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**THE TALKING CURE: HOW CONSTITUTIONAL  
ARGUMENT DRIVES CONSTITUTIONAL DEVELOPMENT**

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INTRODUCTION

Let’s say that you believe that the American political system has become spectacularly dysfunctional – that it has grown a gargantuan national government that, in a fit of law and rulemaking, that has choked the economy and the business and private lives of citizens with generations of invasive, niggling, and expensive regulations. That governments at all levels have restricted liberty and violated basic principles of equality that were part of the society’s foundational social contract. And let’s say that you were convinced that the U.S. Constitution was in large part to blame for this dire and increasingly alarming state of affairs. Not the Constitution rightly understood, but the Constitution as understood for the better part of the last century, from the time of the revolution wrought by the Progressives, and institutionalized through the New Deal, the Warren Court, and the Great Society – a Constitution that fundamentally rewrote the meanings of federalism and the separation of powers, and of administration, the presidency, and the role of the federal courts. Might you view the situation as hopeless, counseling either mute despair and withdrawal, or pragmatic acceptance and accommodation? Might you seek formal Article V amendments to the Constitution to realign its functional meaning in the present to its true historical meaning? Or might you simply work, aggressively, angrily, defiantly, to use every means at your disposal to shift (back) society’s general understandings of what the Constitution means, from the understandings of the past century to a whole new set of meanings that would effectively protect the nation’s core principles of liberty and equality?

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Since World War II, American conservatives have availed themselves of all of the above constitutional options in response to what they took to be America's political dysfunction. While it would be worthwhile to study efforts by Republicans to push for a more conservative slant to public policies operating within a settled and accepted modern liberal constitutional order, or to study the many proposals that have emanated from the Right for formal Article V amendments to bring back elements (if not the entirety) of a presumably more functional time,<sup>1</sup> I focus here on efforts by modern conservatives to shift the conventional wisdom of what the Constitution means and requires from Liberal-Left to hard Right.

The topic is vast and space is short. A growing number of "history of originalism" scholars are studying the history of modern conservatives to forge and activate an originalist discourse. Given the many successes of this Right-wing push for a "talking cure" for constitutional dysfunction, I would like to step back here and discuss the serviceability of talking cures generally for those seeking major, dysfunction-ending constitutional reform. I do so using modern conservative constitutionalism as an instance.

#### I. PRELIMINARIES: CONSTITUTIONAL ARGUMENT AND CONSTITUTIONAL CHANGE

One of the lessons of studying constitutional *development* – as opposed to constitutional *law* – is that over the course of American history the foundational structures of the nation's governing order have been formed, reformed, and revised, at times in fundamental ways.<sup>2</sup> As attorneys seeking to influence real-world decisionmakers (like judges), most law professors are

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<sup>1</sup> See DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at xvii-xviii (1996). For example (amongst others), the 1950s saw the conservative campaign for the Bricker Amendment and, in the early 1960s, for the "Liberty Amendment." DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP 39-43 (1988); *The 24th Amendment*, 19 HUM. EVENTS 460, 460 (1962); *The Liberty Amendment*, 24 HUM. EVENTS 7, 7 (1964); *Liberty Amendment Committee Continues Drive in 44 States*, 23 HUM. EVENTS 8, 8 (1964). Today, a best-selling author on the Right is calling for a package of "Liberty Amendments." MARK R. LEVIN, THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC 18 (2013).

<sup>2</sup> See, e.g., 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 31 (1991); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 1-4 (1993); KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 1 (2004); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 3 (1993); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1-2 (1999); Ronald Kahn & Ken I. Kersch, *Introduction*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 1, 2-3 (Ronald Kahn & Ken I. Kersch eds., 2006).

preoccupied with constitutional *law* and not constitutional *development*.<sup>3</sup> Only the most radical amongst them – for example, Critical Legal Studies Scholars (or Crits) long since out of fashion – argue that constitutional law is mostly (if not exclusively) politics, and that meanings are continually made and remade through (constitutional) politics, an argument that will not fly in most courts.<sup>4</sup> But what is radical for law professors appealing to judges is work-a-day for political scientists and historians whose chief interest is in dispassionately describing and telling causal stories about actual, altering meanings and settlements.<sup>5</sup>

Accounts of American political and constitutional development are full of unembarrassed descriptions of institutional and constitutional change, liberated from the (common) lawyer's predisposition to conceptualize all change as fidelity to the past.<sup>6</sup> During the first half of the nineteenth century, an era of robust "interpretative pluralism," the respective roles of Congress, the President, and the Supreme Court, and the relationship of the national government to the states, which many today consider hard-wired features of the Constitution's text and architecture – to say nothing of the understandings of the principles of liberty and equality – were ill defined and unsettled.<sup>7</sup> As

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<sup>3</sup> See, e.g., Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511, 511 (2007) (arguing that constitutional lawyers largely ignored the political analyses of the Supreme Court because of their interest in shaping the future of the law rather than discovering the reasons for its current form).

<sup>4</sup> See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1990); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); see also Bradley D. Hays, *Nullification and the Political, Legal, and Quasi-Legal Constitutions*, 43 PUBLIUS: J. FEDERALISM 205, 206-08 (2013) (distinguishing legal from political constitutionalism, the former being monist, and the latter embracing "interpretive pluralism").

<sup>5</sup> See generally NANCY MAVEETY, *PIONEERS OF JUDICIAL BEHAVIOR* (2003) (providing profiles of seminal political scientists and their contributions to our understanding of law and courts); *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* (Cornell W. Clayton & Howard Gillman eds., 1999) (showcasing historical institutionalist approaches to the study of the Supreme Court by political scientists and distinguishing these approaches from that of "attitudinalist" political scientists).

<sup>6</sup> On this, see Alexis de Tocqueville's famous chapter on law and lawyers. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 255 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. 2000) (1835 & 1840).

<sup>7</sup> This was plain in the often heated debates – or fights – over the appointment and removal power, the veto, executive privilege, the role of the cabinet, the National Bank, the tariff, and internal improvements, as well as in the sharply opposed constitutional visions of the Republicans and the Federalists, the Democrats and the Whigs. See, e.g., 1 HOWARD GILLMAN ET AL., *AMERICAN CONSTITUTIONALISM* (2013); Hays, *supra* note 4, at 207-08; see also MICHAEL GERHARDT, *THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY*, at xi-xiii (2013) (arguing that "forgotten presidents" have actively and effectively

the polity moved forward through time, a series of “constitutional constructions” and institutional settlements took hold, lending the political order a core of operative stability.<sup>8</sup> Path dependency and mechanisms of entrenchment and institutionalization helped forge a “thickened” constitutional order in which, over time, dislodging and reconstruction became increasingly onerous endeavors.<sup>9</sup> That said, American constitutional development is rife with examples of the most seemingly settled institutions being remade across time, often via slow-moving, long-term, incremental processes.<sup>10</sup> Clearly, so far as the constitutional order is concerned, things are both stable and in flux. The challenge for scholars of constitutional and political development is to describe accurately what is fixed and what is fluid, and when. The most importunate question for political actors who are convinced that the current order is radically dysfunctional is one of agency: they are driven to ask, “what can I do now that will bring about the changes to constitutional institutions that will deliver the political order from dysfunction to function?”

An unremitting pessimism about the U.S. Constitution as a document whose core features are so hard-wired and fixed as to – even without availing oneself of the Article V route – present insurmountable barriers to meeting the challenges of one’s time ignores the lessons of American political and constitutional development. The Constitution is not an iron cage. We are not its prisoners.<sup>11</sup> Although the road to change has often been bitter and hard-fought,

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participated in these debates through their interpretations of their powers under the Constitution).

<sup>8</sup> See SKOWRONEK, *supra* note 2, at 31; Whittington, *supra* note 2.

<sup>9</sup> SKOWRONEK, *supra* note 2, at 216.

<sup>10</sup> See DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATIONS IN EXECUTIVE AGENCIES, 1862-1928, at 6 (2001); KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT 48-49 (2004); PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 43 (2003); ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 3 (2001); James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, in EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER 1, 1 (James Mahoney & Kathleen Thelen eds., 2010); Kathleen Thelen, *How Institutions Evolve*, in COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES 208, 210, 226 (James Mahoney & Dietrich Rueschmeyer eds., 2003); see also DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990); DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 201 (1981).

