Conflict, Coherence, and Constitutional Intent.

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I. A Difficult Relationship: Constitutional Enactment and Constitutional Interpretation

Conflict among individuals in their values, preferences, and perceived interests is the primary basis of a felt need for government. In the American constitutional system, conflict among individuals is often resolved with a widely accepted idea: the majority should rule.

Of course, “majority rule” is not the only principle for resolving conflict in this system. In Marbury v. Madison, Justice Marshall articulated a more fundamental norm: “[T]he people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness . . . .” Throughout America’s

1. Cf. J. Buchanan & G. Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy 43-45 (1962) (Cooperative “collective action” may be required to secure benefits that cannot be secured through purely private behavior. Individual protection against fire, for example, may not be profitable.). Whether government is primarily a mechanism for resolving conflict or for securing the benefits of cooperative action, only its conflict-resolving function is relevant for issues of constitutional law, which after all, are issues only because of conflicting values.

2. It is misleading to say that conflict is “resolved” by legislatures, courts, or any other governmental organ. Rather, while a decision by one governmental body may resolve a disagreement about which competing norms have claims to enforcement, the underlying conflict will remain. Thus, while the Supreme Court decided that political communities have only limited discretion to restrict abortion, see Roe v. Wade, 410 U.S. 113, 164-65 (1973), and thereby may have ended disagreement about currently enforceable norms, it hardly resolved the underlying dispute.

3. The existence of a legal order, or government, requires at least some agreement in recognizing a source of norms that command obedience. Recognition of such a source might be based on its power, or its goodness. Absent such recognition, disputes among individuals would be resolved through the anarchy of exercised force. See McDougal, Lasswell, & Reisman, The World Constitutive Process of Authoritative Decision, in International Law Essays 191, 192 (1981) (distinguishing effective control based on expectations from “naked power”).

4. 5 U.S. (1 Cranch) 137 (1803).

5. Id. at 176; see also The Federalist No. 22, at 152 (A. Hamilton) (C. Rossiter ed. 1961) (“The fabric of the American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE.”); The Federalist No. 49, at 313 (J. Madison) (“the people are the only legitimate fountain of power”); Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 696 (1976) (“The people are the ultimate source of authority; they have parcelled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it.”). Alexis de Tocqueville perceived near universal acceptance of this principle during his early nineteenth century study of America. Americans, he said,

are not always agreed upon the measures that are most conducive to good government, and they vary upon some of the forms of government which it is expedient to adopt; but they are unanimous upon the general principles that ought to rule human society. From Maine to the Floridas, and from the Missouri to the Atlantic Ocean, the people are held to be the source of all legitimate power.

1 A. De Tocqueville, Democracy in America 409 (P. Bradley ed. 1945); cf. Berger, New Theories of “Interpretation”: The Activist Flight from the Constitution, 47 Ohio St. L.J. 1, 3 (1986) (“All federal power must be drawn from the Constitution.”).

This notion of popular sovereignty may have been able to gain such widespread acceptance because it is so vague. Indeed, it begs the fundamental questions, “Who are the people?” and “Who decides who the people are?” These questions, and the difficulty of answering them, reveal that the notion of popular sovereignty itself is a subject of conflict, begging agreement
constitutional history, "the people" have manifested a general preference for democratic decisionmaking, subject to limitations imposed in the name of the Constitution. The preferences of current majorities should not always prevail, because "the people," apparently, do not want such preferences always to prevail.

These basic observations generate questions that have long bedeviled constitutional analysts: What does the Constitution mean? What principles of government have "the people" chosen for their own happiness? How should the constitutional preferences of "the people" be identified? And, less frequently asked, but of more fundamental significance, who are "the people"?

There is a tension between the manner in which members of a political community join to make constitutional decisions and the manner in which courts oft­en have derived and defined constitutional meaning. Framing and ratifying constitutional provisions is a competitive political process. To the extent that individuals disagree, any resolution is likely to reflect compromise. Even if each political competitor pursued an apparently coherent program for public action, the process of political compromise would undermine any possibility for a coherent corporate philosophy. Yet courts, in analyzing the Constitution, frequently purport to resolve social conflict by pursuing the logical implications of certain values to generate consistent, coherent, or "principled" constitutional doctrine.

about how it should be resolved. See infra text accompanying notes 103-09, 248-56, 455-59; notes 94, 306, 318, 325, 370, 376, 443, 455-59.

Throughout this Article, this phrase will be surrounded by quotation marks to emphasize its ambiguity. See supra note 5; see also R.A. Dahl, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 22 (1967); cf. infra text accompanying notes 248-56, 455-59; notes 94, 306, 318, 325, 370, 376, 443.

See, e.g., J. BUCHANAN & G. TULLOCK, supra note 1, at 32 (group decisions are unlikely to reflect rational choices toward specific goals); R.A. Dahl, supra note 6, at 33 ("If the framework of government they finally proposed showed what the Founders could agree on, it also reflected their disagreements and conflicts.").

By "coherent," I mean consistent with some identified value. To the extent that an expressed ideology is coherent, it can be justified as logically derived from one value, or from several consistent values. An ideology lacks coherence to the extent that it is composed of values that conflict with each other.

John Rawls and Robert Nozick might be two people who could claim to advocate a coherent program for public action, although some would disagree. The rest of us have little hope of achieving a perfectly consistent philosophy, derived from a single principle of justice, because we probably have concerns that conflict with, and at some point are more important than, our notions of justice. For a discussion of conflict within individuals, see infra text accompanying notes 51-64.

This is not to say that no statute could possibly reflect some degree of coherent policy. Each individual statute, although itself inevitably reflecting some degree of political compromise, is part of a large collection of statutes enacted during a legislative session and part of an even larger collection encompassed within the entire statutory code. Cf. infra note 224. Major political compromises may be reflected among statutes, rather than within them, so that those favoring a statutory policy might at least get one rational statute, though perhaps at the expense of another policy concern. Thus, individual statutes may well reflect relatively coherent policies, while the statutory code as a whole is full of normative contradictions.

See, e.g., A. BICKEL, THE LEAST DANGEROUS BRANCH 261 (1962) ([T]he Court is the institution best fitted to give us a rule of principle, which we strive to attain along with the principle of self-rule.). This view begs the question of whether, in fact, "we" do strive for principle—at least to the extent that such principle is to supersede the compromises wrought
This judicial process of reasoning from normative premises has a significant potential for distorting the compromises wrought by the politically combative process of constitutional creation\(^\text{12}\) and, thus, for violating a premise that "the people" have a right to govern. Indeed, much contemporary constitutional doctrine—equal protection and privacy, for example—looks little like the political compromises reflected in the original understandings about particular constitutional provisions, precisely because courts have pursued the coherent implications of certain values at the expense of competing values that themselves were essential elements of constitutional meaning at the time of ratification.\(^\text{13}\) As a consequence, adherents to competing schools of constitutional analysis have engaged in vigorous debate about whether and how one can justify such apparent judicial transformation of hard-fought constitutional compromises.\(^\text{14}\)

by the political process. One might assert that the long history of Supreme Court decisionmaking justifies the Court's different modes of analysis. Nevertheless, this history might reflect acquiescence rather than approval. See infra note 111. It would be much more comforting if one could develop an alternative justification for a judicial pursuit of principle, rooted in a basis other than silence after the fact.

In considering justifications for noninterpretive judicial review, Professor Perry articulates a necessary, but insufficient, condition: courts should adjudicate on the basis of a principled analysis and explanation. See M. Perry, The Constitution, The Courts, and Human Rights 25-26 (1982). Perry's notion of "principled" judicial decisionmaking purports to rely on the work of Herbert Wechsler. See id. Yet Wechsler's admonition that courts base their decisions on "standards that transcend the case at hand," Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 17 (1959), does not necessarily require principle in the substance of judicially favored norms, but does at least require reasoned explanation, id. at 15, justifying judicial intrusion on the processes of legislative compromise. See infra note 405.

12. Professor Monaghan argues that the common law method of constitutional interpretation "tends to obscure the compromise character of the enactment, and thus renders opaque its 'imperfect' quality when measured against ideal norms." Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 392-93 (1981). He advocates a statutory approach that fully recognizes "the unprincipled, and imperfect, nature of an enactment produced by compromise." Id.

By advocating a statutory approach rather than a common-law approach, Monaghan assumes as much as those he criticizes. Monaghan must establish his premise as well. Given his own adherence to a principle of popular sovereignty, he must prove that the goal of constitutional analysis, as established by the preferences of "the people" engaged in the political process that he elucidated, is to identify some particular ad hoc compromise, and not to develop the coherence of some preferred norm.

13. How does one justify interpreting the equal protection clause, originally understood as prohibiting only certain specific forms of discrimination against blacks, as prohibiting all discrimination undertaken because of racial prejudice, and indeed, discrimination undertaken because of gender prejudice as well? See infra text accompanying notes 235-441. How does one justify interpreting the first, third, fourth, and fifth amendments, originally understood as relating to specific interests against government intrusion, as implying a broad and general autonomy interest called "privacy"? See infra text accompanying notes 169-232.

14. This problem applies to statutes as well. See Wellington, The Nature of Judicial Review, 91 Yale L.J. 486, 494 (1982) [hereinafter Wellington, Nature of Judicial Review] ("It is standard and appropriate for courts to employ general legal principles to construe the open texture of statutes."). A judicial pursuit of coherence in statutory interpretation is far less problematic than in constitutional interpretation for at least two reasons. First, any judicial error is more easily amenable to legislative correction. See infra note 452. Second, to the extent that statutes pursue instrumental policies rather than intrinsically valued principles, see Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, 222-23 (1973) [hereinafter Wellington, Notes on Adjudication], it is more likely that even a defeated minority would want all of its opponents' program to pass, rather than bits and pieces of incompatible approaches—just in case their opponents are right. See infra note 224.
Some constitutional analysts prefer to focus exclusively on the “intent” of the framers and ratifiers, and treat constitutional provisions as if they were intricate political compromises frozen in time, until formally amended. Raoul Berger, for example, has asserted that because the equal protection clause was originally intended not to prohibit racial segregation, a sound interpretation of the clause, even today, would continue to deem racial segregation as constitutionally permissible.15 Berger also criticizes the notion of constitutional privacy, in which a broad and general right of individual autonomy has been “logically” inferred from the specific protections of the first, third, fourth, and fifth amendments.16

Other constitutional analysts acknowledge the intent of the framers and ratifiers as relevant, but not dispositive, for generating constitutional meaning. Original intent must be related to the needs and conditions of contemporary society. Thus, in Brown v. Board of Education,17 Justice Warren, while finding that historical evidence is “inconclusive” for determining the intent of the framers and ratifiers,18 suggested that “[w]e must consider public education in the light of its full development and its present place in American life throughout the Nation.”19 On this basis, he found racial segregation in public education to violate the fourteenth amendment.20 Justice Brennan has suggested that while courts should “look to the history of the time of [the Constitution’s] framing and to the intervening history of interpretation[,] . . . the ultimate question must be, what do the words of the text mean in our time.”21 Thus, Brennan supports the notion of constitutional privacy in part because notions of sexual autonomy are logically related to values underlying the protection of speech and religion and, in today’s social context, seem to deserve constitutional protection as much as did speech and religion in the era of the framers and ratifiers.22

In considering whether courts should treat statutes as materials for common law development according to judicial perceptions of prevailing social norms, Dean Calabresi has noted that “[a] statute when passed frequently represents a majoritarian decision to favor a particular group, or to compromise among groups despite any inconsistency of treatment this may create with the legal topography.” G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 106 (1982) (emphasis added). Thus, an ideal of “consistency” with certain principles may well be at odds with an ideal of democratic rule. Resolving by the political process particular issues about which there is substantial dispute must yield ad hoc compromise. Whether “the people” wish the courts to develop consistency-coherence—in statutes is an issue of legislative intent. Whether “the people” wish the courts to develop coherence in constitutional principles is an issue of constitutional intent.

15. See R. BERGER, GOVERNMENT BY JUDICATURE 166-92 (1977). Berger acknowledges, however, that it would be “utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions, for example, have aroused in our black citizenry . . . .” Id. at 412-13; see also Monaghan, supra note 12, at 364-65.
18. Id. at 489.
19. Id. at 492-93.
20. Id. at 495.
22. See Roberts v. United States Jaycees, 468 U.S. 609 (1984). In Roberts, Justice Brennan inferred a constitutional right of “intimate association”—essentially an aspect of another similarly generated constitutional right called “privacy,” see infra text accompanying notes 167-215—by referring to the logical implications of other rights, such as speech and religion, that also afford emotional enrichment. Id. at 618-20.
Still other constitutional analysts emphasize a philosophical pursuit of normative coherence in generating constitutional meaning, relatively abstracted from the intricate political concerns either of those who framed and ratified constitutional provisions or of the electorate today. Ronald Dworkin, for example, has asserted that there must be a "fusion of constitutional law and moral theory" if there is to be a genuine advance in constitutional analysis. David Richards believes that based on "moral theory," the Constitution should be interpreted as providing rights to engage in various sexual activities. "[T]he unwritten constitution which gives sense to the constitutional design," provides the "inner moral coherence in the development of the right to privacy." None of these approaches, however, has been justified with adequate attention to the question of who has the right to establish principles of government for their own happiness. Raoul Berger fails to explain why the intricacies of past constitutional compromises should forever determine the meaning of particular constitutional provisions and, indeed, why past constitutional choices should today have any legal consequence at all. To
the extent that analysts such as Chief Justice Warren and Justice Brennan have felt bound by past constitutional choices, they also have failed to explain why past constitutional choices should have any contemporary legal significance. Furthermore, to the extent that they have departed from past constitutional choices, these analysts have not explained why contemporary social circumstances should be deemed relevant for the purposes of constitutional interpretation. Thus, they cannot justify which aspects of contemporary political society they have chosen as relevant for interpreting the Constitution.29 Similarly, Ronald Dworkin and David Richards do not suggest why their philosophies of justice should define constitutional meaning, despite generating constitutional doctrines that not only are more coherent than those chosen by past constitutional majorities, but also have no necessary relationship to the complex and competing values of contemporary political society.30 One might trace the indeterminacy of each

self-justification would hardly be satisfying. Cf. infra note 443. Indeed, reference to the intent of past decisionmakers begs the question of to whom the premise of popular determination refers. Who are “the people” with the right to establish principles of government for their own happiness? See infra text accompanying notes 93-109, 248-56; notes 306, 318, 325, 370, 376, 443.

29. In Brown v. Board of Educ., Warren compared the status of public education in 1954 with its status in 1868, 347 U.S. 483, 489-93 (1954), without considering why a comparison of such status is analytically significant and, therefore, without any basis for determining how such a comparison should be analytically significant. Implicit in Warren’s opinion is the proposition that public education is more important to people today than in 1868. Id. at 493 (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”). This begs the crude response, “so what?” Does Warren mean to suggest that if public education had been as important in 1868 as it is today, the framers and ratifiers would have chosen to prohibit racial segregation in education? If so, does he mean to suggest that the basis for the framers’ and ratifiers’ choices of those contexts in which discrimination would be prohibited was the importance of the rights in those contexts to blacks? If so, why the original understanding that the equal protection clause would not prohibit racial discrimination in voting? Should Warren have considered what values might have impelled the framers and ratifiers to limit the protections accorded to blacks by the fourteenth amendment? Does Warren, instead, mean to suggest that because education is so much more important today than in 1868, he is discarding the past constitutional choice as irrelevant? If so, whose constitutional values is Warren applying, and how is he inferring them?

Justice Brennan leaves similar questions unaddressed in Roberts v. United States Jaycees, 468 U.S. 609 (1984). Brennan suggests that the “emotional enrichment” that people gain from small, family-like associations are constitutionally protected, see supra note 22, but does not explain why constitutionally significant “emotional enrichment” extends beyond speech and religion, which are mentioned in the first amendment, to small, family-like associations, which are not mentioned in the first amendment, but fail to extend to other sources of “emotional enrichment” that are not mentioned in the first amendment. 468 U.S. at 619-620.

30. Ronald Dworkin justifies his resort to moral theory by pursuing the implications of “taking rights seriously.” Whether or not his rigorous logic truly captures the implications of taking rights seriously, his approach begs the question of whether “the people” want to take rights seriously. See R. DWORKIN, supra note 25, at 205.

In a later work, Dworkin seems to acknowledge this question, and attempts to justify his relentless pursuit of coherence in law. See R. DWORKIN, LAW’S EMPIRE (1986). He posits that “we” have a notion of “fairness,” by which he means a norm that looks something like democracy—a right of each individual to participate equally in public decisionmaking. See id. at 177-78. He also posits that “we” have notions of “justice,” which consists of each individual’s preferred morality. See id. He notes that fairness may lead to results that most voters might view as not perfectly just, simply because the product of fairness is political compromise. See id. He terms these compromises “checkerboard solutions.” See id. at 178-79.
Dworkin posits that "we" are uncomfortable with the checkerboard—that in addition to the values of fairness and justice is a third value, "integrity." See id. at 183. Integrity is a desire for normative coherence, for consistent adherence to principle. See id. at 183-84. Indeed, Dworkin posits that:

many of us, to different degrees in different situations, would reject the checkerboard solution not only in general and in advance, but even in particular cases if it were available as a possibility. We would prefer either of the alternative solutions to the checkerboard compromise.

*Id.* at 182 (emphasis added).

Even assuming that Dworkin has correctly identified a broadly based value in American society—and I believe he has—one wonders whether he overestimates its significance relative to other concerns, whether concerns of justice, fairness, or simply expedience. If some people, indeed, did prefer the fully unjust moral alternative to a compromise that is half just and half unjust, they could vote in such a way as to ensure that the fully unjust alternative was selected in preference to the checkerboard. But even as Dworkin notes, see *id.* at 184-85, checkerboard solutions are pervasive in American politics. The original understanding of the fourteenth amendment, for example, is a classic checkerboard. See infra notes 240-42 and accompanying text. Although this does not refute that people have some concern for political integrity, it does suggest that concerns for integrity are less significant than Dworkin would hope.

Dworkin attempts to deal with this problem by reconceptualizing the political community from a collection of individuals into a single moral agent. See R. Dworkin, supra, at 167-75. Through this "personification" of the community, *id.* at 168, Dworkin judges the community as he would judge an individual. While a community's checkerboard can otherwise be explained as a function of political compromise, hence making injustice a function of fairness, an individual's checkerboard can be explained only in terms of the individual's own sense of justice—an inadequate commitment to justice that might be termed hypocrisy.

The "inadequacy," however, is from an observer's perspective, not necessarily from the perspective of the individual, himself. Indeed, the individual might acknowledge that his value scheme and choices are hypocritical, in the sense that he chooses to compromise his concepts of morality to competing concerns that might be simply mundane and expedient. See infra text accompanying notes 57-64, 274-86.

But if this is "hypocrisy" that the individual—or the community personified—chooses, what does Dworkin, as the observer, intend to do about it? He can either accept it, or try to mandate less hypocrisy—more integrity—against the individual's will. Although one may perceive a necessary evil when a community's majority forces individuals to make choices against their will, see supra note 1 and accompanying text, one might be less likely to characterize so benignly a philosopher's effort to impose integrity on an unwilling individual. Thus, even transforming the community into an individual with the notion of "personification" does not vitiate the need to justify taking the community farther than it wants to go—although personification does make the value of fairness (democracy or some other principle for resolving interpersonal conflict) within the community irrelevant. Indeed, I suggest that personification of the community clarifies the need for justifying an unauthorized pursuit of normative coherence, for it sharpens the issue of fairness as between a philosopher and the community he would seek to lead. Can the philosopher justify taking two votes against the single vote exercised by the personified community? See infra text accompanying notes 57-64.

The foregoing should not be taken to suggest that individuals, or groups, could not choose to be led toward a more coherent value scheme. Indeed, I believe they can, do, and have. This proposition, discussed as the notion of self-constraint, will be pursued throughout the remainder of this Article. I suggest only that in the context of disagreement about how far to pursue coherence or integrity, one must justify the mechanism employed for determining which competing value will prevail. Cf. infra note 456.

David Richards' approach is blatantly apolitical. Richards identifies a value, such as equal concern and respect, see Richards, supra note 23, at 977, and pursues one logical implication after another, without considering whether "the people" who create constitutional provisions want quite so much weight placed on that particular value (assuming that Richards has...
goals of "constitutional interpretation" should be,\textsuperscript{31} given the problem of conflict to which government is a response.

