VOTING RIGHTS AND THE “STATUTORY CONSTITUTION”

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I

INTRODUCTION

One way of understanding the capacity of nonjudicial actors to create the operational meaning of our Constitution is to relate the topic to a larger problem perennially plaguing U.S. constitutional theorists, namely, accounting for legal change. Under our conventional professional narrative, the fundamental law of the United States resides in a 1787 document, formally amended twenty-seven times. Yet, no easy reading of that document, including its amendments, could hope to explain why contemporary understanding of our fundamental law differs so drastically from the constitutional law of 1789. The traditional response to this conundrum—identifying courts as the agents of constitutional transformation—depicts radical alterations in U.S. constitutional law as the fruit of two centuries of interpretive activity by the judiciary. Yet this move only plunges us into two further sets of theoretical difficulties.

The first is normative, relating to the legitimacy of change. Any court-centered explanation of constitutional transformation poses the question, from where do the courts derive interpretive authority of this scope? Do judicial interpretations of the Constitution have the status of law? Do they have the same binding force of law as the constitutional text itself? These are difficult, albeit familiar, issues.

The second set of problems, although less often noted, perhaps goes even deeper. Court-centered explanations necessarily reinforce an odd dissonance between what lawyers label our “Constitution” and what a modern constitutional comparativist or legal anthropologist would typically identify as our “constitution,”¹ namely, the system of laws, customs, and conventions that define most fundamentally for the nation what are its organs of government, and their relationship to one another and to the people.² To say that courts have

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1. For purposes of clarity, I will use the capitalized “Constitution” only when referring to the 1787 Philadelphia Charter, as amended, and “constitution” to refer to our fundamental law more generally.

2. See, e.g., GEOFFREY PALMER, *NEW ZEALAND’S CONSTITUTION IN CRISIS: REFORMING OUR POLITICAL SYSTEM* 3-4 (1992); O. HOOD PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 5 (7th ed. 1987).

transformed the constitution is to treat the essence of our constitution as *rules*, and the engine of change as adjudicatory disputes over rules. This focus obscures both those *practices* that may be far more revealing of fundamental assumptions than are explicit rules, and rule disputes that may prove legally definitive, even though they occur outside formal adjudication. Court-centeredness directs our attention to judicial controversies over abortion, school prayer, or affirmative action, for example, where the focus of change is rights, and both the scope and legitimacy of change are most controversial. It fails to draw attention to practices such as the two-party system, the regulatory agency, or social security, which the amended 1787 text does not contemplate, but which are obviously central to understanding how U.S. law currently structures government and its relationship to "the people."

A less court-centered account of constitutional change might help to mitigate both these sets of difficulties. For example, a theory of constitutional change that ascribes to Congress a more prominent transformative role might link constitutionalism with democracy in ways that would reduce anxieties about whether changes in conventional understanding of constitutional meaning presumptively deserve our allegiance as citizens. It would appear less troubling for courts to apply interpretive premises beyond the precise boundaries of the 1787 document if those norms were grounded in democratic practices in Congress that have some claim to authoritative status. Likewise, a theory of change that ascribes constitutional status to practices outside the domain of adjudication could yield a conceptualization of our constitution that is theoretically more sensible than equating our fundamental law with a single text. We might determine that our constitution is actually expressed not in any one text, but rather in a series of documents. These could include not only what we should perhaps call the Philadelphia Charter, but also statutes, judicial opinions, and occasional presidential statements as well.

The purpose of this article is to consider the appeal of regarding certain statutes as having constitutional status. Specifically, I explore the possibility that certain statutes, enacted under special conditions, may lay claim to expressing our fundamental law in a way that entitles them to be included within the range of material relevant to constitutional interpretation.³ By way of demonstration, I focus on the profound series of changes made in voting rights between 1964 and 1971—some through statute, some through judicial opinion, and some

3. Others have observed that certain of our laws enjoy a quasi-constitutional status because they "support the organizational skeleton of the Constitution by developing a more detailed framework," Gerhard Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187 (1985), or otherwise "elaborate [] the constitutional foundation" HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 69 (1990). The Judiciary Act of 1789 is a primary example. Because this article addresses the possibility that statutes may significantly alter the Constitution, not merely confirm or support it, I am posing a more ambitious argument. I am investigating whether certain conditions justify according constitutional status to statutes that depart from, rather than confirm or elaborate upon, preexisting constitutional understandings.

through constitutional amendment following processes prescribed by Article V of the Philadelphia Charter. It is possible to treat all of these documents, not merely those adopted through Article V procedures, as changing the constitution. But because my focus is statutes, I want to consider in particular the prospect that the Voting Rights Act of 1965⁴ not only became part of our constitution, but that it became so in a way more deeply expressive of our constitution than, for example, the 1971 appendage to the 1787 document,⁵ which regulates each state's discretion to set its voting age.

The notion of a statutory constitution is sufficiently unconventional that no sane academic would advance it other than tentatively, and I have some anxiety that advocating so fundamental a change in conceptualization smells of the oft-derided academic penchant for dislodging regular usages simply as a sign of sophistication. It may avoid misunderstanding to state explicitly that this article is not a call for immediate judicial abandonment of conventional constitutional interpretation, nor even a framework for assessing the claims to constitutional status of all legal texts, including judicial opinions and presidential statements. Rather, the article is intended chiefly as a reflection that the time may have arrived when it would genuinely advance the quality of our constitutional discourse to abandon the convention of comprehensively and exclusively designating our formally amended 1787 document as "the Constitution of the United States," and to dethrone it as the sole textual wellspring of constitutional interpretation. I hope to make enough of a case for the utility and appeal of the "statutory constitution" concept to encourage further work in this direction.

II

NORMAL AND CONSTITUTIONAL LAWMAKING

The 1787 Constitution expressly contemplates that the people of the United States will make national law in two different ways. First, under the ordinary process, delineated in Article I, section 7, Congress will make law by enacting bills within its regulatory competence, which, in turn, will be presented to the president for approval, and, if disapproved, perhaps enacted by a two-thirds vote of each House. Second, under the constitutional amendment process, detailed in Article V, Congress, by a two-thirds vote of each House, may propose changes in the Philadelphia Charter, which shall become law if ratified by three-fourths of the states.⁶

Despite the seeming comprehensiveness of this formal dichotomy, "We, the People" may have the capacity to amend our constitution through processes

4. Pub. L. No. 89-110, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1972 to 1973bb-1 (1988)).

5. U.S. CONST. amend. XXVI.

6. Congress, on the application of three-fourths of the states, may also call a convention to propose amendments, which, in turn, would be subject to state ratification. This practice has not yet been employed.

beyond the literal terms of Article V.⁷ As Professor Bruce Ackerman has recently argued, citizens of the United States today regard as part of the Constitution certain rules and practices whose constitutional status cannot be explained in the formalist way. In particular, the Thirteenth and Fourteenth Amendments fit formally within Article V of the 1787 charter only if we ignore a critical fact: The southern states ratified the Amendments pursuant to directives by the national government. Indeed, Congress compelled the southern states in 1867 to ratify the Fourteenth Amendment precisely because, left to their own devices, they refused to do so prior to the 1866 elections.⁸ Nowhere does the 1787 charter contemplate national authority to compel the ratification of constitutional amendments by recalcitrant states. Although no one seriously argues that the Reconstruction Amendments are not part of the Constitution, they did not arrive there through procedures that Article V explicitly authorizes.

Once we recognize that the Constitution may include amendments that respect Article V procedures only superficially, we face the question whether material may be added to the constitution even if not cast as constitutional text at all. To a formalist, the sole New Deal legal changes achieving the status of constitutional amendments were some technicalities involving the President's term and the line of presidential succession, and the repeal of Prohibition.⁹ One might argue, however, that the determination that states need show no more than a rational relationship between a permissible purpose and regulatory means to sustain economic legislation was a constitutional "amendment" of equal significance.¹⁰ So, too, was the national government's undertaking to provide old-age insurance for U.S. workers. These are propositions no member of today's very different government would think to rescind, any more than they would sanction a unicameral Congress or a thirty year-old President.

A claim that the New Deal "amended" the Constitution is *not* a claim that Article V need now be followed if New Deal constitutional politics is to be repealed. The Supreme Court, for example, could decide through normal adjudication to demand strict scrutiny for legislation limiting people's use of their property. Or Congress, through conventional legislative processes, could decide to repeal Social Security. The point instead is that, under any fair assessment of the current legal landscape, neither development is likely to happen, despite the profound political and cultural shifts of the last sixty years. The New Deal innovations are entrenched law. They could not be displaced through "normal politics." If they were rescinded, the populace would recognize the change as a break with the past as profound and fundamental as any legal change following Article V procedures. Thus, to deny New Deal legal innovations their status as constitutional changes is arguably to confuse form and substance.