<sup>11</sup> Compare LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 6, 9 (1955) (describing American society as “a society that begins with Locke, and . . . stays with Locke,” evincing “an absolute and irrational attachment . . . for him,” and referencing “this fixed, dogmatic liberalism of a liberal way of life”), with J. DAVID GREENSTONE, THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM 50, 59 (1993) (positing a “liberal bipolarity” that includes a “reform liberal[]” tradition that can serve as a vehicle for significant social change). U.S. political and constitutional development is characterized by a complex

the Constitution has always been subject to new, reordering interpretations capable of meeting new social, economic, and political challenges.<sup>12</sup> If, as has been shown through empirical studies of constitutionalism around the world, the average lifespan of a constitution is nineteen years, the American case, although an ostensible exception, is, in fact, not all that different.<sup>13</sup> Through the effective mobilization of the sovereign people with distinctive – and often sharply antagonistic – political visions, significant constitutional change, for better or worse, is possible.<sup>14</sup> Liberals, it seems, no longer believe this.<sup>15</sup>

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interplay of stasis and settlement and change, some glacial, some slow moving but continuous, and some rapid. American Political Development (APD) scholars have identified a taxonomy of dynamics of stasis and change including an array of regime theories (for example, Burnham, Sundquist, and Lowi), path dependency (Pierson), institutional thickening (Skowronek), and institutional layering (Schickler). See WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 9-10 (1970); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 43 (2d ed. 1979); PIERSON, *supra* note 10, at 21; SCHICKLER, *supra* note 10, at 15; SKOWRONEK, *supra* note 2, at 31; JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 48 (1983). These broader “historical institutionalist” frameworks can be – and have been – applied to constitutional development. See, e.g., ACKERMAN, *supra* note 2, at 47; RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900*, at 9-10 (2000); GILLMAN, *supra* note 2, at 15; MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 244 (2006); RONALD KAHN, *THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953-1993*, at 3-5 (1994); SUPREME COURT DECISION-MAKING, *supra* note 5, at 4; WHITTINGTON, *supra* note 2, at 216; KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 22, 74 (2007); Kahn & Kersch, *supra* note 2, at 2; Martin Shefter, *War, Trade and U.S. Party Politics*, in *SHAPED BY WAR AND TRADE: INTERNATIONAL INFLUENCES ON AMERICAN POLITICAL DEVELOPMENT* 113, 113 (Ira Katznelson & Martin Shefter eds., 2002). Charles Beard argued that significant change was possible within the current Constitution as against those who believed that repudiating the Constitution was a prerequisite to political progress. See Aziz Rana, *Progressivism and the Disenchanted Constitution*, in *THE PROGRESSIVES’ CENTURY* (Bruce Ackerman et al. eds., forthcoming 2014).

<sup>12</sup> See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *INTERPRETING THE CONSTITUTION* (Jack N. Rakove ed., 1990).

<sup>13</sup> ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 2 (2009).

<sup>14</sup> See ACKERMAN, *supra* note 2, at 108 (“As during previous eras, the ongoing struggles for advantage by well-organized interests and elites have been punctuated by more populist efforts at mass mobilization and national self-definition.”); CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 2 (2008); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 3-5 (2004); EDWARD A. PURCELL, *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE* 3 (2007); see also ELKINS ET AL., *supra* note 13, at 138.

<sup>15</sup> See KRAMER, *supra* note 14, at 8.

Conservatives apparently do.<sup>16</sup> It is for this reason that liberals in recent years have despaired, while conservatives have reoriented the main lines of constitutional discussion in America.

## II. HOW TO TALK CONSTITUTIONALLY IN THE U.S.

While I argue here for the power of constitution-talk under the Constitution as currently written, it is not my view that formal amendments to the Constitution, if they could be ratified, would not have (possibly profound) effects. My chief interest, nevertheless, is in setting out the ways in which the Constitution as currently written can either accommodate or drive significant constitutional change. Under appropriately permissive readings of the current text, many significantly ameliorating structural changes could be adopted via statutes and administrative regulations.<sup>17</sup> Political entrepreneurs and leaders, moreover, can use political and constitutional ideas discursively in popular, movement, group, and party politics as a vehicle for constitutional renovation and transformation.<sup>18</sup> The next Part offers a brief overview of one fairly successful case of discursive, dialogical, constitutional politics – that of the (heavily constitutionalist) modern conservative movement.

The study of American constitutional development suggests a number of vehicles for constitutional change via interpretation. From the nation's inception, parties have been carriers of robust and sometimes comprehensive political and constitutional visions.<sup>19</sup> Realignment and regime theories of American politics all (rightly) presume the possibility of fundamental, institutionally reorienting change.<sup>20</sup> Party visions, of course, are not *sui generis*:

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<sup>16</sup> Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1386 (2006) (describing Republican Party decisions to use Supreme Court nominations to initiate a "counter-revolution in response to the liberalism of the Warren Court).

<sup>17</sup> See Brennan, Jr., *supra* note 12, at 7.

<sup>18</sup> See, e.g., Christopher A. Baylor, *First to the Party: The Group Origins of the Partisan Transformation on Civil Rights, 1940-1960*, 27 STUD. AM. POL. DEV. 111, 112 (2013) (examining the influence of interest groups in pressuring the Democratic Party to pursue civil rights).

<sup>19</sup> See, e.g., JOHN GERRING, PARTY IDEOLOGIES IN AMERICA, 1828-1996, at 6 (1998); see also GERHARDT, *supra* note 7, at xii; GERALD LEONARD, THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS 250 (2002) (stating that parties need a coherent ideology, lest they risk undermining the justification for their existence). See generally GILLMAN ET AL., *supra* note 7.

<sup>20</sup> See ACKERMAN, *supra* note 2, at 39 (arguing that constitutional law is subject to profound change over time); BURNHAM, *supra* note 11, at 9-10; GILLMAN, *supra* note 2, at 1; KERSCH, *supra* note 2, at 1; LOWI, *supra* note 11, at 271; SUNDQUIST, *supra* note 11, at 4; see also Cornell Clayton, *The Bush Presidency and the New Right Constitutional Regime*, 15 L. & COURTS 6 (2005); Clayton & Pickerill, *supra* note 16, at 1386-87; Keck, *supra* note 3, at 514; Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court*

they are themselves outputs – the product of movements and organized interests, operating within the parties or, first, outside of them, and seeking to join or pressure the coalition. The arguments of these movement and interests are fashioned by creative men and women who lead, wielding political and constitutional ideas.<sup>21</sup> Political scientists have mapped the micro-level processes by which ideas move from glints in the eyes of creative theorists, policy entrepreneurs, and political leaders to party positions and ideology, and then to the conventional political and constitutional wisdom of a dominant political regime.<sup>22</sup>

The peculiar structural features of the American constitutional system have made constitution-talk an especially important vehicle for both constitutional maintenance and change. In what Madison called the nation's "compound republic," political power is fragmented both within the national government and divided (with intimations of dual sovereignties) between the national and state governments.<sup>23</sup> This creates a system of diffused authority, rich in alternative power centers and potentially active veto points.<sup>24</sup> While specific in

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*Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37 L. & SOC'Y REV. 827, 831-32 (2003); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305-06 (2002). Political scientists are currently studying and debating the micro-foundations (including the driving agents) of that change, asking whether it might be mass public opinion, voters, knowledgeable/informed voters, voters as motivated and mobilized by political parties, social movements, organized interest groups, political elites, or some combination of those (either as a universal rule or as the opportunity structures of diverse political moments make possible). See Kathleen Bawn, *Constructing "Us": Ideology, Coalition Politics, and False Consciousness*, 43 AM. J. POL. SCI. 303, 303-04 (1999); Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands, and Nominations in American Politics*, 10 PERSP. ON POL. 571, 571 (2012); Christopher A. Baylor, *First to the Party: The Group Origins of the Partisan Transformation on Civil Rights, 1940-1960*, 27 STUD. AM. POL. DEV. 111, 112 (2013).

<sup>21</sup> See GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932, at 35 (2009); Gerald Berk & Dennis C. Galvan, *Processes of Creative Syncretism: Experiential Origins of Institutional Order and Change*, in POLITICAL CREATIVITY 29, 52 (Gerald Berk et al. eds., 2013).

<sup>22</sup> BURNHAM, *supra* note 11, at 3; GERRING, *supra* note 19, at 257; SUNDQUIST, *supra* note 11, at 4; see also FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS, at xvii (2d ed. 2009) ("[T]he course of public policy in the United States is not gradual and incremental, but rather is disjoint and episodic."); EDWARD CARMINES & JAMES STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS 3 (1989); BRYAN D. JONES & FRANK R. BAUMGARTNER, POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS, at vii (2005). *But see* DAVID R. MAYHEW, ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE 35 (2002) (criticizing the contemporary applicability of the realignment theory by asserting that no such realignment has happened since 1932).