This Article considers whether and how the product of political combat—constitutional provisions reflecting a series of ad hoc compromises—can be judicially transformed into a normative scheme more coherent—more "principled"—than the framers and ratifiers originally chose, consistent with a premise that "the people" have a right to govern.\textsuperscript{32} Part II of the Article seeks to provide a basis for a more comprehensive understanding of "original intent" by examining the relationship between different types of constitutional choices and different types of democratic discretion. It poses a question of fundamental motivation: Why would a constitutional majority of "the people"\textsuperscript{33} want to restrict the everyday political discretion of "the

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    \item accurately identified the value as a constitutional concern) at the expense of other competing concerns, or indeed whether it matters what "the people" think. \textit{See id. at 922-1014.}
    \item The conflict among these three camps is particularly significant today as Raoul Berger's approach of frozen historicism has shaped the views of Edwin Meese and Ronald Reagan, who, in turn, are shaping the federal judiciary. On Sept. 12, 1986, for example, in the midst of proceedings toward the confirmation of Chief Justice Rehnquist, William Bradford Reynolds, Assistant Attorney General for civil rights, openly attacked Justice Brennan's judicial methodology. He charged that Justice Brennan's view of the fourteenth amendment reflects a radically egalitarian jurisprudence. It is a theory less concerned with the past or the present than with the future. It is a theory less solicitous of the Constitution's structural arrangements than it is of a Justice's appreciation of evolving moral standards. It is a theory that seeks not limited government in order to secure individual liberty, but unlimited judicial power to further a personalized egalitarian vision of society. \textit{N.Y. Times}, Sept. 13, 1986, at A10, col. 5. For distinctions between the Berger approach and that of Chief Justice Rehnquist, see \textit{infra} text accompanying notes 129-44.
    \item One alternative that might quickly dispose of the issue would be to define "the people" as being Raoul Berger, or Justice Brennan, or Ronald Dworkin. This would justify each analyst's approach, respectively. The difficulty, of course, would be justifying any of these alternative definitions of "the people." \textit{See infra} text accompanying notes 458-59. For other possible ways of defining "the people," see \textit{infra} text accompanying notes 93-107, 248-56; notes 306, 318, 325, 370, 376, 443.
    \item Professor Unger points to the limits of coherence that, in his view, must characterize any body of law:
        \textit{[I]}t would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross-purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory. This daring and implausible sanctification of the actual is in fact undertaken by the dominant legal theories and tacitly presupposed by the unreflective common sense of orthodox lawyers.
        \textit{Unger, The Critical Legal Studies Movement,} \textit{96 Harv. L. Rev.} 563, 571 (1983). This observation may reflect the fact that ordinary people lack the capacity to achieve a "richly developed normative theory" in the manner of philosophers. It also may indicate that ordinary people do not necessarily view normative consistency as an ideal that must be maintained at all costs. \textit{Cf. supra} note 30. Rather, individuals have many conflicting concerns for justice and personal gratification. Their concern for justice may not always prevail.
    \item By "constitutional majority" I mean a national majority sufficient to satisfy the requirements of article V. This is to be contrasted with the notion of a "congressional majority," or a "national political majority," by which I mean a national majority sufficient to satisfy the requirements of articles I and II. \textit{Cf. Ackerman, The Storrs Lectures: Discovering the Constitution,} \textit{93 Yale L.J.} 1013, 1051-57 (1984) (processes other than those prescribed by article
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people"? The essence of that fuller conceptualization of an original understanding involves not simply awareness of the substantive values that might have motivated a constitutional majority of "the people" but, equally important, awareness of why the constitutional majority of "the people" might have determined that their substantive concerns should be left for local political resolution, or should be resolved in everyday national politics through Congress, or should be resolved in extraordinary national politics through constitutional mandate.

Part II then suggests that members of a national majority who wish to frame and ratify constitutional provisions toward restricting ordinary political discretion might act with two distinct motivations. First, members of a national majority might seek simply to constrain the political discretion of local majorities that disagree with national values (constraint of others). Second, members of a national majority might seek to constrain the political discretion both of dissenting localities and of themselves, toward serving ideals that might be vulnerable in everyday national politics (constraint of self). This notion of self-constraint suggests that individuals recognize a tension within their value schemes, and that they wish to favor some of their own competing concerns, at the expense of others, to a greater extent than they otherwise would in everyday decisionmaking. The Article posits that the choice to pursue national values by constitutional mandate, rather than by authorizing Congress to legislate, can reflect a desire among a constitutional majority of the nation for self-constraint—a desire to vindicate certain favored values to a greater extent than Congress could be trusted to achieve—in other words, to a greater extent than the national majority trusts itself to achieve in ordinary, everyday politics.

After suggesting this basis for better understanding the meaning and implications of the framers' and ratifiers' intent—the "original understanding" about various constitutional provisions—Part II further probes the premise that constitutional meaning must be based on the values of "the people." It examines the relationships between past constitutional majorities, present ordinary political majorities, and present potential constitutional majorities. Who are "the people" possessing the right to establish principles of government for their own happiness? Does the past have the right to bind the present? This section suggests an explicit goal for

V may be sufficient to establish constitutional amendment). For an examination of Ackerman's thesis, see infra note 233.
34. See infra text accompanying note 51.
35. See infra text accompanying note 52.
36. See infra text accompanying notes 53-56.
37. See infra text accompanying notes 65-92. This analysis reflects the proposition that the essence of constitutional policymaking involves choosing the political forum in which individuals want political disputes to be resolved. Should particular issues be resolved in the forum of local politics, the forum of congressional politics, or the forum of constitutional politics? This question characterizes the evolution of the American constitutional system. In 1787 and 1791, the primary question was whether certain disputes were better resolved in local legislatures or the national legislature. In 1866, with the Civil Rights Act of 1866, and in 1868, with the fourteenth amendment, the primary question was whether certain disputes were better resolved in the national forum of congressional politics or the national forum of constitutional politics.
38. See infra text accompanying notes 93-106.
constitutional analysis: to identify the constitutional values of "the people" today.\textsuperscript{39}

The Article next considers how the constitutional values of "the people" today might be identified. It posits a premise that there is a continuity of constitutional values from one generation of "the people" to another, and that past constitutional choices can therefore provide good, but incomplete, evidence of present constitutional values.\textsuperscript{40} It suggests that one might identify additional sources of evidence for constitutional values among "the people" today and determine how to employ that evidence, by accounting for the fundamental distinction between national values pursued with the motive of constraining others (national values intended to constrain the political discretion only of dissenting localities) and national values pursued with the motive of self-constraint (national values intended to constrain the political discretion of both local majorities and national or congressional majorities).\textsuperscript{41} Part II concludes, based on the premise of constitutional continuity, that if constitutionally mandated restrictions on local democratic discretion chosen by past constitutional majorities of "the people" indeed reflect a desire for self-constraint—a desire to favor some value to a greater extent than ordinary political majorities would choose in everyday congressional decisionmaking—the impetus for developing constitutional mandates more coherent than those chosen by "the people" of the past must be the development of ordinary, everyday political values, held by "the people" today, beyond those held by "the people" of the past, toward the original constitutional mandates.\textsuperscript{42} Thus might the tension of constitutional self-constraint be maintained both in check and intact, at the level desired by "the people."

In part III, the Article applies this general analysis to the two paradigmatic contexts in which the tension between the political source of constitutional provisions and the philosophical methods of judicial analysis has been particularly intense: privacy and equal protection, as applied to sexual acts and homosexual people, respectively.\textsuperscript{43} The Article suggests that given a goal of identifying the constitutional values of "the people" today, the notion of a broad and generic constitutional right of privacy, derived from the "logical" implications of (or "emanations" from) relatively specific "privacy" rights established by the first, third, fourth, and fifth amendments, has likely been an unwarranted judicial invention—an excessive pursuit of normative coherence at the expense of concerns that "the

\textsuperscript{39} See infra text accompanying notes 107-09. By no means does this goal necessarily release the constitutional analyst to pursue the methodology of Justice Brennan, or that of Ronald Dworkin. Rather, as later analysis will suggest, this goal conceives "the people" as being no less contentious political competitors than were those who actually framed and ratified constitutional provisions. Ronald Dworkin underplays such contentiousness by emphasizing the value of "integrity." He suggests that people have an impulse for consistency—coherence—in pursuing their values. See R. Dworkin, supra note 30, at 183-84. One may accept this as true, but still question how much weight people place on the value of integrity. See infra note 209.

\textsuperscript{40} See infra text accompanying notes 110-28.

\textsuperscript{41} See infra text accompanying notes 145-60.

\textsuperscript{42} See infra text accompanying notes 161-66.

\textsuperscript{43} See supra notes 28-30 and accompanying text.
people" probably wish to retain for democratic compromise. The Article reaches this conclusion by comparing the everyday political values among "the people" who apparently made constitutional choices of self-constraint to protect relatively specific areas of "privacy" in the first, third, fourth, and fifth amendments with the everyday political values among "the people" today. It suggests "the people" today are just as inclined to violate the prohibitions established by these amendments as were "the people" who originally struck a constitutional balance between their desire to protect certain values against undue intrusion, and a concern that their everyday democratic discretion not be excessively constrained. Reasoning from the premise of constitutional continuity, this section concludes that there has not been a development of relevant everyday political values among "the people" that could justify the judicial development of "the people's" preferred constitutional mandates so far beyond those chosen by past constitutional majorities.

Part III then examines the judicial development of the equal protection clause from an original understanding that intended not to prohibit racial segregation, and indeed, not to prohibit many other forms of racial discrimination, to today's far more expansive interpretation. Under modern equal protection clause doctrine, not only has racial segregation been deemed constitutionally impermissible, but all governmental actions undertaken because of racial prejudice and certain majoritarian choices undertaken because of gender prejudice have been deemed constitutionally impermissible. Given a goal of identifying the constitutional values of "the people" today, the Article suggests that this evolution of constitutional mandates under the rubric of the equal protection clause is supportable. It reaches this conclusion by comparing the everyday political values among "the people" who framed and ratified the fourteenth amendment with the everyday political values among "the people" today. This section notes that "the people" today are far less inclined in their everyday politics to violate the relatively limited prohibitions originally established by the fourteenth amendment than were "the people" who chose those original prohibitions. Based on the premise of constitutional continuity, and the premise that the choice of constitutionally mandated restrictions on local discretion reflects a desire among "the people" to favor certain values to a greater extent than ordinary political majorities would choose in everyday congressional decisionmaking, the Article concludes that because relevant values in everyday politics throughout the nation in 1987 have developed toward (and, indeed, well beyond) the original constitutional mandates desired by the framers and ratifiers of 1868, there must have been a commensurate development in the constitutional mandates of self-constraint desired by "the people" of 1987.

This section next suggests that public discrimination against homosexuals in 1987 presents an issue of gender discrimination, and poses much the same analytical problem as did public discrimination against blacks in 1896.

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44. See infra text accompanying notes 169-234. This statement would not be true, however, if one defined "the people" as being, for example, Justice Blackmun. Cf. supra note 32.
45. See infra text accompanying notes 240-380.
when *Plessy v. Ferguson* was decided. The common problem is this: Even after determining as a general proposition that the development of everyday political values throughout the nation can provide a basis from which to infer that the constitutional mandates preferred by "the people" today could reflect a more coherent pursuit of favored constitutional norms than did the constitutional mandates chosen by the framers and ratifiers, a court still must determine whether there has been sufficient development of everyday political values to justify an inference of specific developments in "the people's" preferred constitutional mandates. In other words, a court still must determine whether "the people" today want to impose new constitutional mandates against competing majoritarian preferences reserved by previous generations as a matter for everyday democratic discretion. Part III suggests that this question of timing may be unanswerable for many significant constitutional conflicts.

The Article concludes with an effort to soften the consequences of this interpretive indeterminacy. It suggests a new manner in which courts can more fully serve the constitutional ideals of "the people." In the face of doubt about whether "the people" today would authorize courts to impose the coherent implications of an acknowledged constitutional ideal in a context reserved by previous generations of "the people" for democratic discretion, a court, rather than starkly ruling that a statute is constitutionally valid or invalid, could speak to the electorate with a suggestive declaration. A court might uphold a statute as constitutionally permissible today, while declaring that the statute conflicts with "the people's" own constitutional ideals of self-constraint, and that it someday must fall as constitutionally impermissible.

Thus, the Article explicitly states a goal for constitutional analysis—to identify the constitutional values of "the people" today. It further explicitly posits that "the people's" values—their constitutional choices—exist only as a function of conflict, politics, and compromise. By working from these premises, and by working with some specific definitions of "the people" at every step, the Article seeks to develop a view of what "the Constitution" is, from "the people's" perspective, and what court's should be doing in interpreting the Constitution, from "the people's" perspective. From this perspective, and by asking why "the people" would want to constrict the democratic discretion of "the people," the Article seeks to suggest how one might better determine whether and when the judicial declaration of constitutional meaning moves from the conflict and jumble of politics—the politics of both constitutional ratification and everyday legislation—toward the coherence and internal unity of philosophy.

Beyond this, the Article seeks to raise questions that may circumscribe the usefulness of this primary analysis and, indeed, of any theory about how judges should interpret the Constitution. By adopting "the people's" perspective, always while providing its own definition of "the people," and by

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46. 163 U.S. 537 (1896).
47. See infra text accompanying notes 235-47, 380-90.
48. See infra text accompanying notes 302-09, 314-34, 380-90.
49. See infra text accompanying notes 391-441.
pursuing their constitutional values for resolving contemporary social conflict, the Article insistently begs the foundational question of how conflict about who "the people" are—about what people have the right to establish principles of government for their own happiness—should be (or is) resolved.50

II. THE NATURE OF CONSTITUTIONAL VALUES

A. The Conflict Among Us and the Conflict Within Us: Constraint of Others or Constraint of Self?

The Constitution constrains the discretion of legislative majorities to employ public power in particular ways. Constitutional restrictions are theoretically chosen by "the people"—the same people who might pursue their preferences through ordinary politics. Why would "the people" want to impose constitutional restrictions on the democratic discretion of "the people"? Put more starkly, why would those individuals who have the power to enact a constitutional amendment, and who thus could prevail through the national legislative process, feel any need to restrict ordinary democratic discretion?51

There are two fundamental explanations. The first is a consequence of the federal structure of the United States. There are many political communities—each with a degree of autonomy—and, therefore, many democratic majorities. Thus, preferences held by certain local communities

50. Cf. infra text accompanying notes 248-56, 456; notes 94, 306, 318, 325, 370, 376, 443, 456. This is a weakness not so much for a judge who decides a priori to pursue the values of some self-identified group of people—for example, the strict interpretivist who seeks the choices of the framers and ratifiers, or even one who pursues the constitutional values of "the people" today. Much less is it a problem for those whose values the judge decides to pursue. It is a weakness, however, for the analyst who seeks to justify his or her definition of the relevant electorate—indeed, to justify his or her view that the values of that relevant electorate should prevail. See infra note 456 and accompanying text. As Ronald Dworkin has stated:

Some part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own political or moral theory; otherwise the theory would be wholly circular . . . . It would be like the theory that majority will is the appropriate technique for social decision because that is what the majority wants.

Dworkin, supra note 24, at 496 (footnote omitted).

51. Groups make choices as a function of choice-making by individuals. Thus, to understand the process of group choice-making, the motives and values of individuals must be considered.

Additional problems posed by rationalizing—interpreting—the corporate product of political compromise are not immediately relevant for addressing this question, and the special implications of interpersonal compromise for the issue of politically resolved conflict versus judiciously interpreted coherence will not be considered until the next section. The question for this section concerns the motivations that individuals might have for seeking restrictions on democratic discretion. Thus, for purposes of this discussion, the will of "the people" will be treated as if it were the product of perfect agreement among a portion of the population sufficient to comprise a constitutional majority.

This approach of equating an individual's values with those of a legally empowered group has been pursued in literature developing theories of group choice. See, e.g., J. BUCHANAN & G. TULLOCK, supra note 1, at 9 ("[T]he analysis of group interests leaves us one stage removed from the ultimate choice-making process which can only take place in individual minds.").
might conflict with those held by a majority of the nation. If "the people" who comprise that national consensus were sufficiently offended by the policies of dissenting localities, the national majority might seek to disable those communities by withdrawing the relevant local political discretion.\textsuperscript{52} Call this motive "constraint of others."

The second reason that "the people" might want to restrict the democratic discretion of "the people" is a consequence not of conflicting values held by different people, but of conflicts \textit{within} each individual's value scheme. An individual might hold inconsistent values. Such an individual must make choices about those conflicting values, designating a normative hierarchy according to each value's priority. Yet, individuals evaluate their competing preferences every day, with every decision they make. Why would individuals want to constrain their own discretion to pursue their political priorities at any given time?

One answer has been provided by Alexander Hamilton. Hamilton suggested that through extraordinary and deliberate constitutional decisionmaking, people may seek to insulate certain important values from the relatively careless passions they themselves otherwise would pursue in ordinary politics. Thus, in \textit{Federalist No. 78}, Hamilton notes the supremacy of constitutional values over choices made by legislatures. He states: "Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."\textsuperscript{53}

Although this passage by itself does not explain why "the people" would choose to restrict their own political discretion through a constitution—for, presumably, a legislature roughly reflects the current desires of "the people"—Hamilton goes on to make the necessary argument:

[The] independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of

\textsuperscript{52} These competing impulses—to impose one's will on others, and to insulate oneself from others—have been the root of the federalist struggle from the foundation of the United States, and indeed, have been at the root of all interpersonal conflict.

\textsuperscript{53} \textit{The Federalist No. 78}, at 468 (A. Hamilton) (C. Rossiter ed. 1961).
their constituents incompatible with the provisions of the existing Constitution would, on that account, be justifiable in a violation of those provisions . . . .

This view thus posits a large component of “the people”—a constitutional majority—who choose a route of delayed gratification and charge a relatively independent fiduciary—a court—with the task of protecting their own preferred yet vulnerable values from themselves. Call this motive “constraint of self.”

54. Id. at 469 (footnote omitted) (emphasis added). The emphasized passage demonstrates that constitutional limits on legislative discretion were intended as insurance not simply against a government that inaccurately represents popular sentiment, but also against a government that responds too well to popular passions that “the people” themselves have identified as constitutionally problematic. Cf. Ackerman, supra note 33, at 1027-31 (blurring distinction between accuracy of legislative representation and type of popular values legislature is equipped to represent). See infra note 56.

55. The motive of self-constraint may be reflected not only in affirmative restrictions on one’s own democratic discretion, but also in the choice to join a federal political community and to submit oneself to the authority of others. For example, the choice by thirteen relatively independent states to grant Congress authority over “Commerce . . . among the several States,” U.S. CONST. art. I, § 8, cl. 3, reflected a decision by some to sacrifice short-term economic interests in favor of the greater potential for long-term economic development. See THE FEDERALIST No. 11, at 90 (A. Hamilton) (C. Rossiter ed. 1961) (“A unity of commercial, as well as political, interests can only result from a unity of government.”).

56. One must emphasize that unless society unanimously agrees about some ideal of self-constraint, this motive must be supplemented by a desire to constrain others as well. Cf. C. BLACK, THE PEOPLE AND THE COURT 107 (1960) (“Judicial review is the people’s institutionalized means of self-control.”); L. BOLLINGER, THE TOLERANT SOCIETY 14, 35, 238 (1986) (examining first amendment’s protection of speech as species of “self-restraint”). Bruce Ackerman has detected a notion of constitutional dualism in The Federalist No. 78, but has characterized the dualism less in terms of individuals’ internally conflicting values, than in terms of Congress as a false or distorted representation of popular desires, and the Constitution as the true representation of popular desires. See Ackerman, supra note 33, at 1029-30.

Although this conceptualization seems supported by Hamilton’s own juxtaposition of “the will of the legislature” versus “that of the people, declared in the Constitution,” THE FEDERALIST No. 78 at 468 (A. Hamilton) (C. Rossiter ed. 1961), one could hardly deny that legislatures at least roughly reflect contemporary popular sentiment, or that sometimes they quite accurately translate popular desires into legislation. One must at least accept that they do so better than courts, if one accepts that legislatures should, in general, govern in a democracy.

Indeed, Hamilton did not deny that legislatures well express popular sentiment. His concerns were with the type of popular desires that moved legislatures—the whims and passions of the moment. Thus, Hamilton did not baldly juxtapose “the will of the legislature” against the will of the people, but the will of the legislature against the will of the people declared in the Constitution.” Id. (emphasis added).

Thus, the question is not so much whether the Congress or the Constitution truly reflects the will of “the people”; both do. The question concerns which expression of their will the people want to prevail. Elsewhere, Ackerman does frame such a distinction between constitutional values and ordinary political values. “The Federalist nonetheless places a high value on public-regarding forms of political activity, in which people sacrifice their private interests to pursue the common good in transient and informal political association.” Ackerman, supra note 33, at 1020; see also id. at 1033-34 (discussing the dilemmas of private citizenship).

John Stuart Mill implied that choices for self-constraint might be essential to human nature, and consistent with utilitarianism:
Do these two motives for constraining democratic discretion—the intent to constrain only the offensive political discretion of others and the intent to constrain both the errors of others and one's own discretion to pursue everyday political passions that will be regretted in the constitutional morning—have different implications for the extent to which courts properly seek to develop coherent principle from perceived normative conflict? An observer who picks apart any given value scheme articulated by a constitutional majority might identify the same normative clashes whether "the people" intended the value scheme to constrain only the political discretion of dissenting localities or to constrain their own political discretion as well. Nevertheless, although the same loci of normative conflict "logically" may exist in each of these species of constitutional constraint, the source of relevant normative conflict—"the people"—might choose different loci of normative conflict as relevant for defining constitutional meaning.

To put the matter more concretely, imagine a parent who hires a nanny to supervise a child's welfare and development. The parent authorizes Nanny to regulate the young daughter's diet and exercise. The parent also instructs Nanny that the daughter may watch as much television as she wants.

Nanny perceives normative tension—one might unfairly call it hypocrisy—in the parent's directives regarding the daughter's behavior, as well as between those directives and the parent's own behavior. Nanny believes that the child watches too much television. Beyond this, she concludes that the parent, her employer, eats too much, exercises too little, and watches too much television. She says the following to her employer:

If you truly are concerned about the welfare and development

[Men often, from infirmity of character, make their election for the nearer good, though they know it to be the less valuable . . . . Capacity for the nobler feelings is in most natures a very tender plant, easily killed, not only by hostile influences, but by mere want of sustenance . . . . On a question which is the best worth having of two pleasures, . . . apart from its moral attributes and from its consequences, the judgment of those who are qualified by knowledge of both, or, if they differ, that of the majority among them, must be admitted as final. . . . When, therefore, those feelings and judgment declare the pleasures derived from the higher faculties to be preferable in kind, apart from the question of intensity, to those of which the animal nature, disjoined from the higher faculties, is susceptible, they are entitled on this subject to the same regard.]