7. BRUCE ACKERMAN, *WE THE PEOPLE I: FOUNDATIONS* (1991).

8. HAROLD HYMAN & WILLIAM WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENTS 1835-1875*, at 423 (1982).

9. U.S. CONST. amends. XX, XXI.

10. ACKERMAN, *supra* note 7, at 120.

A conventional response might argue that this analysis conflates non-Article V rules and practices that may be fundamentally expressive of U.S. legal culture in some anthropological sense with sources of legal norms that actually qualify as binding law in the juridical sense, that is, for judges deciding cases. One might concede that the Social Security program signals something critical about our legal culture from a political point of view, but dispute that the Social Security Act communicates anything that qualifies as “supreme law” for purposes of constitutional interpretation.

The juridical claim is plausible, however, especially if one takes a particular view of constitutional interpretation. Lawyers in the United States are wont to consider as constitutional law only what emerges from the Philadelphia Charter as compulsory rules. Thus, U.S. commentators are often puzzled by or dismissive of provisions of other nations’ constitutions that affirm government obligations to the people (or citizen obligations to the community), but which are not directly enforceable in court. Such provisions may, nonetheless, have genuine impacts on constitutional interpretation in other countries, because they are deemed to express values that color the meaning of other provisions that courts may implement.¹¹ Legal changes outside the Article V process might amend our constitution simply by supplying authoritative values that color judicially enforceable provisions.

Thus, if Social Security were deemed to be part of our constitution in this latter sense, then its enactment might be deemed to have amended the constitution in a manner relevant to such cases as *DeShaney v. Winnebago Department of Human Services*.¹² The Supreme Court held in that case that a state was not liable for returning a boy to the custody of his biological father in the face of overwhelming evidence that the boy would be subjected to physical abuse. The Court reasoned that the Fourteenth Amendment requirements of due process and equal protection embodied no affirmative state obligation to improve a child’s welfare. Because the state was not responsible for the boy’s birth to an abusive father, it had no duty to rescue him from the severe physical injuries the father ultimately inflicted.¹³

Even if something might have been said in defense of this reasoning in 1868, judicial recognition of the Social Security Act as actually amending the constitutional order might have suggested a different outcome in 1989. The Justices might have considered their task in *DeShaney* as interpreting the meaning of due process and equal protection in light of a now deeply entrenched commitment by the modern U.S. state to protect its citizens systematically against a broad range of harms that are not the state’s fault. The enactment and persistence of public welfare statutes might be deemed to have so amended the constitution as to impose, through due process or equal protection, at least a

11. On the German experience, see Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 855-63 (1991).

12. 489 U.S. 189 (1989).

13. *Id.* at 194-203.

minimal affirmative obligation not to leave life-threatening harms unaddressed. At least this would be so, if the harms are actually brought to the government's attention and are reasonably within the government's capacity to avoid.

A persuasive case for treating the constitution more expansively, however, can not rest solely on the possibility that it would produce different results in some problem cases. At a minimum, any reconceptualization should offer at least two more general advantages: It should facilitate a narrative of constitutional change that is descriptively truer to the national experience than an account that regards as fundamental all of those amendments, but only those amendments, that endured the Article V gauntlet. Further, it should permit an account of the judiciary's work that helps advance current and recurring debates over legitimacy and the nature of constitutional interpretation.

On the latter point, Professor Ackerman takes an important step toward seeing the Supreme Court's job, and predicament, in an important new light. Viewed across an expanse of time extending backward to 1776, not 1787, Reconstruction and the New Deal can be viewed as but two in a series of key moments of constitutional creativity that required departure from the previously approved mechanisms of constitutional amendment. If these latter episodes were "extra-legal" given the text of Article V, they nonetheless pale in their degree of irregularity as compared to the Declaration of Independence and the 1787 Convention itself.¹⁴

In part because each of these moments produced constitutional changes despite obvious procedural anomalies, courts looking back on these moments have been compelled to recognize that the public actors involved in each realized the extraordinary nature of the changes they worked. In Ackerman's terminology, the changes were sufficiently thoroughgoing to generate a new "constitutional regime." None of these moments of change in the prevailing constitutional system was merely a technical alteration, leaving all principles underlying the prior order intact. Instead, each brought into the constitution new assumptions about government and its relationship to the people that cast doubt on the vitality of substantial portions of the previously prevailing constitutional view of things, including provisions that technically were not reworded or amended in an obvious way.¹⁵

Thus, for example, abolition and the universalizing of national citizenship could not long be regarded as mere ornaments on the federalist order of government. Instead, they marked fundamental changes in the common understanding of the relationship of government to the people. So, too, for the Court's lowering of scrutiny for economic legislation. This doctrinal innovation did not merely leave behind the earlier constitutionally embedded *laissez-faire*

14. ACKERMAN, *supra* note 7, at 328-29 n.4.

15. *Id.* at 58-80.

capitalism but with an asterisk,¹⁶ it marked instead a pervasive reconceptualization of the relationships between property, markets, and the state.

At the same time, none of these changes could sensibly be viewed as eradicating the entirety of the prior order.¹⁷ Lest anyone think even the Philadelphia Charter an exception to this rule, a reconsideration of *Marbury v. Madison*¹⁸ is in order. John Marshall's constitutionalization of the British law of mandamus recognized an enduring commitment to pre-1787 ideas of the rule of law that the Philadelphia Charter did not repeal. So, too, Reconstruction did not dislodge the prior regime's emphasis on property rights, and the New Deal did not undermine the founding ideal of freedom from government arbitrariness. Given this backdrop, many important constitutional cases can be expected to force the Supreme Court to face difficult problems of reinterpreting earlier constitutional rules in light of fundamental subsequent amendments or shifts in constitutional regime.¹⁹ To use my earlier example, *DeShaney* would require the Court to interpret equal protection and due process in light of public welfare statutes that substantially, but not entirely, changed fundamental assumptions of the prior legal order about the government's affirmative obligations to the people.

Any analysis of this kind, however, exacerbates the great interpretive difficulty of antiformalism: identifying the authoritative rules being applied. If the constitution, in its larger and more helpful sense, includes legal rules or understandings beyond those generated pursuant to Article V, what—and where—are they? A great benefit of the Article V process is that it supplies a clear rule of recognition for determining when the Constitution is amended and by what words. To argue, by contrast, that the 1936 election amended the constitution is to pose starkly the obvious question: what did the amendment say?

Professor Ackerman attempts to ease the formalist's anxiety by describing an alternative non-Article V amendment process with sufficient clarity to supply some rule of recognition for when a constitutional change has occurred. According to Ackerman, the key to the amendatory process is its denouement in a decisive election.²⁰ This emphasis on elections expresses Ackerman's normative commitment to strong democracy and to the capacity of a united,

16. I refer to "laissez-faire capitalism but with an asterisk" in the way Roger Maris was, for years, the holder of the major league home run record "with an asterisk." That is, the asterisk indicated the presence of some minor qualification.

17. *Id.* at 158-62.

18. 5 U.S. (1 Cranch) 137 (1803).

19. Ackerman thus casts *Brown v. Board of Education* as an exercise in reinterpreting the Fourteenth Amendment's conception of the individual's relationship to the state (as manifested in *Plessy v. Ferguson*) in light of the intervening New Deal ratification of the activist state and the wholly reconceptualized role of public education in that state. ACKERMAN, *supra* note 7, at 142-50. His reading of Justice Douglas's *Griswold* opinion as an attempt to reconcile the founding period's commitments to freedom with the New Deal ratification of the activist state is an incomplete interpretation, but casts that opinion in a provocative and important new light. *Id.* at 150-58.

20. *Id.* at 268, 285-88.

democratic "We, the People" for direct, deliberate political expression, akin to the tenor of a popular assembly.²¹ It also locates constitutional regime change in a moment as discrete as a constitutional convention or state legislative vote.

Unfortunately, the approach makes for dubious history.²² Moreover, Ackerman's search for an articulable non-Article V process that yields both a claim to authority and rules of recognition equivalent to the Article V process threatens to obscure his central insight. That insight is the notion that certain changes in our legal culture, entrenched without literal observance of Article V, are so sweeping in their implications that they force reinterpretation of all that has come before. Not to pursue that reinterpretation is to promote incoherence. For example, aside from the details of the "incorporation" controversy, it would be incoherent to establish universal national citizenship but permit individual states to establish religions. Or, to use an Ackerman example, it would be incoherent to recognize the enormity of the modern U.S. undertaking of public education but to absolve government of responsibility for any stigma that attaches to African-American students by virtue of legally compelled segregation.²³ It is the pervasive doubt cast on old understandings by particular changes in the legal culture that ultimately renders those developments genuinely transformative.