<sup>23</sup> THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003).

<sup>24</sup> Michael W. Spicer & Larry D. Terry, *Legitimacy, History, and Logic: Public*

some areas, the United States's relatively brief and general Constitution is perhaps least precise in setting out the boundaries between these different power centers within the national government, and between the national government and the states by setting out these relations in terms of (implied) principles and ambiguously specified borders. These imperfectly specified boundaries are a reflection of both the political/ideological tensions at the time of the founding concerning where power should lie and lines should be drawn and a theoretical commitment to the view that it would be best to leave further specification to future needs, experience, and development.<sup>25</sup>

Although often presented as a coherent political understanding constituting the Founders' ideal, Madison's compound republic of checked and divided powers (as rationalized most famously in *The Federalist Papers*) was, in important respects, neither the ideal of Madison himself nor of other Founders, but the product of a political compromise between those who hoped for a national government that would be more streamlined, efficient, and empowered and those who pushed for one that was more aggressively checked.<sup>26</sup> What the Founders bequeathed to us was a Constitution with a distinctive personality, possessed of the simultaneous inclination to corset and to transcend itself. Some – most famously Progressives like Woodrow Wilson (particularly early on, in *Congressional Government*) and their latter day liberal epigones like James MacGregor Burns, Henry Steele Commager, and Sanford Levinson – have sought foundational reforms, even a new Constitution altogether, to streamline the system once and for all by formally eliminating its hard-wired veto points and roosts for countervailing power.<sup>27</sup> Others, however – including the later Woodrow Wilson in *Constitutional Government* – sought functional ways of transcending the system's checks to achieve purposeful, programmatic, even transformative, national objectives.<sup>28</sup>

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*Administration and the Constitution*, 53 PUB. ADMIN. REV. 239, 242 (1993) (arguing that the Constitution creates veto points that constrain discretionary power).

<sup>25</sup> See Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 34 (1936).

<sup>26</sup> See RAY RAPHAEL, CONSTITUTIONAL MYTHS: WHAT WE GET WRONG AND HOW TO GET IT RIGHT 14 (2013); DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING 4-6 (2013); Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3, 32 (1988).

<sup>27</sup> See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 4 (1988); WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (Houghton, Mifflin & Co. 15th ed. 1901) (1885); Sanford Levinson, *Introduction: Imperfection and Amenability, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 3, 9 (Sanford Levinson ed., 1995). Others, more rarely, have proposed throwing out foundational rules altogether. See, e.g., LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 8 (2012); Rana, *supra* note 11.

<sup>28</sup> WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (Columbia Univ. reprt. 1911) (1908). There are others of course – those who do not like either the



The political scientist Adam Sheingate has noted that, across time, complex, heterogeneous institutional environments with ambiguous and uncertain borders like ours are subject to distinctive patterns of constitutional development across time in which the foundational rules fall into complicated patterns of stability and change, settlement and unsettlement, interpretation, reinterpretation, and adjustment.<sup>29</sup> In this iterative process, uncertainties about rules and boundaries are both inherent in the rules themselves and generated by goal-directed political actors in whose interest it is to unsettle and change less advantageous into more advantageous rules.<sup>30</sup> In such an order, political and intellectual entrepreneurs and leaders can draw from a diverse set of traditions of political culture and thought that are robust and continually in flux.<sup>31</sup>

While of course one will not find all resistance permanently vanquished – which would be disturbing in its own right – the history of American constitutional development provides many instances in which coherent constitutional theories work successfully to overcome potential veto points and countervailing centers of power. The Whig’s theory of congressional preeminence sharply limited executive power,<sup>32</sup> just as later the theory of the “modern” presidency put the President at the head of the parties and government.<sup>33</sup> Periods of unified (party) government in times of robust, disciplined parties mitigated against the activating of veto points, as did – under certain institutional conditions – the establishment of autonomous expert

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content of the programmatic policies on offer or the prospects of what, from the Founding forward, they pejoratively called “consolidated” government – who are grateful for the checks the Constitution provides, and labor assiduously to preserve them. *See, e.g.*, PETER BERKOWITZ, *CONSTITUTIONAL CONSERVATISM: LIBERTY, SELF-GOVERNMENT, AND POLITICAL MODERATION* (2013).

<sup>29</sup> Adam Sheingate, *The Terrain of the Political Entrepreneur*, in *FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING* 13, 15 (Stephen Skowronek & Matthew Glassman eds., 2007).

<sup>30</sup> *Id.* at 15, 18-20.

<sup>31</sup> *Id.* at 21; *see also* GREENSTONE, *supra* note 11, at 5. On the important distinction between goal-directed policy “entrepreneurs” and political “leaders,” see Bruce Miroff, *Leadership and American Political Development*, in *FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING*, *supra* note 29, at 33, 33-37. Simply put, this may be the more institutionalist way of saying that ours is a system designed to function by the lights of a “living originalism.” *See* JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>32</sup> *See* *THE AMERICAN WHIGS: AN ANTHOLOGY* (Daniel Walker Howe & David D. Hall eds., 1973); *see also* GERHARDT, *supra* note 7; MICHAEL F. HOLT, *POLITICAL PARTIES AND AMERICAN POLITICAL DEVELOPMENT FROM THE AGE OF JACKSON TO THE AGE OF LINCOLN* (1992); DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* (1984); ROBERT V. REMINI, *DANIEL WEBSTER: THE MAN AND HIS TIME* (1997).

<sup>33</sup> *See* SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL* (1993); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1988).

administration.<sup>34</sup> Considerable consensus was reached in periods in which there were nonideological (or, more accurately, multi-ideological) parties.<sup>35</sup> Congress is quite functional when (nonconstitutional) internal rules allow for strong party or committee leadership.<sup>36</sup> Weak courts, or courts ideologically consonant with the Congress or state governments, are less “activist” in voiding legislation, just as Presidents in tune with Congress are less inclined to exercise their veto.<sup>37</sup> When peak (interest group) associations dominate the policy landscape (for example, as the major labor unions and big business did in the mid-twentieth century), the order is quasi-corporatist, and things get done.<sup>38</sup>

### III. VISIONS OF COHERENCE: SOME POLITICAL SCIENCE THEORY

The American constitutional order puts a premium on effective constitutional argument in politics. In work that I will set out and draw upon here, Victoria Hattam and Joseph Lowndes thus aptly tell us to: “[L]ook to language and culture rather than governance as the locus of significant ‘transformation.’”<sup>39</sup> It is in and through language and culture that political preferences and identities are constructed across time by entrepreneurial

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<sup>34</sup> See COMM. ON POLITICAL PARTIES, TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM, in 44 AM. POL. SCI. REV. supp. (1950), archived at <http://perma.cc/UMM5-XR93>; HENRY JONES FORD, THE RISE AND GROWTH OF AMERICAN POLITICS (1898); V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS (1964); E. E. SCHATTSCHNEIDER, PARTY GOVERNMENT (1977); see also CHARLES M. CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER 2-3, 125 *tbl.5.1*, 238-39 (2000); DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002 (2d ed. 2005); MILKIS, *supra* note 33.

<sup>35</sup> MAYHEW, *supra* note 34.

<sup>36</sup> GARY W. COX & MATTHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE (2007); GARY W. COX & MATTHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES (2005); DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE (1991); see also AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (3d ed. 1979).

<sup>37</sup> See ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (Sanford Levinson ed., 5th ed. 2010); Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

<sup>38</sup> See COLIN CROUCH, INDUSTRIAL RELATIONS AND EUROPEAN STATE TRADITIONS (1994); GØSTA ESPING-ANDERSON, THE THREE WORLDS OF WELFARE CAPITALISM (1990); Gerhard Lehbruch, *Liberal Corporatism and Party Government*, in TRENDS TOWARD CORPORATIST INTERMEDIATION 147 (Gerhard Lehbruch & Philippe C. Schmitter eds., 1979); Philippe C. Schmitter, *Interest Intermediation and Regime Governability in Contemporary Western Europe and North America*, in ORGANIZING INTERESTS IN WESTERN EUROPE: PLURALISM, CORPORATISM, AND THE TRANSFORMATION OF POLITICS 287 (Suzanne D. Berger ed., 1983).