57. For example, a norm holding that no state shall discriminate on the basis of race in contract law, but that states may discriminate on the basis of race in education, can be held with the motive of constraining one's own everyday political discretion (as well as the discretion of others), or with the motive of constraining only other people's everyday political discretion. If held with the former motive, the decisionmaker fears that he or she, as well as others, will vote to violate the norm in everyday politics, and wants to prevent that possibility from occurring. If held with the latter motive, the decisionmaker is concerned only about other people choosing to give inadequate weight to the norm, rather than with errors in exercising his own political discretion.

In either case, an observer might wonder why discrimination in contract law is unacceptable, while discrimination in public education is acceptable. Why does the value that explains the evil of racial discrimination in employment fail to suggest that racial discrimination in housing is evil as well? See infra text accompanying notes 271-86.
of your child, you should forbid her to watch so much television. Furthermore, if welfare and development are appropriate values for your child, they are also appropriate values for you. Therefore, I have taken the liberty of selling your daughter's television set, and I have developed a health regimen for you.

Nanny is promptly fired.

Nanny was perfectly correct in sensing clashing values in her orders. A value of child welfare and development, like any other articulated value, has an expansive potential to be liberated and realized upon logical reflection. The expansive potential reaches in two dimensions—what activities are covered and who is covered—and its logical reach is extended at every apparent limit with the simple question: "Why?" Nanny chose to resolve those conflicts by favoring one particular value underlying her duty to promote the welfare and development of the child, at the expense of her employer's concern for the child's—and the employer's own—enjoyment of everyday living. Thus, Nanny's pursuit of coherence exceeded her authority because she was hired to implement her employer's value scheme—with all its conflicts and apparent inconsistencies.

Consider the implications of a situation in which our value definer is concerned with self-constraint. Our subject values physical well-being for himself, but does not trust himself to make the right decisions on a daily basis. He believes that in the midst of distracting concerns that inevitably plague everyday existence, he will give inadequate attention to his own perceived interest in physical health. Consequently, he hires a personal coach. He instructs Coach to prohibit him from eating ice cream, candy, cookies, and other sugary delights.58

Coach perceives conflict in her client's value scheme. She well understands that enforcing a ban on ice cream and other sweets will serve her client's desire for physical well-being, but wonders why her client persists in lounging in front of the television all day. If her client is truly interested in physical well-being, why does he fail to exercise? Toward a more coherent pursuit of physical well-being, Coach attempts to force her client to exercise. Not surprisingly, she is fired.

Although Coach correctly noted the clashing values comprising her client's pursuit of physical well-being, she was not authorized to favor any value beyond the extent desired by her client. The client demonstrated no desire to sacrifice his passion for television in order to serve his ideal of physical well-being.59

58. Because the client truly is interested in self-constraint, and because he realizes that he will complain when Coach forbids him from eating his favorite sweets, the client gives Coach the following directive: "No matter how much I complain, do not ignore my instructions for self-constraint unless I give you superseding directives, conveyed in mirror writing and signed with my blood." The amendment of constitutional restrictions on democratic discretion requires the assent of "the people" manifested through an extraordinary process. See U.S. Const. art. V.

59. Coach faces additional problems if the client did not consider the conflict between his desire for physical well-being and his passion for television. Coach might, however, pursue several alternative approaches. First, she might assume that her client did, in fact, evaluate the relative worth of these two competing values—even if at a subconscious level—and therefore
If we change our hypothesis about the client's priorities, Coach's obligations change as well. Assume that the client now views physical fitness not simply as a static value to be weighed against competing preferences, but as an ideal toward which he should strive. He hires a coach not only to prevent him from eating food that will harm his health, but also to force him to engage in activities that will promote his physical well-being. Thus, Coach has been authorized to favor one value at the expense of others and to help her employer strive toward an ideal.60

Yet Coach, who is also a philosopher, might still perceive normative tension if she ponders why the client values progressive physical fitness. Coach knows that her client values progressive physical fitness because the employer values personal accomplishment. There are avenues of personal accomplishment in addition to physical fitness, however, and Coach sees that her client, although progressing toward physical fitness, fails to develop other faculties of potential accomplishment. Toward pursuing the

leave television to the client's daily discretion. Alternatively, Coach might assume that her client did not consider the relevance of watching television to his ideal of physical well-being and ask the client for more guidance. Of course, to get a fair reading of the client's values of self-constraint, Coach must put the client in a sober frame of mind, being especially careful to avoid the issue during the client's favorite program. A court in the analogous constitutional situation is not so fortunate. Professor Brest suggests that when the intent of the normative authority is indeterminate, "the judge's [interpretive] decision must be rooted elsewhere," see Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 211 (1980), yet Brest does not develop criteria for determining where the proper "elsewhere" might be. Cf. infra notes 330, 362.

If Coach, like the Court, cannot return to the client for more guidance, she can only extrapolate from the decision her client did make and infer the decision the client might have made had he thought about the conflict between watching television and his ideal of physical well-being. One might note that television provides a different pleasure than does eating ice cream. Coach lacks any information about how highly the client values watching television; indeed, Coach faces similar problems if she considers the conflict between the client's passion for red meat and the ideal of physical well-being. Although eating red meat and eating ice cream provide what might appear to be pleasure in the same general category—pleasing the palate—Coach does not know how highly her client values red meat. Even if the coach knew this, she must postulate that the client, to serve his ideal of physical well-being, is willing to suffer more total everyday pain than he originally envisioned. Given the specific nature of the client's instructions, the relatively few pleasures that the client was willing to forgo, and the many harmful pleasures that the client did not choose to forgo, Coach can reasonably conclude that she is not authorized to impose more daily pain of self-constraint than the client originally authorized. Cf. Dworkin, supra note 24, at 486.

If, however, the client loses his passion for sweets, and therefore no longer feels the pain of self-constraint from the earlier instructions, Coach might well have a basis for imposing new restrictions on her client's eating habits. See infra text accompanying notes 204-15 (discussing privacy), 302-141 (discussing equal protection).

60. Depending on how clearly the employer stated the instructions, Coach may face significant dilemmas in deciding how far, and how quickly, to push her client. Does the client want to be an Olympic athlete? For the next Olympic games, or for games in the distant future? If the client has given no indication about how far, or how fast, he wishes to be pushed, Coach must guess about her client's desires. The employer's complaints about any mandated health regimen might suggest that Coach has gone too far, yet since she was hired precisely to force her client to do what at one level he does not want to do, the significance of any protests is undermined. See supra note 58. Given the nature of their relationship, the client could well protest whenever Coach does what she was hired to do. For a discussion of similar issues in the context of equal protection, see infra text accompanying notes 287-309.
value of personal accomplishment in a more coherent way, Coach attempts to force her client to read Shakespeare. She is fired.

Although Coach was correct in perceiving normative conflict, she was not authorized to do anything about it. She was not authorized to favor the general value of personal accomplishment by pushing her employer toward its logical implications. Although the client was concerned about self-constraint in the service of a specific goal, he did not choose to sacrifice pleasures in the service of other logically related goals. This logical incoherence, although perhaps messy from Coach’s philosophical point of view, is analytically insignificant given the job she was hired to perform. The “incoherence” is simply a function of the employer’s value scheme—a function of his adherence to many competing concerns.

Thus, when the employer hires a coach, with the motive of self-constraint, he wants his coach to help him pursue his value of physical fitness in a relatively coherent fashion. But whether his commitment to self-constraint is stated as a static ideal or as a progressive ideal, the employer does not want to pursue coherent implications of physical fitness beyond his own concern for self-constraint. Rather, the employer wants to pursue his preferred yet vulnerable ideal to the extent articulated in his special instructions to his coach—a degree of commitment that is coherent with respect to the decisions the employer otherwise would make in ordinary, daily decisionmaking.

This analysis has several implications for the tension between the judicial pursuit of coherence in constitutional analysis and the political source of constitutional values. First, and quite obviously, given a premise that “the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness,” courts have authority to pursue constitutional coherence only to the extent “the people” intend for them to do so.

Second, if members of a national majority are concerned only with constraining the discretion of local communities that otherwise would deviate from a national compromise, there is no basis for judicial pursuit of normative coherence beyond that established by the national electorate’s daily accommodation of their competing interests. Individuals comprising a majority of the nation, like the parent who has hired a nanny, have determined their balance of competing norms, and are satisfied with their ability to do so. The majority may change that balance in the future, but they, not their judicial fiduciary, must choose to change the balance.

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62. Compare this personification of the community, and its implications, with that of Ronald Dworkin, supra note 30.
63. More precisely, a court must change the balance only on the theoretical basis that a current national majority would adopt some new ad hoc compromise. Any judicial decision must seek to mirror current democratic preferences as precisely as possible. See, e.g., G. Calabresi, supra note 14, at 106. Furthermore, such judicial decisions must be subject to revision by the legislature since they are based on a court’s estimate of current democratic preferences. Dean Calabresi advocates judicial revision of statutes that seem “out of line with dominant principles, with the fabric of the whole statutory and common law.” Id. at 90. This “occasional use of judicial powers to allocate the burden of inertia” would “permit[] a legislative reconsideration.” Id. at 90-91; see infra text accompanying notes 145-56, 216-29.
Third, if members of a national majority are concerned with self-constraint, they lack faith in their own ability to make proper choices on a daily basis. A national majority's choice to constrain itself, as well as dissenting localities, is reflected in a desire for a court, like the coach, to favor the coherent implications of some values over others by realigning the matrix of values that otherwise would be struck in everyday national politics. Such a desire for self-constraint is a function of normative conflict within individual decisionmakers, rather than among many competing decisionmakers.

B. Self-Constraint and the Implications of Constitutional Relationships

In the previous section, the interpretive problems posed by conflicting values were viewed from the perspective of individual choice—the internal compromise of an individual's many competing values. The problems of interpreting individual choices were made relevant to the problems of interpreting constitutional provisions by assuming that all people necessary to ratify a constitutional provision had exactly the same value scheme. We can now consider how conflict among individuals might affect the propriety of a court's pursuit of normative coherence in defining constitutional meaning.

This section will confront two questions. First, do constitutionally mandated restrictions on local discretion reflect a motive of self-constraint, or might people ratify such constitutional restrictions simply to constrain others? Second, if one determines that “the people” are concerned with constraining the political discretion of both dissenting localities and themselves, can one justify judicial pursuit of normative coherence beyond the political compromises wrought by “the people” in framing their constitutional mandates of self-constraint?

64. For another analogy between the Court and a sports figure, see C. Black, supra note 56, at 178 (At issue is whether it is “undemocratic” for the people themselves to decide they “want a body such as the Court to do the job of constitutional umpiring.”). I choose the coach analogy because “umpire” implies one who resolves disputes among contending parties, while coach implies one who exhorts an individual to favor and develop some among his or her own competing concerns.

65. See supra note 51.

66. One might employ Ronald Dworkin's terminology and suggest that the question concerns the extent to which constitutional provisions reflect chosen “policies” or chosen “principles.” “Policies” may reflect the accommodation of many competing considerations, and therefore can be completely articulated only as a complex collection of specific choices. “Principles,” however, reflect one (or a few) normative consideration(s) that cannot be compromised by other concerns. See R. Dworkin, supra note 23, at 22-23; see also Wellington, Notes on Adjudication, supra note 14, at 222-25 (discussing distinction between “principles” and "policies" in judicial context). A similar notion has been expressed by Robert Nozick. Nozick distinguishes “moral goals,” which may be compromised by more important considerations, from "moral side constraints,” which are absolute and inviolable by any competing value. See R. Nozick, ANARCHY, STATE, AND UTOPIA 28-33 (1974).
1. Do Constitutionally Mandated Restrictions on Local Discretion Reflect a Motive to Constrain Self as well as Others?

Democracy is a process for resolving conflict among people. It is often conceived as a system in which each person has equal voting power with which to pursue personal preferences. Whether or not political power is distributed equally among individuals, the individual’s capability to achieve personal desires is a function of the political power and value schemes of other people. An individual can vindicate personal desires through public power only if those preferences are supported by a majority of the relevant electorate.

Because of this mutual dependence, and because different individuals are not equally committed to their various competing concerns, people can maximize public implementation of their own value schemes only by trading votes and joining coalitions. Thus, for corporate decisionmaking, given conflict among people and limited individual power, compromise is inevitable, because compromise is a matter of rational self-interest. Indeed, assuming that each individual can bargain with whatever political power she has, a political compromise reflects each individual’s view of the best she could get, given her limited status in the political structure.

Constitutional provisions such as the equal protection clause and the first amendment (assuming that “the people” intended its incorporation against the states) reflect a desire among “the people” to disable local democratic discretion. Constitutional provisions are more difficult to enact and to change than are statutes. Thus, a national political compromise is less vulnerable to amendment if framed as a constitutional provision rather than as a statute. Although the motive of self-constraint is implicit in the Hamiltonian justification for judicial review, and to this extent implicit in constitutionally mandated restrictions on ordinary democratic discretion, one can speculate that people might frame a particular national compromise as a constitutional mandate, relatively invulnerable to political change.

67. See, e.g., R. Dahl, A Preface to Democratic Theory 35-61 (1956) (to extent that system deviates from principle of “one person, one vote,” political power is distributed unequally).
69. By this I mean a majority among those voting, or the active plurality of the political community.
70. See J. Buchanan & G. Tullock, supra note 1, at 145 (A voter’s “welfare can be improved if he accepts a decision contrary to his desire in an area where his preferences are weak in exchange for a decision in his favor in an area where his feelings are stronger. Bargains among voters can, therefore, be mutually beneficial.”).
71. See supra note 68 and accompanying text.
72. See infra note 194.
73. See, e.g., J. Choper, Judicial Review and the National Political Process 49 (1980) (discussing difficulty and rarity of constitutional amendment); Tribe, A Constitution We are Amending: In Defense of a Restrained Judicial Role, 97 Harv. L. Rev. 433, 441-42 (1983) (“Highly specific and controversial substantive restrictions—amendments banning intoxicating liquors, federal budget deficits, or handguns, for example—seem out of place in the document regardless of the desirability of the substantive policies they codify. As the history of prohibition illustrates, enacting such measures through constitutional amendment rather than by statute renders them dangerously resistant to modification.”); see also infra note 87.
simply to constrain the political discretion of localities with obnoxious values. Thus, it will be helpful to determine the extent to which people might seek to undermine the forums of everyday democratic politics by freezing a particular national compromise as a constitutional mandate.

Consider the implications of conflict among people pursuing a norm without any concern for constraining their own everyday political discretion, but solely with the desire to constrain the democratic discretion of dissenting localities. Assume, for example, that there is a rough national consensus holding that a fetus has certain rights to birth and, consequently, that abortion is immoral. More specifically, suppose that one quarter of the population favors an absolute prohibition of abortion. Another quarter of the population wants to prohibit abortion except when the life of the mother is endangered by the pregnancy. A third quarter of the population wants to prohibit abortion except when the life of the mother is endangered, or when the pregnancy results from rape. The final quarter of the population believes that abortion should be a woman's personal decision.

Because there is a disagreement among those who comprise this rough national consensus about what particular rights a fetus should be deemed to possess, some must compromise their preferences if they are to enact an anti-abortion provision. One possible compromise would be corporate adoption of the middle position—prohibition of abortion except when the mother's life is endangered by the pregnancy.75 The first quarter of the population would sacrifice their preference that abortions be prohibited even if the mother's life is endangered; the third quarter would sacrifice their desire that abortions be permitted in the event of rape.76

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74. One might note an additional motive for constitutional restrictions on governmental actions. People may wish to constrain abuse and corruption by officials seeking to insulate themselves from accountability to the electorate. This motive, although significant, is decidedly promajoritarian. Examples of provisions that, at least in part, reflect this motive include the first amendment's prohibition of governmental actions restricting the freedom of speech and of the press, see A. Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 16 (1960) ("[T]he government which controls us must itself be controlled."); and the fourteenth amendment's restrictions on political gerrymandering, see Davis v. Bandemer, 106 S. Ct. 2797, 2810 (1986); see also Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 85 Mich. L. Rev. 1223, 1246 (1985) ("The Court's current application of the delegation doctrine, by way of an amorphous and ultimately meaningless definition of legislative power, undercuts the accountability the Constitution seeks to protect."). Justice White has suggested that broad delegations of rulemaking authority, and legislative vetoes, present constitutional problems of accountability. See INS v. Chadha, 462 U.S. 919, 985 (1983) (White, J., dissenting) ("The wisdom and constitutionality of these broad delegations are matters that still have not been put to rest.").

75. This may be based on several assumptions: first, that people have equal bargaining power in other political contexts; second, that each person would prefer a prohibition of abortion that is imperfect from her perspective, over no prohibition at all; and third, that the members of the pro-choice group are unwilling to compromise with the anti-abortion coalition in any way. Cf. infra note 86. Other conditions would yield this compromise as well. The following analysis is concerned with the dynamics of political interaction and employs this compromise as an illustrative point of departure. Cf. infra note 76.

76. Unequal bargaining power with respect to this particular issue, of course, would suggest a different result. Several variables might contribute to unequal bargaining power. These include the popular support for one's point of view, the strength of one's commitment to this particular issue compared to the commitment of one's opponents, and the relationship of these first two factors to other political issues.
Why would those who are part of the rough national consensus seek to impose their will through some sort of constitutional provision? If Congress lacked constitutional authority to protect the unborn with national legislation, one might have an obvious answer. Under those circumstances, "the people" of the nation could impose their preferences on dissenting localities only by amending the Constitution. Would they, however, prefer to amend the Constitution by granting Congress authority to regulate abortion, or by restricting abortion through a constitutional mandate, or both?

Toward addressing this question, assume that Congress does have constitutional authority to protect the unborn by regulating or prohibiting abortion. With this assumption, one can consider whether and why people concerned not with constraining their own political discretion, but with constraining the political discretion only of dissenting localities, would view congressional legislation as inadequate, and constitutional mandates as necessary, to serve their ends. Because the distinctive effect of using a constitutional mandate, rather than a congressional statute, to impose a national norm on local dissenters is a political compromise relatively invulnerable to change, an individual's preference for imposing a present national compromise by constitutional mandate, rather than by statute, must depend on two factors: first, the extent to which other people today adhere to that individual's precise value scheme; and, second, any foreseeable change in public values.

Assume, for example, that no member of the present national consensus will reevaluate his or her position and someday support a more restrictive or less restrictive provision regulating abortion. Under these circumstances, it would not matter whether today's national compromise is framed as a constitutional mandate or as a statute. No one could gain or lose by choosing one mechanism or the other, because the present political compromise would never be altered. Thus, given foreseeably static social values, there is no reason for people to seek both a constitutional and statutory restriction on local discretion.

Now assume that the members of this national coalition anticipate the electorate's values moving toward a more extreme pro-fetus position and foresee greater limitations on local democratic discretion to permit abort-

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For example, if A feels strongly about abortion, but does not care so much about taxation, and B feels strongly about taxation, but not so strongly about abortion, then A has a strong bargaining position against B with respect to the abortion issue, and B has a strong bargaining position against A with respect to the taxation issue. If, however, A does not need B's vote on abortion—because there are enough other people who agree with A on both abortion and taxation—then A's bargaining position against B is greatly strengthened. B simply does not have that much to offer A. See R. Abrams, supra note 68, at 5-39.

77. This ascription of strategic motives for determining whether national action should be taken through a statute or a constitutional mandate is entirely realistic. Ordinarily, we have some idea of whether we are more likely to be in a majority or minority in a particular group. In fact, a good deal of the political process consists of ascertaining the vote count. Moreover, we learn relatively quickly over time whether we have political allies and the kinds of issues which concern us.

R. Abrams, supra note 68, at 26; cf. infra note 90.

78. Indeed, people increase the risk of losing their preferences through erroneous judicial interpretations immune to legislative correction. See infra note 84.

79. Cf. infra note 83.
tion. For example, members of the national consensus believe that some individuals who today favor the "life of the mother exception" will someday adopt the position that abortion should never be permitted. Under these circumstances, again, the electorate would gain nothing by framing today's national compromise as a constitutional mandate. Any future inclination toward greater restrictions on local discretion to permit abortion could be achieved legislatively, given our premise that Congress has authority to protect the unborn by regulating or prohibiting abortion.80

If, however, members of the coalition perceive that some among them might weaken in their opposition to abortion—for example, that those who today favor only the "life of the mother exception" might someday support a rape exception as well—it would be in the interests of those who unwaveringly hold a pro-fetus position more extreme than a future congressional majority might adopt to frame the current national compromise as a constitutional mandate. This is so for the following reason: If the Constitution itself mandated certain rights of the unborn, and left states with the discretion to permit abortion only to save the mother's life, Congress' legislative discretion would be similarly bound. Thus, a future Congress, representing the national electorate's less intense commitment to the unborn, would lack the discretion either to remove those constitutionally mandated restrictions on local discretion, or to enact federal abortion programs that themselves violate principles formally applicable against only the states.81

80. See Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966) (because § 5 of fourteenth amendment is grant of legislative discretion, Congress may choose to protect intended beneficiaries of amendment from victimization by states and localities to greater extent than required by amendment itself); see also Oregon v. Hass, 420 U.S. 714, 719 (1975) (state legislature may afford greater protection to constitutionally favored class than Constitution itself requires). Of course, those who unwaveringly hold an anti-abortion position that is more moderate than a future congressional majority can be expected to adopt might want to amend the Constitution to limit Congress' legislative discretion to regulate or prohibit abortion. Thus, the prochoice people and the people who object to abortion except when the mother's life is threatened and when the pregnancy is the result of rape, might get together to circumscribe Congress' preexisting authority to regulate or prohibit abortion. See infra note 86. Regardless of whether these unwavering moderates have the political clout to prevail, one must emphasize that a desire to limit Congress' discretion to impose a national compromise on localities is antithetical to a desire to impose a national compromise on localities by means of a constitutional mandate. The first motive is prolocal; the second motive is pronational. The first motive characterized the antifederalists of 1787; the second motive characterized the Northern nationalists of 1868. Cf. infra note 86.