If one accepts the observation as accurate that regime shifting changes in our legal culture can occur outside the Article V process, it would be an amazing coincidence if those changes all occurred in a neat or regular form that could be described in identifiable and predictable stages. A more promising start to locating transformative moments in constitutional development would surely pay less attention to decisionmaking procedure and more to issues of substance and cultural significance. Just as Ackerman persuasively argues that compliance with Article V cannot convincingly be regarded as a solid test of "fundamentalness," we should understand that no essentially procedural model could hope to capture what the "people" as a cultural and legal entity truly regard as their most basic law.²⁴

21. Compare Ackerman's discussion of conventions, *id.* at 173-80, with his view of the role of decisive elections in his schema for "higher lawmaking," *id.* at 285-88.

22. For an excellent historical critique of Professor Ackerman's argument, see Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's We the People*, 9 CONST. COMM. 309 (1992) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE I: FOUNDATIONS* (1991)).

23. ACKERMAN, *supra* note 7, at 142-48.

24. Ackerman's attempt at formally modeling his alternative amendment process, and giving elections a central role in that process, is unnecessary as a matter of democratic theory. A literal conception of "the People" should not so hold us in thrall that we are led to give democracy a plebiscitary and, compared to the realities of politics, an implausibly mechanical interpretation. To do so would be both theoretically problematic and historically anomalous. Despite increasing "democracy talk" over the centuries, a key premise to the Philadelphia Charter—and one we have never abandoned as a nation—is the notion that the interests of the people are best represented through a variety of mechanisms, some of which are not at all democratic in a strong procedural sense, and virtually none of which at the national level is strictly plebiscitary. If the only democracy that counts for legitimacy purposes is direct democracy or its closest cousin, the convention, then this nation has never been seriously democratic. On the other hand, it is not at all obvious that fidelity to the interests and views of "We, the People" requires adherence to a plebiscitary model of procedural democracy.

Consider then the predicament of a judge persuaded of Ackerman's general view of constitutional government, but fearful of treating as constitutional amendments certain "unwritten" assumptions of the legal culture beyond the four corners of any document.²⁵ When non-Article V regime changes occur, where will they find at least some authoritative expression to guide courts engaged in constitutional adjudication?

After the 1936 election, both the Court and Congress began writing texts that embodied the New Deal constitutional transformation. Texts are critical to the U.S. conception of judicial review. A fuller account of constitutional change along Ackerman's lines will likely rest less on the notion of precise, definitive, plebiscitary decisions by the people, and more on the actions of popular movements, elected officials, and judges *who place in writing* the clearest signals of our changing constitutional assumptions. Thus, a court seeking the constitutional meaning of the Fourteenth Amendment can find part of its enduring expression in the Civil Rights Act of 1866, and an important part also in the Gettysburg Address.²⁶ A court seeking the constitutional meaning of the New Deal should consult the Social Security Act of 1935²⁷ and the Administrative Procedure Act²⁸ as significant guideposts. These documents are significantly "constitutional." Adopted through processes of authoritative deliberation, they embody transformations that are deeply entrenched in the legal culture.

Not every detail of a transformative statute, of course, is necessarily of enormous weight. Nor is a document's constitutional significance always perceptible at its publication. But each statute I have cited does embody certain underlying premises now so embedded in our constitutional culture that they are fundamentally expressive of our most important government practices and commitments. Their repeal, even pursuant to authorized legislative mechanisms, would itself mark a momentous change in government practice and self-understanding. If it is sensible to theorize about constitutional change through mechanisms that go beyond Article V amendments, and even beyond formal adjudication, to the initiatives of public actors other than courts, we will still be

25. There has already been considerable debate in the United States, of course, whether we have an "unwritten constitution." See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Such a formulation is somewhat misleading, however, because no one to my knowledge has ever suggested that our constitutional law actually excludes the 1787 text. The question is whether sources of norms other than the 1787 text can also guide constitutional interpretation. In a similar confusion, commentators frequently speak of constitutions, such as the British Constitution, which are not embodied in a single document, as "unwritten." This is misleading, at least in the British case, because the constitution of the United Kingdom "is derived partly from custom, but mostly from written sources, namely reports of decided cases, statutes . . . , and occasionally the writings of jurists" D.C.M. YARDLEY, *INTRODUCTION TO BRITISH CONSTITUTIONAL LAW* 3 (7th ed. 1990). I am arguing here for an analogous conception of the U.S. constitution.

26. See generally GARY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992).

27. Act of Aug. 14, 1935, ch. 531, 49 Stat. 620 (codified as amended at 42 U.S.C. § 301 (1988)).

28. Pub. L. No. 404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, and 7521 (1988 and Supp. III 1991)).

federal elections, whether through districting or other means.²⁹ States likewise had authority to impose requirements for voting in state or federal elections based on age, property ownership, literacy,³⁰ or the payment of a poll tax. Finally, although states could not intentionally disenfranchise voters based on race, they could adopt voting practices for other reasons that would incidentally reduce a racial group's likelihood of electoral success.³¹

By 1971, however, that same treatise would have had to be revised in order to report each of the following changes, which are still accurate statements of law:

- (1) States may not disenfranchise otherwise qualified voters in federal elections based on the nonpayment of a poll tax;³²
- (2) States may not disenfranchise otherwise qualified voters over age eighteen based on age in state or local elections;³³
- (3) The authority of states to depart from an equal weighting of all votes in state and federal candidate elections is judicially reviewable and narrowly circumscribed by the Fourteenth Amendment;³⁴
- (4) States generally may not disenfranchise otherwise qualified voters based on property ownership;³⁵
- (5) States may not disenfranchise otherwise qualified voters in state elections based on the nonpayment of a poll tax;³⁶
- (6) States may not adopt voting practices that have the effect of discriminating by race, whether or not intentionally discriminatory;³⁷
- (7) States may not disenfranchise otherwise qualified voters in state or federal elections based on failure to demonstrate literacy;³⁸ and

29. *Cf. Colegrove v. Green*, 328 U.S. 549 (1946) (plurality opinion).

30. *Lassiter v. Northhampton Bd. of Elections*, 360 U.S. 45 (1959).

31. *Cf. id.* (upholding facial validity of literacy tests).

32. U.S. CONST. amend. XXIV.

33. *Id.* amend. XXVI.

34. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

35. *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

36. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

37. I am fudging somewhat in asserting this proposition as a statement of 1971 law. As explained below, Section 2 of the Voting Rights Act of 1965 originally provided that states may not "deny or abridge the right of any citizen of the United States to vote on account of race or color." Fifteen years following its enactment, a Supreme Court plurality construed this provision as leaving intact electoral changes with a disparate racial impact, but for which no discriminatory purpose could be shown. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). A strong argument exists, however, that the plurality misconstrued the 1965 Act, *id.* at 103-35 (Marshall, J., dissenting), and Congress, in any event, amended Section 2 in 1982 to bar voting practices with racially discriminatory effects. To the extent the 1982 amendment imposed a rule different from Congress's intended rule in 1965, my hypothetical 1971 treatise would be ahead of its time in declaring that the original 1965 law barred disparate racial impact in voting practices. My statement would have been accurate in 1971 if Congress's 1982 amendment is best construed simply as a restoration of the 1965 Act.

38. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 201(a), 84 Stat. 314, 315, made permanent by Pub. L. No. 94-73, § 102, 89 Stat. 400 (1975) (codified at 42 U.S.C. § 1973aa (1988)).

(8) States may not disenfranchise otherwise qualified voters over age eighteen based on age in federal elections.³⁹

The significance of the changes between the first and second set of propositions is so great that describing the law's metamorphosis in this area as "revolutionary" would not abuse the word. But what is especially interesting is that the legal transformation just catalogued arose through three distinctly separate mechanisms of change. Propositions 1 and 2 resulted from constitutional amendments adopted pursuant to the cumbersome procedures of Article V. Propositions 3 through 5 resulted from judicial reinterpretations of the meaning of equal protection. Propositions 6 through 8 resulted from Congress's enactment of the Voting Rights Act of 1965 and the Voting Rights Amendments of 1970.⁴⁰ Yet, if one were to try to discern what had truly changed in U.S. legal culture over this period of time—and thus, the content of our fundamental law—Propositions 1 and 2 would surely appear less fundamental than Propositions 3 through 7, the latter of which do not reflect Article V-type amendments.

Which of the above changes should be deemed to have changed the Constitution? Because of their Article V pedigree, that issue, of course, is not posed with respect to the Twenty-Fourth and Twenty-Sixth Amendments. Yet, assessed against any measure other than formal compliance with Article V, the Voting Rights Act appears a more important, farther reaching, and more widely appreciated change in the law.