<sup>39</sup> Victoria Hattam & Joseph Lowndes, *The Ground Beneath Our Feet: Language, Culture, and Political Change*, in FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING, *supra* note 29, at 199, 203.

political agents.<sup>40</sup> This creative work of identity and preference formation imagines and enlists visions of coherence as a means of transcending the checks and veto points that are the natural background condition of the American Constitutional order.<sup>41</sup> As such, these visions both are enriched by and draw from the heterogeneity of American political and constitutional practice and thought and bid to transcend it by enlisting political actors in a common movement, program, or party.<sup>42</sup>

Politics, Hattam and Lowndes explain, is structured in significant part by what they call “discursive regime[s].”<sup>43</sup> In certain periods, a particular discursive regime imposing an apparently coherent order will predominate.<sup>44</sup> This order, of course, was forged and imposed at the behest of an allied set of political actors to advance their own visions, goals, and interests.<sup>45</sup> It is important to emphasize that although the most successful alliances, coalitions, and affinities have become naturalized – they seem commonsensical – they were, in reality, “established slowly over decades during which otherwise disparate elements were hitched together through associative chains.”<sup>46</sup>

The objective of political and constitutional challengers is to construct an opposition that will displace the dominant discursive regime with their own as a means of institutionalizing or entrenching their coalition. To do so, they need to undertake effective culture work. This will involve – importantly, perhaps surpassingly so – language and discourse.<sup>47</sup> In less positivistic times, we called this “ideology.”

While some well-known arguments hold the United States to be hopelessly enslaved to a single, overarching liberal ideology, others have found a more varied ideational landscape, both within liberalism and beyond it.<sup>48</sup> Multiple, diverse conventional ideologies – such as, antistatism and (democratic) popular sovereignty, libertarianism and Christian moralism, liberalism and

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<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 208.

<sup>42</sup> *See id.* at 200-03; *see also* Gerald Berk et al., *Conclusion: An Invitation to Political Creativity*, in *POLITICAL CREATIVITY*, *supra* note 21, at 293.

<sup>43</sup> Hattam & Lowndes, *supra* note 39, at 201.

<sup>44</sup> *See id.* at 204. There are echoes here of Marx’s understanding of ideology and Gramsci’s idea of cultural hegemony. *See* 1 ANTONIO GRAMSCI, *PRISON NOTEBOOKS* 179 (Joseph A. Buttigieg ed., Joseph A. Buttigieg & Antonio Callari trans., 1975); KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* 97 (C. J. Arthur ed., 1990).

<sup>45</sup> Hattam & Lowndes, *supra* note 39, at 204.

<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 205.

<sup>48</sup> GREENSTONE, *supra* note 11, at 5; SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 4 (1981); Kramnick, *supra* note 26, at 32; Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions of America*, 87 *AM. POL. SCI. REV.* 549, 549-66 (1993); *see* Pamela Brandwein, *Law and American Political Development*, 7 *ANN. REV. L. & SOC. SCI.* 187, 212 (2011). The most famous statement of liberalism as an iron cage is, of course, Hartz. *See* HARTZ, *supra* note 11, at 9.

republicanism/communitarianism, “ascriptive Americanism” (that is, racism), and commitments to an equality of natural rights, belief in natural law, and insistence on legal positivism – are in continual circulation in American culture and politics. They are perpetually available to cultural and political actors, who can, through what Sheingate calls “combinatorial acts of innovation,” assemble their diverse elements into a political program that wins adherents, and ultimately political power.<sup>49</sup> Hattam and Lowndes argue that this process is constituted through a set of identifiable linguistic innovations: the construction of issue recombinations and chains of issue associations.<sup>50</sup> Others (including me) have emphasized the role of storytelling, including about the relation of the failures, successes, and the challenges of present politics to the past – a goal-directed (re)construction of historical and constitutional memory.<sup>51</sup> This is both an elite and a popular process. At its most effective, under the auspices of elite leadership, it involves a dense interaction between the two.<sup>52</sup>

Contemporary social movement scholars have insisted that we study movements in time, as they move through life cycles.<sup>53</sup> Discursive recombination, Hattam and Lowndes argue, is most significant in the early stages of a political/social movement, before the shift in durable rules of governing authority takes place.<sup>54</sup> The first step involves the introduction and consolidation of ideas.<sup>55</sup>

Arguably, constitutional development is foundationally about the discursive process of recombining and naturalizing issue bundles. Labor rights and civil rights were often at odds until they were reworked, practically and ideologically, by Americans for Democratic Action and within the Democratic Party, into (naturalized) dual dimensions of modern liberalism.<sup>56</sup> Resistance to

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<sup>49</sup> Sheingate, *supra* note 29, at 15.

<sup>50</sup> Hattam & Lowndes, *supra* note 39, at 204.

<sup>51</sup> Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229, 230 (2011) [hereinafter Kersch, *Beyond Originalism*]; Ken I. Kersch, *Constitutional Conservatives Remember the Progressive Era*, in *THE PROGRESSIVES' CENTURY*, *supra* note 11 [hereinafter Kersch, *Constitutional Conservatives*]; Ken I. Kersch, *Roe and the Supreme Court in Thick Ideological Context: The Conservative Evangelical Documentary Films of Francis Schaeffer* (Feb. 15, 2010) (unpublished manuscript) (on file with author); see DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 1 (2003); Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983); Lisa Jardine & Anthony Grafton, “*Studied for Action*”: *How Gabriel Read His Livy*, 129 PAST & PRESENT 30, 30 (1990); see also Eldon J. Eisenach, *Can Liberalism Still Tell Powerful Stories?*, 11 EUR. LEGACY 47, 48 (2006).

<sup>52</sup> Hattam & Lowndes, *supra* note 39, at 204, 211.

<sup>53</sup> SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 3 (2d ed. 1998).

<sup>54</sup> Hattam & Lowndes, *supra* note 39, at 205.

<sup>55</sup> *Id.* at 204-05; see JOSEPH LOWNDES, *FROM THE NEW DEAL TO THE NEW RIGHT* 5 (2008).

<sup>56</sup> See Ken I. Kersch, *The New Deal Triumph as the End of History? The Judicial*

racial liberalism and opposition to the modern welfare state were initially not conjoined positions, but were made so by culture work.<sup>57</sup> Recent scholarship has emphasized the debt the civil rights movement owed to the dynamics of the Cold War.<sup>58</sup> Those who want to win political power and institute governing policy regimes will have to work to bundle and resignify in order to reconstruct allegiances and reconfigure political identities, through a process that is simultaneously concrete and highly theoretical and abstract.<sup>59</sup> They will need to use symbols and stories creatively, framing friends and enemies, loyalties and aspirations – as modern conservatives have done – to create an operative and effective web of meaning.<sup>60</sup>

#### IV. CASE STUDY: MODERN CONSERVATIVE CONSTITUTIONAL ARGUMENT

In the second half of the twentieth century, the conservative movement has been highly successful in first forging an effective coherent constitutional vision and then having that vision adopted by an ascendant Republican Party.<sup>61</sup> From a legal perspective, the process has mostly been discussed as involving the triumph of originalism as an interpretive method.<sup>62</sup> While this is accurate enough in its broadest terms, we can be more precise about the architecture and methods of contemporary originalism as a political and constitutional discourse – as opposed to a normative theory of interpretation.

In their account of the realignment of southern conservatives to the Republican Party, Hattam and Lowndes have emphasized the way in which the discourse at the core of the process was effectively constituted by “discursive recombination” and the use of “associative chains.”<sup>63</sup> In my own work, I have highlighted the ways in which claims of fidelity to the Constitution itself – as against the alleged abandonment of the Constitution by their political opponents – has worked to unify and motivate a philosophically diverse

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*Negotiation of Labor Rights and Civil Rights, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT, supra note 2, at 169.*

<sup>57</sup> Hattam & Lowndes, *supra* note 39, at 205-10 (describing efforts to link Southern white supremacy with Republican support for free market capitalism, shaping the Nixon, Reagan, and Goldwater campaigns, and the worldview of modern conservatism).

<sup>58</sup> MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 6 (2002); KERSCH, *supra* note 2, at 96; AZZA SALAMA LAYTON, *INTERNATIONAL POLITICS AND CIVIL RIGHTS POLITICS IN THE UNITED STATES, 1941-1960*, at 2 (2000); RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 180 (1999).

<sup>59</sup> For an account of President Richard Nixon’s successes in configuring the party loyalties and identities of Reagan Democrats, see KEVIN J. MCMAHON, *NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* (2011).

<sup>60</sup> See Victoria Hattam & Joseph Lowndes, *From Birmingham to Baghdad: The Micropolitics of Partisan Identification, in POLITICAL CREATIVITY, supra note 21, at 221, 221-24.*

<sup>61</sup> *See id.*

<sup>62</sup> *See infra* notes 74-92 and accompanying text.