81. Congress' hypothetical authority to pass protective legislation for the unborn would not be authority to abrogate constitutional restrictions on local discretion by purporting to restore local authority. See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 318 (1851) ("If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey that power."); see also Katzenbach, 384 U.S. at 651 n.10 ("Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the [Fourteenth] Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."); J. CHoper, supra note 73, at 199 ("When the Supreme Court invalidates state (or private) action under the initial sections of the thirteenth, fourteenth, or fifteenth amendments, . . . these decisions may not be overturned by ordinary federal legislation."). Indeed, if § 5 did give Congress authority to "dilute" or otherwise "abrogate" the restrictions on local discretion imposed by the fourteenth amendment, the
Conversely, still assuming that Congress does have legislative authority to restrict abortions, and that "the people" are acting only to constrain dissenting localities, it would be against the interests of the wavering moderates to pursue a constitutional mandate reflecting their current (and shaky) preferences. Those very considerations that would motivate the unwavering pro-fetus extremists to seek a constitutional mandate reflecting today's national compromise should motivate those individuals who might adopt progressively less extreme pro-fetus views to oppose framing a constitutional mandate reflecting today's national compromise. Without such a constitutional mandate, the wavering could achieve their anticipated ends through Congress. They have every reason not to bind their future discretion with a constitutional knot.82

Thus, those who unwaveringly wish to protect the unborn to a greater extent than a future national majority might choose would want to frame amendment would have provided no truly constitutionally mandated guarantees at all. Rather, the amendment would have been simply a grant of national legislative authority.

That Congress itself would lack discretion to violate constitutionally mandated restrictions on state discretion is suggested by Bolling v. Sharpe, 347 U.S. 497 (1954). In that case the Court determined that the requirements of equal protection, formally applicable only against the states, are applicable as well against the federal government through the fifth amendment's due process clause, because to hold otherwise "would be unthinkable." Id. at 500. This notion of "reverse incorporation" has long been criticized. Indeed, to suggest that an older provision can "incorporate" a newer provision is illogical nonsense. Nevertheless, because a newer provision can supersede, or otherwise change the meaning of, an older provision, there may be a better rationale based on inferences about political motivation from the structure of constitutional choices: It is implausible to posit that if a majority of people in three quarters of the states wish to prohibit violation of certain values within their own states, they would nevertheless choose to authorize a mere majority of their own representatives in the Congress to violate those same values. If this rationale for "incorporating" against the national government constitutional restrictions that formally apply against only the states resembles that of self-constraint, it is because I have moved from considering the motives of a minority (the unwavering moderates) in seeking constitutionally mandated restrictions on local discretion, to considering the motives of a constitutional majority necessary to enact such a constitutional provision.

Even if one continues to doubt that constitutionally mandated restrictions formally applicable only against the states should be viewed as applying against Congress as well, the unwavering extremists simply could seek to frame the present national compromise in a way that explicitly limits both state and national legislative discretion. The wavering moderates, however, would be no more favorably disposed to this proposal than they would be to the original proposal formally applicable only against the states. With this option, it would be even clearer that the wavering moderates, by supporting the constitutional amendment, would be choosing to constrain their own discretion. See infra text accompanying notes 82-85.

82. This rationale for refusing to entrench a particular political compromise as a constitutional mandate parallels a rationale of self-interest for protecting the freedom of speech. Even those people with a moderate commitment to some current community norm are well served by a doctrine that ensures others the opportunity to convince them to adopt another point of view. If those people with moderate preferences for a majoritarian view are indeed convinced to change their minds, their welfare, as they perceive it, will be augmented. Only those who are unalterably committed to a certain idea will question whether there should be a constitutionally guaranteed right to speak about the idea. This dynamic of motivations explains why extremist minority points of view have been so vulnerable to public suppression despite the strong commitment to speech when viewed in the abstract, or in the context of relatively insignificant contests between Democrats and Republicans. Cf. L. Bollinger, infra note 56, at 22-42 (protection of extreme viewpoints difficult to justify as a matter of conventional first amendment theory).
the present national compromise as a constitutional mandate; those waverers who are the very basis for the anticipated moderation in the national majority's commitment to the unborn would not want to frame today's compromise as a constitutional mandate. Of course, the unwavering extremists could enact such a constitutional mandate only if they were sufficiently numerous to comprise a constitutional majority. If they comprise such a solid national majority, however, they would have little to fear from the wavering moderates and, therefore, would have no reason to seek a constitutional mandate to supplement their legislative authority. Indeed, if these unwavering extremists framed today's national consensus as a constitutional mandate, they would unnecessarily invite the complications—and risks—of judicial review.

One might conclude, therefore, that if Congress has relevant legislative authority, "the people" are not likely to enact a constitutional mandate intended to constrain the political discretion only of the localities that otherwise would deviate from some national compromise. Given the basic motivation of constraining the political discretion only of local majorities, those with enough political clout to enact a constitutional mandate have no need to do so, and those with a need to enact a constitutional mandate lack the votes to do so.

This analysis has broader implications. Those considerations underpinning the desirability of framing today's national compromise as a constitutional mandate when the national electorate already possesses...
relevant legislative authority, similarly undermine the desirability of fram­
ing today's political compromise as a constitutional mandate when the
electorate lacks the authority to legislate.\textsuperscript{86} Thus, if “the people" wish only
to disable the political discretion of localities that diverge from some rough
national compromise, and if Congress lacks constitutional authority to
vindicate those national values legislatively, “the people" would choose to
amend the Constitution not by framing today's national compromise as a
constitutional mandate, but by authorizing Congress to act.\textsuperscript{87}

\textsuperscript{86} This observation is a bit more complicated when the electorate anticipates that national
values will drift in a direction more restrictive of local discretion. Under these circumstances,
and still assuming that “the people" lack a motive of self-constraint, one might suggest that
those who unwaveringly hold a view that is more moderate—more permissive regarding local
discretion—than a future congressional majority can be expected to adopt might be reluctant
to empower Congress to legislate. One might suggest that to deny Congress this undesirable
legislative authority, the unwavering moderates might choose to impose today's relatively
moderate national compromise through a constitutional mandate, rather than through a
provision authorizing Congress to legislate, thus contradicting the position taken in the text.

There are two responses. First, returning to the abortion variation in which the electorate
anticipates that those presently adhering to the “life of the mother exception" will someday
adopt the pure anti-abortion position, the class of unwavering moderates might include those
who presently adhere to both the “life of the mother exception" and the “rape exception," and
those who are prochoice. For the unwavering moderates to have credible political clout, the
prochoice people might join with the more moderate anti-abortion people to frame an
anti-abortion provision. It is questionable whether the prochoice people would support an
anti-abortion position simply to ensure that an inevitable national anti-abortion compromise is
more moderate than it otherwise might be.

Second, even assuming that the prochoice people do join with the unwavering moderates
toward ensuring that an anticipated drift toward a more extreme anti-abortion position cannot
be vindicated by Congress, it is hardly clear that this goal is best served by framing today's
anti-abortion compromise as a constitutional provision rather than by framing a provision
authorizing Congress to legislate. One can restrict Congress' authority to legislate by narrowly
defining its legislative discretion. The prochoice people might view a constitutional provision
saying that “Congress shall have the power to regulate abortion, except that a right to choose
an abortion when the mother's life is endangered shall not be infringed," as less offensive than
a constitutional mandate saying that “No state shall permit abortion, except when the life of
the mother is endangered." In the former provision, any national judgment about abortion is
made by congressional choice, for which the political voice of the prochoice minority remains
formally significant. In the latter provision, the national judgment about the morality of
abortion is made directly in the Constitution and brands the prochoice electorate's continuing
objections as constitutionally irrelevant. The implicit position that the rights of the unborn
supersede the rights of the mother is framed more permanently, more solemnly, more
authoritatively, and therefore to a prochoice individual, more offensively.

Thus, even when the electorate anticipates that national values will drift in a direction more
restrictive of local discretion, and when Congress lacks preexisting authority to legislate, one
would expect any national desire to restrict local discretion to be effectuated by means of a
provision authorizing Congress to legislate, rather than by means of constitutional mandate.
Even if the unwavering moderates gain enough political clout to dictate the form in which
national action is taken, their purposes are best served by authorizing Congress to legislate in
a narrowly defined way.

\textsuperscript{87} Professor Tribe has suggested that “[a]ssuming that the commerce clause as construed
in 1919 would not have authorized Congress to legislate temperance, amending the Consti-
tution to broaden Congress' commerce power in a general way would have been sounder than
directly constitutionalizing a controversial regulation of specific primary conduct." Tribe,
\textit{supra} note 73, at 441 n.40. Tribe supports this argument with the notion that specific
regulations, such as Prohibition, “trivialize the Constitution and diminish its educative and
estpressive force as part of our political and legal culture." Id. at 442; see also Tribe, Issues Raised
by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment,
One must emphasize, however, that the foregoing analysis has assumed a stable national electorate—that "the people" who decide whether to frame and ratify constitutional mandates are the same people who otherwise would have legislative discretion through Congress. Such an assumption does not apply to the fourteenth amendment, which was framed and ratified by the Northern electorate in anticipation of the Southern electorate's readmission to Congress. Thus, further analysis is required to determine whether the fourteenth amendment's provisions were ratified with a motive of self-constraint, as well as that of constraining the discretion of dissenting localities. Nevertheless, despite its limitations, this general analysis can provide a point of departure for understanding constitutional policymaking under circumstances of national electoral instability. It also suggests that at least when "the people" have chosen to restrict local democratic discretion by constitutional mandate under circumstances of national electoral stability, there is a substantial basis for inferring that they have acted with a psychology of self-constraint, in addition to a desire to constrain the discretion of dissenting localities.

10 PAC. L.J. 627, 632-40 (1979). The discussion in the text suggests a reason more obviously related to real human motivation: in the context of a stable national electorate, it makes no sense for people concerned solely with constraining the political discretion of others to freeze an ad hoc compromise as a rigid constitutional provision.

Why, then, did "the people" pursue Prohibition through a constitutional amendment, rather than by authorizing Congress to legislate? Perhaps Prohibition reflected an unusually deep motive of self-constraint—to constrain their own behavior not only in the political arena, but in their private lives as well. This would explain the constitutional pursuit of Prohibition in a manner consistent with the dichotomous implications of constraining only others versus constraint of others and self, which this Article seeks to develop.

88. See infra text accompanying notes 248-56.
89. See infra text accompanying notes 257-66.
90. Rather than viewing basic constitutional motivation as a choice between constraining only dissenters, or constraining dissenters and self, some constitutional analysts postulate a motive of self-protection against unpredictable future majorities. See J. Rawls, A Theory Of Justice 136-42 (1971). Although people might be in a majority today with respect to a particular issue, they fear that they might be in a minority tomorrow. This motive of self-protection for constraining democratic discretion is the flip side of a desire to constrain others.

Postulating this motivation requires examining and justifying several premises. First, it presumes that membership in present majorities and future minorities is a matter that participants in political combat cannot predict. This is obviously true for some issues and obviously untrue for others. Cf. supra notes 77, 83. Whether the Republican or Democratic party will receive more votes in four years is uncertain. Whether the Republican or Communist party will be favored by more people in four years—or indeed, in forty years—is far less so.

This "translucent veil of ignorance" explanation for constitutional provisions might apply to issues in which competition is truly close and unpredictable, but cannot plausibly apply to issues in which the constitutional majority is in no way vulnerable to future political defeat. Thus, this postulated motive of self-protection for disabling democratic discretion might justify a first amendment that prohibits content regulation of Republicans or Democrats, but would not easily justify the same for Communists. See generally L. Bollinger, supra note 51, at 23-42; J. Rawls, supra, at 136-42. Rawls posits an entirely opaque veil, behind which people lack knowledge not only about their future welfare and status with respect to public values, but also about their present values and circumstances. Id. On the dangers of overemphasizing the significance of uncertain results in political decisionmaking, see J. Buchanan & G. Tullock, supra note 1, at 37.
2. Coherence with Respect to What?

Even after concluding that a choice by "the people" to restrict local discretion through a constitutional mandate, rather than through authorizing Congress to legislate, reflects a motive of constraining self—as well as dissenting localities—an analyst still must interpret the content of that constitutional choice. A court still must confront the potential for distorting the political compromises through which the constitutional mandate was framed and ratified by erroneously pursuing—or failing to pursue—normative coherence in defining constitutional meaning.91

Although the preceding analysis derived from analogies to Nanny and Coach has suggested that people acting with the motive of self-constraint seek to protect a preferred yet vulnerable value to a greater extent than possible through everyday decisionmaking in the ordinary national legislative process, it has suggested no basis from which to infer that "the people" would authorize

Second, even for those issues about which foreseeable competition is close and uncertain, positing that "the people" would choose to restrict democratic discretion with a motive of self-protection must rest on the premise that "the people" see something special about the contexts in which they choose to disable majoritarian action. There must be something special about what a person loses by being in a majority that makes potential loss so significant as to outweigh the benefits gained through present membership in a political majority. Uncertainty about whether one's economic policy preferences will forever be supported by a majority hardly leads to the conclusion that majorities should be constitutionally disabled from making economic policy. Indeed, as the textual discussion suggests, close and uncertain competition may justify protecting—indeed facilitating—the democratic process of conflict and compromise. See supra notes 82, 83.

Third, one must distinguish between a desire to disable only national legislative discretion on "translucent veil of ignorance" grounds and a desire to disable both national and local discretion. Given the nation's federal structure, one might doubt future national preferences without doubting the future of one's own state or locality. See J. Choper, supra note 73, at 247 (homogenous local communities are likely to seek to retain discretion because "small groups of like-minded persons would be much more disposed than would a distant national government to impose laws that were locally desired"). It is far more likely, therefore, that this "translucent veil of ignorance" explanation would motivate a desire to disable national legislative discretion than it would motivate a desire to disable local legislative discretion. Thus, the first eight amendments, reflecting a desire to disable Congress and protect local discretion, are far more likely to reflect this "translucent veil" motivation than the Fourteenth amendment, which purports to disable state and local discretion. The motive of self-protection is an issue more relevant to community formation than to questions of disabling political majorities from pursuing certain values once a stable political community has been formed. Consider, for example, the applicability of these considerations to the first amendment's religion clauses, for which the "translucent veil of ignorance" rationale seems to have been a contributing element. The concern was "that the same authority which can establish Christianity, in exclusion of all other Sects[,J] everson v. Board of Educ., 330 U.S. 1, 65 (1947) (Rutledge, J., dissenting) (quoting J. Madison, Memorial and Remonstrance Against Religious Assessments ¶ 3)."

This motive of protecting oneself against intrusive majoritarian decisions should not be confused with the motive of protecting from erosion by future majorities one's desire and discretion to intrude on others. Cf. supra note 83.

91. See BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 6-7 (1978). Justice Jackson, ruminating during oral arguments for Brown v. Board of Educ., 347 U.S. 483 (1954), said, "I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress." ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55 244 (L. Friedman ed. 1969).
courts to pursue the coherent implications of that favored value beyond the extent agreed upon in the constitutional compromise. Compromise is the inevitable consequence of each individual's attempt to maximize his or her interests in political competition. Like statutes, constitutional provisions are products of political combat. Even if committed to the same ideal of self-constraint, different people will vary in their commitment to the ideal and, therefore, in how much they are willing to give up to serve the ideal.

Returning to the analogy of the client and his coach, some clients may want to give up cake, ice cream, and television; others only cake and ice cream; and still others only cake, even if all are dedicated to an ideal of physical well-being with a motive of self-constraint. When several clients must act together to make a corporate decision, none would choose to sacrifice that which he has the political clout to preserve. Thus, because a political compromise reflects the best that each individual could get, none of "the people" engaged in creating constitutional provisions would agree to forgo benefits already won through political bargaining and compromise.

In short, the desire for self-constraint suggests that "the people" want their courts to play the role of Coach rather than that of Nanny. But it does not suggest that they want their coach-like courts to force them to read Shakespeare when they are concerned only with progressive physical well-being.

These conclusions might appear to favor Raoul Berger's approach for defining constitutional meaning, rather than those of Justice Brennan or Ronald Dworkin. Courts are not authorized to develop constitutional meaning beyond the compromises wrought by "the people" through constitutional politics. But Berger assumes that in defining constitutional meaning, one should consider only the particular compromises from which each constitutional restriction on democratic discretion was framed and ratified. This premise must be examined.

C. The Tense of Constitutional Choices: Past Perfect or Present Participle?

I. Who Are "the People"?

We have considered the manner in which individuals might want to resolve the conflict within themselves and among themselves. This inquiry is essential for any theory that views the values of "the people" as the proper source of constitutional meaning. Yet, embedded in this search for popular concerns is a nagging and fundamental question: Who are "the people" possessing "an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness"? Whose values are relevant, and why?

92. See supra text accompanying notes 67-71.
94. This section considers who "the people" are by focusing on the relationship between past and present populations. At any given time, however, and for whatever era is authori-
This question also is implicit in the analytical methodologies of those who resort to the intent of the framers and ratifiers for defining constitutional meaning. Almost everyone does. Despite this common regard for past constitutional choices, analysts disagree about what additional information, if any, courts should consider in defining constitutional meaning. Some, like Raoul Berger, suggest that courts should consider only past constitutional choices. Others, like Chief Justice Rehnquist and Henry Monaghan, believe that exclusive reliance on the intent of the framers and ratifiers cannot possibly resolve modern constitutional questions, and therefore resort to drawing “analogies” between present value conflicts and past constitutional judgments. Still others, like Harry Wellington, Paul Brest, and Justice Brennan, advocate open consideration of contemporary values to supplement the ambiguous relevance of past constitutional choices to present constitutional issues.

Despite the existence of these three self-defined camps, the nature of their disagreement is not so clear because their reasons for looking to the past have been neither precisely articulated nor adequately developed. Unless one understands why, if at all, the constitutional intent of the past
should be viewed as binding, one cannot have a clear idea about how past intent should be treated as binding.100

The most commonly expressed reason for requiring courts to consider the framers' and ratifiers' intent rests on a fear of judicial excess—a fear of judicial error.101 To the extent that a constitutional theorist fears "judicial tyranny,"102 he or she might insist that original intent should be the dominant source of judicial analysis. An extreme fear of judicial tyranny might lead one to conclude that the framers' and ratifiers' intent should be the exclusive source of constitutional analysis.

Recognizing that the dispute among these three methodological camps may revolve around the relative risks that each assigns to judicial tyranny, however, is by itself insufficient to crystallize the nature of their disagreement. One must probe the concept of judicial tyranny. Restricting judicial discretion to avoid judicial tyranny implies a standard of right from which deviation is wrong. What is that standard of right?

There are two temporally-oriented possibilities. First, one might claim

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100. One might believe that the framers' and ratifiers' intent is the exclusive proper source of constitutional meaning as an unexamined and, therefore, unjustified first principle. Professor Monaghan has characterized the nature of his adherence to the idea of original intent as follows:

The authoritative status of the written constitution is a legitimate matter of debate for political theorists interested in the nature of political obligation. That status is, however, an incontestable first principle for theorizing about American constitutional law. That I cannot otherwise "prove" the constitutional text to be the first principle is a necessary outcome of my first principle itself. . . . For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration.

Monaghan, supra note 12, at 383 (footnote omitted).

By refusing to consider why constitutional text, as evidence of the framers' intent, was and is viewed as a fundamental—let alone the exclusive—source from which to interpret constitutional meaning, Professor Monaghan risks overlooking essential subtleties in the manner in which past intent should be treated as binding the interpretive discretion of courts. As Ronald Dworkin has suggested, such a posture precludes one from accommodating the ambiguity and indeterminacy inherent in the need to apply the abstraction of original intent to particular circumstances. See Dworkin, supra note 24, at 485-87.

Some readers might suggest that I have inadequately examined or justified the premise on which the primary analysis of this Article relies—that "the people" have a "right" to establish principles of government for their happiness. Cf. supra notes 5, 6, 94; infra text accompanying notes 248-56; notes 306, 318, 325, 370, 376, 443. For an analysis from "the people's" perspective, given a definition of "the people," this is not so much a problem. See supra note 50. For other purposes, of course, such as how a judge should decide to define "the people," or why a judge should feel obliged to do "the people's" bidding, the premise of popular sovereignty indeed must be more deeply explored. See infra text accompanying notes 455-59. I will address these matters further in future work.

101. See, e.g., Berger, supra note 5, at 31. ("In truth, the principal anti-activist argument is that the Constitution confers no judicial power to revise it."). Beyond this, Berger has frequently noted James Madison's cautionary words: "[F] the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers." Id. at 25 n.219 (quoting 9 J. Madison, Writings 191 (G. Hunt ed. 1910)); see also R. Berger, supra note 15, at 3, 364; Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation", 58 S. Cal. L. Rev. 551, 557, 565 (1985).

that the intent of the framers and ratifiers should be binding because the past has a right to bind the present—to bind its future.\textsuperscript{103} Under this view, judicial tyranny involves violating the right of past majorities to choose constitutional principles to govern their progeny. Alternatively, one might claim that "the people" of the present have the right to establish governing principles for their own happiness. Under this view, judicial tyranny involves deviating from the constitutional preferences of the present.

