher lawmaking authority in the name of the People, would be discredited by the selfish factional infighting characteristic of normal politics.

Madison makes it clear, however, that his anxieties about the use of legal gimmicks to summon "constitutional conventions" out of thin air, as it were, does *not* imply that there will *never* be a time when the People will once again be obliged to hand down higher law to their elected representatives. To the contrary, at the very beginning of his discussion of Jefferson's proposal, Madison explicitly recognizes that Jefferson's basic point about popular sovereignty has "great force . . . and it must be allowed to prove, that a constitutional road to the decision of the people, *ought to be marked out, and kept open, for certain great and extraordinary occasions.*" THE FEDERALIST NO. 49, at 339 (James Madison) (Jacob E. Cooke ed. 1961) (emphasis added). Paper 49 focuses instead on the danger of allowing "a *frequent* reference of constitutional questions to the decision of the whole society," warning that frequent appeals will be abused by dominant factions seeking to ram their selfish proposals through the constitutional convention. *Id.* at 340. If we follow Professor Rakove's advice to read these texts "literally," Madison is making the very distinction that is central to the idea of dualistic democracy that I hope to restore to a central place in American constitutionalism. Unfortunately, Rakove does not focus on these passages that reveal Madison distinguishing between rare acts of popular sovereignty and ordinary kinds of factional politics. Instead, he quotes a lengthy passage from paper 49 out of context, ignoring the fact that Madison is here only elaborating on the pathologies that will predictably follow if the Constitution provided a legal gimmick, like Jefferson's proposal, that authorized two branches of the government to summon a new constitutional convention whenever they wished. *See* Rakove, *supra* note 22, at 1956.

Professor Rakove also invokes a letter by Madison to Edmund Randolph as evidence of Madison's true views. *See id.* at 1955-1956 (citing Letter from James Madison to Edmund Randolph (Jan. 10, 1788), *in* 10 THE PAPERS OF MADISON, at 355-56 (Robert A. Turtland et al. eds., 1977)). As a methodological matter, I am much more interested in Madison's public statements than his private correspondence—especially where, in this case, Madison obviously has an instrumental objective at the forefront: to convince Randolph to oppose the calling of a second constitutional convention. Given this objective, it is understandable that Madison thought it rhetorically effective to emphasize the dangers of another round of constitutional politics. But the more elaborate and public presentation in *The Federalist* expresses a more complex, and dualistic, view.

be considered an absolutely central part of each lawyer's professional education?

After all, there are thousands of potentially relevant precedents, and the profession has only limited time to spare for historical perspective on its current predicaments. Even in law school, students are introduced to a remarkably limited constitutional canon that identifies a handful of crucial precedents from the early Republic for concentrated attention—*Marbury v. Madison* and *McCulloch v. Maryland*, a few other cases from the antebellum era, bits of *The Federalist* and maybe snippets from Farrand.[30] But there is so much to learn that even legal academics must rigorously constrain the amount of law-stuff from the early period that gets serious professional attention in the twenty-first century. At best, shouldn't the Founding precedent in unconventional adaptation be consigned to the legal periphery inhabited by a few lawyer-antiquarians who are not diverted by more pressing matters?

I take this question very seriously. The construction of a professional canon is no laughing matter. If lawyers do not have one, everybody will be talking past one another, and the very notion of a legal order will dissolve amidst a cacophony of voices. But if we do have a canon, we had better think long and hard about what goes in, and what stays out. The things we allow ourselves to see in the past will profoundly shape the way the legal mind understands the present and the future.[31] Why, then, does the Founding precedent deserve a central place in the constitutional canon of the twenty-first century?

For starters, because it provides an essential context for understanding the next great turning point in our history, marked by the Reconstruction Amendments. Lawyers do not recognize this today because they suppose they can understand the foundations of the Thirteenth and Fourteenth Amendments in a simple formalist way. On this familiar view, these amendments are validly part of the Constitution for the same reason all the others are—they were enacted in strict conformity with the principles and processes marked out by the Founding text in Article V.

This view is based on sheer ignorance. However inconvenient it may be for lawyers and judges to confront the facts, anyone familiar with them recognizes that the Thirteenth and Fourteenth Amendments were *not* validated in the way the formalist supposes. Don't take my word for it. It is also the verdict of some of America's leading historians (Professors Benedict and Foner) and political scientists (Professors Burnham and Smith). Rather than seeking to refute my basic claim, they go out of their

30. *See* FARRAND, *supra* note 28.

31. *See* J.M. Balkin & Sanford Levinson, *Canons of Constitutional Law*, 111 HARV. L. REV. 963, 987-92 (1998).

way to commend me, in Foner's words, for my "willingness to confront unflinchingly the ambiguities surrounding the ratification of the Reconstruction Amendments."[32]

Yet it is one thing for historians and political scientists to recognize that prevailing legal understandings are utterly detached from historical and political reality; quite another for lawyers and judges to take the bull by the horns. As Professor Smith rightly suggests, constitutional lawyers are in the legitimation business: If some citizen comes up to us and asks why the Thirteenth and Fourteenth Amendment are part of the Constitution, we cannot simply respond in the manner of a scholar in the liberal arts and commend him for asking a good question!

One of the tasks of America's law schools is to come up with some answers. After all, the Reconstruction Amendments have been absolutely central to the legal legitimation of countless acts of coercive authority undertaken in this country over the past 125 years. Surely law professors owe their fellow citizens something more than a shrug of the shoulders when asked about the legal foundation of all this activity?

From this vantage, one can appreciate the anxiety that leads the mandarins of the legal order to evade a sustained confrontation with the facts of American constitutional development. Perhaps the formalist answer to the question of legal validity isn't much better than a fig-leaf. But isn't a formalist fig-leaf better than no answer at all?

But that is not our only choice. We can also recognize these amendments *for the same reason we recognize the continuing legal validity of the original text of 1787.* Like the Founding text, the Reconstruction Amendments are legal markers of a popular revolution on a human scale, legitimated once again by the unconventional adaptation of preexisting constitutional ideas and practices in the service of popular sovereignty.

This is the line of thought that promotes the study of the processes, and not only the substance, of the Founding and Reconstruction into the professional canon. Quite simply, if lawyers and judges hope to explain to their fellow citizens why the Thirteenth and Fourteenth Amendments are *properly* part of the Constitution, they should be in a position to explain how the Republicans, no less than the Federalists, *earned* the constitutional authority to speak for the People by virtue of their unconventional adaptation of preexisting institutions.

Begin with a basic similarity in the situation of Founding Federalists and Reconstruction Republicans. Both were relatively nationalistic for their time and place; both confronted a preexisting system of constitutional

32. Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 101, 2003, 2003 (1999); *see also* Benedict, *supra* note 8, at 2024-2025; Burnham, *supra* note 5, at 2237, 2242; Smith, *supra* note 20, at 2051.

revision that gave veto power to a small minority of the states (1 out of 13 in 1787, 10 out of 36 in 1868); both were perfectly aware that their revolutionary reforms would never gain recognition under the preexisting system.

They confronted, in short, a fundamental conflict between constitutional medium and constitutional message—they hoped to commit their fellow citizens to a new understanding of themselves as We the People of a more *United* States, but faced a lawmaking system premised on an older, and more decentralized, understanding of We the People of the United *States.* In both cases, the response was the same—use preexisting ideas and institutions to increase the prominence of the national center as the leading forum for legitimate constitutional debate and decision.

As we have seen, the Founders did this by transforming the idea of a constitutional convention inherited from English practice during the Glorious Revolution. The Federalists adapted this English idea to create a novel institutional platform at the national level—both to present a transformative proposal and to authorize a second round of ratifying conventions to authorize the states to sever their bonds to the Articles of Confederation. The Republicans further nationalized the higher-lawmaking process, but in their case the crucial institutional resources did not come from the English revolutionaries of 1688, but from the American revolutionaries of 1787, who had left them a novel system that separated powers between the Presidency, Congress and the Supreme Court.

The Founding Federalists had not intended this system to serve as the primary engine of higher lawmaking; instead, they thought that constitutional amendments would occur by repeating the scenario through which they themselves had achieved success. Just as the Federalists gained the support of popular assemblies operating on both the national and state levels, they opened up similar options for their successors in providing the text of Article V.

But Americans jumped off these formalist tracks during and after the Civil War. In a revolutionary move no less creative than their eighteenth-century predecessors, they transformed the national separation of powers into the primary system by which they defined, debated, and finally decided the constitutional meaning of their colossal struggle over the fate of the Union. As the Founders built up national authority through the unconventional use of constitutional conventions, the Republicans did the same thing through the unconventional use of the separation of powers.

Happily, none of the commentators criticize my blow-by-blow account of this great transformation. But they do question whether some of the leading participants were fully conscious of the extent to which they were revolutionizing preexisting institutional relationships. Professor Smith, for

example, wonders whether Lincoln fully appreciated how much he was transforming the Presidency into an engine of constitutional change.[33]

It is hard to say. Lincoln's Emancipation Proclamation, his Gettysburg Address, and his decision to make the Thirteenth Amendment into a central plank of his reelection campaign served to project a view of the Presidency in the public mind as a constitutionally legitimate change-agent for the People. Nonetheless, John Wilkes Booth cut Lincoln short at a moment when the deep issues raised by presidential leadership on behalf of the Thirteenth Amendment were just becoming high-visibility items. While Lincoln's last public address reveals him self-consciously confronting the need for further presidential action to gain the assent of three-fourths of the states to the Emancipation Amendment,[34] it was Andrew Johnson who decisively resolved the problem that Lincoln only talked about.

Building on Lincoln's precedents in presidential leadership, Johnson repeatedly used his office in unconventional ways to win Southern ratification of the Thirteenth Amendment during the summer and fall of 1865. When his effort finally succeeded in December, the new President announced his triumph in a State of the Union address that proudly explained the extraordinary measures he had taken to induce the Southern states to ratify the amendment "in the name of the whole people."[35]

Such a vision of the Presidency would have shocked the Founding generation. The last thing they wanted was a President who took unconventional legal action as a representative "of the whole people." They feared such behavior, associating it with the great destroyers of republics, like Caesar and Cromwell.[36]

So much the worse for the Founders. Americans of the 1860s took a very different view, applauding Johnson's frank avowals of unconventional presidential leadership in the process of higher lawmaking. The congressional leaders of the Republican Party would have been Johnson's most enthusiastic supporters if he had continued developing this unconventional model in the struggle over the Fourteenth Amendment. But Johnson refused, thereby forcing the Republicans to elaborate an alternative model of unconventional congressional leadership if they hoped to win constitutional authority for the Fourteenth Amendment.

This is the point at which Professor Benedict joins Professor Smith in doubting my portrayal of the Republicans as self-conscious revolutionaries. To a large extent, his doubts should dissolve upon further reflection on *Transformations*'s distinctive angle of vision. In contrast to the leading

33. *See* Smith, *supra* note 20, at 2057.

34. *See* 2 ACKERMAN, *supra* note 4, at 137.

35. Johnson's first State of the Union is excerpted and analyzed in 2 *id.* at 151-53.

36. *See* JAMES W. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 51-57 (1979).

works of the last generation (including Professor Benedict's[37]), my book focuses on the process by which the Fourteenth Amendment became higher law, not on its substantive commands. Most of Professor Benedict's skeptical remarks, however, concern the Republicans' substantive vision. In sharp disagreement with historians like Eric Foner, Benedict emphasizes the extent to which main-line Republicans remained "moderates" committed to traditional federalist values.

This is a key debate relevant for the thoughtful resolution of many legal problems. Nevertheless, I did not think it was necessary for me to take sides in this particular book. Even on Benedict's more "moderate" reading of Reconstruction, the 1860s plainly count as a revolution on a human scale. Recall my proposed thought experiment: We confront a thoughtful lawyer of 1860 with a crystal ball informing him that, a decade later, blacks would be proclaimed equal citizens with whites, armed with the right to vote and constitutional guarantees of due process and equal protection. Can there be any doubt that this news would set him reeling in disbelief?[38]

That Professor Benedict describes such an achievement as the work of "moderates" only emphasizes how revolutionary they would have appeared ten years earlier. Of course, if one rejects Benedict's view for more radical interpretations like Foner's, the revolutionary character of Reconstruction is even more apparent.

Given this point, it did not seem worthwhile for me to try to pass judgment on the dispute between Fonerians and Benedictines. After all, this is not something that can be done responsibly in a couple of pages, and the book is long enough already! I contented myself, then, with uncontroversially vague statements describing the substantive achievements of Reconstruction so as to focus on my principal problem. In contrast to the broad recognition of the revolutionary substance of Reconstruction, modern work contains no similar recognition of the revolutionary character of the process that brought it about. It is here, I thought, that a couple of hundred pages might actually make a contribution.

Once my thesis is cleanly differentiated from the one driving the Benedict-Foner debate, it is no longer so clear that Professor Benedict disagrees with it. To be sure, he remarks that "Republicans never spoke in the terms Ackerman uses. Never did they admit that their actions made the ratification of the Civil War amendments 'unconventional.'"[39] But this is not a serious objection. Obviously, the Republicans were in no position to

37. *See* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869 (1974).

38. *See generally* KENNETH M. STAMPP, AMERICA IN 1857: A NATION ON THE BRINK (1990) (providing an insightful description of the political and legal world as it appeared at the dawning of the civil war crisis).

39. Benedict, *supra* note 8, at 2030.

use a neologism created to enrich an impoverished twentieth-century vocabulary that fails to grasp the distinctive characteristics of revolutions on a human scale. The point of my neologism, however, is to describe a distinctive type of constitutional consciousness and practice. Once we move beyond mere word-play, there is overwhelming evidence that the Republicans and their opponents were entirely aware of the unconventional character of the struggle over the Fourteenth Amendment.