<sup>63</sup> Hattam & Lowndes, *supra* note 39, at 217-18.

movement.<sup>64</sup> Conservatives have worked self-consciously and aggressively to reconstruct constitutional memory (not only of the eighteenth century founding, but, more recently, of the meaning of the *Dred Scott* case and of Gilded Age and the Progressive Era) to the same end, reshaping the story into a mythic pattern of fall and redemption.<sup>65</sup>

In their account of the realignment of the South toward conservative Republicanism, Hattam and Lowndes offer the illustrative case of the southern segregationist Charles Collins.<sup>66</sup> At the time he began rethinking the relationship between white supremacy and an activist regulatory social welfare state within the southern Democratic Party, it was “natural” or commonsensical for southern Democrats to hold dual commitments both to racial segregation and New Deal liberalism.<sup>67</sup> Acting in his innovative writing and speaking as a political agent, Collins, through acts of “discursive recombination,” newly combined small government and states’ rights commitments through “associative chains” tying opposition to state intervention in the economy with an explicit commitment to white supremacy.<sup>68</sup> His purpose was to generate new political identifications among Southern supporters of Jim Crow through which they could reconfigure an understanding of their social location and interests.<sup>69</sup> The context in which Collins worked was, of course, set by hard-wired political and constitutional structures. But by creatively recombining (multiple) ideological systems, he was nevertheless able to maneuver within these structures in ways that were politically significant to help forge new political identities and alliances, in the process erasing old political and social cleavages and generating new ones.<sup>70</sup> This process of discursive recombination, Hattam and Lowndes contend, was no less than “the ground of politics, the site of change.”<sup>71</sup> “[O]nce the discursive links have been accepted, they take on a common-sense quality, a naturalism that elides their constructed character.”<sup>72</sup> It is through this process that dominant discursive – and, ultimately, political and constitutional – regimes are both displaced and created.<sup>73</sup>

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<sup>64</sup> See Kersch, *Constitutional Conservatives*, *supra* note 51.

<sup>65</sup> *Id.*; see also COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN* 4 (2011); Kersch, *Beyond Originalism*, *supra* note 51, at 279; Ken I. Kersch, *Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in National Review, 1955-1980*, 25 *STUD. AM. POL. DEV.* 86, 99-110 (2011).

<sup>66</sup> Hattam & Lowndes, *supra* note 39, at 205-10.

<sup>67</sup> *Id.* at 206.

<sup>68</sup> *Id.* at 207-08.

<sup>69</sup> *Id.* at 208.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 204 (emphasis omitted).

<sup>72</sup> *Id.* at 218.

<sup>73</sup> See *id.* But see John Milton Cooper, *1912 and All That: From Promoting to Ending*

The forging of an originalist constitutional discourse was a critical part of the modern conservative ascendancy. Prior to the invention of the familiar anti-judicial activist “old originalism” by conservative law professors reacting against the Warren Court,<sup>74</sup> constitutional theorists on the Right had directed the attention of conservatives and would-be allies and converts back to the nation’s eighteenth century constitutional founding. Writing in the long shadow of Progressive Era devaluations of that Founding by Charles Beard and others holding the Constitution to be the handiwork of a self-interested “reactionary oligarchy” with little contemporary appeal, Straussian political philosophers like Martin Diamond joined a cohort of others who insisted that the Founders’ ideas were normatively important and relevant guides for the contemporary United States.<sup>75</sup> Diamond insisted that the Founding was “a beginning that must be re-won in the face of progressivist prejudices that steadfastly reject the beginning as superseded.”<sup>76</sup> He called for a “renewed appreciation of our fundamental institutions and rededication to their perpetuation.”<sup>77</sup>

Over time, a lively debate developed on the Right amongst the Straussians (and others) about the nature and meaning of the Founding. While these debates are too elaborate to detail here, a rough division developed between those (like Diamond and the neoconservative Irving Kristol) who argued that

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*Big Government, in THE PROGRESSIVES’ CENTURY, supra note 11 (dating this work to an earlier period).*

<sup>74</sup> See RAOUL BERGER, GOVERNMENT BY JUDICIARY: TRANSFORMATION OF THE FOURTEENTH AMENDMENT 4-5 (1997); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971); see also Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 675 (2013); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 62 (2009); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 679 (2009) [hereinafter Greene, *Selling Originalism*]; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392 (2013).

<sup>75</sup> DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS (Trevor Colbourn ed., 1974) (collecting essays from the 1940s and 1950s setting out what became known as the “republican” view of the Founding); ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF “AN ECONOMIC INTERPRETATION OF THE CONSTITUTION” 3 (1956); FORREST MACDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 7 (1992) (criticizing Beard’s use of economic data); see CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 17 (1913). The other major Straussian theorists of Diamond’s generation to study American political thought – and the U.S. Constitution – were Walter Berns, Harry Jaffa, and Herbert Storing. See, e.g., WALTER F. BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT 16 (1965); HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 222 (1959); HERBERT J. STORING, TOWARD A MORE PERFECT UNION (Joseph M. Bessette ed., 1995); Martin Diamond, *The Declaration and the Constitution: Liberty, Democracy, and the Founders*, 41 PUB. INT. 39, 39-40, 42-45 (1975).

<sup>76</sup> CATHERINE ZUCKERT & MICHAEL ZUCKERT, THE TRUTH ABOUT LEO STRAUSS: POLITICAL PHILOSOPHY AND AMERICAN DEMOCRACY 215-16 (2006).

<sup>77</sup> Diamond, *supra* note 75, at 45.

the American revolution was at its core a modern, bourgeois revolution, entailing a realistic understanding of man's self-interested nature,<sup>78</sup> and those (like Harry V. Jaffa) who, following and celebrating the constitutionalism of Abraham Lincoln, put the Declaration of Independence's commitment to the equality of natural rights at the core of an aspirational understanding of the Founding.<sup>79</sup> The first group insisted that matters of constitutional structure like federalism and the separation of powers were the paramount features of the United States' constitutional design.<sup>80</sup> The later gave pride of place to rights, understood from a natural rights/natural law perspective.<sup>81</sup> The disagreements amongst partisans of these two positions were vehement: amongst non-law school-based constitutional theorists they continue to the present day.

The second of these schools, in conjunction with the Roman Catholic and Evangelical Christian Right, has been highly successful in effort in constructing the "lifeworld" of the modern Right. One prominent example has been their success in re-signifying the Supreme Court's decision in *Dred Scott v. Sanford*<sup>82</sup> in politically and constitutionally useful ways. For conservatives operating under the framework of the "old originalism" of Robert Bork and Raoul Berger, *Dred Scott* was taken as Exhibit A in a story of the dangers of judicial activism.<sup>83</sup> As such, it was commonly joined in a rogue's gallery with two other abominations of activist judging, *Lochner v. New York*<sup>84</sup> and *Roe v. Wade*.<sup>85</sup> As conservatives ascended to power on the federal bench and near control of the Supreme Court, however, they moved from a reactive "old" to a proactive "new originalism," which placed less emphasis on judicial activism (as measured by the number of laws struck down as unconstitutional) as a problem.<sup>86</sup> New originalists subscribed instead to a more substantive measure of activist judging, holding legislation contravening the Constitution as originally understood by the Founders as ripe for aggressive voiding on the grounds of fidelity.<sup>87</sup> Under the new proactive originalism, activist judges struck down laws that, as assessed by the yardstick of the Founders, should have been upheld, and upheld laws that should have been voided.<sup>88</sup> They held there to be no condemnable activism in judges aggressively voiding laws that

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<sup>78</sup> See ZUCKERT & ZUCKERT, *supra* note 76, at 214, 264.

<sup>79</sup> *Id.* at 221.

<sup>80</sup> See *id.* at 215.

<sup>81</sup> See *id.* at 63.

<sup>82</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV.

<sup>83</sup> See, e.g., William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV 1, 4 (1992) (describing *Dred Scott* as a condemned instance of judicial activism).

<sup>84</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>85</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>86</sup> Greene, *Selling Originalism*, *supra* note 74, at 671-72.

<sup>87</sup> WHITTINGTON, *supra* note 2, at 393.