In considering whether the past has a right to bind the political discretion of the present, imagine that "the people" of 1787 wanted to prohibit their progeny from making constitutional choices for themselves. Thus, imagine that instead of providing an amendment process, article V stated, "This Constitution shall not be amended in any manner or by any means, despite any desire among the people to the contrary."\textsuperscript{104} This scenario poses a question of right, because the hypothetical desire of the past to bind its progeny conflicts with the subsequent desires among "the people" to amend the Constitution—desires successfully vindicated twenty-six times since 1787.

Given a postulated conflict between the constitutional values of the past and those of the present, the notion that past intent is the proper theoretical source of constitutional values is problematic. A parent's belief that he has the right to bind his adult child matters little if his adult child believes the contrary. It matters not at all once the parent has died. Ultimately, the past cannot bind the contrary preferences of the present because the past lacks the power of enforcement.\textsuperscript{105} Indeed, it is revealing that this issue is posed at this moment between us, a contemporary writer and a contemporary reader. Each of us, and others of our generation, must evaluate our preferred relationship to the past for ourselves. Thus, simply as a matter of power and logistics, the question whether the past has the right to bind the present is a question of whether the present wants to be bound by the past.\textsuperscript{106}

\textsuperscript{103} Of course, even under this view, consideration of contemporary values would be appropriate if the framers and ratifiers intended future values to shape constitutional meaning. Such a view is implicit in interpretations of the ninth amendment as a license to courts, granted by "the people" of the past, to develop unspecified constitutional rights. \textit{See}, \textit{e.g.}, M. \textsc{Perry}, \textit{supra} note 11, at 24. Perry argues that "[i]f in fact the framers had authorized the judiciary to exercise (some sort of) noninterpretive review, there would be no problem of legitimacy. To the contrary, there would be a serious question as to the legitimacy of the judiciary's foresaking that office." \textsc{Id.} The thrust of that "serious question" would be either that the judiciary is failing to vindicate the constitutional preferences of the past (assuming that the past has the right to bind the present), or that the judiciary is improperly postulating that the constitutional values of the present no longer authorize such judicial creativity (assuming that the values of "the people" today are the proper theoretical source of constitutional meaning). On the implausibility of this view of the ninth amendment, see \textit{infra} notes 198, 200, and accompanying text.

\textsuperscript{104} \textit{ Cf.} \textsc{U.S. Const. art. V} (proposed constitutional amendment requires ratification by three-fourths of the states).

\textsuperscript{105} \textit{Cf. infra} note 443.

\textsuperscript{106} \textit{Cf.} A. \textsc{Bickel}, \textit{supra} note 11, at 98 ("[T]he future will not be ruled; it can only possibly be persuaded.").
By rejecting the notion that the past has the right to bind the political discretion of the present, one concludes that "judicial tyranny" is the failure to enforce the constitutional values of "the people" today. This conclusion, however, begs the questions of what the constitutional values of "the people" today might be, and how those values should be ascertained. Indeed, if the goal of constitutional analysis should be to identify the constitutional values of "the people" today, then why look to the past at all?

2. The Oversight of Raoul Berger's Strict Interpretivism

Given the goal of ascertaining the constitutional values of "the people" today, the practice of looking to the framers' and ratifiers' intent must be

indeed, whether Locke's view of "right" was a function of power is not clear. See id. ¶ 66, at 33 (suggesting "there be a time when a child comes to be as free from subjection to the will and command of his father as the father himself is free from the subjection to the will of anybody else"); id. ¶ 74, at 38 (any parental right over adult children exists only "by the consent" of the children).

A notion of "right" that depends entirely on power is less than satisfying. Cf. supra note 50; infra notes 306, 318, 325, 370, 376, 443, 456 & text accompanying notes 248-56. But even "the people" of 1787 apparently did not believe that they had a right to preclude their progeny from making constitutional policy, as suggested by the amendment process provided by article V of the Constitution.

This view was also expressed in the Declaration of Independence:

[Whenever any Form of Government becomes destructive of these ends [Life, Liberty, and the pursuit of Happiness], it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.]

The Declaration of Independence, para. 2 (U.S. 1776); see also Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 H HARV. L. REV. 386 (1983). Dellinger points out that "[s]ection 3 of the Virginia Constitution of 1776 . . . provided that 'whenever any government shall be found inadequate . . . a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.' " Id. at 43 n.232. Note the conflict between this proposition, as stated, and article V of the Constitution of the United States. See supra note 104.


108. See supra text accompanying note 39.

109. The existence of article V, and the extent to which "the people" have, in fact, amended the Constitut on through article V, suggest that the American political culture does not, and never did, believe that the constitutional discretion of the present should be restricted by the choices of the past. Of course, although the constitutional discretion of the present is not disabled by past choices, it might seem that the ordinary political discretion of the present is. By framing the question of constitutional meaning as one concerning the constitutional values of "the people" today, however, any constitutional interpretation would be, at least theoretically, a function of "the people's" own constitutional choices to define the parameters of their own ordinary political discretion. Given the limits of judicial capabilities, one is left with the significant problem of transforming that theoretical identification of modern constitutional concerns into reality. See infra note 452. Thus, although this section has defined constitutional values in terms that eliminate the tyranny of the past, it has not addressed the remaining problem of "judicial tyranny"—how to avoid judicial failure to identify accurately, and to enforce effectively, the constitutional values of "the people" today. For a consideration of how courts might confront the potential for judicial tyranny thus defined, see infra text accompanying notes 111-66.
based, at least in part, on a premise that past constitutional choices are good evidence of present constitutional preferences. Those who advocate exclusive reliance on the framers’ and ratifiers’ intent implicitly suggest that past constitutional choices are the only good evidence of present constitutional concerns.110

If one accepts that the concerns of “the people” today are the proper theoretical source of constitutional values, however, one simply cannot avoid making some judgment about modern constitutional preferences.111

110. Alternatively, they implicitly suggest that “the people” today want to be bound by precisely those constitutional choices made in the past. See infra note 111; cf. supra note 106.

111. Some might draw certain conclusions about “the people’s” contemporary constitutional preferences from a formalist perspective. Absent any amendment, “the people” today continue to accept all (and only) the constitutional judgments made by the framers and ratifiers. See Monaghan, supra note 12, at 376 (“Our legal gründnorm has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.”).

This view is vulnerable. “The people” today simply are unaware of constitutional judgments made by another group of people in another era. Indeed, to the extent that a constitutional provision is a product of political compromise, it may be that the people who actually adopted the provision did not clearly understand it to have some precise content. Courts and scholars are all but overwhelmed in pursuing the intent of past constitutional majorities. It would be unreasonable to assume that “the people” can do the same, and to conclude from this assumption that absent any amendment, “the people” remain dedicated to the precise constitutional choices of the past.

One might argue instead that popular inaction constitutes popular approval of the Supreme Court’s interpretations of past constitutional intent. See Brest, supra note 59, at 236. This argument proves too much and too little. The argument proves too much as it applies equally to decisions written by Chief Justice Rehnquist, purportedly interpreting the intent of past constitutional majorities, and to decisions written by Justices Blackmun or Douglas, relying vaguely on notions of contemporary social values. In no way does it suggest the analytical ideal toward which both Rehnquist and Douglas should strive. The argument proves too little because popular inaction is as likely, if not more so, to reflect mere acquiescence to the status quo, rather than popular desires or preferences. Cf. J.J. Rousseau, The Social Contract 254 (E. Barker ed. 1980) (“Yesterday’s law has no authority today, but silence is held to imply consent, and the sovereign is deemed to confirm all laws that it does not abrogate . . . .”); Dworkin, supra note 24, at 474.

A standard of popular acquiescence does not justify any particular decision or analytical philosophy. Legislative action is difficult. Popular mobilization is rare. People may care about issues, yet not care quite enough to expend the energy required to overturn a judicial decision. See G. Calabresi, supra note 14, at 101-02 (statutes may remain on books, neither amended nor repealed, despite their failure to reflect evolving community sentiment). What applies to judicial (and other) decisions theoretically subject to legislative displacement—e.g., administrative rulemaking, statutory interpretation by courts, and common law development—applies with greater force to judicial decisions made in the name of the Constitution, which, of course, “mere” legislative majorities theoretically may not displace. As Dean Choper has argued:

Having surveyed the various constitutional sources of indirect congressional and presidential authority that may serve as political brakes on the power of judicial review, we may fairly conclude that their highly infrequent and largely ineffective use gravely undermines the view that the people have continuously approved of the Court’s function simply because, in the main, they have let the Court be.

J. Choper, supra note 73, at 55.

Thus, a standard of acquiescence poses a question of raw power. What can the Court get away with without engendering an uncontrollable popular backlash? Cf. A. Bickel, supra note 11, at 21 (resignation of majority to Court’s judicial review power does not mean “consent to the power on its merits”). The standard of acquiescence would pit Rehnquist and Brennan in a power play with each other, and each of them, to the extent that each prevails on the Court, in a power play with the electorate. For legal realists and members of Critical Legal Studies,
Simply asserting that past constitutional choices are the only good evidence of modern constitutional concerns provides an incomplete justification for strict interpretivism. Even the strict interpretivist who accepts the present electorate as the proper theoretical source of constitutional values must, in addition, posit and establish that “the people” today view past constitutional choices as the only evidence of their constitutional concerns that courts may properly consider.\(^{112}\)

There is, therefore, a critical weakness in the strict interpretivist’s claimed exclusive reliance on the framers’ and ratifiers’ intent. At least for deciding what sort of evidence courts should consider in ascertaining the constitutional values of “the people” today, the constitutional values of “the people” alive today must be confronted and evaluated—implicitly or explicitly—by interpretivists, strict or otherwise, and noninterpretivists alike. Those, like Raoul Berger, who claim that past constitutional intent should be the exclusive source of judicial analysis fail to address this issue and thereby assume an answer.\(^{113}\) Most courts fail to address this question and thereby assume an answer. By assuming an answer, these analysts abdicate the responsibility of justification.

3. The Hamiltonian Premise of Constitutional Continuity: A Reason for Looking Toward the Past

The task of justification is formidable. One must consider whether “the people” of the present wish to be bound by the constitutional choices of the past and, if so, for what reason and to what extent. Why, after all, should the constitutional choices of the past be better evidence of contemporary constitutional values than the contemporary legislative choices of “the people”? To the extent that “the people” adhere to constitutional values, why would they not account for those values in their daily political endeavors?

An answer rests on the fundamental motive that this Article has postulated as a basis for constitutional restrictions on democratic discretion—the motive of self-constraint—and its natural ally, the Hamiltonian justification for judicial review. People have ideals that are vulnerable to their everyday passions. If they want help in achieving those ideals, they may hire a court (like a coach) to carry out special instructions. One must

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112. The same applies to those who suggest that even though past constitutional choices might not be the only good evidence of contemporary constitutional preferences, these past choices are at least good evidence to be considered along with other indicia.\(^{113}\) If Raoul Berger accepts the proposition that “the people” today are the proper theoretical source of constitutional values, then his claimed exclusive reliance on past constitutional intent assumes that “the people” today want courts to consider only past constitutional intent for inferring present constitutional values. If Berger rejects the proposition that “the people” today are the proper theoretical source of constitutional values, he must justify the problematic proposition that the past has a right to bind the present. It is probably more accurate to say that Berger assumes an answer to neither question, because he has no confronted the fundamental question, “who are ‘the people’?”
emphasize that the instructions are *special*. Their distinctiveness is shaped by the essential motive of *self*-constraint. Their identification by "the people" requires a rare and self-conscious evaluation of higher ideals that deserve protection from the ordinary concerns of everyday politics. Thus, by definition and by nature, contemporary constitutional values of *self*-constraint are unlikely to be fully reflected in the battles of daily legislative combat.\(^{114}\)

Concluding that today's political squabbles provide poor evidence of contemporary constitutional concerns, however, does not establish that past constitutional choices provide better evidence. Although it is probably true that values of *self*-constraint are not reflected in everyday politics, it is not necessarily true that "the people" today continue to hold the values of *self*-constraint manifested by the past—or, indeed, that they hold any values of *self*-constraint at all.

It is this question—whether "the people" continue to embrace constitutional principles chosen in the past—that Alexander Hamilton might have had in mind when cautioning courts to adhere to the Constitution, even to the extent of thwarting the preferences of current political majorities. Hamilton said:

> Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.\(^\)\(^{115}\)

\(^{114}\) See *supra* text accompanying notes 53-56.

\(^{115}\) *The Federalist* No. 78, at 469-70 (A. Hamilton) (C. Rossiter ed. 1961) (citation omitted). Hamilton elsewhere expressed doubts about a court's ability to remain immune to majoritarian pressures:

> What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.
Thus, after declaring that “the people” intend their will expressed in the Constitution to supersede their will expressed in legislation, Hamilton emphasizes that mere legislative declarations are not to be interpreted as revisions of “the people’s” constitutional will. Such revisions must be made only by acts as “solemn and authoritative” as were the acts that created the constitutional provisions being amended. But Hamilton must have recognized that as the generations pass, “the people” who are governed by those aging constitutional provisions are not “the people” who created them. Because he justifies the superiority of constitutional provisions to “the people’s” current momentary passions as a function of their own choices, Hamilton must have presumed that the constitutional values of “the people” persist through the generations.

One should presume, Hamilton implies, that “the people” of 1987 are sufficiently like “the people” of 1787—and 1868—that “the people” today would make the same constitutional judgments as did “the people” of the past. If “the people” of the past restricted their own democratic discretion for the sake of certain important yet vulnerable values, then, more likely than not, so would “the people” today. The notion that post constitutional choices, until amended “by some solemn and authoritative act,” reflect current constitutional values will be called the “Hamiltonian premise of constitutional continuity.”


116. See supra text accompanying notes 53-56.

117. Bruce Ackerman paints an interesting picture of non-article V acts that might satisfy Hamilton's criteria of solemnity and authority. Ackerman, supra note 33, at 1051-57 (notion of “structural amendment”). For an evaluation of Ackerman's theory, see infra note 233.

118. Ackerman characterized this problem as the “intertemporal difficulty.” Id. at 1045-49.

119. Raoul Berger has misused this quote to suggest that Hamilton wanted to constrain judges from excessively developing constitutional meaning against competing everyday political values. See Berger, supra note 5, at 4. The thrust of Hamilton's concern, however, was contrary to Berger's suggestion. Hamilton sought to ensure judicial enforcement of constitutional restrictions, despite adverse legislative pressure. Although judicial excess surely must have been a concern, it was not expressed in the passage cited by Berger. See Cottrol, supra note 84, at 302 (Berger approach fails to present focus of framers' concerns).

120. Of course, the normative choices to which the premise of continuity refers can be recast when “the people, . . . by some solemn and authoritative act,” amend the Constitution. The Federalist No. 78, at 470 (A. Hamilton) (C. Rossiter ed. 1961). Presumably, in Hamilton's view, article V provides the proper basis for “the people” to express their solemn will to amend the Constitution. Bruce Ackerman is developing a theory for finding constitutional amendments, and, in my terms, for rebutting the premise of constitutional continuity, by reference to political processes other than those prescribed in article V. In Ackerman's view, the original Constitution was framed and ratified according to irregular procedures that were not in accord with existing law. See Ackerman, supra note 33, at 1017-23. Constitutional amendments might follow that precedent of irregularity. Ackerman calls them “structural amendments.” He suggests that the apparent demise of constitutional federalism after the national elections of 1936 is an example of such irregular “structural amendments,” not prescribed according to proper article V procedures, but equally authoritative, nevertheless. Id. at 1051-63. The extent to which his analysis is supportable depends on whether such postulation of constitutional amendment augments or diminishes the prospects for judicial tyranny. See supra notes 101-07 and accompanying text. For further evaluation and criticism of the “structural amendment,” see infra note 233.
The premise of constitutional continuity may be somewhat a matter of faith, but it is not unreasonable. One must distinguish between a continuity of values between "the people" of the past and "the people" of the present, on the one hand, and a congruence between choices that "the people" of the past made and choices that "the people" of the present would make, on the other. There cannot be congruence between choices made by past electorates and choices facing the present electorate, simply because time has brought new issues that "the people" of the past could not have considered. This alone would make exclusive reliance on past constitutional choices as the basis for defining present constitutional meaning analytically vulnerable. See infra text accompanying notes 129-39.

When I speak of "constitutional continuity," I refer to the relationship between a desire among a majority of "the people" for democratic discretion, on the one hand, and a desire among a majority of "the people" for constitutional self-constraint, on the other. How much immediate gratification were "the people" willing to forgo in the name of their ideals of self-constraint? What was the relationship between those democratic values they were willing to forgo and their ideal of self-constraint? What was the relationship between those values they were not willing to forgo in the name of their ideals of self-constraint? See infra text accompanying notes 153-66 & note 208.

There are reasons to suspect that constitutional values might not remain stable through time. It is clear that ordinary political values can change dramatically. Racism is far less intense today than in the mid-nineteenth century, see infra text accompanying notes 325-26, 350-53, and sexism may be following a similar pattern, see infra text accompanying notes 325-90. Furthermore, one might suggest that constitutional choices are influenced by circumstances unique to an era—for example, the Revolutionary War or the Civil War. If the relevant political pressures of those eras do not last through time, the constitutional choices made under the influence of those pressures must be, at best, woefully imperfect evidence of the constitutional values of "the people" today. Beyond this, it is not necessarily true that "our parents" made these past constitutional decisions. Many people in America today have recent immigrant backgrounds and cultural heritages far removed from those who made significant constitutional choices in 1787, 1791, and 1868. Many constitutional choices were made before the electorate included blacks and women. Indeed, the population has greatly expanded. The number of states has increased nearly four-fold since 1787, and by nearly a third (from thirty-seven to fifty) since 1868. See infra note 376.

To recognize these vulnerabilities in the Hamiltonian premise is one matter; to determine what should be done about them is quite another. One can work from the premise of constitutional continuity, and refine its meaning by refining one's understanding of constitutional choicemaking. See infra notes 306, 318, 325, 370, 374, 376. This Article suggests that the essential question for constitutional choicemaking concerns identifying the forum in which political conflict is to be resolved. Why not leave issues to be resolved locally? Why should the national electorate resolve conflict legislatively in Congress? And if the national electorate is to resolve matters, why by constitutional mandate rather than by Congress? These questions are as fundamental as questions can be in ordered politics. The depth of values that shape a participant's view of these questions is likely to persist through the generations, if any sort of value (other than the motive of self-interest) can persist from one generation to another. In the end, one must recognize that although the Hamiltonian premise may be far from perfect, the functions it is intended to serve—to enable the electorate to protect its own preferred yet vulnerable values—might not humanly be served any better without it. See infra note 123; text accompanying notes 124-66.

Despite the theoretical vulnerability of the Hamiltonian premise of constitutional continuity, there is empirical evidence of its validity. Among the thirty-seven states involved in the struggles to ratify both the fourteenth amendment and the Equal Rights Amendment (two
for effectively vindicating whatever values of self-constraint "the people" today might have.123

4. How Do "the People" Today Want Courts to Infer Their Constitutional Values?

By defining "judicial tyranny" as failure to vindicate the constitutional values of "the people" today, and by justifying an examination of past constitutional choices with the Hamiltonian premise of constitutional continuity, one can begin to consider what evidence "the people" today would want courts to examine in ascertaining their substantive constitutional concerns. As Raoul Berger has noted, those framers and ratifiers who thought about the issue seemed to believe that courts should seek to define constitutional meaning by referring to the intent manifested in particular constitutional provisions.124 They, as does Raoul Berger, feared the erroneous judicial constriction of democratic discretion. Yet, as suggested by the Hamiltonian rationale for judicial review, and apparently unlike Raoul Berger, the framers and ratifiers also feared that courts might erroneously fail to thwart political passions that violate the constitutional values of "the people."125

Which potential judicial error—the erroneous constriction of preferred democratic discretion or the erroneous failure to enforce a preferred constitutional limit on democratic discretion—did the framers and ratifiers view as more important? Their views on these questions are unclear.126

provisions with similar normative roots, see infra text accompanying notes 360-79), the pattern of constitutional choicemaking was almost identical. See infra note 376.

123. Thomas Jefferson's preference for popular reconsideration of constitutional norms every nineteen years would mitigate doubt about (and the need for) the premise of constitutional continuity. See infra notes 135-36. But it also could blur the distinction between constitutional politics and ordinary politics, thereby blurring the distinction between constitutional values of self-constraint and ordinary political values intended to constrain only the political discretion of others. Cf. infra note 138. The Hamiltonian notion of self-constraint implies that constitutional politics must be rare and special, and therefore inevitably must rely on a premise of constitutional continuity. Popular rejection of the Jeffersonian option—the absence of an ethic calling for a frequent and active reconsideration of constitutional values and provisions—suggests that the premise of constitutional continuity is supportable, and that "the people" still regard the Constitution as a desired means of self-constraint. See infra text accompanying notes 129-39.

124. See R. Berger, supra note 15, at 364-65; cf. Powell, supra note 28, at 948 (framers of 1787 did not intend that Constitution be interpreted by reference to their "own purposes, expectations, and intentions"). Powell's conclusions about the framers of 1787 are far less likely true for the framers of 1868. See infra note 291.

125. See supra notes 115-19 and accompanying text; see also Cottrol, supra note 84, at 362 (Berger approach fails to present focus of framers' concerns about legislative excess); cf. R. Dworkin, supra note 23, at 148 (danger of judicial error lies with possibility of excess activism and excess restraint).