Consider, for example, the flood of passionate debate and institutional struggle centering on the Republicans' decision to exclude Senators and Representatives elected by the Southern states from the Thirty-Ninth and Fortieth Congresses. With this single act, the Republicans—however "moderate" they might have been in other respects—made it perfectly clear to all citizens of the Republic that they would not allow the ordinary legal forms to regulate their effort to move beyond the Thirteenth Amendment in codifying the meaning of the Civil War.[40] And if anybody failed to notice that the assembly on Capitol Hill was a rump, President Johnson drove the point home time and again in veto messages and political speeches during the fateful election campaign of 1866, and continued to do so despite his crushing defeat at the polls that year.[41]

The Republicans were painfully aware of the damage the President was doing to their cause among more conservative Americans by constantly harping on the exclusion of the Southern states. For example, consider their conduct of Johnson's impeachment trial in the Senate. The fate of their campaign to remove the President was finally decided by a vote on an article of impeachment that began as follows:

> That said Andrew Johnson . . . did . . . on the 18th day of August, 1866, at the city of Washington, in the District of Columbia, by public speech declare and affirm in substance that the Thirty-ninth Congress of the United States was not a Congress of the United States . . . but, on the contrary, was a Congress of only part of the States thereby denying and intending to deny the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States.[42]

This is the kind of evidence that leads me to call the Republican-dominated assembly a *Convention/Congress*, thereby analogizing it to the Convention Parliament that brought the Bill of Rights to England in 1688.

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40. *See* 2 ACKERMAN, *supra* note 4, at 160-85.

41. Given Johnson's home in Tennessee, the ongoing debate about the readmission of this particular state provided a particularly poignant example of this struggle. *See* 2 *id.* at 166, 170, 189; ERIC L. MCKITTRICK, ANDREW JOHNSON AND RECONSTRUCTION 284-91 (1960).

42. CONG. GLOBE, 40th Cong, 2nd Sess. 1638-42 (1868) (quoted and discussed at greater length in 2 ACKERMAN, *supra* note 4, at 179-83).

Just as the Convention of the Glorious Revolution contained an empty throne where the King formerly sat, the Convention/Congress of Reconstruction had empty chairs where formerly sat the representatives of Alabama, Virginia, and the nine Southern states that stood (alphabetically) in between them.[43]

Actions speak louder than words: So long as the Convention/Congress continued to exclude the Southern states, nothing the Republicans might say would fool anybody into thinking their "Congress" was a perfectly legal assembly. Of course, like all revolutionaries, the Republicans thought that their break with the constitutional status quo was entirely legitimate. Professor Benedict reminds us, for example, that many relied on the "grasp of war" doctrine to extenuate their unconventional treatment of the South. But Republicans never would have perceived the need to embrace such a remarkable doctrine if they had supposed that the ordinary legal rules and principles of Article V sufficed to legitimate their campaign on behalf of the Fourteenth Amendment. Moreover, "grasp of war" by no means exhausted the Republicans' repertoire of unconventional justification—the *Congressional Globe* is full of ingenious efforts to explain why the Republicans were right in engaging in one unconventional action after another in their struggle for the Fourteenth Amendment.

To be sure, most Republicans steered clear of Thaddeus Stevens's totalizing vision of a revolution that would propel America far beyond the parameters of the Fourteenth Amendment.[44] But Professor Benedict misleads when he calls the anti-Stevens faction "moderate"—at least if this word is taken in its standard non-revolutionary sense. The simple fact that Benedict's "moderates" shied away from Stevens's more totalizing vision did not prevent them from repeatedly assaulting deeply entrenched constitutional doctrines defining the Presidency, the Supreme Court, and the role of the states whenever this was necessary to maintain institutional momentum for the Fourteenth Amendment. On a single day in March 1867, for example, the Convention/Congress stripped the President of his core powers as commander-in-chief, forced the Southern states to accept black

43. Professor Rakove objects to my description of the Convention/Congress as merely "rhetorical," on the ground that nobody self-consciously looked back to the Glorious Revolution as a precedent. *See* Rakove, *supra* note 22, at 1948. Despite this fact, the term is very useful for those seeking to define the distinctive features of the Anglo-American revolutionary tradition—a tradition that has reemerged repeatedly from 1688 through 1937 and beyond. Granted, professional historians currently limit themselves to the study of one or another of these revolutionary periods. But this should not lead them to reject as "rhetorical" the possibility that these recurrent Anglo-American exercises in revolution may exhibit deep historical continuities. (I say "may," not "must"—the question can be answered only by sensitive historical research of a broader kind than is usual in today's academy since it requires an in-depth comparison of different periods of the 18th, 19th, and 20thcenturies. The breadth of this inquiry, however, does not make it "rhetorical." It only makes it difficult.)

44. *See* 2 ACKERMAN, *supra* note 4, at 193-98.

voters, and declared that even black-and-white Southern polities could not reenter into Congress unless they ratified the Fourteenth Amendment. When the month of March came around again in 1868, the Convention/Congress was impeaching the President and stripping the Supreme Court of jurisdiction lest it join Johnson in denouncing the constitutionality of its earlier initiatives. If this is what Professor Benedict considers "moderation," what qualifies as "revolutionary"?

Now I'm the last guy in the world who would condemn Benedict for stretching the English language. To the contrary, I applaud his Pickwickian usage of "moderation" since I think it expresses the very same insight that has been leading me to coin the term "unconventional." To state the matter in a way that emphasizes our common insight: I agree that many members of the Republican party were "moderate" in that they were trying to find a middle ground between perfect legality (of the kind demanded by Johnson) and more totalizing versions of revolution (of the kind demanded by Stevens). While their particular theories varied a good deal, these inhabitants of the middle ground were (1) willing to break well-established constitutional rules and principles when necessary to redeem their vision of the Union, as codified by the Fourteenth Amendment; but (2) took no joy in these breaches, and hoped to reestablish a new constitutional equilibrium as soon as they had successfully cemented new fundamental principles into the foundations of the Republic. In other words, Benedict's "moderates" were engaged in unconventional actions aimed at winning a revolution on a human scale.

Both Professor Benedict and Professor Burnham raise a second question that helps refine the ongoing terms of the debate. Pointing to the popularity of "grasp of war" theories amongst Republicans, Benedict asks why I do not endorse "grasp of war" as the true historical foundation of the Reconstruction Amendments. My answer, once again, requires one to reflect on the way that *Transformations*'s shift in focus from substance to process requires compensating shifts on other methodological fronts. If I were interested in elaborating the substantive meaning of the Fourteenth Amendment, there is much to be said for Benedict's focus on the way leading Republicans understood its provisions. But this focus on the *Republicans*' original understanding is far more problematic when the question is the original understanding of the process through which the amendment managed to win recognition as a valid expression of the constitutional will of the American People.

After all, if the Republicans were ever to get the Fourteenth Amendment on the books, it would never be enough for them to proclaim one or another unconventional theory from their outpost on Capitol Hill. Every such utterance would be matched by a counter-theory coming out of the White House of Andrew Johnson. The crucial question was how the

American People would resolve this great struggle for their hearts and minds. If we are to answer *this* question, it will never be enough to consider what some of the partisans of the Convention/Congress said on its behalf. We must consider the ways in which *the constitutional system as a whole* enabled the People finally to decide the great debate raging between the protagonists confronting one another on Pennsylvania Avenue, each appealing to millions of mobilized partisans throughout the country.

If this is the historical question, "grasp of war" theories misdirect the search for an adequate answer. They suggest that the South—and especially the white South—played a passive role in the process by which the fate of the Fourteenth Amendment was decided. Nothing could be further from the truth. White Southerners were not passive political victims immobilized in a Northern "grasp of war." Their interests and ideals were vigorously represented by their champion in the White House who pleaded with moderates throughout the nation to reject the revolutionary nationalism and egalitarianism of the Convention/Congress. This Southern challenge shook the Republican party to its roots, creating grave anxiety amongst its partisans as they looked ahead to the elections of 1866 with genuine alarm. It was only after winning these elections that the Republicans began to earn the constitutional authority to proceed with the ratification of the Fourteenth Amendment; indeed, this single electoral victory was not enough to secure the amendment a foundational place within the emerging regime. For that to happen, much more work—on both the electoral front and amongst political and legal elites—would be required.

When we view the matter historically, "grasp of war" simply does not describe the revolutionary process through which the Fourteenth Amendment ultimately emerged as a foundational element of American government. Rather than cannonading out of the guns of the Union Army, the constitutional validity of the Fourteenth Amendment emerged from a series of decisions made by ordinary voters in the entire nation, including the South, on fundamental constitutional choices proffered to them by means of the separation of powers.

More concretely, the separation between the Convention/Congress and the Presidency (backed by the Court) both emphasized the crucial constitutional issues at stake and encouraged both sides to make a maximum effort to mobilize their forces for electoral struggle. It was only by repeatedly beating their opponents at these elections that the Republicans created a successful institutional bandwagon that ultimately submerged the grave constitutional doubts generated by the conduct of their Convention/Congress during the critical years of 1865 through 1868. With the Republicans gaining firm control of all three branches during the Grant Administration, the Supreme Court finally was poised to dismiss all reasonable doubts about the validity of the Reconstruction Amendments in

the *Slaughter-House Cases* of 1872.[45] Henceforward, only bitter-end partisans of the Lost Cause continued to deny that the amendments deserved recognition as the deliberate choice of the American People.[46]

In reflecting on this account, both Rogers Smith and Joyce Appleby express some anxiety at its Whiggish optimism.[47] Am I parodying Pangloss in crafting a constitutional narrative in which even Andrew Johnson has a constructive role to play? Aren't I carrying Ronald Dworkin's famous dictum to absurd extremes when I put the President's war against the Fourteenth Amendment "in its best light"?

There are Whigs and there are Whigs. My own version—such as it is—absolutely renounces any notion of linear constitutional development, and especially the Whiggish conceit that this linear development has reached a happy culmination in the year 1999—just in time for all of us to greet Y2K as the final triumph of the American struggle for freedom, equality, and justice. To the contrary, my sympathy for Andrew Johnson (and later on, for the Old Court of the 1930s) reflects my larger sympathy for all those solid conservatives who find, to their shocked surprise, that revolutionary reformers are seeking to destroy their political world. This is not a pleasant experience, and it is even tougher when your political world *does* disintegrate, with disheartening speed, over the next few years.

It is easy, of course, for totalizing revolutionaries to smother these conservative anxieties by speaking of "the death rattle of the old order" or "the need to break eggshells to cook an omelet." But for revolutionaries on a human scale, the challenge is very different: Rather than suppressing conservative resistance, can the Constitution channel it in ways that help define, and ultimately, legitimate the revolutionary transformation?

My Whiggism consists of suggesting that the American constitutional tradition contains the materials for an affirmative answer. It *is* possible to incorporate passionate conservative critique into the very process of its ultimate undoing. Two constitutional structures turn out to be crucial in this dynamic of legitimation: first, the separation and division of power between the various branches and different levels of government; second, a constitutional calendar that makes it virtually impossible for a revolutionary movement to gain control of all the levers of power at a single instant in time. The interaction of these structures implies that revolutionary reformers will still confront conservatives in at least a few other power centers even after they have won one or two elections. It will be up to these conservatives to determine whether they will continue to resist the revolutionary onslaught

45. 83 U.S. (16 Wall.) 36 (1872).

46. Rather than questioning this account, Professor Benedict's essay endorses many of its central assertions. *See* Benedict, *supra* note 8, at 2025.

47. *See* Joyce Appleby, *The Americans' Higher Law Thinking Behind Higher Lawmaking*, 108 YALE L.J. 1995, 1995 (1999); Smith, *supra* note 20, at 2056-2057.

and return once more to the voters in a last-ditch effort to throw the rascals out at the next election, or whether the time has come to recognize that the People have spoken. If constitutional lawyers and statesmen manage this process well, the revolutionary appeal to popular sovereignty may not only accommodate some (if not all) of the conservatives' central interests. It might also encourage the conservatives, through their very participation in the process, to reconcile themselves to defeat.

This entire dynamic is lost by an appeal to "grasp of war" theories. To be sure, there were millions of die-hard white Southerners who went to their graves asserting that Reconstruction amounted to nothing more than the brutal outcome of Northern military dictatorship. But it is past time to recognize that there is another, and more accurate, view—one that reveals Reconstruction as bearing a family resemblance to the Founding. James Madison was sometimes driven to use strong language—rhetorically equivalent to "grasp of war" and other such theories—to explain why the Federalists were not going to play strictly by the rules of amendment set out by the Articles of Confederation.[48] Such talk is cheap in revolutionary settings. But if we are to understand how Federalists and Republicans actually managed to gain general recognition for their claim to speak for the People, we must move beyond their talk and consider their distinctive brand of constitutional statesmanship. Rather than presenting their Constitution as a fait accompli, the Federalists both prepared the ground for their proposal by gaining the support of most of the relevant pre-existing institutions and then sought to organize a set of ratifying conventions on the state level. While none of this complied with the rules, it nonetheless forced them to confront the protests of their opponents both in word and at the ballot box. As more and more of the states signed on, the Founders could exploit the "democratic bandwagon effect" and *credibly* begin to claim that they were speaking for the People despite their violation of the Articles.

The Republicans generated the same kind of democratic bandwagon during Reconstruction, albeit with different institutional materials. Their ultimate success in legitimating the Fourteenth Amendment was not due to their "grasp of war" theories, but to their success in mastery of a complex institutional obstacle course established by the separation and division of powers. It was only after their appeals to the People were repeatedly rewarded by victory at the polls that they could construct a "democratic bandwagon effect" that enabled them *to earn* the public credibility required to place the Convention/Congress of 1865-1868 on the same level as the Constitutional Convention of 1787.

48. *See* 2 ACKERMAN, *supra* note 4, at 54-55, and *supra* note 29.

IV. THE NEW DEAL

The model of elite management is nowhere so obviously on display as in academic and professional treatments of the New Deal Revolution. The terms of Laura Kalman's thoughtful essay serve as a tip-off. She tells us, accurately enough, that two schools offer competing accounts: "externalists" say that political forces outside the Court forced the Justices to revolutionize their doctrines, while "internalists" deny this, and attribute some or all of the changes to the juridical elite's ongoing efforts to keep the law up to date with evolving folkways and the invisible-hand dynamic of market forces.[49] Professor Kalman's spatial imagery identifies the center of controversy with precision: The "internal" space is occupied by the Court seeking to manage its relations with "the external world." Under this model of elite management, the key question is whether the outside world proved too hot for the judges to handle, or whether—appearances to the contrary notwithstanding—the judges were in control after all.