<sup>88</sup> *Id.* at 384.



did not square with the Founding, no matter how many times they did so.<sup>89</sup> Under this new approach, many contemporary conservatives now reject the old (Progressive) democracy-versus-the-courts framework that underwrote earlier originalist critiques of *Dred Scott/Lochner/Roe* as abominations of counter-majoritarianism. They, for example, no longer hold *Lochner* to have been wrongly decided.<sup>90</sup> And the problem with *Roe* is increasingly being framed less as a problem of counter-majoritarianism per se than as a case study in the perils of secularism – of abandoning “the laws of nature and nature’s God” as the foundation of law and the U.S. Constitution.<sup>91</sup> *Roe* is then linked directly to *Dred Scott* within a wholly new frame: it is presented as a case study in the ways that the abandonment of God’s law as foundation leads to moral abomination (first, slavery; then, abortion).<sup>92</sup>

This sort of constitutional culture work is pervasive on the modern Right, at both the scholarly and popular level. For instance, proponents of natural law as constitutional sheet anchor have built an associative chain joining both *Dred Scott* and *Roe* with the Supreme Court’s infamous eugenics decision in *Buck v. Bell*<sup>93</sup> – where, significantly, given the history of these debates, the Court upheld the law in question, noting that the oft-celebrated “Progressive” justices on the Court, Oliver Wendell Holmes, Jr. and Louis D. Brandeis, voted with the majority, and that the only dissent in *Buck* was from the Court’s only Roman Catholic, Justice Pierce Butler.<sup>94</sup> These decisions are then tied rhetorically to the modern liberal Court’s jurisprudence concerning the

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<sup>89</sup> *Id.* at 393.

<sup>90</sup> See, e.g., DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011); RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006); Hadley Arkes, *Lochner v. New York and the Cast of Our Laws*, in GREAT CASES IN CONSTITUTIONAL LAW 94 (Robert P. George ed., 2000).

<sup>91</sup> Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 38, 57-58 (1997).

<sup>92</sup> *Id.* at 52.

<sup>93</sup> *Buck v. Bell*, 274 U.S. 584 (1923).

<sup>94</sup> See Robert P. George, *Natural Law and the Constitution Revisited*, 70 FORDHAM L. REV. 273, 281-82 (2001). That the author of the Court’s *Dred Scott* opinion, Chief Justice Roger B. Taney, was a devout Roman Catholic is never mentioned. Nor is that fact that it was the Constitution of the Confederate States of America that remedied the (alleged) defect in the U.S. Constitution of not explicitly setting out its basis in God and His laws by providing in its preamble:

We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity *invoking the favor and guidance of Almighty God* do ordain and establish this Constitution for the Confederate States of America.

CONSTITUTION OF THE CONFEDERATE STATES, Mar. 11, 1861, pmb. (emphasis added). In the real world, both slavery and racial segregation were both aggressively defended through appeals to the natural order and God’s law. See Mark A. Graber, *The Declaration of Independence as Canon Fodder*, 49 TULSA L. REV. 469 (2013).

“separation of church and state” (a fiction, they contend, of which the Founders would never have approved), the perils of the expansion of a godless federal bureaucracy, most significantly, into areas involving life and death, like national health care – a nascent sphere in which ungrounded secularists will be newly empowered to impose their own amoral standards to decide who lives and who dies.<sup>95</sup>

Contemporary conservatives are actively rewriting the histories of entire eras and of the grand trajectory of U.S. constitutional development to create congenial terrain for discursive recombination and the forging of new associative chains. Straussian natural rights theorists like Jaffa (and his many “West Coast Straussian” followers) have, for instance, devoted sustained attention to the Civil War era – and, most prominently, to the political thought of Abraham Lincoln.<sup>96</sup> This has been extended outwards to include strong interests in abolitionist and civil rights movement thought (Frederick Douglass and Martin Luther King, Jr., respectively).<sup>97</sup> These deep and serious studies, by Harry Jaffa, Herbert Storing, and others, provide the framework within which mass market and polemical conservatives in books, magazines, on television, and the internet trace associative chains between antislavery constitutionalism and opposition to abortion rights and same sex marriage.<sup>98</sup> Within this framework, conservatives cast themselves as the direct descendants of abolitionists and segregation opponents committed to the timeless truths of natural law and natural rights. If the modern Right sometimes seethes with the rage of William Lloyd Garrison, Charles Sumner, and John Brown, this is no small part of the story.

There is, of course, nothing natural about the significance of Lincoln and antislavery constitutionalism to the modern Right. Facing a strong headwind of both neoconfederatism and libertarianism – neither of which had much use for Lincoln – Jaffa and the others made Lincoln’s constitutionalism and the northern triumph in the Civil War newly significant to contemporary conservative thought.<sup>99</sup> This did not happen quickly. It was the product of an extended discursive process of constitutional theorizing on the Right. Early on, Jaffa, Storing, Walter Berns, and others, citing Lincoln, the Civil War, and the Civil War Amendments as touchstones, took a vigorous stand within the

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<sup>95</sup> Jim Rutenberg & Jackie Calmes, *Getting to the Source of the ‘Death Panel’ Rumor*, N.Y. TIMES, Aug. 14, 2009, at A1.

<sup>96</sup> See JAFFA, *supra* note 75.

<sup>97</sup> See STORING, *supra* note 75; Clarence Thomas, *Toward a Plain Reading of the Constitution – The Declaration of Independence in Constitutional Interpretation*, 30 HOWARD L.J. 983, 985 (1987) (arguing that originalism is not sympathetic to *Dred Scott*, if viewed in light of Douglass’s view of the Declaration of Independence, a view shared by Lincoln and the Founders).

<sup>98</sup> See, e.g., JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* (2013); JAFFA, *supra* note 75; STORING *supra* note 75.

<sup>99</sup> ZUCKERT & ZUCKERT, *supra* note 76, at 219.

conservative movement for an expansive understanding of the constitutional powers of the national government.<sup>100</sup> Over time, however, as the civil rights movement succeeded and white supremacy was discredited, neoconfederate thought became *persona non grata* on the Republican Right (as such, this is the story of the subsequent dismantling of Charles Collins's thought). Jaffa's insistence on the centrality of the Declaration and the equality of natural rights to the Constitution was adopted, however, in time by both libertarian and old southern states rights conservatives.<sup>101</sup> While disagreements remain on the Right concerning constitutional theory, a shared commitment to timeless natural rights (incompletely theorized, to be sure – and usefully so)<sup>102</sup> now joins the Religious Right, libertarians, and neoconservatives. This act of discursive recombination has the added benefit of telling those parts of the coalition formerly tied to neoconfederatism that their commitment to natural rights demonstrates that they are more antiracist than modern liberals.

As I have detailed elsewhere, revisionist histories of the Progressive Era have, in recent years, become a core component of conservative stories of the post-founding trajectory of U.S. constitutional development.<sup>103</sup> Although contemporary conservatives are telling many stories about the Progressive Era and its constitutionalism, a set of key themes predominate in both scholarly and polemical accounts. These histories emphasize the Progressive movement's faithlessness, betrayal, treachery, shifting the moment of abandonment back from Franklin Delano Roosevelt and the New Deal (where modern conservatives had traditionally fixed it) to the Progressive Era, where, as they emphasize, the Founders' Constitution was rejected, not just in fact or by implication, but frankly and proudly, under the auspices of an openly articulated and aggressively heretical political theory.<sup>104</sup> Modern conservatives condemn this betrayal by the Progressives on various grounds: for its impiety, for its antinomianism, and for the bad consequences it will entail for foundational political principles (like liberty).<sup>105</sup> Beyond the overarching

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<sup>100</sup> *Id.* at 197-227 (citing, e.g., JAFFA, *supra* note 75; STORING, *supra* note 75).

<sup>101</sup> See Thomas, *supra* note 97, at 985 (linking originalism with the Declaration of Independence in the context of banning slavery).

<sup>102</sup> Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 47 SOC. RES. 1, 1 (2007); see also JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (illustrating Rawls's notion of "overlapping consensus").

<sup>103</sup> Kersch, *Constitutional Conservatives*, *supra* note 51.

<sup>104</sup> *Id.*; see also ANDREW P. NAPOLITANO, *THEODORE AND WOODROW: HOW TWO AMERICAN PRESIDENTS DESTROYED CONSTITUTIONAL FREEDOM* 248-49 (2012).

<sup>105</sup> See, e.g., John Marini, *Abandoning the Constitution*, CLAREMONT REV. BOOKS, Spring 2012, at 27, 27 ("Because of the success of the Progressive movement, contemporary American politics is animated by a political theory denying permanent principles of right derived from nature and reason."); Johnathan O'Neill, *Constitutional Conservatism During the Progressive Era: The National Association for Constitutional Government*, in *TOWARD AN AMERICAN CONSERVATISM: CONSTITUTIONAL CONSERVATISM DURING THE PROGRESSIVE ERA* 13, 24-25 (Joseph W. Postell & Johnathan O'Neill eds., 2013); Johnathan O'Neill &

allegation of betrayal and repudiation, conservative histories repeatedly level five substantive charges against the Progressives: (1) statism; (2) democratism; (3) elitism; (4) hostility to free markets, business, and accumulated wealth; and (5) racism.<sup>106</sup> The Right's revisionist histories of the Progressive Era are crucial because they provide the terrain upon which conservatives can trace the origins of innumerable contemporary liberal policies – and the histories cast early twentieth-century progressivism as a direct progenitor of contemporary liberalism – to their root in an avowed repudiation of the U.S. Constitution and the principles of its Founders.