A. Forged in Crisis

One would expect regime-changing alterations in the legal culture to arise during periods of economic, social, or political crisis. Only during these occasions can the allure of large-scale change hope to compete with institutional inertia and the appeal of the familiar, which limit reform prospects in ordinary political times. Moreover, it would be most sensible to look for regime-changing alterations among those legal or political reforms explicitly intended to be a sweeping response to crisis.

All of the cited election law changes occurred, of course, against the backdrop of two profound episodes in our national political development, the civil rights movement and the protests against the war in Vietnam. All of these changes qualify as government decisions prompted by generally recognized social and political crises. Of all the developments, however, the Voting Rights Act, with its focus on race discrimination generally, was most clearly perceived as a profound response to crisis and an ambitious attempt to help remedy it.

Compare the two Article V-type amendments in this respect with the Voting Rights Act. The elimination of the federal poll tax had been proposed in every

39. Prior to adoption of the Twenty-Sixth Amendment, the right of 18-year-olds to vote in federal elections was secured by Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 302, 84 Stat. 314, 318, and upheld in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

40. § 302, 84 Stat. 314.

Congress since 1939, often with Southerners among its sponsors.⁴¹ When finally proposed by Congress in 1962, the Twenty-Fourth Amendment, which eliminated the federal poll tax, was not only fighting an old battle, but fighting it in the most limited way. Since only five states still levied a poll tax in 1964,⁴² limiting the poll tax ban to federal elections embodied as much a concession to states' rights in principle as it did a victory for racial equality. Though surely not a trivial victory for the "old" civil rights agenda, it hardly counted as a thoroughgoing attempt to promote political equality for either African-Americans or the poor. It was ratified within eighteen months of Congress's proposal.⁴³

Lowering the voting age to eighteen, meanwhile, was a reaction to college student protest and the Vietnam War. A key argument for the Amendment lay in the unfairness of conscripting young men to the most serious of civic obligations without entrusting those same individuals with the most basic right of civic participation.⁴⁴ Yet, there does not appear to have been any real expectation that the Amendment would succeed in resolving the national crisis posed by Vietnam, nor any popular sense that redressing the particular unfairness of drafting disenfranchised young men would reshape notions of civic participation or obligation in some broad and helpful way. Antidraft protests persisted after the Amendment, just as public doubts concerning the appropriateness of U.S. intervention in Vietnam continued to grow until the point of U.S. withdrawal.

By contrast, the story of the Voting Rights Act is the saga of the civil rights movement. It is the story of Selma—a history of the Southern Christian Leadership Conference's victory in galvanizing public opinion behind the campaign of southern African-Americans for genuine enfranchisement.⁴⁵ The Act's anticipated role in ameliorating the moral and political crisis posed by the civil rights movement could not have been made more plain than in the words and actions of President Johnson in introducing the Act. Two days before its formal submission, Johnson convened an extraordinary joint session of Congress for the purpose of delivering a televised message on voting rights. He declared: "the time for waiting is gone. . . . [O]utside this chamber is the outraged conscience of a nation, the grave concern of many nations and the harsh judgment of history on our acts."⁴⁶ When Johnson submitted his bill on March 17, 1965, the President stated that the Act would "help rid the nation of racial

41. CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, S. DOC. NO. 16, 99th Cong., 1st Sess. 1875 (1982) [hereinafter "CRS ANNOTATED CONSTITUTION"]; STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969*, at 290 (1976).

42. CRS ANNOTATED CONSTITUTION, *supra* note 41, at 1875.

43. Congress proposed the Twenty-Fourth Amendment in September, 1962, and it was ratified on January 23, 1964.

44. See, e.g., S. REP. NO. 26, 92d Cong., 1st Sess. 4 (1971), *reprinted in* 1971 U.S.C.C.A.N. 934-36.

45. See generally DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965* (1978).

46. *Text of President's Voting Rights Speech to Congress*, 23 CONG. Q. WKLY. REP., Mar. 19, 1965, at 445, 446.

discrimination in every aspect of the electoral process.”⁴⁷ The Act would not tinker with the then-current system, but overhaul it. Its impact on the electoral process proved to be, as it was expected to be, far more amendatory than that of either the Twenty-Fourth or Twenty-Sixth Amendment. The number of African-American voting registrants nearly tripled in the Deep South between 1964 and 1989, and the number of African-American elected officials in the seven states originally targeted by the original Act went from fewer than 100 to 3,265.⁴⁸

B. Addressing Fundamental Issues

If any government decision can lay claim to speaking for “the People” in amending the Constitution, that decision, when deliberated, should be widely understood to implicate issues regarding fundamental relationships among government institutions, or between government and the people. Rules governing representation are as basic as any to capturing the relationship of the government to the people and, for that reason, the issues raised by all my enumerated electoral reforms were genuinely constitutional in nature.

Yet, the issues raised in the Voting Rights Act were understood in 1965 to be of constitutional dimension for a reason different from that of mere subject matter. Part of the legislative debate surrounding the Act focused on whether the law could properly be defended as falling within Congress’s power to “enforce” such voting rights as the Constitution already conferred.⁴⁹ Both supporters and critics of the Act agreed that no remedial measures of equivalent ambition had ever previously been legislated.⁵⁰ Opponents went farther, however, explicitly insisting that the Voting Rights Act represented a *de facto* amendment to the Constitution:

we are being asked to pass a bill that would disregard the provisions for amendment of the Constitution as set out in article V thereof, and substitute . . . a bill passed by a simple majority of Congress and ratified by . . . a majority of the Supreme Court of the United States.⁵¹

If one consequence of designating the Voting Rights Act as constitutional in nature would be simply to recognize the magnitude of the change it embodied, that assessment of magnitude would not have come as a surprise to either the Act’s sponsors or critics.

47. *Sweeping Voting Rights Bill Introduced in Congress*, 23 CONG. Q. WKLY. REP., Mar. 19, 1965, at 427.

48. Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7, 43 (Bernard Grofman & Chandler Davidson eds., 1992).

49. H.R. REP. NO. 439, 89th Cong., 1st Sess. 16-19, 76-83 (1965).

50. Congress’s prior efforts to protect voting rights through legislation are reviewed briefly at 111 CONG. REC. 8295-96 (1965) (statement of Sen. Mansfield).

51. *Id.* at 9483 (statement of Sen. Hill).

C. Tension With the Existing System

The argument that any statute (or Article V-type amendment, for that matter) marks a regime change must rely heavily on the notion that the statute rests on premises at odds with key assumptions of the then-current legal regime. It is the tension between the amendatory act and the conventional understanding of earlier practices in the legal culture that renders the amendatory act potentially transformative in a broad sense.

There are three respects in which the Voting Rights Act could claim to pose a transformative tension. First, the Act joined the 1964 Civil Rights Act⁵² in ratifying a vigorous national role in enforcing civil rights at the state or local level. More than *Brown v. Board of Education*,⁵³ the mid-60s statutes worked a nationalization of civil rights responsibility and authority equivalent to the nationalization of economic authority in the New Deal.

Second, the Act significantly altered the operative conception of representative democracy in our public law. To understand this point fully, it is necessary to place the Act in the context of the Supreme Court's reapportionment decisions, which were also significantly transformative.

By 1964, *Baker v. Carr*⁵⁴ and *Reynolds v. Sims*⁵⁵ had rendered the weighting of votes in state and local elections a national affair, and a judicial, as well as legislative, concern. Even more fundamental, however, was the Court's validation of a new operative conception of the idea of representation in our public law. Prior to *Reynolds*,⁵⁶ the theory of political representation manifestly underlying most state electoral systems was one of vicarious group interest representation. This concept of politics, never challenged by the judiciary, understood legislative process as a contest of competing interests—rural versus urban, industrial versus agricultural, and so on—in which individuals were understood to be represented adequately if their interests had some voice in the overall system even if this voice was not subject to their control.⁵⁷ It was wholly permissible prior to *Baker* and *Reynolds* to permit the disproportionate entrenchment of certain interests at various stages of the political process, at least as an implicit tradeoff for a lack of influence or power in other areas.⁵⁸

By contrast, *Reynolds* embraced a far more individualist conception of politics in which the paramount significance of voting is its status as a form of personal expression and individual civic involvement. *Reynolds* described the

52. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 20000).

53. 347 U.S. 483 (1954).

54. 369 U.S. 186 (1962).

55. 377 U.S. 533 (1964).

56. *Reynolds* confirmed one-person, one-vote as the governing rule in elections for state and local officials. *Wesberry v. Sanders*, 376 U.S. 1 (1964), adopted the rule for state-run elections of federal officials.

57. For a survey of patterns of representation in the states prior to the 1960s, see ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 35-98 (1968).