126. The statements on which Raoul Berger relies to justify his "strict" interpretivism hardly supply unambiguous support. For example, Berger quotes Madison: "[I]f the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers." R. Berger, supra note 15, at 364. The word "guide" implies more flexibility than Berger acknowledges. Perhaps more significant, Madison speaks of "the sense in which the Constitution was accepted and ratified." Id. (emphasis added). This suggests a general attitude as much as it does the particularized meaning that Berger seeks—a general
Beyond this, and apart from determining the relative importance of the two kinds of judicial error, one must devise mechanisms so that each might be effectively circumscribed. In what manner should constitutional provisions be interpreted? The framers' and ratifiers' views on this question also are unclear. Thus, toward determining how “the people” of 1987 would want courts to infer their constitutional values, one has little choice but to identify and compare the risks presented by contending approaches to constitutional analysis. One might pursue such an inquiry even if the framers and ratifiers had left a clearer indication of their views. After all, “the people” of 1987 have far more experience with the practice—if not the theory—of constitutional decisionmaking by courts than did “the people” of 1787, 1791, or 1868.

In examining the relative risks of judicial error, either in failing to serve “the people’s” contemporary constitutional values of self-constraint, or in erroneously circumscribing democratic discretion that they wish to retain, one must make a fair comparison. It will not do to compare the possibilities of judicial error flowing from an idealized conception of interpretivism against the possibilities of judicial error flowing from a pessimistically conceived parade of wild-eyed and unconstrained judicial horribles. One surely must consider the dangers of inadequate constraints on judicial discretion. But one must also consider the dangers of an attempt to remain strictly constrained by the constitutional choices of the past. One must consider not only whether such strict limits on judicial inquiry, when rigorously pursued, might inadequately serve the constitutional values of self-constraint among “the people” today, but also whether such limits on judicial decisionmaking, to the extent that they have not been rigorously pursued, promise much more than they deliver. Finally, one

attitude such as those reflected in the distinction between the motive of constraining only others, and the motive of constraining others and self, as well.

Berger also quotes Hamilton: “To avoid arbitrary discretion in the courts, it is indispensible that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” Id. at 365. This, of course, says nothing about what those strict rules are, or where they come from. The phrase could refer as easily to rules reflecting sensitivity to the judicial role—sensitivity to both the possible erroneous intrusion on democratic discretion and the possible erroneous failure to enforce constitutional limits on democratic discretion—as it might refer to Berger's notion of “strict” interpretivism.

127. See supra note 126; cf. Powell, supra note 28, at 947-48 (although framers and ratifiers of 1787 lacked notion that Constitution should be interpreted by reference to their intentions, some framers and ratifiers of 1868 had developed such a view). With such ambiguity as to whether the framers believed that their “intent” should be considered at all in interpreting the Constitution, it is hardly surprising that there was no stable consensus among them about how the Constitution should be interpreted. Indeed, one might speculate that people would advocate modes of constitutional interpretation that would yield benefits they were unable to attain politically. See generally id.

128. Cf. R. NOZICK, supra note 66, at 6-7. In considering whether “the state” is “justifiable,” Nozick notes that the question is a function of evaluating alternatives to “the state” in the context of his Lockean normative scheme. Nozick suggests that the proper comparison would not consider the worst scenario of a “state”-less society—the Hobbesian state of nature—but a “realistic” scenario of a “state”-less society, in which people generally follow the Lockean principles and an equally “realistic” conception of the “state.” Whether or not Nozick’s sense of the “realistic” coincides with yours, his counsel that one must justify the sorts of comparisons one makes is both fundamental and compelling.
must consider whether alternative approaches might better serve the goal of vindicating those principles of government that "the people" today desire.

a. Strict (or Closed) Interpretivism: The Progressively Irrelevant Constitution

If courts were to consider only value judgments made in the past, they would be unable to decide constitutional issues that the framers and ratifiers did not consider, or could not have considered.\textsuperscript{129} "The people" could evaluate and compromise only those competing concerns that they had in mind.\textsuperscript{130} If the framers and ratifiers in 1868 did not contemplate discrimination against blacks on public golf courses,\textsuperscript{131} or discrimination against women in the Air Force,\textsuperscript{132} and did not determine whether democratic discretion to pursue those concerns was more or less important than some constitutional notion of human equality, then a court absolutely restricted to past value choices could not decide cases presenting these issues.\textsuperscript{133}

Thus, if courts took seriously the notion that they are permitted to make constitutional decisions only on the basis of value determinations the framers and ratifiers did make, or could have made, then constitutional provisions would be progressively less relevant to society as the passage of time brought unprecedented issues to the agenda of political concern.\textsuperscript{134}

\textsuperscript{129} The distinction between the notion of "what the framers did consider" and "what the framers could have considered" is largely a function of how an analyst treats the inevitable problem of imperfect historical knowledge. To speak of "what the framers considered" is really to speak about our knowledge of what the framers considered. Yet, it is probable that our evidence of what the framers actually considered is woefully incomplete, and therefore reflects only a subset of all the factors that were considered among the framers and ratifiers. Thus, even Raoul Berger extrapolates from his available evidence to make his conclusions about what the framers and ratifiers intended. He does not know that they made certain determinations. But for issues that were extant at the time, he translates his best guess as to what they most likely would have determined—if they had thought about it—into his best guess as to what they did determine. See Dworkin, supra note 24, at 485-87.

\textsuperscript{130} See A. Bickel, supra note 11, at 102-03. Bickel suggests that asking for the intent of the past is the wrong question for constitutional analysts, in part for this very reason. "No answer is what the wrong question begets," because the framers and ratifiers did not, and could not consider many current constitutional issues. Id. at 104. Yet, Bickel cautions that knowledge of past constitutional choices is an essential component of effective constitutional analysis. "We require to know, as accurately as may be, whence we come, in order to be aware that it is our own reasoned and revocable will, not some idealized ancestral compulsion, that moves us forward." Id. at 110.

\textsuperscript{131} Holmes v. Atlanta, 223 F.2d 93, 94 (5th Cir. 1955), vacated and remanded, 350 U.S. 879 (1955). In 1868 there were no golf courses in the United States. See M. McCormack, The Wonderful World of Professional Golf 361 (first permanent golf club in United States formed in 1888).


\textsuperscript{133} See Brest, supra note 59, at 211 (when issue concerns circumstances that value definer did not consider, there can be no judicial resolution based on intent of value definer). Even the slightest consideration of issues that the framers and ratifiers could not have confronted requires a theory to justify those additional sources of analysis.

\textsuperscript{134} According to Professor Tushnet, "interpretivism seems to constrain judges only at the cost of leaving legislatures too little constrained." Tushnet, supra note 102, at 789. This
"the people" today want to restrict courts to such strict interpretivist sources for generating constitutional meaning, and if courts took this restriction seriously, then "the people" would be encouraged, and indeed compelled, to consider their constitutional values actively and formally each generation.135 To justify Raoul Berger's strict interpretivism, therefore, the question is this: Do "the people" today adhere to the Jeffersonian ideal of actively considering constitutional principles every nineteen years (or so)?136 Only if they do is it plausible to infer that they would prefer that courts be strictly limited to those constitutional choices that the framers and ratifiers actually made, or could have made.

On this basis, one might seriously question the proposition that "the people" want courts to consider only constitutional value choices that the framers and ratifiers did make, or could have made. The Jeffersonian model of constitutional politics undermines the distinction between constitutional choices and ordinary national legislative choices.137 If each generation of "the people" actively and formally struggled toward ratifying a constitution, constitutional politics would become less exceptional, less special, more like the politics of everyday life, and, therefore, more vulnerable to the pressures of everyday life.138 Good or bad, such an active statement is meaningless without criteria by which one might determine that legislatures are "too little constrained." Given the context of seeking the proper relationship between constitutional values and democratic discretion, the criteria for defining legislative excess might refer to the contemporary constitutional values of "the people"—the values that "the people" would adopt today if they thought in constitutional terms and pursued the amendment process. See infra note 136.

135. See Bickel, supra note 11, at 244-45. According to Bickel:
Everybody knows that the lifetime of applied principle is often no longer than one or two generations. Principle may endure beyond that, of course, but not necessarily as formulated in the application; if it does endure, it will often be through a process of renewal. And so what one means by the ultimate, final judgment of the Court is frequently a judgment ultimate and final for a generation or two. That, however, is quite long enough to worry about, and the really interesting question, therefore, is what happens within the generation or two.

Id. (footnote omitted).

The reconsideration of constitutional principle implied by the Jeffersonian ideal, and the reconsideration characterized by Bickel, are distinguishable in the extent to which the electorate actively participates, and in the extent to which each perspective views such active participation as desirable.

136. 5 THE WRITINGS OF THOMAS JEFFERSON 121 (P. Ford ed. 1895); cf. THE FEDERALIST No. 50, at 318-19 (J. Madison) (C. Rossiter ed. 1961) (periodic resort to electorate for "revising the Constitution, in order to correct recent breaches of it," runs excessive risk that questions will be resolved by momentary passions rather than reason).

137. James Madison feared that even the politics of constitutional amendment could be dominated by shortsighted public passion, rather than reason, if an amendment machinery were activated in response to particular political issues, see THE FEDERALIST No. 49, at 317 (J. Madison) (C. Rossiter ed. 1961), or if activated on a routine or periodic basis, see THE FEDERALIST No. 50, at 317-20 (J. Madison) (C. Rossiter ed. 1961). One might question whether this rather extreme fear of the electorate reflects "the people's" chosen fear of themselves, or an elitist fear of "the people." Cf. Ackerman, supra note 33, at 1025 ("[I]t is precisely The Federalist's insight that constant appeals to public virtue could not be expected to sustain the normal politics of the American people.").

138. See A. BICKEL, supra note 11, at 105 ("If a constitution purports to settle, in detail and for all time, most of the issues that are likely to be the grist of the political mill, it invites either
constitutional politics is alien to apparently long-held notions that constitutional provisions are special—that they should be the products of extraordinarily reflective politics. Indeed, despite the unpopularity of many Supreme Court decisions, the political pressure for corrective constitutional amendments has not even begun to approach a consensus holding either that the very idea of constitutional self-constraint is undesirable, or that the Constitution should be entirely reconsidered every generation.

b. Lax (or Open) Interpretivism: Bringing Twentieth Century Issues to Nineteenth Century Decisionmakers

Of course, courts have not generated constitutional meaning by relying exclusively on value choices that the framers and ratifiers did make, or could have made. Rather, courts have drawn "analogies" from the framers' and ratifiers' value choices to determine the constitutional choices they might have made if they had been confronted by today's constitutional questions.140

Any claim that this process of "analogy" employs only past value judgments is simply wrong.141 Even if one could bring the "typical" framer or ratifier into the twentieth century by magic, and ask him to apply the abandonment or frequent amendment. The familiarity of amendment will breed a species of contempt and incapacitate the document for symbolic service.


1.40. Professor Brest distinguishes "strict" from "moderate" originalism. See Brest, supra note 59, at 222-23. He suggests that:

[A] moderate textualist takes account of the open-textured quality of language and reads the language of provisions in their social and linguistic contexts. A moderate intentionalist applies a provision consistent with the adopters' intent at a relatively high level of generality, consistent with what is sometimes called the "purpose of the provision." Where the strict intentionalist tries to determine the adopters' actual subjective purposes, the moderate intentionalist attempts to understand what the adopters' purposes might plausibly have been, an aim far more readily achieved than a precise understanding of the adopters' intentions.

Strict originalism cannot accommodate most modern decisions under the Bill of Rights and the fourteenth amendment. . . . Although moderate originalism is far more expansive, some major constitutional doctrines lie beyond its pale as well. Id. at 223 (footnotes omitted).

Brest's treatment somewhat blurs two separate issues. One issue concerns the substance that the analyst attributes to the framers' and ratifiers' choices. The second issue concerns the extent to which an analyst feels constrained to consider only the framers' and ratifiers' constitutional intent. The former issue would be reflected in a debate between Raoul Berger's view of the fourteenth amendment, which assumes that the framers and ratifiers had a static view of the state activities that would be constitutionally prohibited and permitted, and a view of the fourteenth amendment which suggests that the framers and ratifiers wanted a progressively coherent development of one value at the expense of competing concerns. Such a debate would focus on whether the framers intended the fourteenth amendment, someday, to prohibit antimiscegenation statutes. See infra text accompanying notes 235-46.

The latter issue is currently addressed in the text. Even assuming that the framers and ratifiers interred courts to develop the coherence of some ideal at the expense of their competing concerns, is a constitutional analyst properly constrained to contemplate only the progressive constitutional judgments that "the people" of the era did make, or could have made, or may the constitutional analyst properly extrapolate from the value judgments actually made to consider their relevance in disposing of modern constitutional issues?

141. See Tushnet, supra note 102, at 793-804.
same value judgment to our world that he applied to his, he would still need additional information. He cannot apply the same compromise and accommodation of his own competing concerns to our problems as he did to his, because he has not experienced the problems we are asking him to solve. Indeed, for this "typical" framer or ratifier to apply his nineteenth century values to twentieth century problems, the constitutional analyst must "explain" the modern world to him and, in doing so, necessarily imports subjective perceptions of contemporary values. Thus, this analyst is accounting for contemporary values, yet is doing so in an intuitive and unexamined manner. The "lax interpretivist" is, therefore, unable to demonstrate the particular relevance of those contemporary values to the constitutional values of "the people" today.

c. A Candid (and Careful) Pursuit of Today's Constitutional Values: All Evidence in Its Proper Place

There is a third alternative. Courts might dare explicitly to ask, "What are the constitutional preferences of 'the people' today?" Dean Harry Wellington has been a prominent proponent of an analytical methodology that openly seeks the values of "the people" today. Wellington counsels that courts should make constitutional decisions that protect contemporary notions of "conventional morality" or "the moral ideals of the community." Based on a determination that a legislature, for some reason, has transgressed conventional notions of morality, a court may invalidate the
This analysis begs an important question: Why should the court intervene in the name of contemporary "conventional morality"? After all, as the argument goes, courts, at least when compared with legislatures, are ill-suited for ascertaining contemporary values. By their very structure and electoral accountability, legislatures would seem to be equipped better than courts to ascertain the precise contemporary balance and compromise of "the people's" conflicting values. Thus, Raoul Berger, Chief Justice Rehnquist, and Henry Monaghan would suggest that the risk of judicial tyranny is a powerful argument against judicial consideration of contemporary values in defining constitutional meaning. They believe that this risk is mitigated when courts are restricted to identifying past constitutional values and choices.

The propriety of judicial intervention depends on Dean Wellington's definition of "conventional morality." Does his definition refer to everyday values held by a contemporary local majority? Does it refer to everyday values held by a contemporary national majority—values that a national majority wishes to impose on dissenting localities? Or does the notion refer to ideals of self-constraint held by a contemporary constitutional majority? In other words, when a court intervenes in the political process, pursuant to Dean Wellington's "conventional morality," is it acting to help local political majorities achieve what they want; is it acting to help a national political majority achieve what it wants; or is it acting to protect contemporary constitutional values, despite what ordinary political majorities, local or national, might want.

These distinctions are essential. They go to the heart of the relationship between constitutional norms and democratic discretion. If Wellington means that courts should second-guess the legislative process and identify contemporary local preferences, then the counter-majoritarian dilemma of constitutional decisionmaking does not exist. With this notion of conventional morality, a court would be eliminating laws that, in its view, probably do not reflect the desires of a current majority within the relevant

147. See Wellington, Notes on Adjudication, supra note 14, at 287-95. Dean Wellington suggests that Connecticut's law prohibiting the use of contraceptives violated the conventional morality of the mid-twentieth century. Id. at 291.

Brest postis "(mere) adjudication" as an alternative to "originalism." Brest, supra note 59, at 224. By "(mere) adjudication," he means the "'common law' method, which derives legal principles from custom, social practices, conventional morality, and precedent." Id. at 228-29.

148. See J. ELY, DEMOCRACY AND DISTRUST 67 (1980) ("As between courts and legislatures, it is clear that the latter are better situated to reflect consensus"—to the extent that consensus exists.). Indeed, the premise of legislative supremacy reflects the judgment that the competitive political process is the best available mechanism for resolving conflict among people and defining social norms. There must be something special about certain issues justifying a departure from this premise. This Article suggests that a distinctive element of constitutional restrictions on local democratic discretion, and the allocation to courts of the responsibility to protect those values, is the motive of self-constraint.

149. Dean Wellington disputes this premise. See Wellington, Notes on Adjudication, supra note 14, at 225. For an examination of Wellington's argument, see infra note 224.
local community. This is a prodemocratic rationale, which posits that a legislature might have made a mistake, that some interest group asserted undue power, or that the statute was predicated on a moral judgment no longer predominant in the community. To consider whether such a prodemocratic rationale for judicial invalidation of local legislative choices is supportable would go beyond the scope of this Article. It is important to note, however, that such a rationale for judicial invalidation of statutes does not pose the troubling theoretical question presented by true constitutional issues: on what basis is it proper to prohibit a current political majority from achieving what it does want to achieve?

If, instead, Dean Wellington means that a court should base its decision on prevailing national political preferences, then conventional morality would be employed to disable localities from violating that national morality. This rationale for judicial action is vulnerable from the perspective of constitutional federalism. If the area of national moral consensus is one over which the Constitution does not grant Congress legislative authority, then a court, to justify disabling local discretion, must postulate two elements in addition to this rough national consensus. First, the court must postulate that a national political majority—a congressional majority—wants to impose its preferences on dissenting localities, but for some reason has not followed through with legislation; second, because the idea contravenes constitutional federalism, the court must postulate that individuals comprising a contemporary constitutional majority would choose to grant Congress new legislative authority to address those moral concerns, but

150. See G. Calabresi, supra note 14, at 106 (although reflecting majoritarian preferences when passed, statutes may “lose [their] majoritarian basis over time” and therefore thwart premise that will of majority should prevail).

151. This rationale requires a theory of fair power in democratic politics and would open up a host of issues about the relationship between disparate economic power and political influence. Indeed, it raises fundamental questions about the nature of popular sovereignty and the premise that “the people” have a right to rule. See supra notes 5, 6, 100; infra, note 443.

152. This issue has been elegantly considered by Dean Calabresi. See G. Calabresi, supra note 14, at 91-119. It is interesting to note that a court might well have been on solid ground had it struck down the Connecticut statute on the theory that it no longer reflected the state majority's preferences. See Griswold, 381 U.S. at 531 n.8 (Stewart, J., dissenting) (“[T]he Connecticut House of Representatives recently passed a bill . . . repealing the birth control law. The State Senate apparently has not yet acted on the measure, and today is relieved of that responsibility by the Court.” (citing New Haven Journal-Courier, May 19, 1965, at 1, col. 4 & 15, col. 7)); see also J. Cooper, supra note 75, at 27 (“[T]he same inertia in the lawmaking system that operates to block the passage of new statutes supported by the people may also work to hinder the repeal of existing laws despite their loss of majoritarian backing.”); id. at 130 (judicial invalidation may not be contrary to local popular will).

153. The notion that if conventional morality is a proper basis for restricting democratic discretion, then that conventional morality must be national, rather than local, also was expressed by Alexander Bickel. See A. Bickel, supra note 11, at 250 (“[E]ven if the task of the Court were, in Mr. Dooley's phrase, to follow the election returns, surely the relevant returns would be those from the nation as a whole, not from a . . . majority in a given region. Fragmented returns cannot count, any more than early ones.”); see also Nelson, supra note 142, at 1262-75 (criterion of judicial neutrality may be satisfied if judges generate constitutional meaning by reference to quasi-legislative national consensus). Of course, if the relevant conventional morality were local rather than national, one would not be disabling democratic discretion in the name of a constitutional restriction. Rather, one would be seeking to help a locality attain its true majoritarian desires.
have not been sufficiently motivated to avail themselves of the article V amendment process.\textsuperscript{154} Given the Hamiltonian premise of constitutional continuity, this devaluation of constitutional federalism is difficult to justify.\textsuperscript{155}

Despite these constitutional problems, one should note that judicially enforced conventional national morality is still promajoritarian so far as the national electorate is concerned. The rationale presumes an underlying motive to constrain the political discretion only of dissenting localities, rather than the additional motive of self-constraint. In this sense, the rationale is essentially legislative rather than constitutional. If a court were to pursue this promajoritarian rationale rigorously, its decisions would not be final, but would be subject to “correction” by Congress—presumptively

\textsuperscript{154} If, indeed, a congressional majority does want to enact such legislation to restrict the discretion of dissenting localities, one might wonder why it has not done so. There are two possible responses. First, the national electorate might believe that it lacks the constitutional authority to do so. This defect could be cured if the Court declared that Congress now has such legislative discretion. Indeed, Bruce Ackerman might find that “the people” wish to grant Congress new legislative authority even if they have not manifested that intent through article V procedures. See \textit{infra} note 233. If the Court does find and declare such national legislative authority, however, one might wonder whether it should continue to act as Congress’ quasi-legislative front, as it does under the dormant commerce clause. See \textit{infra} note 156.

Alternatively, one might question the premise about the national electorate’s ordinary, everyday values. Perhaps a congressional majority does not want to impose its values on dissenting localities. If so, one would lack a foundation to deem local discretion constrained by national values held with the motive of constraining others.


First, by following Michael Perry’s lead and relying on the putative distinction between originalism and nonoriginalism, Professor Conkle begs the fundamental questions of who are “the people,” and how do “the people” want courts to discern their constitutional values. See \textit{infra} note 163.

Second, he seems unconcerned with the antifederalism implications of his analysis and, indeed, regards the implicit augmentation of national legislative authority as an argument in favor of judicial action.

Abortion, the death penalty, “reverse” discrimination, homosexual rights, religion in the public schools—issues such as these evoke intense and passionate feelings . . . .