I begin from a different place—with the escalating popular repudiation of the constitutional traditions of laissez faire and limited national government that organized the life of the Republic during its first 150 years. My first challenge is to understand how the constitutional system, considered as a whole, tested the democratic credibility of the New Dealers as they increasingly claimed the authority to speak in the voice of ordinary Americans demanding a revolutionary redefinition of their relationship to the national government and the market economy. As the years moved on, and the larger system legitimated the New Dealers' claim to speak for the People, my second task emerges: to explain the constitutional options opened up to the New Dealers as they tried to translate the passionate rhetorics of constitutional politics into the enduring languages of constitutional law. Only at this point does the traditional internalist-externalist debate enter the analysis, though in a changed form.

A. *Reconstruction as a Precedent for the New Deal*

My first task is to fix the broad outlines of the process by which the deep and escalating popular demand for a revolutionary break with the status quo was ultimately transformed into a new set of constitutional understandings. To gain legal perspective, I take the path of the common law—searching for precedents from our constitutional history that might provide a suitable framework for professional understanding. Like the New Deal Democrats, the Founding Federalists and Reconstruction Republicans

49. Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2168-85 (1999).

were relatively nationalistic for their time and place; like them, they faced a formal system of amendment that gave the states a decisive voice in determining whether they spoke for a more nationalistically defined People; like them, they took an alternative institutional path, confronting different obstacle courses than those for constitutional amendment established by prior practice; and yet, despite the legalistic challenges they encountered, they too managed to generate constitutional authority to reconfigure the basic terms of America's social contract. How, then, did the New Dealers' twentieth-century exercise in popular sovereignty compare to these earlier paradigms of revolutionary achievement?[50]

The precedents from Reconstruction prove especially fruitful. When used as a basis for comparison, they reveal that there is a lot less new to the institutional course taken by the New Deal Revolution than might appear to the naked eye. It was Reconstruction, not the New Deal, that revealed how the separation of powers, when combined with popular elections, might be transformed into a mighty engine of higher-lawmaking, allowing Presidents Lincoln and Johnson in the case of the Thirteenth Amendment, and the Convention/Congress in the case of the Fourteenth, to convert repeated victories of the Republican Party at the polls into an enduring mandate from the People. The same thing happened during the Great Depression—but this time it was Roosevelt, and the Democratic Party, that used the separation of powers to earn higher-lawmaking authority as they repeatedly appealed to the People to support the New Deal at the polls against the conservative constitutional vision elaborated by Republican politicians and the Supreme Court.

Transformations presents a series of thought experiments to suggest the compelling structural similarities between Reconstruction and New Deal. For example, imagine that John Wilkes Booth had missed his presidential target at Ford's Theater while a better marksman had gunned down Franklin Roosevelt in 1935. The reversal of this single contingency would have generated a massive change in the formal ways through which the great revolutions of the nineteenth and twentieth centuries would have expressed their constitutional meaning. If Roosevelt had been replaced by his conservative Vice President, John Nance Garner, in 1935, the resulting period of sharp conflict between the Presidency and Congress would have been reminiscent of the struggle between Andrew Johnson and the Convention/Congress in the aftermath of Booth's bullet. Once again, a Southerner in the White House would have denounced revolutionary reforms like the Wagner Act and Social Security Act in thundering vetoes, with the Supreme Court looming darkly in the background; once again,

50. *See generally* JED RUBENFELD, FREEDOM AND TIME (forthcoming 1999) (manuscript on file with the *The Yale Law Journal*) (describing the paradigm case method).

Northern liberals—with Robert Wagner, say, playing the role of John Bingham[51]—would have found themselves in a life-and-death battle for political survival; once again, they would have had little choice but to draft formal Amendments in support of their transformative statutory proposals, appealing to the People for support in the next round of state and national elections. Since the elections of 1936 generated a massive Democratic landslide that swept Democrats into power in the state legislatures in about three-fourths of the states, this alternative scenario could well have yielded formal Article V amendments—even without any unconventional maneuvers of the sort relied upon by the Convention/Congress at an analogous moment in Reconstruction![52]

By the same token, a missed shot at Ford's Theatre would have vastly increased the likelihood of a constitutional revolution in the New Deal mode. Rather than ramming the Reconstruction Acts through Congress in a life-and-death struggle to secure ratification of the Fourteenth Amendment, Lincoln could have secured the constitutional guarantees of national citizenship by less revolutionary means. By comparison with the Reconstruction Acts, a Lincolnian proposal to expand the Court to fifteen would have seemed a relatively modest proposal—as suggested by the fact that the Reconstruction Republicans actually did change the number of Justices on the Court repeatedly for purposes of controlling its constitutional output. Under this presidentialist scenario, Lincoln and his Republican Senate would have sent a wave of committed Republicans to the Court intent upon overruling *Dred Scott*.[53] Instead of Section One of the Fourteenth Amendment, our constitutional canon would now contain a ringing series of transformative opinions in the late 1860s elaborating an affirmative vision of the rights of national citizenship.

Indeed, even with Lincoln's death, our records do contain hints of constitutional transformation through judicial revolution. In nominating Salmon P. Chase to the Court, Lincoln explained that "we wish for a Chief Justice who will sustain what has been done in regard to emancipation and

51. Wagner was at the center of a vast network of liberals and policy intellectuals that, with sufficient remove, resembles the network of the 19th-century Republicans surrounding congressional leaders like Bingham. *Compare* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1403-07 (1993) (describing the New Deal network of legal and policy intellectuals), *with* William E. Nelson, *The Impact of the Antislavery Movement upon Styles Official Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 525-38, 551-55 (1974) (describing the social and intellectual roots of Republican legal thought).

52. *See* Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45, 63 tbl. 5 (1992).

53. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

the legal tenders."[54] And in its 1867 decision of *Crandall v. Nevada*,[55] the Lincoln Court did begin a creative redefinition of the rights of national citizenship without any assistance from the text of Fourteenth Amendment, then in constitutional limbo.

But the need for further aggressive judicial development of the "privileges or immunities" of national citizenship was eliminated by the unconventional ratification of the Fourteenth Amendment. Once the Convention/Congress had managed to get this formal text on the books, there was no imperative need for the Lincoln Court to continue down the transformative path by following up on *Crandall* with an even more powerful opinion overruling *Dred Scott*. Moreover, once Johnson replaced Lincoln in the White House, the new President was no longer interested in the appointment of Republican Justices eager to accelerate the doctrinal revolution.

In contrast, the New Dealers maintained control of the Presidency, and as a consequence had different institutional options open to them. Since congressional Democrats were not confronting an antagonist like Johnson/Garner in the White House, they were not forced to make use of Congress's powers under Article V to get their constitutional initiative under way. Instead, they could take full advantage of the powers of the Presidency to send a steady stream of New Deal Justices to the Roosevelt Court for the purpose of overruling cases like *Hammer v. Dagenhart*[56] in ringing transformative opinions like *United States v. Darby*[57] and *Wickard v. Filburn*.[58]

B. *Why No Formal Amendments?*

These thought experiments prepare the ground for a decisive answer to the eternal question raised by my reinterpretation of the New Deal Revolution: If Roosevelt and his Democrats were bent on constitutional change, why did they not pass some constitutional amendments under Article V?

Personal experience suggests that many lawyers and judges suppose that this question is a conversation-stopper, closing off any further professional discussion of my thesis. But they are wrong. Once we place our precedents

54. *See* 2 ACKERMAN, *supra* note 4, at 274 (quoting Letter from Abraham Lincoln to George S. Boutwell, *in* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 401 (1926)).

55. 73 U.S. 35, 44 (1867) (establishing the right to travel across state lines). The Court proclaimed this right of national citizenship as "in its nature independent of the will of any State over whose soil he must pass in the exercise of it." *Id.*

56. 247 U.S. 251 (1918).

57. 312 U.S. 100 (1941).

58. 317 U.S. 111 (1942).

in a row—Founding, Reconstruction, New Deal—the so-called "failure" of the New Dealers to use Article V forms can be seen for what it is: a consequence of their *success* in maintaining control over the Presidency during their period of maximum constitutional creativity. In contrast, the so-called "success" of the Republicans in enacting the Fourteenth Amendment is in fact a consequence of their *failure* to control the Presidency during their crucially generative years, forcing them to take even more revolutionary steps to gain legal recognition for their amendment-simulacra. By insisting on the primacy of Article V, formalist lawyers are transforming John Wilkes Booth into one of the greatest constitutional lawmakers in the history of the Republic.

As we come to appreciate how the presidentialist logic of Reconstruction was cut short by an assassin's bullet, it appears that the sort of presidential leadership exemplified by the New Deal Democrats is much more likely to serve as an enduring precedent for future constitutional revolutions. Presidential assassinations at critical moments will be—one hopes—the exception, not the rule, during future periods of constitutional development. As a consequence, parties of revolutionary reform will likely control both the Presidency and Congress when their claims to higher lawmaking authority are most emphatically supported by the People. If lawyers use the "problem of missing amendments" to ignore the historical reality of presidential leadership in transformative reconstructions of the Supreme Court, their official theory of the Constitution threatens to prevent disciplined analyses of future efforts by Presidents to transform constitutional law in the name of the People.

The presidentialist linkages between Reconstruction and New Deal lie at the very center of my argument in *Transformations*, which devotes an entire chapter to their elaboration.[59] I was surprised that none of the Symposiasts gave this chapter sustained critical attention. Perhaps this is a sign of historical overspecialization, with experts in Reconstruction and the New Deal unduly reluctant to invade each others' turf and address the more general themes of American constitutional history.

C. *The Emerging Debate over the New Deal*

Whatever the reason for the silence, many of the more focused contributions indirectly strengthen my case. Begin with the now-traditional legal understanding of the doctrinal revolution of the 1930s. Rather than recognizing its source in a mobilized act of popular sovereignty, the meaning of the New Deal Revolution is captured through a myth of

59. *See* 2 ACKERMAN, *supra* note 4, at 255-78.

rediscovery. On this familiar view, the reigning jurisprudence of the *Lochner*-era is dismissed as a mistaken departure from the true path marked out by some nationalist opinions of Justices Marshall and Story during the early Republic; somehow or other, the Roosevelt Court found the strength to recover the Marshallian truth that had been there all along. When I began writing *We the People* some twenty years ago, this myth served as the unquestioned starting point in the legal academy. Yet, as Steven Griffin demonstrates, this "restorationist" picture of New Deal Democracy has now been thoroughly discredited by serious political and legal historians—among whom Walter Dean Burnham, William Forbath, and Laura Kalman should now be numbered.[60]

But if, as the emerging historical consensus suggests, the New Deal Revolution cannot be legally justified by the old myth of rediscovery, it is only a matter of time before this disturbing news trickles out of the academy, destabilizing the traditional understanding of the practicing bar and bench. It does not take much prophetic talent to suggest that we are in for a serious legitimation crisis over the next decade or two. As the frailties of the received interpretation of the New Deal appear to view, lawyers, judges, and scholars will seize the opportunity to shore up or tear down the constitutional foundations of the New Deal Revolution.

Some lines in the upcoming struggle are already appearing to view. Mr. Justice Thomas's concurring opinion in *Lopez* inaugurates a clever conservative campaign to use the reigning myth of rediscovery as a two-edged sword.[61] Just as this myth has operated during the last half-century to sustain New Deal constitutionalism, Justice Thomas proposes to use it to kill off the New Deal during the next era. This can be accomplished by embracing the myth of the Golden Age of Madison and Marshall and giving it new historical content: If the myth of rediscovery is historically incorrect in portraying Marshall & Co. as New Deal Nationalists, shouldn't the next generation of lawyers and judges face these hard historical truths? Under Thomas's *new* myth of rediscovery, we must recognize that the "'wrong turn' was the Court's dramatic departure in the 1930s from a century and a half of precedent,"[62] and that the New Deal is therefore an illegitimate departure from the higher law handed down to us from the Golden Age.

If the Thomas line emerges triumphant, the current generation of historians will find themselves victims of a rather bitter historical irony. Most of them are political liberals, and many flirt with a trendy skepticism

60. *See* Burnham, *supra* note 13, at 104-05; William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. (forthcoming Oct. 1999)); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2123-2132 (1999); Kalman, *supra* note 49, at 2168 (1999).

61. *See* United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

62. *Id.* at 599.

about the very possibility of historical truth. Nevertheless, as Griffin shows, they are building a professional consensus that powerfully supports the doubting Thomases of the legal world. Like Mr. Justice Thomas, the new historical consensus emphasizes the great gap in worldview that separates nationalists like Hamilton and Marshall from nationalists like Roosevelt and Jackson. Like Thomas, it denies that the New Deal can justly be seen as merely the restoration of Founding truths. It is only a matter of time, then, before Mr. Justice Thomas will be appealing to left-liberals like William Forbath and Laura Kalman in support of his views of the New Deal Revolution.

Not, mind you, that this appeal to the emerging historical consensus will be enough for the doubting Thomases to carry the day in the Supreme Court. As the past half-century demonstrates, our constitutional law is quite capable of sustaining legal fictions for a very long time, perhaps indefinitely. A majority of the Supreme Court will not adopt Justice Thomas's opinion in *Lopez* any time soon unless somebody like Newt Gingrich emerges from the political wilderness to run for President in the year 2000 and successfully reenacts the Roosevelt scenario of the 1930s. Even if President Gingrich, and his Republican Senate, managed to flood the Supreme Court with enough transformative appointments over the next decade to convert Justice Thomas's solitary *Lopez* concurrence into the ringing majority opinion of the Gingrich/Thomas Court, the readers of this journal will be in a position to savor the ironic complexities of the Republicans' constitutional victory: The triumphant Chief Justice Thomas will have managed to repudiate *Darby* and *Wickard* only as a result of Gingrich's success in using the Rooseveltian precedent of transformative appointments. In short, the Gingrich Court would be *enacting* New Deal constitutionalism on the level of process at the same time it was *erasing* it on the level of substance.