58. Cf. *Lucas v. Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 754-59 (1964) (Stewart and Clark, JJ., dissenting). Technically, of course, it was not clear prior to *Baker* that constitutional challenges to malapportionment were justiciable at all. See *Colegrove v. Green*, 328 U.S. 549 (1946).

legislative process as not merely a contest among interests, but as a process of mediating the political preferences of each and every individual citizen.⁵⁹ Accordingly, an interest could not be deemed appropriately weighted in a legislative structure if that interest were embodied in a number of legislative representatives disproportionate to the number of individual voters sharing that interest.

The Supreme Court's reconceptualization of U.S. politics in the early 1960s was widely understood to be at odds with key assumptions of the then-current legal regime. Efforts in Congress to reverse or limit these decisions, though unsuccessful, were fervent.⁶⁰ Yet the Court's vision was itself profoundly reshaped by the Voting Rights Act, and the Act's theory of politics has endured.

The Act included four sections of predominant importance: the originally temporary and geographically limited ban on the use of literacy as a qualification for voting,⁶¹ enhancement of the Attorney General's authority to prosecute voting discrimination cases,⁶² the requirement that covered jurisdictions clear proposed changes in their electoral systems with the Attorney General,⁶³ and a general command that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure . . . be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."⁶⁴

59. For exemplary passages, consider:

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature.

Reynolds, 377 U.S. at 561.

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Id. at 562.

[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Id. at 565.

60. DIXON, *supra* note 57, at 385-435.

61. The Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438-39 (codified as amended at 42 U.S.C. § 1973b (1988)).

62. *Id.* §§ 3, 10, 79 Stat. 437-38, 442-43 (codified as amended at 42 U.S.C. §§ 1973a, 1973h (1988)).

63. *Id.* § 5, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973c (1988)).

64. *Id.* § 2, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1988)).

These provisions, most notably the Attorney General's preclearance authority, went far beyond the reapportionment decisions in rendering the national government chiefly responsible for guaranteeing voting equality at the state and local level. By making the adjudication of nondiscrimination in voting changes an administrative function, and by shifting to covered states the burden of sustaining their proposed changes as nondiscriminatory, the Act entirely reversed the burden in southern voting discrimination disputes from plaintiffs to defendants. Given the breadth with which Attorneys General have interpreted their jurisdiction to review "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," the incursion into preexisting state discretion has been unprecedented.

It is critical to observe not merely the scope, but also the direction of the new federal intervention. As noted above, the rhetoric of *Reynolds v. Sims* had been wholly individualistic; the notion that voters embody group interests which might or might not be effectively represented regardless of the weighting of their individual votes had been emphatically discarded. The Voting Rights Act effectively recast this aspect of election law by reasserting the salience of group impact to a meaningful measure of equality in the United States. It did so by insisting, at least for states specifically covered by the Act, that no "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" would be permitted unless "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color"⁶⁵ An "effects" test makes sense as a measure of voting equality only if (1) there is recognition of the phenomenon of racial bloc voting and (2) the fairness of the electoral system is assessed with reference to the political power of groups, namely racial blocs.⁶⁶ The Act reasserted the salience of group interests, at least under conditions in which racial majorities vote as if race expresses a group interest.

The Voting Rights Act thus spawned a quarter century of legal interest in "voting dilution," a concept that rejects "one person, one vote" as an adequate measure of political equality in a racially divided nation. Innumerable cases have now invalidated voting systems that, however respectful of "one person-one vote," submerge the potential electoral effectiveness of a cohesive racial minority.⁶⁷ Indeed, following the Voting Rights Act, at least some Justices have

65. *Id.* § 5, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973c (1988)) (emphasis added).

66. This point is well explained in the Court's extended analysis of the effects test explicitly imposed by section 2 of the Voting Rights Act, as amended in 1982. *Thornburg v. Gingles*, 478 U.S. 30, 52-61 (1986).

67. A substantial number of the cases are reviewed briefly in Tim A. Thomas, Annotation, "At-Large" Elections as Violation of § 2 of Voting Rights Act of 1965 (42 U.S.C.S. § 1973), 92 A.L.R. FED. 824 (1986). For more detailed analysis of the evolution of voting dilution litigation, see Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992); Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249 (1989).

come to regard "one person, one vote" less as a good in its own right and more as a prophylactic device designed to reduce the likelihood that electoral competition will be structured to entrench the interests of some political groups while simultaneously disadvantaging weaker groups within the community.⁶⁸ In short, the Voting Rights Act rejected what might have been a wholly neutral and individualist principle of "one person, one vote" and converted it to a principle in which racial minority groups are regarded as deserving of special national protection in their quest for political equality.

There is a third way in which the Voting Rights Act posed a tension with the prior legal system, and it relates to the relative capacities of the Court and Congress to adjudicate the scope of individual rights. In upholding the Voting Rights Act, the Court came as close as it ever has to an explicit statement that Congress could override judicial assessments of the scope of constitutional rights. This is most clearly evident in *Katzenbach v. Morgan*,⁶⁹ which upheld section 4(e) of the Act.⁷⁰ Registered voters in New York challenged a provision that

no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English.⁷¹

In contemplating the voters' challenge, the Court was aware both of its own 1959 holding that literacy tests are not per se unconstitutional⁷² and a New York Court of Appeals determination that New York's English literacy test, in particular, was not unconstitutional.⁷³ The Supreme Court nonetheless upheld the section 4(e) ban as applied to the New York literacy test based on two theories, much debated since by academic commentators.⁷⁴ Under the first theory, Congress could enact section 4(e) as a prophylactic against intentional discrimination that the Court would recognize as unconstitutional, albeit not as discrimination in voting systems. That is, the Act would secure for Puerto Rican New Yorkers "enhanced political power [which would] be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community."⁷⁵ This theory, since called by commentators the "remedial theory"

68. *Karcher v. Daggett*, 462 U.S. 725, 747-48 (1983) (Stevens, J., concurring); *Davis v. Bandemer*, 478 U.S. 109, 164-68 (1986) (Powell and Stevens, JJ., concurring in part and dissenting in part).

69. 384 U.S. 641 (1966).

70. The Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973b(e) (1988)).

71. *Morgan*, 384 U.S. at 643 (paraphrasing 42 U.S.C. § 1973b(e)).

72. *Lassiter v. Northhampton Bd. of Elections*, 360 U.S. 45 (1959).

73. *Cardona v. Power*, 209 N.E.2d 119 (N.Y. 1965), *vacated*, 384 U.S. 672 (1966).

74. See, e.g., Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975).

75. *Morgan*, 384 U.S. at 652.

of *Morgan*, sustains the statutory ban on certain literacy tests not as a protection against voting discrimination but as a remedy for as yet unadjudicated discrimination in the delivery of government services to an ethnic minority.

Under the majority's alternative theory, however, Congress was permitted to reach its own independent view, contrary to that of the courts, "that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause."⁷⁶ Because this theory would explicitly permit Congress to amend the reach of a constitutional guarantee, commentators have called it the "substantive theory" of *Morgan*.

What is remarkable, however, is that under either theory the Court is authorizing Congress to undertake precisely the sort of balancing that the Court itself customarily undertakes in adjudicating disputes over constitutional rights and, further, to reach a judgment contrary to the Court's in doing so. Congress could examine the nature of the burden inflicted on plaintiffs, the weightiness of state interests offered to justify that burden, and the sufficiency of the state's rationale in light of the contribution that the challenged legislation actually makes to the state's asserted interests. Lest the resulting judgment not be recognized as constitutional adjudication, note that the majority felt compelled to add in a footnote:

Contrary to the suggestion of the dissent, [section] 5 [of the Fourteenth Amendment] does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under [section] 5 is limited to adopting measures to enforce the guarantees of the Amendment; [section] 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.⁷⁷

This cautionary note would hardly have been necessary had the Court not recognized that Congress was being permitted effectively to broaden and enlarge the constitutional guarantee of equal protection, at least in the context of voting. The Court was permitting Congress to amend the Constitution.

I have argued in some detail that the Voting Rights Act, in many respects, casts doubt on the vitality of important general premises underlying the pre-Act legal regime. Compare the situation for the Twenty-Fourth and Twenty-Sixth Amendments. As noted earlier, the elimination of the federal poll tax affected only five states—and, even as to those states, it left the poll tax intact with respect to state and local elections. The Voting Rights Act itself went further on this subject, authorizing the Attorney General to bring anti-poll tax litigation

76. *Id.* at 656.