Despite our deep divisions on these questions of individual rights, the questions require American answers, and they must be American answers. On moral issues such as these, there are no differing local conditions sufficient to justify differing local answers, and local “experimentation” is hardly well-suited to moral inquiry . . . . The issues simply are too important to America, and too basic to each of our citizens, to be subject to geographic disparity. They cry out for national resolution, which the Supreme Court can provide through the recognition of nonoriginalist constitutional rights.

\textit{Id.} at 28-29 (footnotes omitted).

This statement seems to disregard the constitutional significance of federalism. The “differing local conditions” that justify “differing local answers” are precisely the deep and passionate normative divisions that Professor Conkle recognizes. Thus, to justify his position, he must confront the constitutional value of federalism. He must determine that “the people” of 1987 want to amend the Constitution by augmenting Congress’ legislative discretion to include authority over general moral or “police power” concerns. Cf. Ackerman, \textit{supra} note 33, at 1051-57 (political action by non-article V procedures might be interpreted as “structural amendment” of Constitution); \textit{infra} notes 229, 232-33.
the best conduit of the national popular will.\textsuperscript{156}

In addition to the notion of "conventional morality," Dean Wellington has suggested that courts should pursue the "moral ideals of the community."\textsuperscript{157} With his notion of moral ideals, we come closer to the second basic

\textsuperscript{156} But cf. C. Black, supra note 56, at 133 (political leverage, threat of filibuster, and senatorial representation of equal states rather than equal voters, distort principle of majority rule in national electorate); Easterbrook, \textit{Implicit and Explicit Rights of Association}, 10 Harv. J.L. & Pub. Pol'y 91, 94-95 (1987) ("A political body that can satisfy an intense minority here and another intense minority there will be protected by its constituency even if time and again the body injures the majority's interests.").

The dormant commerce clause has reflected such a relationship between a national majority's values and judicial action since Justice Stone's majority opinion in Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). In that case, the Court undertook the responsibility of determining whether the national interest in commerce outweighed a state policy that burdened interstate commerce. Justice Stone suggested that restrictions on state and local discretion were derived from "the presumed intention of Congress," rather than from "the commerce clause itself." \textit{Id.} at 767-69. Whatever determination the Court made as to the relative importance of local versus national interests could be corrected by Congress:

\begin{quote}
Congress has undoubted power to redefine the distribution of power over interstate commerce. It may . . . permit the states to regulate the commerce in a manner which otherwise would be impermissible . . . . But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application . . . .
\end{quote}

\textit{Id.} at 769-70 (citations omitted); see also J. Choper, supra note 73, at 207-08 (courts play quasi-legislative role under dormant commerce clause, subject to congressional revision); Conkle, supra note 155, at 36-37 (judicial enforcement of nonoriginalist rights should reflect quasi-legislative norms, subject to congressional revision, akin to judicial-congressional relationship under dormant commerce clause).

This view, of course, conflicts with the orthodox notion of binding constitutional interpretation. See A. Bickel, supra note 11, at 202-03 (only Court has theoretical authority to reverse or revise principle). Indeed, it is a marked departure from the early judicial enforcement of the dormant commerce clause as established by Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), in which the Court viewed the commerce clause itself as restricting local discretion. "If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner re-convoy to the states that power." \textit{Id.} at 318. Justice Curtis held that states were constitutionally precluded from regulating commercial activities that were "in their nature national." \textit{Id.} at 319. Whatever that might have meant at the time, it is clear that states were constitutionally precluded from regulating certain activities, even in the absence of a conflicting congressional statute. Indeed, Congress could not, even if it wanted to, permit such state regulation.

The distinction between the \textit{Southern Pacific} view of the dormant commerce clause and the \textit{Cooley} view is the distinction between a constitutional provision implicitly resting on the motive of constraining only others and one resting on the motive of constraining others and constraining self. \textit{Southern Pacific} sees no independent constitutional restrictions on local discretion; rather, it sees national legislative authority, exercised by both the Court and Congress in a purely partnership role. Such a grant of national authority reflects the desire to constrain only those who dissent from a rough national consensus. In contrast, \textit{Cooley} envisions an independent constitutional restriction on local discretion and, hence, a restriction on congressional discretion. Such an independent limit on local and national discretion implicitly rests on a motive of self-constraint.

Note that under the \textit{Southern Pacific} view, the Court is not authorized to pursue the coherent implications of the national trade value beyond the extent to which it is valued by a current national majority. Under the \textit{Cooley} view, the Court is authorized to protect the value of national trade against the competing desires for greater local autonomy (economic protectionism, for example), even if a national majority now supports state protectionism.

motive for imposing constitutional restrictions on democratic discretion—that of self-constraint. Dean Wellington states:

Moral ideals are different from moral principles. Their realization is "an achievement deserving praise." They connect with moral principles (which impose obligations) in that they are a guide to the virtuous, inviting him "to carry forward beyond the limited extent which duty demands," to be, for example, especially concerned with the interests of others and to make sacrifices which are not required.\footnote{158}

It should be apparent, however, that people do not wish to be forced to pursue all of their ideals. Thus, not all ideals, even if broadly acknowledged as worthy, necessarily provide a basis for prohibiting contrary democratic choices as unconstitutional.\footnote{159} To justify judicial protection of certain ideals against democratic erosion, a court must postulate and establish that "the people" want to constrain their own everyday democratic discretion for the sake of those ideals.\footnote{160} Like the notion of conventional

\footnote{158. Wellington, Notes on Adjudication, supra note 14, at 245; see also Wellington, Nature of Judicial Review, supra note 14, at 514 (moral ideals of community may be unduly compromised in legislative politics).}

\footnote{159. Dean Wellington has stressed an analogous point:

When the Justices are right about the moral ideals of the community, their decisions become settled and accepted. The turmoil, the resistance, and the threats from other governmental entities, from private groups, institutions and individuals diminish with time. Thus, few today can be heard to endorse government supported racial segregation or other state practices that discriminate against blacks. Wellington, Nature of Judicial Review, supra note 14, at 516.

The last sentence of this passage may be true, and it may be true that ending racial discrimination is a "moral ideal of the community." Cf. infra text accompanying notes 287-334. But it is not necessarily true that all moral ideals should be judicially protected in the name of the Constitution. To say that moral ideals, even if accurately identified, properly constrain blips or exceptions carved out by popular sentiment, is to assume the necessary conclusion. Indeed, one could argue with equal force that a popular choice to compromise the moral ideals of the community is evidence of the strength of the countervailing consideration. Thus, assuming that the legislature is accurately reflecting the majority's sentiments, a court has warrant to step in only if it finds that the community has the constitutional intent that courts protect the frustrated value against such blips and exceptions. See supra text accompanying notes 95-109.

Furthermore, it is not necessarily true that the tempering of turmoil and resistance is evidence that the enforced principle was, or is, a moral ideal of the community. Quietude may mean simply that the dissatisfied elements of the populace are not so dissatisfied as to resist. Yet they may remain dissatisfied. If this dissatisfaction is not theoretically problematic, then one may require a notion of democracy that properly accounts for the intensity of feeling about issues in social conflict. See supra note 111.

160. After rejecting the proposition that the Court should declare its view of "an existing national consensus" as constitutional principle, because "this would charge the Court with a function to which it is, of all our institutions, least suited," Bickel urges that "the Court should declare as law only such principles as will—in time, but in a rather immediate and foreseeable future—gain general assent." A. BICKEL, supra note 11, at 238-39. This views the Court as a leader of public opinion and places on the Court an obligation to succeed in leading. This assertion raises several questions. Why should a consensus that does not yet exist prevail over present normative conflict? If the consensus develops, it will have claim to prevail as a majoritarian value, yet no more claim to prevail than does the present ad hoc compromise that the Court would be thwarting. Why would "the people" want a court to predict future values and give them mandatory effect before they emerge in ordinary politics?}
national morality, which courts can properly employ to restrict local discretion only if they can establish that “the people” today would like to grant Congress additional legislative discretion to address such moral concerns, courts properly can strike down a democratic choice, local or national, in the name of the “moral ideals of the community,” only if they can establish that “the people” today would endorse such a constitutional principle of self-constraint. Dean Wellington does not provide a basis for establishing either condition.

* * *

This Article has posited a goal for constitutional analysis: to identify the constitutional values of “the people” today. It has suggested that past constitutional choices can be relevant for inferring present constitutional preferences, based on a Hamiltonian premise of constitutional continuity. This Article also has sought to provide a basis for more comprehensively understanding “original intent” by identifying the different implications of national values held with the motive of constraining the political discretion of only dissenting localities, and national values held with the motive of constraining the political discretion of both dissenting localities and self. To the extent that “the people” of the nation adhere to constitutional restrictions on local discretion with the motive of self-constraint, they want to favor certain national norms to a greater extent than they otherwise could achieve in ordinary national legislative politics. To the extent that “the people” adhere to norms simply with the desire to constrain the political discretion of dissenting localities, they wish to favor norms precisely to the extent that they would achieve in ordinary legislative politics.

One might conclude, therefore, that obsession with the labels “interpretivism” and “noninterpretivism” has posed an issue only tangentially relevant for mitigating the risks of judicial error in interpreting the Constitution. The relevant distinction for mitigating the chances for

An answer, I suggest, lies in identifying the basic motivation with which these values are held. Values of self-constraint are ideals that “the people” want courts to help them attain. On the other hand, values held with the motive of constraining only others do not justify judicial intrusion into the political process. “The people” would not want courts to tamper with their present compromises in order to anticipate future compromises. Cf. infra text accompanying notes 248-66.

161. See supra text accompanying notes 64, 91-92.  
162. See generally R. Berger, supra note 15; J. Ely, supra note 148; M. Perry, supra note 11; Berger, supra note 5; Brest, supra note 59; Monaghan, supra note 12.  
163. Michael Perry has conceived the dilemma of constitutional analysis as “interpretivism” versus “noninterpretivism.”

The Supreme Court engages in interpretive review when it ascertains the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists. . . . The Court engages in noninterpretive review when it makes the determination of constitutionality by reference to a value judgment other than one constitutionalized by the framers. . . . Interpretivism refers to constitutional theory that claims that only interpretive judicial review is legitimate and in particular, that all noninterpretive review is illegitimate. Noninterpretivism describes constitutional theory that claims that at least some noninterpretive review . . . is legitimate too.
"judicial tyranny" is not between the values of the past and the values of the present; rather, the relevant distinction is between constitutional values held by "the people" today-values of either self-constraint (constitutionally mandated restrictions on local discretion) or self-empowerment (constitutionally authorized congressional discretion)—and the ordinary political values held by "the people" today.

The foregoing analysis thus begins to suggest how past constitutional choices might be used to infer present constitutional values in a manner that mitigates the possibilities for "judicial tyranny." It has identified three necessary evidentiary elements. First, one must understand the structure of past political conflict. To what extent did past national political majorities want to disable offensive local discretion?

Second, one must consider whether members of past constitutional majorities chose to disable local discretion with the simple motive of constraining the political discretion of dissenting localities, or with the compound motive of constraining their own everyday political discretion as well. What were the constitutional majority's goals? Why would a grant of ordinary national legislative discretion fail to achieve the constitutional majority's goals? Did the constitutional majority have an ideal of self-constraint—a desire to favor some value to a greater extent than they could trust themselves to achieve in ordinary politics? If so, what was the content of the ideal? What compulsive national values that would otherwise undermine the constitutional ideal did "the people" choose to forgo for the sake of the ideal? What compulsive national values did they choose not to forgo, despite compromising their ideal of self-constraint?

Third, one must consider the everyday political values among "the people" today, and the relationship of these values to the everyday political values held by "the people" who made formal constitutional choices in the past. By understanding the relationship between the everyday national political concerns of the past and the constitutional choices of the past, and

M. Perry, supra note 11, at 10-11. Perry suggests that "[n]o contemporary constitutional theorist seriously disputes the legitimacy of interpretive review." Id. at 11. He also concludes that

There is no plausible textual or historical justification for [noninterpretive] constitutional policymaking by the judiciary. . . . The justification for the practice, if there is one, must be functional: If noninterpretive review serves a crucial governmental function that no other practice realistically can be expected to serve, and if it serves that function in a manner that somehow accommodates the principle of electorally accountable policymaking, then that function constitutes the justification for noninterpretive review.

Id. at 24 (emphasis added).

Perry's criterion of "accountable policymaking" is as foundational to his analysis as Justice Marshall's criterion that the government reflect the preferences of "the people" is foundational to the analysis presented in this Article. See supra notes 5, 6, 100. A requirement that the government reflect the will of "the people," however, can undermine Perry's notion of "interpretive review" just as it can undermine "noninterpretive review." To satisfy the will of the framers is not necessarily to satisfy the will of the current electorate. Departing from the will of the framers, as in "noninterpretive review," even to contradict it, might reflect the desires of today's electorate. Thus, the essential questions are those confronted in this section: Who are "the people" to whom the principle of accountability refers? Why refer to the preferences of the framers and ratifiers?
the relationship between the everyday national political concerns of the past and the everyday national political concerns of the present, given the Hamiltonian premise of constitutional continuity, one has a basis for inferring, justifying, and criticizing a definition of present constitutional concerns.

One might represent the relevant relationships with the following "constitutional equation":

\[
\text{[ord. nt'l prefs. : const'l choices](past)} \parallel [\text{ord. nt'l prefs. : const'l values}(pres)]\text{.}\text{164}
\]

By using the information that one has about past ordinary, everyday national political preferences, past constitutional choices, and present ordinary, everyday national political preferences, one might infer the content of the fourth variable—the constitutional values of the present.\text{165}

The operation and limits of this analytical structure will be illustrated in the next section.\text{166}

III. GETTING FROM THERE AND THEN TO WHERE—AND WHEN?: CONFLICT, SELF-CONSTRAINT, AND THE QUALITY OF JUDICIAL RESOLUTION

It is time to apply the general analysis developed thus far to particular constitutional conflicts.\text{167} At issue is the possibility that courts, in the name of defining coherent constitutional principle, could distort the constitutional compromises that "the people" today would strike by excessively restricting the discretion of ordinary political majorities. Also at issue is the possibility that courts, in the name of remaining true to past constitutional compromises, might fail to vindicate values of self-constraint held by "the

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164. In plain language, this representation, whose form is borrowed from a familiar group of questions on the Law School Admissions Test, would read:

"The relationship between the nation's past ordinary, everyday political preferences and the values underlying constitutional mandates chosen by "the people" of the past reflects the relationship between the nation's present ordinary, everyday political preferences and the values underlying constitutional mandates desired by "the people" today."

165. Cf. A. Bickel, supra note 11, at 110 ("We require to know, as accurately as may be, whence we come, in order to be aware that it is our own reasoned and revocable will, not some idealized ancestral compulsion, that moves us forward.").

166. The conclusion that the past has no right to bind the present suggests that the postulated constitutional motive of constraining the discretion of future majorities to prevent the development of values, one way or another, cannot be given effect consistent with the Hamiltonian premise of constitutional continuity. If "the people" of the past acted with this motive, they wanted and exercised the discretion to order certain values, and hired the Court only as a nanny. Cf. supra text accompanying notes 58-64. The Hamiltonian premise suggests that "the people" today would want similar discretion to order values precisely as they please in ordinary politics. If the proper theoretical source of values is "the people" of the present, and if past constitutional choices are relevant only as evidence of present constitutional values, the desire of "the people" of the past to satisfy their ordinary political whims (and to constrain the future) would suggest, at least, a present desire among "the people" to satisfy their own ordinary political whims. Thus, accepting the premise of constitutional continuity, the fundamental motive with which constitutional provisions are enacted governs their future significance. See infra note 266.

167. Wechsler, supra note 11, at 20 ("One who has ventured to advance such generalities about the courts and constitutional interpretation is surely challenged to apply them to some concrete problems—if only to make sure that he believes in what he says.").
people” today. The vehicle for this analysis will be the increasingly frequent claims of special constitutional concern for the interests of homosexuals. These claims are derived primarily from two doctrinal sources: first, the judicially developed constitutional right of privacy, and second, judicial recognition of groups protected from “prejudice” under the equal protection clause.168 Can one determine whether “the people” today adhere to constitutional values that would supersede ordinary politics as the basis for resolving disagreements about these issues?

A. Privacy and Sexual Acts

1. The Issue

Michael Hardwick was arrested by the Atlanta police in his bedroom on August 3, 1982.169 Mr. Hardwick was arrested for engaging in certain consensual sexual activities and thereby violating a Georgia criminal statute that prohibits sexual acts defined as “sodomy.”170 Mr. Hardwick challenged the statute as unconstitutional, claiming that it violates the right of privacy.171

Mr. Hardwick lost his case in the Supreme Court.172 Justice White,

168. Homosexuals also have pursued constitutional protection under the first amendment's prohibition of laws “abridging the freedom of speech.” U.S. CONST. amend. I. In these cases, however, the question is not whether homosexual activity or homosexual persons have special constitutional protection, but whether, for purposes of the first amendment, the political issues of homosexuality should be protected as is any other political issue. See, e.g., Gay Alliance of Students v. Matthews, 544 F.2d 162, 167 (4th Cir. 1976) (public university discrimination against gay student organization violated first amendment protection of speech); Gay Students Org. v. Bonner, 367 F. Supp. 1088, 1101-02 (D.N.H.), modified, 509 F.2d 652, 660-62 (1st Cir. 1974) (public university discrimination against gay student organization violated first amendment protections of association and speech); Wood v. Davison, 351 F. Supp. 543, 546 (N.D. Ga. 1972) (same).


170. See GA. CODE ANN. § 16-6-2 (1984). The Georgia Code provides as follows:
(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person. (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

171. Hardwick, 760 F.2d at 1204. Mr. Hardwick's action was for declaratory judgment. The State did not bring charges before a grand jury, but left the case open for possible future action.

writing for a majority of five, held that the constitutional right of privacy does not encompass sexual activity between people of the same gender. Justice Blackmun, for a dissenting minority of four, concluded that it does.

The dispute between Justice White and Justice Blackmun is deeper than a difference over results. The dispute, at least implicitly, is one of basic analytical methodology. In Justice White’s view, protected privacy interests are based on values “deeply rooted in this Nation’s history and tradition”; marriage and traditional family life are protected while homosexual relationships are not. By referring to past and present national political consensus, as reflected in statutes and the practices of daily living throughout the nation, Justice White’s analysis implicitly presumes that “the people” adhere to privacy concerns with the motive of constraining the political discretion of dissenting localities—that “the people” do want to restrict local judgments that diverge from an ordinary political consensus among “the people” of the nation, but that they do not want to constrain their own everyday political discretion.

Conversely, in Justice Blackmun’s view, the right of privacy serves to protect “the happiness of individuals.” Constitutional privacy protects “the right to be left alone” with respect to concerns that “make[] individuals what they are.” This principle logically extends to “intimate sexual relationships”—even between members of the same gender. In conceiving protected privacy interests as reflecting the coherent implications of a general concern with “the happiness of individuals”—even unpopular sources of individual happiness such as homosexual relationships—Justice Blackmun’s analysis implicitly rests on a premise that “the people” of the nation adhere to privacy values with the motive of self-constraint and, therefore, that courts have been authorized to protect the coherent implications of a favored constitutional norm against local intrusion to a greater extent than ordinary national majorities would choose.

This analytical cleavage in deriving and defining the right of privacy has roots deeper than the conflict between Justice White and Justice Blackmun in Hardwick. It originated with the birth of constitutional privacy

173. Justice White’s opinion was joined by Chief Justice Burger, and Justices Powell, Rehnquist, and O’Connor. See id. at 2842.
174. See id. at 2842-47.
175. Justice Blackmun’s opinion was joined by Justices Brennan, Marshall, and Stevens. See id. at 2848.
176. See id. at 2848-56 (Blackmun, J., dissenting).
177. Id. at 2844, 2846.
178. See infra note 222 and accompanying text.
179. Hardwick, 106 S. Ct. at 2851 (Blackmun, J., dissenting).
180. Id. at 2848 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
181. Id.
182. Id. at 2852 (Blackmun, J., dissenting). Justice Blackmun conceived the issue of homosexual sodomy as a specific element of a general set. “The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.” Id.
183. See supra text accompanying notes 67, 92.
In *Griswold v. Connecticut*, Justice Douglas constructed a constitutional right for married couples to use contraceptives by postulating that the “specific guarantees” of the first, third, fourth, and fifth amendments “have penumbras, formed by emanations from those guarantees that help to give them life and substance.” Each of these amendments, in Douglas’ view, protects individuals from state intrusion on certain interests that Justice Douglas characterized as “privacy” interests. From their emanations, Justice Douglas inferred a generic right of privacy, which encompasses a married couple’s desire to use contraceptives.

In using the somewhat fanciful words “penumbras” and “emanations,” Justice Douglas was describing the analytical process by which courts have often developed constitutional meaning. “Emanations” refers to the common process of judicial analysis by which courts pursue the logical implications of certain identified constitutional norms. “Penumbras” refers to the relatively coherent body of principle that is the natural consequence of this traditional judicial reasoning. Thus, by pursuing the coherent implications of a putative constitutional value, Justice Douglas’ analysis implies that “the people” adhere to that value with a motive of self-constraint. It was this approach to constitutional privacy that Justice Blackmun followed in *Hardwick*.