Many of the more polemical of the recent conservative accounts of the Progressive Era are generously seeded with references to contemporary politicians and policies. So, for example, in his recent book *Theodore and Woodrow*, Fox News legal analyst Andrew Napolitano condemns Theodore Roosevelt's elitism, citing his mocking of the constitutionalist William Howard Taft as a "puzzlewit" (stupid) in a way, Napolitano explains, "similar to the tactic used by the modern Left to describe Republican candidates such as George W. Bush, Sarah Palin, and Michele Bachmann."<sup>107</sup> The journalist Jonah Goldberg's asserts that the messianic Progressive faith that "the day of the organic redeemer state was dawning" was far more dangerous than today's "obscene moral panic over the role of Christians in public life."<sup>108</sup> Despite what is taught in school, about liberals being committed to intellectual freedom and civil liberties (taught, it is intimated, by unionized liberal teachers in public schools), "nothing that happened under the mad reign of Joe McCarthy [in "silencing dissent"] remotely compares with what [Woodrow] Wilson and

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Joseph Postell, *Introduction: The Conservative Response to Progressivism: Myth and Reality*, in *TOWARD AN AMERICAN CONSERVATISM: CONSTITUTIONAL CONSERVATISM DURING THE PROGRESSIVE ERA*, *supra*, at 1, 3; William Schambra, *The Election of 1912 and the Origins of Constitutional Conservatism*, in *TOWARD AN AMERICAN CONSERVATISM: CONSTITUTIONAL CONSERVATISM DURING THE PROGRESSIVE ERA*, *supra*, at 95-96, 116; Thomas West, *Progressivism and the Transformation of American Government*, in *THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME* 13, 29-30 (John Marini & Ken Masugi eds., 2005).

<sup>106</sup> Kersch, *Constitutional Conservatives*, *supra* note 51; *see, e.g.*, JONAH GOLDBERG, *LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING* 5-6, 22, 144 (2007); NAPOLITANO, *supra* note 104, at 71, 96.

<sup>107</sup> NAPOLITANO, *supra* note 104, at xii, 5, 8. For a discussion of President Woodrow Wilson and the ways in which he allegedly exemplified Progressive elitism, *see* GOLDBERG, *supra* note 106, at 82; NAPOLITANO, *supra* note 104, at 76-77.

<sup>108</sup> CHARLES R. KESLER, *I AM THE CHANGE: BARACK OBAMA AND THE CRISIS OF LIBERALISM* 158 (2013); *see also* GOLDBERG, *supra* note 106, at 87-88; ERIC VOEGELIN, *THE NEW SCIENCE OF POLITICS* (1952); RICHARD M. WEAVER, *IDEAS HAVE CONSEQUENCES* (1948); John Marini & Ken Masugi, *Introduction*, in *THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME*, *supra* note 105, at 1, 1-2.

his fellow progressives foisted on America.”<sup>109</sup> If it were not for the Progressive Era’s democratizing reforms, Napolitano asks, citing the Sixteenth Amendment legalizing the federal income tax and the Seventeenth Amendment providing for the direct election of Senators, would Congress have abused the Constitution’s spending clause as they have ever after?<sup>110</sup> Would the Patriot Act, the Affordable Care Act, or TARP have become law?<sup>111</sup> Through these histories – whose lines of argument make their way down from conservative scholars to mainstream conservative media outlets and email alerts – Michelle Obama’s recommendations on healthy eating, President Obama’s “leadership” on issues like financial and healthcare reform, or calls for an active compassionate federal government are all rooted in the gargantuan constitutional betrayals of the early twentieth century.<sup>112</sup> And Republican intransigence on the budget, federal grants to social scientists, and action on climate change are framed as heroic acts of resistance in defense of the Founders’ Constitution. How successful this constitution-talk is likely to be over the long term remains to be seen. But, even if its advance were halted tomorrow, it has had a powerful run and many triumphs in combining seemingly inconsistent elements narratively and symbolically through rhetoric, discourse, symbols, and stories. On the Right, at least, it has been naturalized “tak[ing] on a common-sense quality, a naturalism that elides [its] constructed character.”<sup>113</sup> As such, as constitution-talk, it has been highly successful.

#### CONCLUSION

Dear Friends of the Claremont Institute,

The shut down of the government has served to remind us once again of the dysfunctional relationship between Washington and the rest of the country. In the past century, a massive regulatory state has been built, governing everything from education to health care, along with a system of entitlement programs that are now bankrupting the nation—and so a fight is in order.

We in Claremont, and many of our friends and fellows, have been making an argument for a return to limited, constitutional government. Unlike many of our colleagues, we believe that this battle must be fought on the field of ideas, not policy.

. . . .

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<sup>109</sup> GOLDBERG, *supra* note 106, at 112-13; *see also* KESLER, *supra* note 108, at 188; NAPOLITANO, *supra* note 104, at 227-32, 234.

<sup>110</sup> NAPOLITANO, *supra* note 104, at 87-88 (discussing the Seventeenth Amendment’s erosion of federalism, leading the federal government to bribe states into passing laws by threatening to withhold federal funding).

<sup>111</sup> *Id.* at 75-78, 84-85, 87, 89, 172-83.

<sup>112</sup> *See* KESLER, *supra* note 108, at 28; NAPOLITANO, *supra* note 104, at 31.

<sup>113</sup> Hattam & Lowndes, *supra* note 39, at 218.

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In this on-going fight we will need a better, smarter conservative movement. The Claremont Institute is unique in fighting to win the battle of ideas, the key to overturning the progressive expansion of government in the 20th century. Think of us as a school dedicated to identifying and educating the conservative leaders of the future and advancing their careers.

. . . .

Your support is critical to our mission. I am grateful for it and encourage you to join us by rededicating yourself to victory in the battle of ideas and a return to the government we deserve.

With warmest regards,

Brian Kennedy

President<sup>114</sup>

Distinctive features of the U.S. constitutional order – characterized by a relatively brief, written Constitution fashioned, *ab initio*, to fragment political power, but with its stipulated boundaries and divisions overlapping, shared, abstract, and uncertain – make it (especially when combined with a tradition of providentialist nationalism in its political thought), highly susceptible to influence through stories about purpose and about how understanding the boundaries in certain ways either advances or thwarts that purpose. Historically, the trajectory of U.S. constitutional development has been shaped in major ways by the enlistment of these stories in political contention, with the victors ultimately enlisting them in framing programmatic public policies and instituting and justifying new constitutional rules.

In recent years, conservatives have been highly successful in telling these stories. Liberals, by contrast, have been doing a poor job of making a comprehensive, affirmative case for an activist liberal government, and particularly for the proposition that such a government would fulfill – as opposed to simply not transgress – foundational constitutional aims.

While there have been a few academic exceptions,<sup>115</sup> when it most matters, liberal politicians have insisted on employing policy arguments in situations that conservatives have framed as constitutional, making little or no reference to the Constitution. In the congressional debates over the constitutionality of

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<sup>114</sup> Email from The Claremont Inst. to author (Oct. 8, 2013) (on file with author). The Institute is a major center devoted to Straussian conservative constitutional theory. See Steven M. Teles, *How the Progressives Became the Tea Party's Bete Noir*, in *THE PROGRESSIVES' CENTURY*, *supra* note 11.

<sup>115</sup> JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 2* (2011) (“Fidelity to the Constitution requires faith in the Constitution.”); SOTIROS A. BARBER, *WELFARE AND THE CONSTITUTION 1* (2003). Ronald Dworkin, of course, also emphasized constitutional arguments – to broad influence – but he largely argued about court-enforced rights as trumps, which in the current context is as bad or worse than nothing. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 132-33 (1977).

the Affordable Care Act, Democratic Speaker Nancy Pelosi expressed shock that anyone would even raise the law's constitutionality as an issue.<sup>116</sup> In the recent government shutdown by Constitution-wielding conservatives in which it could have been very plausibly contended that Congress was abrogating its duty under the Fourteenth Amendment to honor the national debt, neither the President nor Democratic Party leaders made any serious effort to advance the constitutional case politically.<sup>117</sup> While, true to the moldy commitments they have held since the 1950s and 1960s (as justified by John Rawls and Ronald Dworkin in the 1970s), they are ever willing to fashion arcane and tendentious arguments to judges, they have all but ceded constitutional argument in the public sphere to the Right.<sup>118</sup> This has helped reinforce public perceptions that liberals simply don't care about the Constitution, and do not see it a touchstone of the American political order – a perception that conservatives have taken extensive pains over the course of the last decade to reinforce through genealogies of contemporary liberalism that trace its foundations back to the expressly anti-constitutionalist and anti-Founder commitments of early-twentieth-century Progressives.<sup>119</sup>

One outgrowth of this train of liberal political and intellectual failures is a growing commitment to the proposition that the Constitution itself has failed and needs to be either ditched or radically altered through formal means. Conservatives, of course, will see this too – and conferences like this one – as all the more evidence that they have got liberalism right: that it is a disloyal ideology that seeks to dispense with the foundational commitments of the American constitutional and political order.