77. *Id.* at 651 n.10.

against the remaining state poll taxes.⁷⁸ History left it to the Supreme Court finally to invalidate all poll taxes as unconstitutional.⁷⁹

As for lowering the voting age to eighteen in state elections, Congress, prior to the Twenty-Sixth Amendment, had already done so for federal elections.⁸⁰ With regard to the issues that the states perceived critical in connection with the Twenty-Sixth Amendment, one commentator's summary indicates the rather undramatic context for ratification:

Confronted . . . with the possibility that they might have to maintain two sets of registration books . . . for federal elections and . . . for all other elections, the States were receptive to the proposing of an Amendment by Congress to establish a minimum voting age qualification at 18 for all elections and ratified it promptly.⁸¹

Such an amendment, ratified within four months of proposal,⁸² and largely as an afterthought to the federal statute, hardly qualifies as transformative.

D. Requiring Consensus Implementation

Part of the evaluation of whether a legal change is of constitutional stature ought to depend on an assessment of the breadth and depth with which the legal culture has become committed to that change. A single governmental institution might well reach an unconventional interpretation of the Constitution which, for various reasons, it could implement within the sphere of its own jurisdiction.⁸³ Yet, one would be reluctant to argue that any branch of government could actually amend the Constitution through unilateral action; the consolidation in a single institution of such profound authority would offer no assurance of careful and broad-based deliberation in the formulation of the amendatory decision.

By contrast, the requirement that multiple levels or branches of government cooperate in the implementation of a putatively amendatory legal decision helps assure that the decision enjoys broad support and is the product of serious and sustained deliberation and consensus. For example, the Supreme Court's apportionment decisions might be deemed constitutionally amendatory and not

78. Pub. L. No. 89-910, § 10(b), 79 Stat. 442 (1965) (codified as amended at 42 U.S.C. § 1973h(b) (1988)).

79. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

80. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 302, 84 Stat. 314, 318, upheld in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

81. CRS ANNOTATED CONSTITUTION, *supra* note 41, at 1881.

82. Congress proposed the Twenty-Sixth Amendment on March 23, 1971. It was ratified on July 1, 1971. *Id.* at 44.

83. See, e.g., Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461-542 (1987) (discussing the different understandings of executive privilege law within Congress, the executive branch, and the judiciary).

just interpretive because they have now been ratified in practice by three decades of routine implementation by all fifty states.⁸⁴

The Voting Rights Act has been ratified by every branch and level of government through a similar commitment of moral and material resources. It is doubtful whether any civil rights law has enjoyed more continuous and vigorous enforcement, irrespective of the White House occupant. Attorneys General have interpreted its provisions broadly,⁸⁵ and the number of judicial decisions upholding enforcement decisions is all but beyond counting. States have largely acquiesced in the federal government's administrative role in policing their electoral processes. Congress reauthorized and significantly strengthened the Act in 1970⁸⁶ and 1982.⁸⁷ There are, thus, no government "hold-outs" against the profound changes the Act contemplated.

E. Political Entrenchment

Acceptance of the Voting Rights Act is not signalled only by the concurrence of all branches of the national government and the cooperation of state governments. The political exertion involved in the adoption and implementation of the decisions has created an enormous counterweight to efforts to trim the Act back through "normal politics."

The Act's legitimacy and durability were demonstrated dramatically in the early 1980s. Although section 5 of the Act, governing post-1965 electoral changes in the South, expressly requires covered states to satisfy a test of voting "effects," Congress did not use the word "effects" in articulating its broader standard of voting equality applicable to all states and to electoral systems predating the Act. This broader statutory command, contained in section 2 of the 1965 Act, provided in somewhat different words that states may not "deny or abridge the right of any citizen of the United States to vote on account of race or color."⁸⁸

This language was susceptible to two quite different interpretations. The first would treat the "non-abridgement" requirement as imposing a test of electoral effects essentially identical to that of section 5. The two sections would then differ only to the extent that plaintiffs challenging state voting practices under

84. The changes worked by these decisions have endured despite the tenuous historical claim made for the "one person, one vote" principle in the early opinions. The historical pedigree afforded "one person, one vote" by the Philadelphia Charter is hardly stronger than the foundation afforded for reproductive rights. Yet, while abortion remains the most contested of issues, it is probably a fair statement that a Supreme Court nominee questioning the authority of the reapportionment precedents would likely be ridiculed as eccentric. For an attempt to question at least the current scope of Supreme Court involvement in policing election districting that acknowledges the Court's extraordinary success in evoking public acceptance of its enterprise, see Peter Schuck, *The Thickest Thicket: Partisan Gerrymandering and the Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

85. See the historical discussion in *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 832-38 (1992) (Stevens, White, and Blackmun, JJ., dissenting).

86. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314.

87. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

88. Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 197 (1988)).

section 2 would shoulder the burden of proving discriminatory effects, while the covered states under section 5 would bear the onus of disproving such impacts. The second interpretation, however, would employ a conception of constitutional harm rooted in the law of intentional torts. Under this view, embraced by the Court in *Washington v. Davis*,⁸⁹ a plaintiff's rights would be abridged by a facially nondiscriminatory government practice, such as an electoral system, only when that practice was animated by a state's discriminatory intent. Electoral effects would be irrelevant under this interpretation. The contested issue in typical section 2 cases would be solely one of government purpose.

The Court was called upon to choose between these interpretations of section 2 in *City of Mobile v. Bolden*.⁹⁰ *Bolden* involved a vote dilution challenge to the City's at-large system for electing city commissioners, a system adopted in 1911 and thus beyond the purview of section 5. A plurality decided that, notwithstanding the effects test imposed by section 5 for covered jurisdictions, the proscription of section 2 was limited to intentional discrimination. An electoral system satisfying the "one person, one vote" command of *Reynolds v. Sims* could thus be nondiscriminatory, even if racial bloc voting rendered it unlikely that a racial minority could ever elect candidates of its choice in numbers proportional to their share of the electorate or, indeed, any at all.

It took Congress but two years to overturn *Bolden*.⁹¹ Congress proceeded to do so despite the landslide election of Ronald Reagan, who vigorously opposed effects-based conceptions of racial equality in employment and education, and a Republican takeover of the Senate which put in the minority those surviving members of the Senate who had championed the 1965 Act.

For nearly all the first half of 1982, Republicans in the Senate were deadlocked between extending the Voting Rights Act without overturning *Bolden*, and adopting a House-passed extension that expressly included an "effects test" under section 2 of the Act.⁹² The Administration had testified originally that it was opposed to any measure of voting inequality that considered effects, on the ground that any such measure would lead to proportional representation.⁹³ Orrin Hatch, chairman of the Judiciary Committee, strongly echoed that view.⁹⁴

89. 426 U.S. 229 (1976).

90. 446 U.S. 55 (1980).

91. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

92. See Nadine Cohodas, *Amid Intense Lobbying, Senate Faces Decision on Voting Rights Act*, 40 CONG. Q. WKLY. REP., Mar. 6, 1982, at 520 [hereinafter Cohodas, *Senate Faces Decision on Voting Rights Act*]; Nadine Cohodas, *Disputes, Maneuvers Delay Senate Voting Rights Markup*, 40 CONG. Q. WKLY. REP., May 1, 1982, at 1017 [hereinafter Cohodas, *Senate Voting Rights Markup Delayed*]; Nadine Cohodas, *Senate Judiciary Approves Voting Rights Bill*, 40 CONG. Q. WKLY. REP., May 8, 1982, at 1041 [hereinafter Cohodas, *Voting Rights Bill Approved*]; Nadine Cohodas, *Senate Passes Extension of Voting Rights Act*, 40 CONG. Q. WKLY. REP., Jun. 19, 1982, at 1456; Ross Evans, *Senate Panel Approves Voting Rights Bill*, 40 CONG. Q. WKLY. REP., Mar. 27, 1982, at 680.

93. Nadine Cohodas, *Administration Draws Fire From Civil Rights Groups on Voting Rights Position*, 40 CONG. Q. WKLY. REP., Jan. 30, 1982, at 170.

94. Cohodas, *Senate Faces Decision on Voting Rights Act*, *supra* note 92, at 520.

The figure who stepped in with a “compromise,” clearly overturning the Rehnquist plurality’s interpretation of section 2, was conservative Senator Robert Dole of Kansas.⁹⁵ To get the bill through the Senate Judiciary Committee, Dole reformulated the effects test to include two key provisions. First, his proposal provided that courts would follow the Supreme Court’s enumerated factors in a 1973 vote dilution case, *White v. Regester*,⁹⁶ in assessing discriminatory effects. Second, the Dole formulation expressly foreswore any requirement of proportional representation. What is critical to note, however, is that neither of these provisions weakened the voting rights position advocated by the opponents of *Bolden*.⁹⁷

With his language adopted, Dole was instrumental in persuading the Reagan Administration to abandon its initial opposition to the reform.⁹⁸ Congress approved and an anti-affirmative action President signed a rewording of section 2 that provided:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.⁹⁹

This extraordinary rebuff to the Rehnquist Court by a Reagan-dominated government is the starkest possible testimony to the extent to which the 1965 change was embedded in our constitution and culture. A sense of the pressure confronted by opponents of the Dole “compromise” to reaffirm their allegiance to the 1965 Act can be glimpsed in the tenor of Senator Hatch’s separate remarks in the Senate committee report:

Whatever my difficulties with the proposed amendments to the Voting Rights Act—and they are considerable—I have supported final passage of the immediate measure. I have done so because I believe that the basic Voting

95. Cohodas, *Senate Judiciary Approves Voting Rights Bill*, *supra* note 92, at 1041, 1042. Also instrumental was Iowa’s conservative Senator, Charles Grassley. Evans, *supra* note 92, at 680.