But all this is, of course, very unlikely—and if it comes about, it surely would satisfy my crystal ball test for revolutions on a human scale. I am quite confident that sober lawyers of 1999 would look to a very different opinion if asked to make a solid short-term prediction about the future course of judicial interpretation of the New Deal Revolution. Instead of turning to Justice Thomas's concurrence in *Lopez,* they will point to the plurality opinion of Justices O'Connor, Kennedy, and Souter in *Casey* as marking the most likely path of main-line legal development.[63] Rather than condemning the great New Deal cases as a "wrong turn," this opinion seeks to justify *Darby*, *Wickard*, and the rest through a lens offered by the model of elite management. On this view, economic forces had created a single national market by the 1930s, and it was past time for the Supreme Court to

63. Planned Parenthood v. Casey, 505 U.S. 833, 843-901 (1992).

take account of these new commercial realities thrown up by the invisible hand. Hence, the Court of the Roosevelt era was absolutely right to abandon established doctrine in the light of changing "facts"[64] about the American economy.

As Professor Griffin suggests, there is only one problem with the plurality view: It is false. The New Deal Revolution was not merely a response to changing facts, but a reappraisal of fundamental values—most notably the place of free market capitalism and limited national government within the constitutional order.[65]

This is, of course, precisely the way *Transformations* presents the New Deal, inviting the profession to move beyond the half-truths glimpsed by the two preceding approaches. Like Justice Thomas's concurrence in *Lopez*, *Transformations* recognizes that Americans did not endorse anything like the New Deal vision of activist national government either at the Founding or Reconstruction, and that the Court of the *Lochner* era was right to insist on this basic point. But like the plurality opinion in *Casey*, it asserts that the Court was also right to change its mind in the 1930s.

In contrast to both views, *Transformations* does not try to evaluate the Court's famous "switch in time" primarily through the model of elite management—either joining Thomas's concurrence in condemning the Roosevelt Court for losing sight of Founding values or joining the plurality opinion's praise for the Court's agility in adapting constitutional doctrine to changing facts. It seeks instead to evaluate the Court's performance as part of a much larger process through which the American People revolutionized their constitutional values in the 1930s.

D. *Was the New Deal Really Revolutionary?*

Transformations banishes the Supreme Court from the center of the New Deal story, emphasizing how the Old Court's initial resistance to the New Deal assisted the President, Congress, and the country at large to confront the fundamental constitutional questions raised by an embrace of activist national government. Rather than condemning the Old Court for failing to appreciate some Marshallian truths, I applaud it for forcing the rising elites in Washington, D.C. to return repeatedly to the People before they could win solid constitutional legitimacy for their revolutionary reforms.

This said, I do not wish to disguise the serious failings of my account. My focus on the ongoing institutional dynamics among President, Congress, and the Court in Washington, D.C. prevented me from giving adequate

64. *Id.* at 862.

65. *See* Griffin, *supra* note 60, at 2144-46; *see also* 2 ACKERMAN, *supra* note 4, at 400-01.

attention to the larger process of political transformation going on in the country. I am very grateful, then, to Professors Burnham, Forbath, and Leuchtenburg for pointing in directions that help fill this gap: Burnham emphasizes how the institutional struggles in Washington, D.C. were part of a revolutionary transformation in the American party system;[66] Forbath explores its complex relationship to the massive mobilization of Americans into a politically focused, and constitutionally aware, movement for social citizenship;[67] and Leuchtenburg addresses the popular understanding of the extraordinarily high stakes of the 1936 election.[68]

Since Professor Kalman's essay is the most skeptical of my description of the New Dealers as "revolutionary," I begin with her critique. Many of her doubts will dissolve, I hope, in light of this essay's effort to clarify my central notion of revolution on a human scale. I am sure, for example, that she would agree that the New Deal "Revolution" has no trouble qualifying as such under my "ten-year test." Some of her other skepticisms—even if warranted—would not suffice to discredit the revolutionary character of the New Deal. For starters, she claims that I have "exaggerated the coherence of the First New Deal and created a distorted impression of the rupture it represented."[69] As to coherence, this is no part of my brief; revolutions on a human scale have often broken sharply with the past without displaying much in the way of an internally consistent vision of the future. This is especially true in their early stages. Consider, for example, the First New Deal: Kalman is quite right to suggest that the philosophical foundations of the Tennessee Valley Authority were very different from those of the Securities and Exchange Commission, which were different from Roosevelt's decision to go off the gold standard, which was different from New Deal initiatives on labor or agriculture, and so forth. Nonetheless, the cumulative impact of so many rapid initiatives on such a broad front was clear enough: They made "nonsense of the notion that the Constitution delegated [Congress] a list of strictly limited powers [over the economy]."[70]

As to Professor Kalman's charge of "distortion," we come to a serious disagreement. I continue to believe the NIRA was absolutely central to the early New Deal—as does Professor Leuchtenburg: "Though the Roosevelt administration had a plethora of important alphabet agencies, there could be 'no denying that the NRA had become the symbol of the New Deal itself,

66. *See* Burnham, *supra* note 5, at 2249-62.
67. *See* Forbath, *supra* note 60 (manuscript at 1).
68. *See* Leuchtenburg, *supra* note 71, at 2111-14.
69. Kalman, *supra* note 49, at 2196
70. 2 ACKERMAN, *supra* note 4, at 288.

and that with its passing, . . . something very tangible has been removed from the atmosphere of the nation's capital.'"[71]

I also disagree with Professor Kalman's assessment of the NIRA's ideological significance. On her view, my "claim that the NIRA proposed to abolish market capitalism is silly: It simply added the public stamp of approval to cartels."[72] Pardon my silliness, but I continue to believe that the NIRA's endorsement of the cartelization of the *entire* economy, under the ultimate superintendence of the Presidency, not the Congress, should count as a very revolutionary step indeed, made even more so by the statute's unprecedented endorsement of collective bargaining.[73] While Professor Kalman is perfectly right to suggest that "corporatism" is a protean term, it still usefully marks a qualitative difference between the comprehensive repudiation of free-market capitalism implied by the NIRA and the more selective, if cumulatively revolutionary, regulatory tinkerings and welfare state interventions endorsed by the other great statutory innovations of the First New Deal.[74]

E. *The Creative Role of Judicial Resistance*

The Court's unanimous rejection of the NIRA was therefore an event of large constitutional importance. It is here, of course, where the first great question about the Old Court emerges: Was it acting appropriately in *unanimously* setting its face against the NIRA in *Schechter*?[75]

According to the reigning myth of rediscovery, the right answer is No. If the New Deal was but a restoration of Marshallian principles, the Court was grievously wrong-headed to repudiate its preeminent initiative, the NIRA.

I say the Old Court was right. In seeking to revise the traditional view, I do not argue, as Professor Kalman suggests, that the Old Court served as the

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71. William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2215, 2220 (1999) (quoting Delbert Clark, *Washington Now Pauses To Take Stock*, N.Y. TIMES, June 23, 1935 (Magazine), at 3).

72. Kalman, *supra* note 49, at 2198.

73. As to the significance of the NLRA's legitimation of collective bargaining, see James Pope, Section 7(a) and the Revitalization of the American Labor Movement, 1933-35: A Study of the Symbolic Impact of Law (unpublished manuscript on file with *The Yale Law Journal*).

Kalman is uncertain in her own characterization of the NIRA's significance. She argues that the failure of the NIRA was "compounded by its dismal administrations" and a "failure at organizing the economy or bringing economic recovery." Kalman, *supra* note 49, at 2198. In making this claim, she is acknowledging that the purpose of the NIRA was, in fact, *to organize* the economy. I agree with her that the NIRA failed at this task. Corporatist institutions often fail. My point has never been that the NIRA was a successful revolutionary step, merely that it was a revolutionary step.

74. For another scholarly characterizations of the NIRA as "corporatist," see James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AMER. J. COMP. L. 747 (1991).

75. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

primary causal force behind the enactment of epochal statutes like the National Labor Relations Act and the Social Security Act. To the contrary, I would be the first to emphasize that the push behind these statutes came from a resurgent labor movement, and other popular forces, demanding a basic change in America's relationship to laissez-faire.[76]

My defense of the Old Court contemplates a more dialogical understanding of its contribution to the ultimate constitutional outcome. By saying "no" to the NIRA, the Court rightly put Roosevelt on notice that he had not yet won the constitutional authority to claim a mandate from the People for such a sweeping revolutionary reform, and that if he wished to insist on such a mandate, he would have to go to the People in 1936 on an electoral platform that squarely attacked *Schechter* and vigorously insisted on the imperative need for the reenactment of an improved version of the NIRA. His famous denunciation of *Schechter* shows that he understood this point perfectly well, but that he was unwilling to commit himself to the proposition that the People would support a campaign for a corporatist America.[77]

Instead, Roosevelt responded to *Schechter* by dropping full-blown corporatism from the New Deal agenda and coming forward to the American People in 1936 with a qualitatively different program. Rather than seeking to displace the free-market baseline completely, the President offered up the very different ideal of a *democratically controlled capitalism*—in which the harshness of laissez-faire would be tempered by a host of ameliorating institutions ranging from social security to collective bargaining to massive public investment to the intensive regulation of hard-hit economic sectors to the public supervision of stock markets, and beyond. This cascading series of selective interventions marked a radical break with traditional constitutional principles—a point rightly reinforced by a series of famous Old Court decisions striking down representative New Deal measures during 1935 and 1936.[78] But at the same time, it did not amount to the same kind of totalizing assault on the competitive marketplace envisioned by the NIRA.

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76. *See* Barenberg, *supra* note 51, at 1401-02, 1411-12; William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1231-32 (1989); Drew D. Hansen, The Sit-Down Strikes and the Switch in Time 9-10 (Feb. 1999) (unpublished manuscript, on file with *The Yale Law Journal*).

77. *See* 2 ACKERMAN, *supra* note 4, at 298-301.

78. While the Court struck down New Deal measures during 1935 and 1936, many of them went down with dissenting opinions. *See* United States v. Butler, 297 U.S. 1, 78-88 (1936) (Stone, J., dissenting); Carter v. Carter Coal Co., 298 U.S. 238, 324-41 (1936) (Cardozo, J., dissenting); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 374-92 (1935) (Hughes, C.J., dissenting). For a brief discussion of these cases, see 2 ACKERMAN, *supra* note 4, at 303 nn.71-72 and accompanying text; on the importance of dissent, see 2 *id.* at 373-74, and Leuchtenburg, *supra* note 71, at 2101-05.

Since Professor Kalman refuses to concede the revolutionary character of the NIRA, she does not recognize the way in which its elimination from the operational agenda changed the character of the New Deal program. Indeed, she goes even further and questions whether statutes like the National Labor Relations Act and the Social Security Act were revolutionary at all. She rightly points out that Southern Democrats managed to carve out big exceptions from both the NLRA and Social Security Act in ways that largely excluded Southern blacks from the protections of America's emerging welfare state.[79]

This is true, but such strategic compromises are typical of revolutions on a human scale.[80] Only totalizing revolutionaries imagine that any single generation can right all wrongs and inaugurate heaven on earth. Even where race was concerned, Roosevelt's conduct was quite different from Democratic predecessors like Woodrow Wilson or Grover Cleveland. Rather than completely capitulating to the Southern political establishment, Roosevelt was the first Democratic President to make a serious effort to purge the Southern Democracy of its white conservative leadership. While he failed in this effort, with vast consequences for modern American history,[81] it is downright anachronistic of Professor Kalman to use this failure to belittle the New Deal's revolutionary breakthroughs on other fronts. In contrast to the deep hostility of the federal courts to labor unions before the New Deal, the NLRA was nothing less than a radical break with the past,[82] as was the Social Security Act in relation to a similar hostility to the basic principles of minimum wage legislation.[83]

As Professor Leuchtenburg explains, all this was immediately obvious at the time: "The nation understood perfectly well that it confronted a fundamental choice in 1936."[84] By voting overwhelmingly for Roosevelt against Landon, and awarding the Democrats an unprecedented victory in Congress, Americans were self-consciously legitimating the welfare state.[85]

What is not so obvious is the Supreme Court's contribution to the way in which the meaning of this election was framed.[86] After all, it is not every

79. *See* Forbath, *supra* note 60, at 95-96 (discussed *infra* text accompanying notes 113-120).

80. In this case, moreover, the strategic compromise was successful, since the exceptions for agricultural and domestic workers were in fact eliminated later by the more gradual processes of statutory evolution.

81. *See* SIDNEY M. MILKIS, THE PRESIDENCY AND THE PARTIES 3, 52-53, 69-97 (1993); Forbath, *supra* note 60, at 105-06; Bruce Ackerman, *The Broken Engine of Progressive Politics*, AM. PROSPECT, May-June 1998, at 34, 40.

82. Karen Orren provides a richly historical account of the radical character of the New Deal break with traditional labor regulation. *See* KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES 29-67, 209-30 (1991).

83. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

84. Leuchtenburg, *supra* note 71, at 2112.

85. *See id.* at 2111.

86. *Cf.* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 591-600, 669-73 (1981).

day in America that an election involves something so portentous as the status of "the Welfare State." Professor Leuchtenburg's essay deepens the account of this framing process presented by *Transformations*. My aim there was to suggest how the Old Court's decisions to say "no" to the NIRA (unanimously) and other representative New Deal measures (by a divided vote) performed two different framing effects for two different audiences. We have already considered the Old Court's impact on the first audience—consisting of the rising political elite in Washington, and most especially President Roosevelt. Here the Court's "no" repeatedly forced the New Dealers to sharpen their ideological focus as they prepared themselves for the upcoming electoral campaign. But Leuchtenburg's account is especially useful in deepening our understanding of the Old Court's impact on a second, and ultimately more important, audience—consisting of the political nation as a whole as it began to confront its choices in 1936.

As Leuchtenburg shows, the Republicans were constantly using the Old Court as a rhetorical framing device in their efforts to convince their fellow citizens of the high stakes involved. While the Old Court had stood (more or less) firm against the New Deal onslaught during the preceding two years, Landon and his fellow Republicans correctly emphasized that time was not on its side. If Roosevelt won again, the Old Court would fade away during his second term—either through the workings of mortality or through more emphatic actions like court-packing or constitutional amendment. There was only one sure way, then, for Americans to secure the "Constitution as we know it" against the threat of radical transformation—and that was for ordinary Americans to seize the chance afforded by the 1936 elections to turn Roosevelt out of the White House and to cut down the enormous Democratic majority in Congress.