In their sustained commitment to using (and creatively refashioning and reinventing) American constitutionalism in the public sphere, conservatives are lapping liberals. All I am arguing here is that, if they want to be successful, they need to make serious attempts to engage in effective constitution-talk in the public sphere, of the sort that their progenitors have engaged in throughout American history. Indeed, even if formal changes to the Constitution are warranted – and I do not argue that they are not – such talk will be needed to secure ratification of these changes in the first place. Either way, as modern

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<sup>116</sup> Doug Bandow, Op-Ed., *Constitutional Death for Obamacare? The Left Threatens John Roberts and the Supreme Court*, FORBES (May 28, 2011), <http://www.forbes.com/sites/dougbandow/2012/05/28/constitutional-death-for-obamacare-the-left-threatens-john-roberts-and-the-supreme-court>, archived at <http://perma.cc/8MF7-BXW3>.

<sup>117</sup> See Sean Wilentz, Op-Ed., *Obama and the Debt*, N.Y. TIMES, Oct. 7, 2013, at A27.

<sup>118</sup> There was no shortage of clever legal arguments about how this provision of the Fourteenth Amendment might enable him to raise the debt ceiling unilaterally (the implication being that the argument could win in court). There were very few calls for him to use this argument in political combat discursively or aggressively. See *id.*

<sup>119</sup> See Kersch, *Constitutional Conservatives*, *supra* note 51.

conservatism has demonstrated, in the U.S. context, successful constitution-talk is essential.<sup>120</sup>

Is formal change needed? Constitutional discourse is essential. But it may not be sufficient. However powerful a discursive approach alone may have been to significant constitutional change in the past, it may be plausibly argued that it no longer (as) significant for the future because, in a firm disjuncture between past and present, the institutional conditions of constitutional politics have changed because of what Stephen Skowronek has called “institutional thickening.”<sup>121</sup> The fluid conditions in which discursive politics flourishes as a route to transformational constitutional change may no longer exist. A developmental past, marked by fundamental shifts, even “constitutional revolutions,” may no longer be consonant with the operative conditions of the constitutional present. This theory of disjuncture is held by Adam Sheingate, who emphasizes contemporary partisan polarization, the declining power of political parties in Congress, and a waxing power of small-bore interests, empowered by changes in the financial sector and campaign finance rules<sup>122</sup> – to which I would add both a cascading commitment to the privatization of public functions and a diverse and growing set of plutocrat policy entrepreneurs with strong interests in making public policy through private means. Sheingate argues that the problem is not too little creative political entrepreneurship, but too much.<sup>123</sup> This entrepreneurship “has accelerated the diffusion of authority in the American political system, exacerbating the effects of separated powers and institutional fragmentation. This has produced tensions between the pursuit of individual and collective political goals . . . .”<sup>124</sup> The result is a new disconnect between political leaders and the public, and the rise of deracinated “governance” via “issue networks” as opposed to government.<sup>125</sup> Under these conditions, a proliferation of veto points and regions of micro-governance (increasingly through the delegation of public authority to private actors, both corporate and plutocratic) has trumped the traditional mechanisms of coordination via public authority that had functioned even in a system of dispersed power.<sup>126</sup>

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<sup>120</sup> Contemporary conservatives offering a list of proposed Article V amendments to the Constitution are immersed in the framings of the Right’s constitution-talk venerating the Founders and the Constitution. See LEVIN, *supra* note 1, at 1 (“I undertook this project *not* because I believe the Constitution, as originally structured, is outdated and outmoded, thereby requiring modernization through amendments, but because of the *opposite*—that is, the necessity and urgency of *restoring* constitutional republicanism.”).

<sup>121</sup> SKOWRONEK, *supra* note 2, at 31.

<sup>122</sup> Sheingate, *supra* note 29, at 17, 23, 28 (discussing the impact of these changes on American political development).

<sup>123</sup> *Id.* at 21.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 28.

<sup>126</sup> *Id.* at 21, 27, 29, 31; see also Joanne Barkan, *Big Philanthropy vs. Democracy: The Plutocrats Go to School*, 60 DISSENT 47, 48 (2013); Joanne Barkan, *Plutocrats at Work:*



A second possible objection to my call for a renewed commitment to public constitution-talk on the left as a means of constitutional reform, renovation, and revitalization is that, when it comes to change through discursive constitutionalism, there is a fundamental asymmetry between Left and Right. Simply put, the Liberal Left wants to build and the Right wants to block. What I have shown above (if anything) is that a robustly discursive constitutional politics can be used effectively to stoke fears and resistance and frustrate government action. To this we might add that appeals to the Constitution – and particularly to the American Founding – are, if not exclusively, than preponderantly reactionary: they are biased against liberal policy programs.<sup>127</sup>

I believe that history shows that this is not the case. Moreover, to the extent that institutional thickening has occurred, it is clearly to the benefit of liberals, not conservatives, whose ultimate objective is not simply to block, but to dismantle. Regardless, even if liberals are convinced that hard-wired change is essential – to make the Constitution easier to amend, to reverse the Supreme Court’s decision in *Citizen’s United*,<sup>128</sup> or to limit the terms of Supreme Court justices (or federal judges generally) for example – that change will only be realized through the sort of effective constitution-talk that liberals have, in recent years, failed miserably in undertaking.<sup>129</sup>

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*How Big Philanthropy Undermines Democracy*, 80 SOC. RES. 635, 637 (2013). The trendy “global constitutionalism” literature celebrates precisely this sort of “governance” through issue and policy networks – to the point of all but sweeping the nation itself and national constitutions into the dustbin of history – as the wave of the “constitutional” future. See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 1, 3 (2004); Parag Khanna, Op-Ed., *The End of the Nation State?*, N.Y. TIMES, Oct. 13, 2013 (Magazine), at SR5. This literature is largely the spawn of technocratic minds, where the chief concern is effective policy, with only half-hearted gestures toward issues of popular legitimacy. It seems to be quite attractive to many American liberals, in whose precincts it is one of the “constitutional” visions currently vying for preeminence. See Ken I. Kersch, *Justice Breyer’s Mandarin Liberty*, 73 U. CHI. L. REV. 759, 816 (2006); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 346 (2005).

<sup>127</sup> See COREY ROBIN, FEAR: THE HISTORY OF A POLITICAL IDEA 2-3 (2004); ROBIN, *supra* note 65, at 18-19; see also Rana, *supra* note 11; Brian Tamanaha, *The Progressive Struggle with Courts: A Problematic Asymmetry*, in THE PROGRESSIVES’ CENTURY, *supra* note 11.

<sup>128</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>129</sup> All significant constitutional change, whether via the formal Article V amendment process or through informal “constitutional moments,” is accomplished through constitution-talk. If the Article V route is taken in the current context, it will be most effective when a group of amendments is adopted as a package – as were, for example, the Bill of Rights, the Civil War Amendments, and the Progressive Era Amendments. See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY (2005). I would add that even where the change seems to be cleanly made and targeted at a particular problem, the change can be remarkably feckless without supportive political change – as our experience with the Civil War amendments amply demonstrates.

Conservatives have been very effective in recent years in their constitutional politics. But, in the U.S. political order, no success is permanent. We are living through a (neo-Jacksonian) era of robust interpretive pluralism<sup>130</sup> in which one side is currently – rhetorically, at least – trouncing the other. Conservatives have been highly successful in using the techniques of discursive recombination, associational chains, storytelling, and symbolism and re-signification, to forge powerful visions of coherence. If liberals want to fight this, they will need to get out of the weeds of analytic philosophy, get back in the game, and fight – by fashioning effective “constitutive stories”<sup>131</sup> that work for their country, and countrymen (and women), stories about fidelity and aspiration to the U.S. Constitution.

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<sup>130</sup> Hays, *supra* note 4, at 26.

<sup>131</sup> ROGERS M. SMITH, STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP 67 (2003).