96. 412 U.S. 755 (1973).

97. For the argument of the bill’s supporters that the 1982 Act did no more regarding section 2 than fulfill the original 1965 intent, see S. REP. NO. 417, 97th Cong., 2d Sess. 17-19 (1982).

98. Cohodas, *Senate Judiciary Approves Voting Rights Bill*, *supra* note 92, at 1041.

99. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134 (emphasis added). A new subsection further provided:

A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id. (emphasis in original).

Rights Act has made an immeasurable contribution toward ensuring for all American citizens regardless of race or color, the most fundamental guarantees of the Fifteenth Amendment to the Constitution.

Having said that, I can merely repeat what I have consistently said during the debate Instead of reinforcing the great constitutional principle of equal protection as did the original Act, the amendments would substitute a totally alien principle of equal results.¹⁰⁰

F. Broader Ramifications

A final variable by which to measure the significance of a legal innovation is whether the assumptions underlying that innovation have become acceptable as premises for subsequent government decisions of importance. This is a fuzzy variable under the best of circumstances, and no final verdict on the influence of Voting Rights Act "values" is possible because the legal culture regarding civil rights enforcement and affirmative action is still in a state of flux. Of course, one "value" associated with the Act, the nationalization of civil rights enforcement, has continued unabated with the enactment of additional antidiscrimination statutes reaching practices beyond voting, and protecting cohorts other than racial groups.¹⁰¹ Further, the Court has recently and repeatedly ratified another Voting Rights Act premise, namely, that Congress possesses extraordi-

100. S. REP. NO. 417, 97th Cong., 2d Sess. 94 (1982) (additional views of Sen. Hatch).

Some will argue that Senator Hatch's views may ultimately prevail. In June 1993, the Clinton Administration withdrew its nomination of Professor Lani Guinier to head the Justice Department's Civil Rights Division because of her alleged support of racially proportional legislative representation, even at the cost of majority rule. Later that month, the Supreme Court decided in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), that states might violate the Constitution by apportioning legislative districts "only as an effort to segregate voters into separate voting districts because of their race." *Id.* at 2832.

I doubt, however, that either of these events marked a significant retrenchment in the government's commitment to the premises of the 1982 amendments to the Voting Rights Act. The Guinier withdrawal followed an organized campaign to distort her ideas and to attribute to her a commitment to rigid proportional representation that the 1982 amendments explicitly reject. See generally Kathleen Quinn, *Author of Her Own Defeat: Lani's Lesson for Academia*, LINGUA FRANCA, Sept./Oct., 1993, at 54; William T. Coleman, Jr., *Three's Company: Guinier, Reagan, Bush*, N.Y. TIMES, Jun. 4, 1993, at A15. The 5-person majority in *Shaw v. Reno* were explicit in limiting their holding to what seemed to them a bizarre instance of racial redistricting in which the members of a newly created North Carolina minority-majority congressional district would have no interest in common other than race. They quoted with approval Justice Douglas' dissent in *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964), which embraced a highly individualist voting rights rhetoric. *Shaw*, 113 S. Ct. at 2827-28. Yet, the majority explicitly rejected a requirement of color-blindness in legislative districting, *id.* at 2224, and "express[ed] no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim," *id.* at 2828. The majority also implied that a state's demonstration that a particular instance of racial gerrymandering was necessary to assure compliance with the Voting Rights Act might satisfy constitutional scrutiny, even though the majority also implied some doubt whether North Carolina could successfully defend its particular legislative map on this ground. *Id.* at 2830-31. For these reasons, *Shaw* does not seem a fundamental cutback in the Court's earlier readings of the Voting Rights Act.

101. E.g., Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (1988)); Age Discrimination Act of 1975, Pub. L. No. 94-135, 89 Stat. 728-32 (codified as amended at 42 U.S.C. §§ 6101-6107 (1988)); Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

nary power to impose changes on state and local electoral systems in the name of voting rights "enforcement."¹⁰²

On the other hand, the commitment of the Voting Rights Act to measuring nondiscrimination at least in part in light of the relative size of the actual shares of whatever is being distributed has had a much more erratic career. Race-conscious remediation in the context of employment, university admissions, and public contracting has not achieved anything like the general acceptance accorded race-conscious remediation in the context of politics.¹⁰³

Having pointed out this degree of uncertainty, however, it is still a fair assessment that the general principle of group representation underlying the Voting Rights Act has become steadily more pervasive in our public life since 1965. Although this is plainly a complex evaluation to attempt, I offer the following bits of evidence: Notwithstanding the legal hurdles to affirmative action in employment, university admissions, and public contracting, the major media, large economic enterprises, the Democratic Party, and significant portions of the higher education community have all pursued affirmative action. They have proceeded vigorously on the assumptions that racial minorities deserve a degree of institutional visibility in important public organizations that is nontrivial in comparison to their share of the population, and that such visibility may be pursued as an explicit goal. There seems widespread operational consensus that, where the "good" being distributed is intangible, such as access, influence, or opportunity, race-consciousness is not an impermissible factor in pursuing equality, so long as the pursuit of equal effects is not unduly rigid. However rocky the legal fortunes of particular affirmative action plans in contexts other than voting rights, consider that the current Democratic President repeatedly promised a cabinet that would "look . . . like America,"¹⁰⁴ and his Secretary of Education pledged prior to his confirmation to overturn the Bush Administration's opposition to scholarships earmarked for minority students.¹⁰⁵ It seems inconceivable that public actors highly sensitive to political opinion would champion affirmative action so explicitly unless the premises underlying the Voting Rights Act vision of equality had taken hold within the political culture to a very substantial degree.

For all the foregoing reasons, the Voting Rights Act is more critically a part of our genuine constitution than are the narrower, less significant provisions of the Twenty-Fourth and Twenty-Sixth Amendments. Still, some may object that

102. *City of Rome v. United States*, 446 U.S. 156 (1980); *cf. Chisom v. Roemer*, 111 S. Ct. 2354 (1991); *Houston Lawyers' Ass'n v. Attorney General of Texas*, 111 S. Ct. 2376 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

103. See generally *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (limiting race-based affirmative action in municipal set aside programs); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (limiting race-based affirmative action in public employment job security); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) (limiting race-based affirmative action in university admissions).

104. See, e.g., *News Conference: Clinton Renews Past Pledges at Post-Election Session*, 50 CONG. Q. WKLY. REP., Nov. 14, 1992, at 3643.

105. Jim Zook, *Incoming Education Secretary Endorses Minority Scholarships as "Good and Legal,"* CHRON. HIGHER EDUC. Jan. 20, 1993, at A20.

I have simply provided a framework for analyzing the state of our political culture, not sources of rules or values to guide constitutional interpretation. When did "We, the People" ratify the Voting Rights Act's constitutional status, and authorize its availability as a basis for constitutional interpretation?

I can think of no formal rule of recognition that will clearly capture when "the People" made the Voting Rights Act part of our Constitution. My intuition locates the key cultural moment at the 1982 reauthorization of the Voting Rights Act, which strengthened its affirmative action commitment at a most unlikely political moment. But, as suggested earlier, the search for a clear rule of recognition may be looking for the wrong thing.