The recurring effort by Landon and his fellow Republicans to use the Supreme Court as an electoral rallying point had two important consequences. First, it allowed the Old Court's basic message to move beyond the esoteric pages of the United States Reports and come alive to ordinary citizens. With the Court behind them, the Republicans were in a perfect position to emphasize that the New Deal—even shorn of the corporatist trappings of the NIRA—really did amount to a revolutionary assault on deeply entrenched constitutional traditions of laissez-faire and limited national government. Second, and paradoxically, the Republicans' regular appeal to the voters to defend the Supreme Court's efforts to say "no" to the New Deal endowed the "yes" rendered by the voters in November with a deepened constitutional meaning—generating "a ringing endorsement," in Leuchtenburg's words, "to the welfare state."[87]

87. Leuchtenburg, *supra* note 71, at 2111.

We have seen this paradox of resistance operating during Reconstruction, though different constitutional actors then played leading roles in the Framing process. In the aftermath of the Civil War, it was the sitting President, Andrew Johnson, who took the lead in framing the conservative case during the crucial election of 1866—urgently calling upon the People to rise up and defend the then-traditional vision of the Constitution by ousting the revolutionary Republicans from control of the Convention/Congress. During this earlier episode, President Johnson combined the framing functions discharged both by the Supreme Court *and* Alf Landon in the run-up to the 1936 elections. Johnson's Veto Messages accompanying key Republican measures during 1866 functioned like the Old Court's vetoes of key New Deal measures during 1935-36: strongly denouncing in *legal language* the revolutionary character of the reforms advanced in the name of the People by the Republicans/Democrats. Johnson's subsequent decision to take to the hustings in the election campaign and use his oratorical powers against the Radical Republicans was the functional equivalent of the effort by Alf Landon and his fellow Republicans to rouse the voters to defend the Court against the predictable consequences of a second Roosevelt term.

These (important) differences in institutional detail should not be permitted to obscure the main point: In both cases, the party system operated as the great engine through which constitutional issues became a central part of a *popular* political rhetoric. Although ordinary Americans might never get the chance to study the mandarin legal materials presented in presidential vetoes and Supreme Court opinions, the conservative opposition in the election campaign did all in its power to bring these concerns home.

In both cases, moreover, the rising party of revolutionary reform responded to this conservative rhetorical assault with a good deal of caution. As Professor Benedict notes, Reconstruction Republicans did *not* trumpet the further reaches of their revolutionary aspirations during the election campaign of 1866. While the Fourteenth Amendment served as their campaign platform, it ostentatiously did not guarantee the vote to freedmen; nor did the Republicans explain what they would do if their proposed amendment were rejected by three-fourths of the states.[88] By the same token, Roosevelt kept his mouth shut throughout 1936 despite the repeated provocations provided by the Supreme Court, and he then went on to approve a Democratic campaign platform that, in Professor Leuchtenburg's words, contained "a calculatedly vague construction that came out for a

88. *See* BENEDICT, *supra* note 37, at 134-39, 188-209; *see also* 2 ACKERMAN, *supra* note 4, at 178-83 (describing the campaign strategies of Republicans and Democrats in election of 1866).

'clarifying amendment,' but only if these problems could not 'be effectively solved by legislation within the Constitution.'" [89]

Certainly this ambiguous language hardly reassured voters who recalled Roosevelt's front-page denunciations of the Court after the *Schechter* decision and who confronted the Republicans' cries of alarm about the danger of imminent constitutional transformation. Nonetheless, it is certainly true that the New Deal Democrats, like the Reconstruction Republicans, put first things first. The challenge during the campaigns of 1866 and 1936 was to win a broad popular mandate for the *substance* of the new constitutional ideals. If and when this was accomplished, there would be time enough to consider how their revolutionary visions of national government would be transformed into enduring principles of constitutional law.

F. *The Place of Triggering Elections*

Unfortunately, Professor Leuchtenburg stumbles at this point and chooses to take seriously those critics of mine who suppose that I view Election Day, November 3, 1936, as if it were *the* "magic moment" at which the People-with-a-capital-P emerged from the clouds of normal political rhetoric and decisively SAID EVERYTHING WORTH SAYING. This is to mistake the apocalyptic fantasies of total revolution for the decade-long dynamics of revolution on a human scale. Yet it is only because Professor Leuchtenburg supposes that I want to pack my entire thesis into one Election Day that his essay reaches a Solomonic judgment: While he supports my claim that the election of 1936 did amount to a popular mandate for "the welfare state," he denies that it amounted to a mandate for court-packing as well.

But this second claim is no part of my thesis. In calling 1936 a *triggering* election, I do not suggest that it resolved all fundamental issues raised by the constitutional crisis. To the contrary, the very notion of a triggering election only makes sense when placed within the ten-year time horizon of a revolution on human scale. Before anything like a triggering election can occur, it must be preceded by a substantial period of institutional conflict between rival political elites in Washington, D.C. Emphatic and extended disagreement in the nation's capital puts ordinary Americans on notice that something special is happening, something that only they can resolve by mobilizing in support of the revolutionaries, or the conservatives, at their next democratic confrontation at the polls. Even after the triggering election occurs, much more hard work remains before the

89. Leuchtenburg, *supra* note 71, at 2085 (quoting RAYMOND MOLEY, AFTER SEVEN YEARS 346-47 (1939)).

rising elite of revolutionary reformers, with the continuing support of the voters, can legitimately claim that they have hammered out the enduring terms of a new constitutional solution that deserves recognition as the work of We the People.

Within this larger cycle of debate and decision, a triggering election serves a single crucial function, analogous to a shift in the burden of persuasion at an ordinary trial. Before the triggering election, the institutional burden of persuasion rests heavily on the party of revolutionary reform. While it may use the branches under its control—the Republican Convention/Congress during Reconstruction, the Democratic Presidency and Congress during the New Deal—to claim a mandate from the People on behalf of revolutionary reform, conservatives in control of other branches—the Presidency and Court during Reconstruction, the Court during the New Deal—repeatedly reject such assertions, and are rather successful in sustaining the traditional Constitution against the first waves of revolutionary assault. Indeed, as the conservatives return to the People during the triggering election campaign, they are still full of hope that their heroic defense of the traditional Constitution will be rewarded by the voters—with the *Literary Digest* predicting a Landon victory,[90] is there any surprise that Mr. Justice James McReynolds expected vindication for his heroic defense of the Constitution at the polls?[91]

But once the election returns come in, the balance of constitutional persuasion decisively shifts. The revolutionary reformers are now in a position *credibly* to claim a mandate from the People for their substantive vision—whether it be, as in 1866, a new national commitment for equal rights or, as in 1936, the legitimation of activist national government. The balance of perceived legitimacy now shifts against the constitutional conservatives: Will they continue to deny that their opponents have indeed gained a mandate from the People for their revolutionary reforms, and use their remaining institutional power to veto these initiatives, or will they begin to cooperate in the consolidation of the new principles and institutions of American government?

For better or for worse, I have introduced some lingo to mark the rise of this new question to the forefront of constitutional concern. With the basic substantive issue resolved by the *triggering* election, the process of unconventional adaptation moved into its *ratification* phase—with rival elites proposing alternative methods of translating the excited rhetoric of electoral politics into enduring principles of constitutional law. A large

90. *See* Leuchtenburg, *supra* note 71, at 1086 (citing *Topics of the Day*, LITERARY DIGEST, Oct. 31, 1936, at 5, 5-6). Similar expressions of conservative hope can be found in great abundance during the triggering election of 1866. *See* BENEDICT, *supra* note 37, at 189-93.

91. *See* Leuchtenburg, *supra* note 71, . at 1086 n.57.

chunk of *Transformations* tries to recover the seriousness with which the institutional protagonists, and millions of ordinary Americans, took this question. Since these debates have been understudied by political and constitutional historians, I have devoted entire chapters to their analysis in both the case of Reconstruction and that of the New Deal.[92] I am very grateful to Professor Kalman for scrutinizing my New Deal treatment at length—especially since it emerges, in her judgment, as one my account's "great virtues."[93]

For scholars working within the school of elite management, only one aspect of this debate is salient: Roosevelt's announcement of his "court-packing" proposal in early February. Once the President attacked the Court, these scholars move immediately to frame their crucial question: Did the President's threat actually cause the Justices to make their famous "switch in time," or was the Court already well on its way to making the necessary doctrinal changes without the President's assistance? As Kalman explains, "externalists" affirm the first hypothesis; "internalists," the second.[94]

Within the revolutionary framework of popular sovereignty, the court-packing debate has a richer meaning. I am not only interested in the Court's response to the President's initiative, but in the reaction of his congressional critics and the public at large: Did they seriously contest Roosevelt's claim to a mandate from the People on behalf of the activist welfare state? Or did they merely protest against the particular technique—court-packing—he was proposing as the method of translating the terms of this popular mandate into constitutional law?

These questions lead me to focus particular attention on the reactions of Senator Burton Wheeler, whose decision to take the leadership of the anti-court-packing coalition was absolutely crucial to the ultimate outcome. Wheeler made it abundantly clear that he neither defended the Court's traditional jurisprudence nor denied the existence of an overwhelming mandate from the People for activist national government. He crossed swords with the President on a single if fundamental point: Should the Old Court be overruled through court-packing or should it be overruled through a constitutional amendment?

To demonstrate his good faith, Wheeler proposed a formal amendment that would have authorized Congress to overrule by a two-thirds vote any Supreme Court decision invalidating a statute.[95] He made it clear, moreover,

92. *See* 2 ACKERMAN, *supra* note 4, at 186-206, 312-44.

93. Kalman, *supra* note 49, at 115. 2229.

94. *See id.* at 2166.

95. *See* 2 ACKERMAN, *supra* note 4, at 320-23. The amendment provided:

> [In] case the Supreme Court renders any judgment holding any Act of Congress or any provision of any such Act unconstitutional, the question ... shall promptly be submitted to the Congress for its action ... ; but no action shall be taken by the Congress upon such question until an election shall have been held at which Members

that he would happily join with Roosevelt the minute the President chose to abandon court-packing for an appropriate package of Article V amendments. This was no rhetorical gesture. As political scientists have since confirmed, the New Deal landslide had given the Democrats such overwhelming control of state politics that ratification by three-fourths of state legislatures was well within the realm of possibility.[96]

In short, the President's court-packing proposal almost immediately provoked a wide-ranging, and deeply serious, debate over transformative options by the President, the Congress, and the citizenry at large. The question was not whether, but how, the New Deal's popular mandate was to be codified. And it is within this context that I propose to consider the issues traditionally raised by the internalist/externalist debate.

The Court had two choices—continued confrontation or precipitate retreat, with two very different consequences on the ongoing popular debate. If it had sustained its course of emphatic opposition to the constitutional claims of the New Deal—making its 1937 term a rerun of 1935 and 1936—the result would have been a further intensification of the debate raging between Roosevelt and Wheeler and their partisans in the country at large. If the President and Congress had failed to reach a solution on the mode of constitutional ratification—either by enacting court-packing or proposing a package of Article V amendments—the escalating conflict would have undoubtedly framed the meaning of the 1938 elections. Just as 1936 was a referendum on the welfare state, 1938 would have served as a referendum on the best way of overcoming the Supreme Court's continuing resistance to the People's will.

But as we all know, the Court retreated, taking the heat out of popular debate. Instead of hammering out the terms of a constructive constitutional solution, Roosevelt and Wheeler were all too willing to delegate the task of codifying the doctrinal terms of the New Deal Revolution to the Court—which then proceeded to undertake this task in a series of transformative opinions culminating in *Wickard*[97] and *Darby*[98] during Roosevelt's third term.

> of the House of Representatives are regularly by law to be chosen. If such Act or provision is re-enacted by two-thirds of each House of the Congress to which such Members are elected at such election, such Act or provision shall be deemed to be constitutional and effective.

S.J. Res. 80, 75th Cong. (1937). The substance of the amendment demonstrates the convergence of Wheeler and Roosevelt on the desired ends, though not the means, of allowing the People to express their voice in non-Article V ways.

96. *See* Gely & Spiller, *supra* note 52, at 60-61.

97. Wickard v. Filburn, 317 U.S. 111 (1942).

98. United States v. Darby, 312 U.S. 100 (1941).

G. *The "Switch in Time" and Its Aftermath*

This phoenix-like process of judicial rebirth is absolutely central to the study of modern constitutionalism, but I hazard only three points in response to the Symposiasts' insightful commentary. First, and most important, the Court's successful deescalation of the public struggle meant that further transformations in constitutional doctrine would be shaped by a politics of judicial appointments, rather than a mass politics involving further direct appeals to the People. So long as the President and the Senate remained firmly under the control of the New Deal majority, and so long as these two institutions self-consciously supported the appointment of strong New Deal constitutionalists to the Court, the process of doctrinal consolidation could proceed without any further institutional crises that would invite further direct popular participation.

This is not to say that the elections of 1938 and 1940 were insignificant. But I do not view them in quite the way Professor Kalman supposes. She seems to think that I look upon these elections as *popular mandates* for judicial transformation—similar in kind to, but different in substance from, the popular mandate for the welfare state generated by the 1936 elections. Given this reading of my thesis, she finds it historically implausible; in neither 1938 nor 1940 did the politics of judicial appointment achieve anything like the public saliency of the constitutional issues raised in 1936.