As Professor Ackerman points out, the structure of Article V was intended to insure that the Constitution would be amended pursuant only to some process that would transcend the passions and self-interest of normal, factional politics.¹⁰⁶ Ackerman details at length the many virtues of "higher politics" that he thinks are insured by his post-New Deal formulation of the timing of constitutional changes. It is these virtues that qualify his formulation of the process of constitutional change as legally amendatory. Specifically, Ackerman wants to insure that a constitutional change reflects a wide range of support,¹⁰⁷ that supporters are well-informed and have "conscientiously probed their initial reactions" to a proposed change,¹⁰⁸ and that the proposed change, once adopted, can withstand an intense and prolonged period of "public mobilization and deliberation"¹⁰⁹ concerning its merits prior to formal codification.¹¹⁰

These are helpful criteria for describing constitutional legitimacy, that is, the conditions under which legal change deserves the presumptive allegiance of the people. It also seems to me that the criteria are extremely well satisfied by the experience of the Voting Rights Act. Although no critical election campaign signals the People's precise focus on the Voting Rights Act as proposed constitutional change, editorials,¹¹¹ letters to editors, mail to Congress, and

106. In part, Professor Ackerman prefers his account of constitutional change because, rhetorically, it helps underscore the possibility of transcendent democratic politics. That is, Ackerman would like his fellow citizens to regard Article V not merely as a technical description of lawmaking process, but rather as an embodiment of one of the most profound insights left us by the founding generation, namely, Madison's comprehension of the dual nature of politics. ACKERMAN, *supra* note 7, at 165-99. Most often, politics is but the organized pursuit of self-interest by contending groups or factions. Indeed, the tendency towards faction is so deeply embedded in human nature that the central purpose of constitutional structure as prescribed by Madison is to curb faction and its excesses in government deliberations and administration. THE FEDERALIST NO. 10 (James Madison). But politics can, at high moments, transcend faction. It is possible for a deliberative people occasionally to speak in the name of a public interest greater than a single individual, party, interest, or cause. Ackerman argues that U.S. citizens should prefer his antiformalist narrative of constitutional development because it gives greater recognition to the capacity of "We the People" to govern ourselves, and awakens us to past achievements of the United States speaking as "We the People."

107. ACKERMAN, *supra* note 7, at 274.

108. *Id.* at 272.

109. *Id.* at 285.

110. *Id.* at 288-90.

111. See, e.g., *Right to Vote*, WASH. POST, Mar. 15, 1965, at A16; "We Shall Overcome!" WASH. POST, Mar. 17, 1965, at A20; *Ark of Democracy*, N.Y. TIMES, Mar. 18, 1965, at A32.

mass demonstrations in the mid-1960s¹¹² all reflected the country's deep and prolonged engagement in issues of racial equality, including voting. The creation of the Civil Rights Commission in 1957¹¹³ helped inaugurate what might be considered in retrospect an eight-year deliberative process acquainting the nation with the pervasiveness of voting discrimination and the justness of aggressive remedies. It is difficult to attribute either the Act's initial passage or its subsequent enhancements to the narrowly defined interest of any faction. The Act had to be enacted and approved by politicians chosen through the very electoral process that the Act sought to undermine; if ever there were evidence of public-minded legislation being enacted against the pull of short-term self-interest, this would be it. The Voting Rights Act is an act of "higher politics."

Any antiformalist account of constitutional change will likely have to rely at some point on the courts themselves to identify those legal innovations that have become constitutionally amendatory, as well as the timing of the amendment. Without a clear rule of recognition, the process will be significantly judgmental and, therefore, a source of institutional anxiety. Yet, even if the sensible identification of genuinely amendatory changes in our legal system requires complex political and cultural assessments that may be possible only over a prolonged period of time, there may be no fully attractive alternative. The assessment I have undertaken does identify the Voting Rights Act not merely as a fundamental expression of how our legal system works, but also as an authoritative embodiment of certain constitutional value commitments that were not present in the Constitution in 1787, 1868, or 1937. Failure to attend to these commitments now misconstrues our constitution.

IV

CONCLUSION: WHAT DIFFERENCE DOES IT MAKE?

Having initially confessed my unease with proposing, even tentatively, so profound a shift in conventional thinking about the contents of the constitution, it is impossible to escape wondering what difference such reconceptualization would make. For anthropologists or historians, the answer, if my account is persuasive, may seem straightforward. A reconceptualization of what is *in* the constitution, and how it changes, may simply proffer a more coherent story of how the legal culture operates in fact. Lawyers, though, have other worries: how would it affect the behavior of courts and the decision of cases?

As to institutional behavior, it seems clear that adopting some theory along the lines advanced here would enhance judicial discretion to interpret the Constitution. Those already anxious about judicial discretion will count this a cost. On the other hand, it may be that the increase in interpretive discretion will be but incremental and to some degree less worrisome because changes in

112. The major movement protests are chronicled in JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* (1987).

113. Civil Rights Act of 1957, Pub. L. No. 85-315, § 101, 71 Stat. 634.

the statutory constitution incorrectly identified by courts could, unlike Article V amendments, be undone by statutes as well.

Adoption of such a theory might likewise tempt Congress to seek self-consciously to amend the Constitution through unjustified evasions of Article V. This, too, would be a cost, but perhaps one easily overstated. Most of what Congress wants to accomplish by statute it presumably can and will do within existing constraints. Explicit recognition of greater congressional power to amend the constitutional system through statutes would presumably entail doctrinal developments to constrain the abusive use of such authority in rare cases.

As for the actual decision of cases, we cannot be sure that my proffered reconceptualization is actually necessary or sufficient to change the outcome in any particular dispute. If one reads statutes and constitutional provisions with the narrow positivism of a Justice Scalia or Kennedy, the juridical status of the Voting Rights Act as "statutory" or "constitutional" is unlikely to make a significant difference to its treatment by the judiciary.¹¹⁴ In neither case would the Act's premises likely overflow the Act and influence the resolution of disputes beyond its direct purview.

Nor is the picture much more predictable for nonpositivists. Many already treat the Constitution, as did Chief Justice Marshall in *McCulloch v. Maryland*,¹¹⁵ not as statute-like codification, but as a source of general principles of government. I have argued elsewhere that the dominant interpretive tradition in U.S. constitutionalism is "'aspirationalism'—viewing the Constitution as a signal of the kind of government under which we would like to live, and interpreting that Constitution over time to reach better approximations of that aspiration."¹¹⁶ For those of like mind, to elevate the Voting Rights Act to a source of general principles of government would license the Court to adjudicate subsequent government practices for consistency with those principles. Yet, I think it a fair guess that many such nonpositivists could locate the Voting Rights Act's principles in the existing constitutional text anyway, using some version of modernist constitutional interpretation. To mention again an earlier example, one hardly need accept the Ackerman account of constitutional change to write a persuasive opinion that *DeShaney* was wrong.¹¹⁷

There is, in sum, but a single benefit that I would confidently link to a shift in legal understanding that goes beyond Article V and the judiciary in describing the sources of legitimate constitutional change. As the Constitution ages, and as

114. Compare, e.g., Justice Kennedy's textualism in *Presley v. Etowah County Comm'n*, 112 S. Ct. 820 (1992), construing the Voting Rights Act literally to avoid regulating political practices designed to evade the impact of the Attorney General's Section 5 review, with Justice Scalia's literalism in *Coy v. Iowa*, 487 U.S. 1012 (1988), construing the Confrontation Clause, U.S. CONST. amend. VI, to preclude placing screen between child sexual assault victims and criminal defendant during victim testimony.

115. 17 U.S. (4 Wheat.) 316 (1819).

116. Peter M. Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531, 550 (1988).

117. See generally David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53.

underlying interpretive premises and concerns come to depart increasingly from the understandings of the eighteenth century, there comes to be a growing artificiality to discussions of the Constitution, as if each word on parchment not directly amended by another word on parchment has a fixed and ancient meaning that binds the future. That Constitution becomes more and more difficult to understand as a product of a "People" to whom we, the current U.S. polity, belong. Its hold on us begins to seem both excessive, due to its age, and insufficient, given the authority a constitution should enjoy.

The usual mode of grappling with these difficulties relies on notions of contemporary community sentiment or evolving understandings of reality as ways of bridging old words to new meanings. The advantage of my theory of change is that it disciplines both the originalism that would bind us to every antique word and the modernism that reaches easily to contemporary sentiment in order to evade the past.

Thus, I return to what is Professor Ackerman's perhaps most helpful insight, his recognition of "regime changing" constitutional alterations. By suggesting that developments other than Article V amendments can change the Constitution, we would be endorsing the notion that some system changes do occur that profoundly shift our commitment to much of what came before. Before binding ourselves to the then-conventional meaning of 1787 or 1868 or other text, we should ask: Are we still bound? Has the system remained such that the principles animating those earlier texts still speak to us, and in the same way? I believe that asking questions of this sort would make many decisions, including *Brown*, *Griswold*,¹¹⁸ and *Roe*¹¹⁹ easier to write in a compelling and accessible way.

On the other hand, by locating non-Article V constitutional changes in actual texts—statutes, for example—we would deny that every uncoded shift in popular attitude or political philosophy amounts to constitutional change. Only texts adopted under special conditions would count. Constitutional democracy can not demand that the constitution always be implemented according to the values of "the People" as they experience and express those values at the very moment of a particular adjudication. But constitutional law should implement the values of the people as they have experienced and expressed their values under special, judicially specified conditions characteristic of our higher "constitutional politics." For a theory of this sort to work, however, further analysis of those conditions that yield constitutional change confronts us as an urgent task.

118. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

119. *Roe v. Wade*, 410 U.S. 113 (1973).