She is absolutely right. Given the Court's retreat, there was only one way that the future of American constitutionalism would return to the absolute center of the political stage—and that is if the *Republicans* put it there, first by using the Senate as a stage upon which to denounce, delay, and defeat Roosevelt's nomination of emphatic New Dealers like Douglas, Frankfurter, and Murphy to the Supreme Court, and second, by running a vigorous campaign against Roosevelt's strategy of transformative judicial appointments in the presidential elections of 1940. Significantly, the Republican Senators were almost completely silent on the first front—allowing the confirmation of a series of transformative appointments to the Court with barely a peep of protest. Professor Kalman suggests that the Republicans remained silent because "they had bigger fish to fry"; in her judgment, the ideological stakes involved in Roosevelt's choice of Thomas Aimlie to the Interstate Commerce Commission were higher than those involved in the nomination of Frankfurter and Murphy to the Supreme Court.[99]

99. *See* Kalman, *supra* note 49, at 2204. She also suggests that my emphasis on the failure of conservative Senators to fight Roosevelt's judicial nominees may be anachronistic, since only five nominees have been rejected or withdrawn since 1895; at the same time, however, she concedes that the idea of a "spineless Senate . . . is surely overblown." *Id.*

Was Thomas Aimlie really more important than Frankfurter and Murphy combined? Not very likely. With respect, the reason the Republicans targeted a (relative) small fry like Aimlie is pretty obvious: Politically speaking, they would be shooting themselves in the foot by engaging in a campaign to "save" the Supreme Court from the likes of Frankfurter and Murphy. However bitter their personal disappointment, Republican Senators were perfectly aware that most Americans did not think that the Old Court needed saving and were generally pleased to see the New Deal Revolution proceeding to a satisfactory constitutional close after all the *sturm und drang* of the 1935-1937 period. Rather than continuing a pointless bitter-end battle against New Deal constitutionalism, it was far more profitable for the Republicans to adopt a strategy of *conservative accommodationism*: On the one hand, accepting the basic principles of the new regime, but on the other, blocking the legislative implementation of activist ideals or reshaping their administration in ways most favorable to Republican interests and principles. The Republicans' mute acceptance of the nominations of Frankfurter and Murphy to the Court, coupled with their active campaign against Aimlie, serves as a cameo of this larger conservative strategy—which, as both Kalman and Forbath rightly emphasize, was quite successful in blunting the force and coherence of activist policymaking in the decades ahead.

These conservative successes, however, proceeded only within the premises of the New Deal regime and never again challenged them frontally in the manner of 1935-1937. Conservative successes should not, then, lead us to trivialize the revolutionary achievements of New Deal constitutionalism. Not only did the Court announce a new vision of activist national government, but these activist principles did in fact express a sweeping reorientation in real-world relationships between government, the economy, and social life in general.

The strategy of conservative accommodationism played itself out differently during the election of 1940. The Republicans' surprise nomination of Wendell Willkie, a self-described "liberal Democrat," spoke louder than any words—the search was on for new modes of opposition that amounted to a something-less-than-frontal assault on the New Deal Revolution. Yet even Willkie was not quite prepared to join Republican Senators in hoisting the white flag of ideological surrender on the question of the Roosevelt Court. In his run-up to the nominating convention, Willkie *did* raise his voice in protest against the "revolutionary" nature of the Court decisions that were already accumulating by the end of the President's second term.[100] And if he had managed to beat Roosevelt in 1940, his

100. 2 ACKERMAN, *supra* note 4, at 356 (quoting Wendell Willkie, *The Court Is Now His*, SATURDAY EVENING POST, Mar. 9, 1940, at 29).

nominees to the Court might well have dissented from such decisive, and unanimous, New Deal opinions like *Darby* and *Wickard.*[101] But with Willkie's defeat, the fate of the traditional Republican constitution was sealed. In my lingo, the elections of 1938 and 1940 served as *consolidating elections.*

Such elections are qualitatively different from the *triggering election* that preceded them. In a year like 1936 or 1866, fundamental constitutional principles are at the very center of American politics; every member of the political nation recognizes that the rising party of revolutionary reform is on the verge of a decisive victory, and that the time to stop the accelerating forces of transformation is NOW. Once this crucial victory has been won, the balance of legitimacy shifts against the conservatives. It is now up to them to win, *and win fast*—otherwise the revolution will be cemented into the foundations of the Republic in ways not readily eroded by subsequent political victories.

The historical analogy to the election of 1940 is the election of 1868. If the presidential slate led by the Democrat Seymour had beaten the Republican Grant—and the election was actually quite close—the Democrats might have successfully reversed the ratification of the Fourteenth Amendment. Like the Republicans in 1940, the Democratic candidates of 1868 had given notice in their campaign that they had not yet completely accepted the terms of the emerging constitutional settlement.[102] But once this conservative threat was beaten back at the polls in 1868 and 1940, the party of revolutionary reform proceeded quite quickly to entrench its new constitutional solutions into the very foundations of the Constitution.

To be sure, there was nothing inevitable about this movement from the triggering election of 1936 to the consolidating elections of 1938 and 1940. If the Court had not made its switch but had continued to strike down legislation like the NLRA in 1937, the electoral scene in 1938 could well have been dominated by questions of constitutional principle even more than in 1936. Under this scenario, the outcome of the election might have triggered even more basic constitutional reorientations than in fact occurred in the late 1930s and early 1940s. Would this have been a good thing?

101. On the role of unanimity on the Court, see 2 ACKERMAN, *supra* note 4, at 373-74.

102. Frank Blair, the Democratic vice presidential candidate, emphasized before the 1868 elections that the first orders of business after a Democratic win should be a declaration that the Fourteenth Amendment was "null and void" and a withdrawal of the military from the South. *See id.* at 234-37.

H. *Internalism/Externalism Revisited*

We now come to my main complaint about the internalist/externalist debate that marks conventional legal and historical scholarship. Operating within the model of elite management, it has simply failed to take this question seriously. By placing the Court at the center of its analysis, it has fixated on the extent to which Roosevelt, and the forces of public opinion, forced the Court where it did not want to go. It has utterly failed to turn the question around and consider how the Court's decisionmaking ultimately contributed—for good and for ill—to the legitimation of a revolutionary break with the *Lochner* era in the name of We the People. The recent wavelet of internalist scholarship, discussed in Professor Kalman's essay, is simply the last to hit this scholarly shore. Taking up a theme developed by early writers like Merlo Pusey,[103] the neo-internalists view the Old Court's emphatic New Deal negations of 1935 and 1936 as aberrations concealing a deeper tendency toward accommodating the emergent values of an activist regulatory state. From this perspective, the "switch of 1937" does not represent a sharp break, but merely an evolutionary advance on past trends. Putting aside for a moment my main objection to court-centered scholarship, I am happy to respond briefly to Professor Kalman's request to clarify my relationship to the recent internalist revival.

First off, my basic thesis does *not* imply that the New Deal Revolution represents a total break from the doctrinal patterns established by prior case-law. Such radical breaks may inspire totalizing revolutions, but they have no place in revolutions on a human scale. To the contrary, one should expect juridical revolutionaries to construct their new paradigms of constitutional legality by quarrying selectively from the materials of the old regime. Insofar as the new internalists illuminate the doctrinal sources of this process of New Deal reconstruction, they perform a scholarly service. In particular, the internalists are right to insist that the Justices of the Lochner era did generate important *accommodationist doctrines*, enabling them to uphold much activist legislation, and that these doctrines helped the Roosevelt Court to engage in its legitimation project with greater legal credibility.

Where they go wrong is failing sufficiently to appreciate the way the Old Court had embedded these accommodationist doctrines into a deeper set of *framework values* establishing more basic commitments to freedom of contract, private property, and limited federal government. To put this point in operational terms, imagine yourself as a mainstream lawyer of the early 1930s called upon to summarize the decisional patterns that had emerged over the preceding generation. Undoubtedly, you would elaborate upon the

103. *See, e.g.*, MERLO J. PUSEY, THE SUPREME COURT CRISIS 48-53 (1937).

many accommodationist doctrines developed by the Old Court to authorize a good deal of activist intervention in the marketplace. Nevertheless, you would caution your client that any further expansion of regulatory power could well encounter serious resistance as the Court anxiously considered whether the new initiative "went too far" in undermining the framework values established by generation after generation of Justices from 1868 through 1932. To mix metaphors from Robert Cover and Ronald Dworkin, I will say that the constitutional nomos and narrative of the *Lochner* era endowed the framework values of free contract, private property, and limited national government with very powerful "gravitational force" as lawyers and judges went about their business designing workable doctrine.[104]

This is a point that the revisionists too easily forget. In their eagerness to find doctrinal antecedents for the massive expansion of state power legitimated after 1937, they fail to appreciate that the *Lochner*-era decisions they hail as "precedents" operated very differently within the preexisting nomos of limited government and laissez faire. Before 1937, these cases merely functioned as accommodationist doctrines within a deeper, and more constraining, framework. It was only the "switch in time" that shattered the legal profession's confidence in the enduring value of the old orienting framework.

After all, the old framework had endured despite its exposure to other political shocks in earlier decades. And yet this time, it utterly disintegrated within five short years, with *Darby* and *Wickard* marking the epitaph. During the same short time span, the Roosevelt Court took up the formidable challenge of creating a new fundamental framework out of the legal materials littered about the juristic landscape in the aftermath of the switch. While the Court was only making tentative suggestions in cases like *Palko v. Connecticut*[105] and *Carolene Products*[106] in 1937 and 1938, the great issues of framework construction were soon generating fierce new debates among Roosevelt appointees in cases like *Gobitis*[107] and *Barnette*.[108]

In short, 1937 inaugurated something quite rare in legal history—the self-conscious juridical reconstruction of framework values. And it is precisely this rapid period of disintegration and reconstruction that is the hallmark of doctrinal revolutions on a human scale. Indeed, it is this phenomenon that lies behind my proposal to measure such revolutions by a

104. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111-13 (1978) (referring to gravitational force); Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11-44 (1983).

105. 302 U.S. 319 (1937).

106. United States v. Carolene Prods., 304 U.S. 144 (1938).

107. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

108. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

"ten year test." During most decades, there is no wrenching need for lawyers to confront the agonizing reappraisals required by framework transformation; and without compelling need, the profession is hardly inclined to engage in agonizing reappraisal for the sake of intellectual excitement!

So long as the framework remains more or less intact, it is generally quite possible for lawyers to make reliable estimates as to the future shape of doctrinal development over the coming decade. Hence, most decades do not satisfy the "ten year test" for revolutions on a human scale. But when the existing framework disintegrates, all bets are off. While the emerging framework undoubtedly contains fragments from the past, it has been so radically reorganized that new lines of legal development become possible, and old ones are cut off, in ways that can only shock lawyers trained under the old paradigm.

This is precisely what happened during the New Deal Revolution, and it is precisely why the internalist account is inadequate. Consider, for example, Professor Barry Cushman's internalist claims that the "real" switch in time occurred in 1934 with the Court's five-four decision in *Nebbia v. New York*[109] and that the famous 1937 decisions should be treated almost as juridical footnotes to *Nebbia*'s mighty redefinition of the nature of substantive due process. For starters, this claim is utterly anachronistic. As a recent article by David Pepper demonstrates, neither lower court judges nor serious academics writing before 1937 understood *Nebbia* as inaugurating Cushman's great awakening. It was only after the "switch in time" that *Nebbia* was retroactively endowed with larger meaning by courts scavenging earlier eras for precedential authority that would shore up their great paradigm shift.[110]

But my basic point goes beyond one or another reading, or misreading, of the original understanding of a single case. It is this: *No single case can possibly destroy something so basic as an entire orienting framework of constitutional value.* We are dealing with a profession renowned for its collective self-confidence and its formidable rationalizing abilities. For a community of smart-alecks, it is child's play to defang the revolutionary implications of *any* single decision—by distinguishing it on its facts, or remarking on the weakness of its reasoning, or noting the power of the dissenting opinions, or what-have-you. Indeed, the more surprising the decision, the more it may provoke the cleverest amongst us to show "how it really isn't very surprising, after all."

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109. 291 U.S. 502 (1934). *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

110. *See* David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 83-84 (1998).

It requires much more than one big Supreme Court decision to destroy the cognitive self-confidence of America's lawyers. Before doubts about the very framework of constitutional reasoning can get off the ground, the reigning professional understanding must be battered time after time by a seemingly endless barrage of judicial decisions that defy ready comprehension within the traditional framework. Only this kind of unremitting and intense pressure leads to the disintegration of dogmatic certainties, and the reluctant recognition of the need to organize a new paradigm for professional thought. This only happened in 1937, not before, and it is the reason why this remarkable year deserves to remain a crucial marker in the annals of American law.

I. *Did the Old Court Switch Too Soon?*

I return to my basic question about 1937: Did the switch come too early? Would it have been a better thing for the long-run development of American law if the Court had continued its spirited resistance to New Deal constitutionalism by striking down the NLRA and by forcing Roosevelt and his Democrats to win at least one more election before the nation abandoned the constitutional framework that judges had built over the previous two generations?

Not only does the internalist interpretation blind us to the importance of this fundamental question, but it suggests that it is an easy one to answer. In depicting 1937 as if it were merely an evolutionary development from prior case law, internalists are committed to viewing the Court's spirited resistance of 1935 and 1936 as if it were a tragic waste of time: Why didn't Justice Roberts have the wit to appreciate the profound implications of his *Nebbia* decision of 1934? Why on earth did he blunder onward in 1935 with such reactionary howlers as his five-to-four majority opinion in *Railroad Retirement Boad v. Alton Railroad*?[111]

If New Deal constitutionalism already existed in embryo before 1937, its remarkably difficult birth-agony must have been due to professional malpractice. The anxious cries of 1935 and 1936 could have been readily avoided if the men-in-black had been more adept practitioners of their evolutionary arts. Within the internalist framework, the question of whether the Old Court should have continued to resist beyond 1937 is a no-brainer: Of course not, dummy! They should have followed up on *Nebbia* with a total capitulation before the activist welfare state in 1935—or maybe even earlier!

111. 295 U.S. 330 (1935).

I have been arguing, in contrast, that it was entirely appropriate for the Old Court to seek to defend the established juridical framework of limited government and laissez faire, and that the final judicial defense of this framework greatly contributed to the clarity with which the rising elites in Washington, and the People more generally, defined the contours of New Deal constitutionalism.

Instead of condemning the Court for retreating so late, the really interesting question is whether underlying values of popular sovereignty would have been better served by more judicial resistance, more popular debate, more self-conscious reflection, and more triggering elections before the doctrinal lines of New Deal constitutionalism had been definitively established?

After some hemming and hawing, I say no in *Transformations*.[112] All things considered, I believe that the Court abandoned its traditional framework at just about the right time. Even when one takes full account of our constitutional tradition of popular sovereignty, it would have been a mistake for the courts to generate a further period of institutional crisis to provoke more popular debate.

But Professor Forbath's introductory essay introduces an important consideration that I had not factored into my equation. He suggests that the 1930s witnessed the rise of a broad popular movement in support of a constitutional vision that went far beyond the doctrines eventually elaborated by the New Deal Court in the early 1940s.[113] While cases like *Darby* and *Wickard* authoritatively established the plenary powers of the federal government over economic and social life, it did not go further to elaborate a new set of fundamental rights to social provision of the kind, for example, proposed by Roosevelt in his famous speech of 1944 on the need for a new economic bill of rights.[114]

Forbath is right to emphasize that the New Deal Court's failure to take this vision of economic and social citizenship seriously has had a profound consequence for the path of the law during the modern era. Even the Rehnquist Court accepts the foundational status of *Darby* and *Wickard*,[115] but the absence of analogous New Deal decisions establishing constitutional rights of social citizenship has made it easier for later, more conservative, courts to banish this notion from the field of serious professional debate.[116]

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112. *See* ACKERMAN, *supra* note 4, at 345-50.

113. Forbath, *supra* note 60, at 7-8.

114. *See* Franklin D. Roosevelt, Message to the Congress on the State of the Union, (Jan. 11, 1944), *in* 13 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN ROOSEVELT, VICTORY AND THE THRESHOLD OF PEACE, 1944-45 at 32, 41 (Samuel I. Roseman ed., 1950).

115. *See* United States v. Lopez, 514 U.S. 549, 553-61 (1995).

116. I do not say that social rights would have endured even if the New Deal Court had incorporated Roosevelt's speech into its developing jurisprudence—only that it would have been much harder to banish the idea into the jurisprudential wilderness.

Why, then, didn't the New Deal Court follow Roosevelt's lead down the path to social rights in the early 1940s?

Professor Forbath points his finger at the dark role played by the effective disenfranchisement of black Americans in the South. Jim Crow enabled the lily-white Southern delegation in Congress to oppose affirmative economic and social rights on racist grounds and avoid electoral retribution from a large proportion of their nominal constituents. If blacks had not been effectively disenfranchised at the turn of the twentieth century, Congress would have contained many more vigorous advocates for a constitutionalism of social citizenship in the 1930s, thereby greatly increasing the chances of its incorporation into the New Deal constitution. He is absolutely right, and his point raises fundamental issues that I do not have space to address here.[117]

But at least I can explore the relationship between Forbath's thesis and the question I am raising about the "switch in time." If the movement for social citizenship was very dynamic during the 1930s, the Court's deescalation decision of 1937 could well have been very consequential in shaping the ultimate constitutional outcome. To take the most obvious example, if the Court had provoked a further round of intense popular debate about the Constitution by striking down the National Labor Relations Act, the movement for social rights would have gathered a lot more steam before the meaning of the New Deal Revolution had been legally

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After all, other liberal democratic courts have had little difficulty recognizing the enduring significance of affirmative economic rights. The German constitutional commitment to social welfare is elaborated in 2 THEODOR MAUNZ & GÜNTER DÜRIG, GRUNDGESETZ: KOMMENTAR, art. 20 (1996); and Michael Kittner, *Sozialstaatsprinzip (SP), in* 1 KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 1390-1464 (Rudolph Wassermann ed., 2d ed. 1989). Moreover, Article 38 of the Italian Constitution provides: "Every private citizen unable to work and unprovided with the resources necessary for existence is entitled to private and social assistance." 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz tr., Albert P. Blaustein & Gisbert H. Flanz eds., 1987). Our own current rejection of the idea is, if anything, idiosyncratic when viewed against the broader background provided by comparative constitutional law. For an eloquent American voice crying in the wilderness, see CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED (1997).

117. Forbath's essay suggests that an adequate understanding of the New Deal requires us to probe much more deeply into its relationship to the great constitutional upheavals that occurred in the 1890s—the decade during which Southern blacks were effectively disenfranchised. *See* Forbath, *supra* note 60 (manuscript at 53-61). Eric Foner reaches the same conclusion, but from a different historical direction: While Forbath works backwards from the 1930s to the 1890s, Foner works forward from the 1860s to insist on the crucial constitutional importance of the 1890s. *See* Foner, *supra* note 32, at 2007-08. This point is emphasized once again, from yet another direction, by political scientist Walter Dean Burnham. *See* Burnham, *supra* note 5, at 2262-67.

They are obviously right in identifying the 1890s as one of the big holes in my analysis. While I hope to remedy this failure some time down the line, I would love it if somebody else got there ahead of me. I should note, perhaps, that I recently explored one aspect of the much larger problem in a recent discussion of the Income Tax Cases of 1895 in Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999).

codified.[118] If Roosevelt and the New Deal Democrats had been obliged by the Court to convert the 1938 election into a further electoral mandate on matters of basic principle, perhaps the victorious political coalition emerging from the election would have insisted on a social rights version of New Deal constitutionalism—either by enacting appropriate Article V amendments or creating a political environment conducive to the appointment of Supreme Court justices determined to move beyond *Darby/Wickard* and affirm a more affirmative constitutional vision of social citizenship?

Hard to say, but this scenario should be factored into any final judgment on the ultimate wisdom of the Court's refusal in 1937 to fight one more electoral round on behalf of laissez-faire constitutionalism.[119] The thought experiment inspired by Forbath also suggests the paradoxical relationship between conservative resistance and popular mobilization that I have been emphasizing throughout. So long as conservative branches continue to resist, they exert pressure on revolutionary reformers to expand and deepen the meaning of their constitutional ideals; once explicit conservative resistance collapses, there is a tendency for revolutionaries to rest on their laurels and allow the previously resisting institutions to play an important role in the process of consolidation. This not only happened after 1937 but after 1868—and in both cases the previously resisting institutions interpreted the revolutionary transformation in relatively conservative ways.

This sobering fact predictably tempts some historians into a familiar sort of radical chic. Gripped by intimations of total revolution, it is easy for some to dismiss as insignificant any enduring achievement that falls short of the most radical promise of the previous decade of popular mobilization. For example, Professor Forbath seems so disheartened by the failure of the social rights ideal to gain ascendancy during the New Deal that he is almost dismissive of the constitutional revolution actually achieved in the wake of *Wickard* and *Darby*. Similarly, Professor Smith condemns *Slaughterhouse* as a "judicial attack on the substance of the postwar amendments"—when, if Professor Benedict is right, *Slaughterhouse* may only suggest that the great revolution of the nineteenth century fell far short of twentieth-century understandings of American nationalism and the requirements of social justice in a liberal state.[120]

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118. *See* Hansen, *supra* note 76 (manuscript at 20-49) (describing the 1937 protests by American workers against the nonenforcement of the National Labor Relations Act).

119. For other dimensions of the calculus, see 2 ACKERMAN, *supra* note 4, at 345-50.

120. As I mentioned earlier, *see supra* note 37 and accompanying text, I am neither endorsing nor rejecting Benedict's understanding of the substantive meaning of Reconstruction—hence the word "may" in the text. I mention Benedict's interpretation as a counterweight to Smith's denunciation. Even if Benedict's view proves unpersuasive at the end of the day, the basic point stands. Revolutions on a human scale are inevitably limited in their scope, and it is always

But for those who see our history as an engagement with revolution on a human scale, it will not do to condescend to the genuine achievements of the Founding, Reconstruction or New Deal merely because each generation could have done more—much more—to fulfil the promise of America's highest ideals. These will forever elude our grasp. We should count ourselves lucky if we manage to seize the moment as creatively as they did, and take one large step forward for every two small steps back.

V. THEORY AND PRACTICE?

We are now in a position to confront some penetrating questions raised by Professors Griffin and Levinson. Their doubts do not involve the need to rewrite the basic professional narrative. To the contrary, both endorse my call to legal scholars to remove the blinders of Article Five and confront the reality of our post-New Deal Constitution.

Their challenge comes only at the next step. So far as they are concerned, I am hopelessly old-fashioned in supposing that this change in intellectual approach might actually make a difference in practice. They join the growing group of intellectual anti-intellectuals who would build a high wall of separation between serious legal scholarship, on the one hand, and competent legal practice, on the other.[121] On this view, it is philosophically naive or professionally pretentious (or both) to suppose that theory and practice can or should be linked up in a mutually supportive, and ultimately holistic, approach to constitutional law.

A. *How Theory Can Guide Practice: The Case of the Clinton Impeachment*

Professor Levinson suggests that "Ackerman provides no guidance at all as to how one should think during a constitutional moment"—and analyzes my own defense of President Clinton in the recent impeachment affair as a telltale example.[122] Undoubtedly, there is much to criticize in my

possible to condemn them for failing to win even greater transformative victories than those they manage to accomplish.

121. There has been an explosive growth of separationist theories in recent years. Here is a sampler: PAUL KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); ANTHONY KRONMAN, THE LOST LAWYER (1993); PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAL LEGAL MIND (1996); CASS SUNSTEIN, ONE CASE AT A TIME (1999); ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996); Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569 (1992); Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981); and Posner, *supra* note 3, at 1.

122. Levinson, *supra* note 16, at 2235.

professional performance, but these personal failings should not obscure the possibility that the framework provided by *Transformations* might serve other practicing constitutionalists as a source of useful guidance—of at least four kinds.

The first is diagnostic. If *Transformations* establishes anything, it is that no constitutional regime lasts forever. One ongoing practical problem, then, is to identify the conditions under which a fundamental challenge to the existing regime is constitutionally legitimate, and when it is not. After all, whenever a politician wins at the polls, he is in the habit of claiming a "mandate from the People" for anything he wants—even so unrevolutionary a President as George Bush had no trouble interpreting his election as a profound popular "mandate" for a reduction in the capital gains tax! Since talk is cheap, the first practical challenge is to distinguish between the banalities of normal politics and the relatively rare occasions on which the constitutional system should begin to take the claim of a mandate from the People seriously. To put the point in terms of Levinson's claim, before one can determine whether *Transformations* can provide practical guidance "during a constitutional moment," we must determine whether it can reliably identify such moments in the first place and distinguish them from the to-and-fro of normal politics.

My proposed method involves the use of our most successful past revolutions as paradigm cases for testing the claims of present-day revolutionaries to speak for the People.[123] For example, any reader of *Transformations* will immediately begin to draw analogies between Bill Clinton's recent travails and the impeachment of Andrew Johnson. Despite all the obvious differences, there are striking similarities. As in the 1860s, so in the 1990s, the Republican Party had become an ideological instrument of self-declared "revolutionaries" intent on setting American politics on a radically new course; as in the 1860s, the revolutionaries of the 1990s were not in control of the presidency, but sought to use their power in the House as the springboard for an effort to revolutionize public values and institutional relationships. Newt Gingrich appears as the constitutional heir of Thaddeus Stevens—each seeking to pursue a transformative project to a successful conclusion despite the spirited resistance of a President committed to the defense of the constitutional status quo.

But *Transformations* suggests the existence of salient differences as well. The Republicans of the 1860s had lost the Presidency as the result of an assassin's bullet. When Stevens began to confront Johnson, it was against the background of the Republican electoral victories of 1860 and 1864. In contrast, the Republican revolutionaries who swept into the House

123. For an illuminating elaboration of the idea of a paradigm case, see RUBENFELD, *supra* note 50.

after the election of 1994 could not follow through with another large victory in 1996. They could not even gain the presidential nomination for one of their number, and had to settle for Bob Dole—the very paradigm of a normal politician who would react with alarm to any seriously transformative initiative. Even then, the Republican candidate was defeated by Bill Clinton—in no small measure because of the public's negative reaction to the House's confrontational style of politics, exemplified by the extraordinary government shutdown.

In short, while both Gingrich and Stevens were engaged in broadly analogous efforts to renegotiate basic terms in the government's "Contract With America," the two impeachments arose at very different stages in the revolutionary enterprise. Before using impeachment as a weapon in their struggle with President Johnson, the Radical Republicans waited to win the triggering election of 1866. In contrast, the Republican revolutionaries of 1998 proceeded against Clinton despite their electoral setbacks of 1996 and 1998. If you will excuse a lapse into jargon, the House campaign against Clinton represented a belated effort at *signaling* to the People the rise of a transformative politics of revolutionary reform, while the campaign against Johnson represented an effort to *consolidate* the judgment of the People on the Fourteenth Amendment reached after a lengthy series of institutional struggles and electoral victories.

Despite this big difference, neither Stevens nor Gingrich allowed legalistic compunctions to override their fundamental aims. To be sure, the breaches with constitutional principle contemplated by the Gingrich Republicans paled in comparison with those endorsed by their Reconstruction predecessors. But by any other measure, they were very substantial. Given the doubtful constitutional status of the independent prosecutor—emphasized by a Supreme Court justice who is generally admired by the Republican revolutionaries[124]—one would have supposed that conscientious Representatives would have refused to delegate so much of their impeachment power to so doubtful a constitutional authority. Nevertheless, the House allowed the independent counsel, and not its own judiciary committee, to do most of the heavy lifting. Similarly, given the American People's repudiation of the authority of lameduck Congresses with the enactment of the Twentieth Amendment, one would have supposed that the lameduck House would have waited until it was replaced by its newly elected successor before entertaining such a fateful assault on the Presidency—or that Henry Hyde and his fellow impeachment managers would have waited for a new bill of impeachment before proceeding to a Senate trial.[125]

124. *See* Morrison v. Olson, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting).

125. *See* BRUCE ACKERMAN, THE CASE AGAINST LAMEDUCK IMPEACHMENT (1999).

But nothing of the sort happened. Very much as in the late 1860s, the Gingrich Republicans used constitutionally anomalous institutions—the independent counsel, the lameduck House—to generate a sense of institutional momentum that might create a "bandwagon effect" in the public mind that served to legitimate their behavior, despite the objections of legalistic nit-pickers.

This diagnosis of the evolving situation brings certain normative questions of constitutional process to the fore—leading to a second practical use of my framework. For present purposes, two questions will suffice. The first addresses the situation from the perspective of the Republican revolutionaries: Under what conditions is it constitutionally appropriate to override legalistic compunctions and try to create an unconventional "bandwagon" effect? The second takes up the matter from the vantage of Democratic defenders of the constitutional status quo: Under what conditions should legalistic objections be energetically pressed, and when is it constitutionally appropriate to engage in statesmanlike retreat?

As Professor Levinson notes, I concluded that the Republicans' bandwagon was constitutionally illegitimate, and repeatedly protested against the lameduck impeachment in a variety of public places.[126] In launching my personal campaign in defense of the President, Levinson suggests, I was somehow acting inconsistently with the professed message of *Transformations*: If I hoped to reinvigorate the revolutionary tradition of American constitutionalism by writing the book, why did I come out so loudly in conservative defense of the status quo in defending the President?

Well, for one thing, I deeply oppose the substance of the Gingrich revolution. But even if this were not so, I very much hope I would have come out the same way on the basis of my study of constitutional law. As *Transformations* establishes, American revolutionaries cannot rightly hope for instant gratification simply because they have won control over a single institution of American government. To the contrary, our constitutional system rightly requires them to endure a decade-long period of rigorous institutional testing before they can legitimately claim to revolutionize governing values in the name of We the People.

Apart from my opposition to the merits of their program, I had a serious constitutional problem with the way the Republicans were seeking to

126. See my testimony before the House Judiciary Committee on December 8, 1998, *reprinted in Testimony Before the House Judiciary Committee*, PS: POLITICAL SCIENCE AND POLITICS, Mar. 1999, at 24. My media campaign on the procedural issues included Bruce Ackerman, *Contest Lame-Duck House Vote*, USA TODAY, Dec. 23, 1998, at 12A; Bruce Ackerman, *Lame-Duck Impeachment? Not So Fast*, N.Y. TIMES, Dec. 8, 1998, at A27; Bruce Ackerman, *This Lame-Duck Impeachment Should Die*, WASH. POST, Dec. 24, 1998, at A17; and Bruce Ackerman, *Without the People, Impeachment Fails*, L.A. TIMES, Nov. 6, 1998, at B9, culminating in a pamphlet, published in mid-January and submitted to all members of the House and Senate with a supporting letter by leading legal scholars. *See* ACKERMAN, *supra* note 125.

advance it. Quite simply, they were trying to do too much too quickly with too little popular support. Instead of allowing the Republicans to use the independent prosecutor and lameduck House to generate a bandwagon effect, the right thing to do was to challenge the constitutional legitimacy of these shortcuts—and call upon the newly elected House of Representatives to do its own homework, and revote articles of impeachment, before proceeding to a trial in the Senate.

It is a matter of public record that the President and his lawyers took my proposal seriously.[127] In the end, however, they decided to waive their constitutional objections to the lameduck impeachment, and move immediately to a trial before the Senate. While I was in ongoing contact with the President's legal staff, I was not privy to their most important deliberations on this strategic decision. But my own guess, for whatever it's worth, is that the President's remarkably high standing in the public opinion polls played a crucial role in his decision to waive his procedural objections.

To see why, consider that the President had nothing to fear from a Senate trial as long as his popular support remained at stratospheric levels—since it was obvious to all concerned that, so long as the President stood at seventy percent in the polls,[128] such a trial would lead to a quick acquittal. In contrast, there were dangers involved in throwing the matter back to the House. At the very least, this threatened to drag out the proceedings for months before the House leadership either pushed through a new bill of impeachment or gave up on the project. At the worst, the President's popularity might sink in the meantime, encouraging the House Republicans to vote out a second impeachment at a moment when the President ran a greater risk of Senate removal. Why not, then, waive the procedural objections, and move quickly to acquittal?

I do not challenge this strategic calculation, but emphasize its paradoxical aspect: If the President had been less popular, it would have been harder for Clinton to predict the outcome of his Senate trial, and it would have made more strategic sense to stop the trial dead in its tracks by challenging the legitimacy of the lameduck impeachment, and force the Republicans to go through a second round of activities in the House.

Easy cases make bad law: The President's popularity led him to create a precedent that may well weaken the Presidency at some future moment.

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127. *See Clinton May Challenge 'Lame Ducks,'* UPI, Dec. 20, 1998, available in LEXIS, Nexis Library, UPI File ("The White House apparently is looking into an argument by Yale Law School professor Bruce Ackerman . . . . White House Chief of Staff John Podesta told the [Washington] Post: 'Our legal team will take a look at that in the days to come.'").

128. *See* Gary C. Jacobson, *Impeachment Politics in the 1998 Congressional Elections*, 114 POL. SCI. Q. 31, 51 (1999) (noting that the first post-impeachment Gallup Poll put Clinton's job approval rating at 73%).

After all, most sitting Presidents do not enjoy the luxury of seventy percent approval ratings. If and when the next resident of the White House is obliged to confront a lameduck impeachment, he or she may well regret Clinton's decision to allow the Republican bandwagon to proceed unchallenged!

To be sure, nothing in *Transformations* led me to anticipate the strategy President Clinton would ultimately select to defend his interests. But it is far too simple to suggest, with Professor Levinson, that *Transformations* did not guide my practical activities on behalf of the President, or that these did not help shape—and in a constructive way?—the President's constitutional understanding of his strategic alternatives.

Thus far, I have been discussing the way in which *Transformations* might serve to guide practical deliberation about matters of constitutional process. But another aspect of Professor Levinson's critique generates a third, and more substantive, use of my framework—as a guide in determining the kind of "high crimes and misdemeanors" that might justify the President's removal from office. As he notes, I opposed a broad construction of this famous formula on the ground that it would dramatically weaken the Presidency and result in "a massive shift toward a British-style system of parliamentary government."[129] So far as Levinson is concerned, this was precisely the wrong ground to stand on. As an academic pioneer in the exploration of our Constitution's stupidest ideas, Professor Levinson offers his considered opinion that a "fixed-term president, who is impervious, as a practical matter, to removal" is high up on the list—perhaps one of the crowning "stupidities" of our system.[130] Why, then, did I intervene in defense of such a retrograde notion?

If we were writing a constitution on a clean slate, there would be much to be said in favor of Levinson's critique of the American Presidency. Indeed, I have recently written a paper criticizing the export of our presidentialist model abroad for reasons that he might well commend.[131] I also agree with Levinson's claim that we will not get very far by asking about the original intentions of the Framers. In writing about "high crimes and misdemeanors," the Founders envisioned a very different Presidency from the one that has emerged over the last two centuries. Indeed, the Founding vision did not survive Thomas Jefferson, let alone Abraham Lincoln and Franklin Roosevelt.[132] We cannot begin to elaborate modern

129. *See* Bruce Ackerman, *What Ken Starr Neglected To Tell Us*, N.Y. TIMES, Sept. 14, 1998, at A33.

130. Levinson, *supra* note 16, at 2234.

131. *See* Bruce Ackerman, *Rethinking the Separation of Powers*, 113 HARV. L. REV. (forthcoming Jan. 2000).

132. I discuss the shattering consequences of the Jeffersonian Revolution in a forthcoming book. *See* ACKERMAN, *supra* note 9.

standards for impeachment by pretending that the Founding vision of the Presidency represents our reality when it has in fact long since been exploded by the constitutional experience of the American people. If we are to decode the meaning of "high crimes and misdemeanors" successfully, nothing less than a profound act of translation is required.[133] We must place these words within the context of the modern Presidency as it has been transformed over time by the American People, not as it emerged from the collective imagination of the Founders.

Up to this point, then, Levinson and I are travelling down a common path: When considered in the abstract, there is much to be said against the idea of an independent Presidency; and the Founders' deliberations shouldn't serve to block critical thought in this area. It is one thing, however, to urge us to move beyond the Founders; it is quite another to ignore the larger lessons of American history. This is the place where Professor Levinson underestimates the potential contribution of *Transformations* to a thoughtful modern elaboration of impeachment standards. My revised professional narrative tells a story that emphasizes the role of the independent Presidency in the practical exercise of popular sovereignty by the American People over the generations. I believe that this historically rooted connection between the Presidency and popular sovereignty should serve as a focus of our inquiry: Would the use of impeachment in cases like the Lewinsky Affair serve to undermine this constitutionally fundamental presidential function?

This is not the place to attempt a final answer. But the question should suffice to rebut the charge that my framework "provides no guidance at all" in guiding final judgment on the merits. At the very least, *Transformations* cautions against an unconsidered weakening of the Presidency in the absence of broad and deep popular support for a reconstruction of its powers.

The first three uses of my framework—diagnostic, processual, and substantive—were available as a guide to conduct during the episode itself. The final function deals with its enduring constitutional significance: What is the precedential value of the President's impeachment and acquittal? How should we view the episode as we proceed with our further struggles over the future of the Republic?

Transformations suggests that we should view the episode as a failed constitutional moment—and one that *rightly* failed because the Republican revolutionaries went too far too fast without remotely gaining the kind of

133. *See* Lawrence Lessig, *Fidelity as Translation: Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

mobilized and sustained support required by the American constitutional tradition. Such an abuse, of course, may well generate more abuses in the coming decades. House Democrats will long remember the days of Newt Gingrich and Henry Hyde—and they will be sorely tempted to exact their pound of flesh the next time they are in control of Congress and a Republican President sits in the White House.

If this happens, I'd be happy to sign on to the President's legal team at my customary rate of $0 an hour. I am a constitutionalist first, a liberal Democrat second: If the next abusive impeachment gets as far as the last one, we will find ourselves trapped in an endless cycle of incivility and recrimination. Constitutionalists of all parties should work together to build a consensus that establishes the Clinton case as a *negative precedent* for future constitutional development. If we fail in constructing such a common understanding, the ensuing cycles of impeachment will make it increasingly impossible for Americans to conduct a decent system of normal politics, let alone a serious and mobilized debate on our constitutional future as a nation.[134]

B. *Speaking Truth to Power*

Professor Griffin attacks the relationship between theory and practice from a very different front. Professor Levinson proceeds from the side of practice, telling the thoughtful statesman that he is wasting his time consulting *Transformations* as a source of practical insight. Professor Griffin attacks from the side of legal scholarship. His credo is straightforward: Scholars should seek the truth, and nothing but the truth.[135] We should not be addressing the practical concerns of lawyers or judges or statesmen, but the academic concerns expressed by our fellow scholars in the humanities and social sciences. One citation from Jürgen Habermas or Kenneth Arrow is worth a million cites from Anthony Kennedy's law clerk.

I propose an amendment to Griffin's credo. The legal scholar's rightful aim is not simply to speak the truth, though this is hard enough. It is *to speak the truth to power.* I am unwilling to cut my links to the men and women charged with the task of governing this country according to the Constitution of the United States. They need all the help they can get; if the academy turns its back on them, the quality of their decisions is sure to suffer.

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134. Of course, it is always possible that the next Republican President will turn out to be *such* a threat to the Republic that impeachment might be constitutionally plausible. But I very much urge restraint in close cases—the Democrats' (non-) reaction to President Reagan's role in Iran-Contra, not the Republicans' abuse of impeachment in the Clinton affair, should be Congress's guide.

135. *See* Griffin, *supra* note 60, at 2156.

But speaking truth to power generates its own pathologies. The powerful may not listen unless the truthtellers pander to their prejudices. The price of credibility in the world of the powerful may be the sacrifice of truth itself.

It is not a price worth paying, but this is easier said than done. Each legal academic dreams his own dreams of direct influence in the world, and these dreams may prove intoxicating. Perhaps they suggest the need to write a rhetorically powerful law review article that might convince a judge to do justice, but at the cost of accepting a host of legal fictions that do not correspond to the scholar's understanding of truth. Is there anything wrong with steaming ahead regardless, and getting the thing published in the *Harvard Law Review*?

I am not a purist, but I agree with Griffin that law reviews contain too much thinly-disguised instrumental advocacy. And too little truth seeking. But I think his remedy—academic purism—is even worse than the disease. I part company in particular when it comes to the longer run, measured in decades, which represents the natural time-horizon for scholarly influence on professional opinion. It is right and proper to hope for such influence; and on legal scholarship that refuses to direct itself toward this goal is in danger of preciosity and self-indulgence.

Let me make the point in terms of my hopes for *Transformations*. Within the short run of the next decade, I completely agree with Professor Griffin's pessimistic assessment of the chances that my revisionist view of American constitutional development will triumph on the pages of the *United States Reports*. The present generation of judges are the captives of their own legal educations, just like the rest of us, and they have neither the time nor the inclination to undertake the agonizing reappraisal required to move beyond the present interpretive horizon. Within the near term, then, I expect most lawyers and judges to continue adhering to the "restorationist" account of the New Deal that many leading scholars in law, history, and political science have discarded. As cracks in this consensus appear, the judicial debate will orient itself by the light cast by the plurality opinion in *Casey*, with Justice Thomas's dissent in *Lopez* serving as a visible, if not popular, alternative. If I am lucky, *Transformations* will be a distant third in the judicial sweepstakes.

But I am not so despairing of the longer run. There are two ways *Transformations* might ultimately gain professional ascendancy. The first is through the model of elite management. This requires, first, that many younger members of the legal academy come to believe that something like my account is really true; second, that these newly understood truths change the teaching of constitutional law in the nation's classrooms; and third, that the new learning then trickles into the practical life of the profession,

incorporating itself slowly into judicial opinions at various levels of the hierarchy—until at long last, it trickles up to the Supremes.

The second path is through a new round of revolutionary renewal. On this scenario, the next cycle of popular mobilization contrasts sharply with the recent movements from the Radical Right. Rather than seeking to restore a narrowly sectarian version of Christian morality, the next generation of Americans prove to be more interested in seeking to redeem, and move beyond, the promises of economic and social justice made during the New Deal and Civil Rights eras. If such a renascent liberalism ever regains the support of the American People, the judges flooding the courts would become much more interested in reinterpreting their relationship to earlier episodes of revolutionary renewal, opening themselves up to whatever truths on such matters have been stored up in the academy.

I am not holding my breath in anticipation of either of these great judicial awakenings. Only a fool actually expects to succeed in speaking truth to power. But only a knave gives up entirely, at least if he is a law professor conscious of his debt to his fellow citizens. What kind of legal order can Americans ever hope to achieve without *anybody* in the academy making the effort to take the courts' ongoing claims to constitutional legitimacy seriously?