In contrast, Justices Goldberg and Harlan in *Griswold* perceived privacy as a function of the “traditions and [collective] conscience of our people” and the “balance [of traditions] struck by this country,” respectively. By referring to traditions, as *reflected in statutes and daily practice*, their approach looks for an ordinary national political consensus, and implies that “the people” of the nation adhere to privacy concerns with a motive of constraining the political discretion of localities whose values conflict with the national majority’s ordinary political values. This approach also implies that “the people” of the nation adhere to privacy concerns without a motive to constrain their own everyday political

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185. 381 U.S. 479 (1965).
186. Id. at 484.
187. Id. at 485.
188. Id. at 493 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1933)).
189. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). The passage from which the excerpt was taken follows:
  Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them.
  The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. The tradition is a living thing.

Id.

One perhaps sees in Justice Harlan’s juxtaposition of reason and living tradition the essential distinction between the methods of philosophy and legislative compromise for defining public policy.

190. See infra text accompanying notes 216-26.
discretion. It was this approach to "constitutional" privacy that Justice White followed in *Hardwick*.

The implications of both approaches—that which presumes a motive of self-constraint among "the people," and that which presumes a motive to constrain only the political discretion of dissenting localities—will be considered in what follows. The issue is broader than Mr. Hardwick's claim that constitutional privacy extends to protect "sodomy" between people of the same sex. At stake is whether the notion of constitutional privacy is at all supportable given a goal of ascertaining the constitutional values of "the people" today.

2. Self-Constraint: The Limits of Language

a. The Constitutional Choices of "the People"—There and Then

If "the people" adhere to a value of constitutional privacy with a motive of self-constraint, they must want courts to protect the coherent implications of that value to a greater extent than that attainable by relying on the ordinary national political process through empowering Congress to act. One must note that although Justice Douglas' analysis considered the logical implications of the first, third, fourth, and fifth amendments, "the people" who made the relevant choices were not those of 1791, but those of 1868. The framers of the first ten amendments were concerned with the protection of local discretion against national intrusion and, therefore, were motivated not by a desire for self-constraint but by one of self-protection against intrusion by overreaching national majorities—a motive of local empowerment. Thus, the Douglas-Blackmun rationale for constitutional privacy must rest on a premise that "the people" of 1868, by ratifying the fourteenth amendment, intended to incorporate at least portions of the Bill of Rights against the states, and thereby to constrict the very local discretion that "the people" of 1791 originally intended to protect. Although Justice Douglas' *Griswold* opinion was not entirely clear

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191. This word is surrounded by quotation marks because the rationale of vindicating national political values is not one of constitutionally mandated limits on democratic discretion. It is, instead, an antifederalism postulation of national political discretion. See supra text accompanying notes 150-56.

192. See supra text accompanying notes 67-92.

193. Cf supra note 90.

194. To examine the premise of incorporation is beyond the scope of this Article. This section assumes the intent among "the people" of 1868 to incorporate the first, third, fourth, and fifth amendments against the states, and considers whether such choices of self-constraint can support a general notion of constitutional privacy. Cf. infra note 207. For a discussion of the ninth amendment, and the plausibility of its incorporation against the states through the fourteenth amendment, see infra notes 198, 200.

about what common value the first, third, fourth, and fifth amendments were intended to protect, Justice Blackmun's *Hardwick* opinion explicitly raises a concern for individual happiness as the essence of the privacy right.\(^{195}\) One might infer that Justice Douglas similarly perceived the essence of constitutional "privacy" as a concern for individual happiness and "the right to be left alone"\(^{196}\) in areas that touch "the heart of what makes individuals what they are."\(^{197}\) If one assumes, as Justice Douglas apparently did in *Griswold*, that "the people" were dedicated to some

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195. *Hardwick*, 106 S. Ct. at 2851 (1986) (Blackmun, J., dissenting) ("[W]e protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households." (emphasis added)).

196. *Id.* at 2848 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

197. *Id.* at 2854 (Blackmun, J., dissenting). A similar notion was crafted by Justice Brennan as underlying the putative constitutional right of "intimate association." *See* Roberts v. United States Jaycees, 468 U.S. 609, 618-22 (1984). Justice Brennan noted that constitutional protection for certain kinds of personal relationships "reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619; *see supra* note 29.

Such an ideal of individual happiness is also implicit in the Court's conclusion that the "right of personal privacy" is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *See* Roe v. Wade, 410 U.S. 113, 153 (1973). Justifying this proposition, the Court noted the many inconveniences that an unwanted pregnancy would cause a woman to suffer:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm, medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may impose upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

*Id.* at 153 (emphasis added). Thus, justifying a postulated special constitutional concern for these hardships seems to be a function of their importance to the target of state regulation—the pregnant woman.

Such an ideal of protecting each individual's most important sources of happiness is ultimately self-destructive—a potential prescription for anarchy. *See* J. CHOPER, *supra* note 73, at 7-8 ("[I]f . . . each person has the unqualified right to define liberty for himself, we have entered a quagmire that rapidly swallows democracy's central feature of majority rule. Indeed, the theory seemingly conflicts with all governmental rule . . . ."). Obviously, the mere fact that an activity is important to an individual cannot conclusively insulate that activity from regulation. According to the judicially developed doctrine enforcing the judicially developed "right of privacy," a protected privacy interest can be regulated, but only if the state has an especially strong justification. Thus, whether the state, in the final analysis, will be prohibited from regulating those specially protected sources of individual happiness will be a function of the Court's evaluation of the state's justification. Even assuming that the principle for generating specially protected individual interests is sound—i.e., supported among a constitutional majority of "the people" as an ideal for which they are willing to endure the pain of self-constraint—it demands a judicial role in its application which, at best, can be described as quasi-legislative. *See* Easterbrook, *supra* note 156, at 100 ("Decisions based on 'liberty' . . . require the judge to select among values and to resolve tension when values clash—more an exercise in moral philosophy than in interpretation."). It is unclear why "the people" would choose to grant courts the final say in determining the "proper" balance between two permissible state concerns.
The answer might well be that they had competing concerns that they were not willing to sacrifice. The ideal of self-constraint was not sufficiently important to override a desire for democratic discretion with respect to those competing concerns. For the areas covered by the first, third, fourth, and fifth amendments, "the people" apparently were willing to endure the pain of self-constraint. They were willing to endure the pain of seeing individuals engage in morally offensive sources of happiness and if one assumes, again as Justice Douglas apparently did in Griswold, that they held this norm as an ideal of self-constraint, one must explain why "the people" chose to protect only the specific sources of individual happiness mentioned in those amendments.

Thus, Justice Douglas' reasoning was as vulnerable as was that of the coach who forced her client to read Shakespeare. Even assuming that

198. This assumption is vulnerable. Although constitutional protection for the free exercise of religion may well be based on a view that religion is specially important to individual happiness, many constitutional analysts seriously question the proposition that such a value underlies the freedom of speech. See, e.g., J. Ely, *supra* note 148, at 105 (most supportable values to protect against democratic choices are those which protect "channels of political change"); A. Meiklejohn, *supra* note 74, at 54-55 (first amendment protects freedom of public speech but "has no concern for the need of many men to express their opinions on matters vital to them if life is to be worth living" ) (quoting Z. Chafee, *Free Speech in the United States* 33 (1942)); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1, 20 (1971) (constitutional protection to be accorded only to speech that is explicitly political); Schauer, *Must Speech Be Special?*, 78 NW. U.L. REV. 1284, 1303-06 (1983) (underlying theoretical justifications for principle of freedom of speech include both unitary and multivalue theories); cf. T. Emerson, *The System of Freedom of Expression* 6 (1970) (freedom of expression serves "individual self-fulfillment").

199. Assuming that the first amendment's protection of speech is rooted, in part, in a concern for individual happiness, "the people" of 1868, see *supra* text accompanying note 194, chose to endure ordinary political pain for the sake of individuals who had morally offensive things to say. Similarly, through the free exercise clause, "the people" apparently were willing to endure such pain of self-constraint in order to protect at least some morally offensive religious practices.

If reference to morally offensive sources of happiness seems incongruous with respect to the third, fourth, and fifth amendments, it may stem from a notion that these amendments do not relate to notions of 'privacy predicated on a value of individual happiness and autonomy.' This undermines Justice Douglas’ contention that these amendments are all species of the same general "privacy" concern. The analysis in the text, however, seeks to rest on the analytical premises most favorable to Justice Douglas' conclusion.
Justice Douglas' general notion of protected privacy was the genus of which the particular guarantees in the first, third, fourth, and fifth amendments were species, the specification of constitutional concerns in the first, third, fourth, and fifth amendments suggests that "the people" had a limited and specific dedication to the ideal of individual happiness. In pursuing the coherent implications of the common value that might underlie the first, third, fourth, and fifth amendments, without acknowledging that those amendments reflect relatively specific choices, Justice Douglas left the realm of constitutional analysis, seeking the values of "the people," and entered the realm of philosophy, seeking to create a more perfect world in his own image. He failed to recognize the limits placed on his role by the value choices implicit in constitutional language.200

b. The Constitutional Values of "the People"—Here and Now

This weakness in Justice Douglas' analysis of the intent of those who incorporated the mandates of the first, third, fourth, and fifth amendments against the states does not end the matter. If one's goal is to identify the constitutional values of "the people" today, past constitutional choices are significant as evidence of contemporary constitutional concerns.202 The evidentiary significance of constitutional language, chosen by "the people" of the past, may have its own limits. Even if "the people" of 1868 were

200. One might argue that the (substantive) due process clause is formally the source of constitutional privacy, and that this clause is not specific at all. The language of "due process" is broad and vague, one might argue, and invites courts to provide content. This argument for a general right of constitutional privacy is vulnerable on several grounds. First, the argument is not relevant to Justice Douglas' derivation of constitutional privacy in Griswold, since his rationale was predicated on the specific incorporation of the first, third, fourth, and fifth amendments, and on the coherent implications of those amendments. Cf. supra note 198. Second, if the argument does not envision incorporation of the first, third, fourth, and fifth amendments, it leaves the due process clause with substantive content that is vague indeed—
to the point of indeterminacy.

Third, if the argument envisions incorporation of the first, third, fourth, and fifth amendments—and more—one is left with a similar indeterminacy: What else? The ninth amendment may be a response, but it is not an answer that mitigates the normative indeterminacy of the (substantive) due process clause. See supra note 198. Given earlier analysis suggesting the limited circumstances under which political competitors would want to forego political power, see supra text accompanying notes 57-92, to posit that "the people" would choose to grant courts such an indeterminate license is implausible.

Ultimately, the weakness of relying on the vague language of the due process clause for generating more than procedural restrictions on state and local discretion rests in the weakness of viewing the due process clause as the intended route of incorporating the Bill of Rights. If, indeed, "the people" of 1868 did intend to incorporate the Bill of Rights to restrict state and local discretion, as a matter of self-constraint, the most plausible route by which they would have expressed this incorporation is through the privileges and immunities clause. This clause, by reference, is as specific as the first, third, fourth, and fifth amendments. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 166 (Black, J., concurring) (clause at least should incorporate protections enumerated in Bill of Rights); cf. J. Ell, supra note 148, at 28 (interpreting clause as "delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding.").

201. See supra text accompanying notes 95-109.
202. See supra text accompanying notes 114-23.
concerned only with particular aspects of individual happiness, perhaps "the people" of 1987 would, if they thought about it, prefer some privacy ideal of self-constraint beyond those contexts specified by the first, third, fourth, and fifth amendments.203

How might one establish this proposition? As suggested in the previous section, modern constitutional values can be inferred from the relationships among three variables: the everyday political preferences of past national majorities, past constitutional choices to constrain (and not to constrain) local political preferences in the name of some constitutional ideal, and the everyday political preferences of present national majorities.204

Turn now to the first two variables, and consider the relationship between the nation's ordinary political impulses and its constitutional ideals of self-constraint at the time a constitutional provision was ratified. We have assumed that "the people" of 1868 maintained a broad and general ideal of "privacy"—or individual "happiness"—but that they had competing concerns they otherwise would seek to vindicate in everyday politics.205 Thus, because they chose to protect the particular aspects of that ideal reflected in the first, third, fourth, and fifth amendments, we can surmise that they were willing to endure some amount of everyday political pain in the service of that ideal. One might represent the everyday political pain that "the people" of 1868 chose to endure as follows: the total amount of everyday political pain, $P_t[1868]$, is equal to the sum of the everyday

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203. This has been referred to as choosing the "level of generality" at which a constitutional norm is perceived and defined. See L. Tribe, AMERICAN CONSTITUTIONAL LAW § 15-13, at 946 (1978). In speaking about a purported right of sexual privacy, Professor Tribe cautioned that "arriving at a complete definition of protected human sexual activity at an appropriate level of generality will [not necessarily] be an easy task." Id. Although he signals some sexual activities that might or might not be protected, Professor Tribe does not provide criteria by which a constitutional analyst can explain the choice to include one sexual activity in the realm of constitutional protection while excluding another. Cf supra note 29.

Professor Tushnet also has noted that a question of constitutionality "frequently . . . turns completely on the level of generality at which some feature of the issue under analysis is described. But the choice of that level must be made on some basis external to the analysis." See Tushnet, supra note 102, at 791; see also Brest, supra note 59, at 222-24.

What does it mean to define a principle with an appropriate level of generality? He could mean that the analyst who has defined the principle has properly determined that the value, as defined, has been deemed by a constitutional majority to supersede the competing values of ordinary democratic majorities. If so, the choice of a level of generality at which a constitutional principle is described must account for the precise nature of conflict that motivated a constitutional majority to circumscribe the discretion of ordinary democratic majorities. Any choice to define a constitutional principle in a way that does not confront the question of why "the people" would want to circumscribe the democratic discretion of "the people," fails to adhere to a notion of popular determination.

When the Supreme Court deemed the equal protection clause to prohibit governmental actions based not only on racism, but also on sexism, it shifted to a more general level than was previously necessary for characterizing the clause's normative content. For an effort to justify this move, and to distinguish this treatment of equal protection from the creation of constitutional privacy from the general value purportedly underlying the first, third, fourth, and fifth amendments, see infra text accompanying notes 335-390; note 374.

204. See supra text accompanying notes 162-66. For a clarification of this analysis, see its application to equal protection in infra text accompanying notes 314-90.

205. See supra text accompanying notes 195-200.
political pain that they chose to endure in the particular contexts covered by
the first, third, fourth, and fifth amendments, \( \{Pc_1 + Pc_2 + Pc_3 + Pc_4\} \) [1868].\(^{206}\) The measure of everyday political pain that the constitutional
majority was willing to endure for the sake of privacy consists of the extent
to which the Constitution, in disabling local discretion to victimize individ­
ual privacy interests, was to force a greater national commitment to the privacy
ideal than ordinary national majorities in Congress could be expected to choose.\(^{207}\)

Now turn to the third variable—ordinary political values today.
Suppose that everyday political values have developed—that local majorities are less likely today than in 1868 to violate the first, third, fourth, or fifth amendments.\(^{208}\) Indeed, suppose that everyday national majorities in Congress are more likely than in 1868 to enact legislation protecting
individual speech interests, religion interests, or the interests of criminal
defendants from intrusion by local political choices. Given this new national
political context, the first, third, fourth, and fifth amendments would impose less everyday political pain on "the people" of 1987 than they
imposed on "the people" of 1868. \( \{Pc_1 + Pc_2 + Pc_3 + Pc_4\} \) [1987] < \( \{Pc_1 + Pc_2 + Pc_3 + Pc_4\} \) [1868]) Thus, the total amount of everyday political pain that "the people" of 1987 would be forced to suffer from the

\(^{206}\) By framing national norms through constitutional mandates rather than through congressional legislation, the national majority denies itself discretion to cut back on those constitutionally mandated national norms if it someday wants to. See supra note 81 and
accompanying text. By pursuing norms through constitutional mandates, the national majority forces a commitment to certain values greater than ordinary congressional majorities might choose in everyday decisionmaking. Thus, such constitutional mandates envision choices by
national majorities to suffer losses—endure pain—in the forums of everyday politics. Each mandate in each chosen constitutional context reflects such a choice of self-constraint—to endure pain in the ordinary political processes for the sake of certain ideals.

The nomenclature in the text seeks to represent this idea. It assumes, as Justice Douglas asserted, that the first, third, fourth, and fifth amendments were all intended to protect certain elements of individual autonomy or happiness. It posits that each amendment reflected particular choices of self-constraint in particular contexts, and that each choice of self-constraint reflected a choice to endure some losses—some pain—in ordinary politics. Thus, think of \( Pc_1 \) as the pain "the people" of 1868 chose to endure in the contexts covered by the first amendment, \( Pc_2 \) as the pain they chose to endure in the contexts covered by the third amendment, \( Pc_3 \) as the pain they chose to endure in the contexts covered by the fourth amendment, and \( Pc_4 \) as the pain they chose to endure in the contexts covered by the fifth amendment.

\(^{207}\) See supra text accompanying notes 162-66. I am, for the moment, ignoring the peculiar circumstances in which the fourteenth amendment was ratified. See supra text accompanying notes 88-89; infra text accompanying notes 258-66.

\(^{208}\) A change in ordinary, everyday political preferences does not itself contradict the premise of constitutional continuity. Recall that the latter notion is concerned with the relationship between a desire for democratic discretion and a desire to restrain democratic discretion. See supra note 164. When the motive to restrict democratic discretion is that of self-constraint, "the people" resolve a dynamic tension between an ideal value and competing everyday preferences by choosing those ordinary preferences to forgo toward serving the ideal and those to retain, despite compromising the ideal. These competing everyday preferences thus limit the extent to which "the people" choose to protect the ideal value, which, but for those competing preferences, could have been vindicated to the full extent of its worth to "the people." Thus, only if there is some change in this relationship of tension between the ideal and ordinary political preferences is the premise of constitutional continuity contradicted. See infra note 209. For a consideration of the vulnerability of the Hamiltonian premise, see supra note 122.
Constitution's original mandates related to individual happiness, *Pt [1987]*, would be less than the everyday political pain that "the people" of 1868 chose to endure for the sake of their happiness ideal, *Pt [1868]*.

Assuming all this, one might make the following argument. The notion of self-constraint suggests a competition within an individual's value structure between an elusive ideal and pressing everyday concerns. Particular choices of self-constraint reflect a particular relationship or accommodation among those competing impulses, reflecting an equilibrium in which the benefit to an ideal is worth the loss of competing everyday preferences. The constitutional equation, which reflects the Hamiltonian premise of constitutional continuity, suggests that this relationship of tension between the constitutional ideal and competing everyday preferences persists through time.\(^{209}\) It suggests not only that "the people" of 1987, like those of 1868, adhere to an ideal of individual "happiness," but also that they are willing to endure as much everyday political pain for the sake of that ideal as were "the people" of 1868.\(^{210}\) Thus, if "the people" today no longer feel as much everyday political pain imposed by the first, third, fourth, and fifth amendments as "the people" of 1868 chose to endure—if \{Pe1 + Pe2 + Pe3 + Pe4\} [1987] is less than \{Pe1 + Pe2 + Pe3 + Pe4\} [1868]—"the people" today must want some additional restriction on their everyday political discretion, Pc5, to maintain intact the level of their commitment to their ideal of individual "happiness."

By interpreting the Constitution as prohibiting local choices that intrude on some previously unspecified context related to individual happiness—sexual activity, for example—the Court, acting as a coach, can ensure that the everyday political pain that "the people" of 1987 suffer for the sake of individual happiness equals the everyday political pain that "the people" of 1868 chose to endure. Thus, if Pc5 represents "sexual activity," and if \{Pe1 + Pe2 + Pe3 + Pe4 + Pe5\} [1987] is equal to \{Pe1 + Pe2 + Pe3 + Pe4\} [1868], the Court could have a sound analytical basis for determining that the constitutional values of "the people" today extend to self-constraint for the sake of individual happiness in the supplemental context of sexual activity.\(^{211}\)

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209. *See supra* note 164. This is because the individual who has values of self-constraint views them as ideals to be attained, but feels restricted in the extent to which those ideals might be pursued because of competition from everyday desires. The notion of an *ideal* establishes the preferred *direction* for normative movement. Thus, if the individual no longer holds those everyday desires that once restricted the extent to which he could realize his ideal, he would gladly make choices that make his everyday behavior more closely approximate his ideal. This notion of an ideal as setting the preferred direction of normative movement resembles Dworkin's notion of "integrity." *See supra* note 30. Dworkin, however, accounts only for the ideal, and not for the everyday impulses that compete with the ideal. *Id.* The premise of constitutional continuity, focusing on the *relationship* between constitutional choices and everyday political values, accounts for both. *See supra* text accompanying notes 161-66; *infra* text accompanying notes 363-79.


211. *See supra* note 208. Of course, this raises significant difficulties in determining which new particulars of a general ideal of individual happiness should be deemed protected by the constitutional preferences of "the people." One must have some additional criteria since there are so many sources of individual happiness logically begging to be protected. Yet, the contexts
However sound this argument could be, and although this hypothetical has suggested circumstances that could supersede the superficial implications of constitutional language, it is probably not true that the first, third, fourth, and fifth amendments intrude less on choices made by ordinary democratic majorities today than in 1868. Indeed, those amendments, as interpreted by the courts today, may intrude on democratic preferences to a greater extent than the framers and ratifiers intended.

Thus, to establish a generic constitutional ideal of privacy, with mandates going beyond the contexts specified in the first, third, fourth, and fifth amendments, one must postulate that "the people" today are willing to endure more pain of self-constraint in the service of individual happiness than "the people" of 1868 chose to endure. There is, quite naturally, no evidence for such a proposition. Values of self-constraint are by nature vexing and elusive. Because values of self-constraint are by definition unpopular in everyday politics, they will not be manifested in daily political processes. Only when "the people" are thinking in constitutional terms, making constitutional choices by "solemn and authoritative act," and therefore considering why, if at all, democratic discretion should be circumscribed, is it likely that they will seriously consider values of self-constraint. Thus, even if it is true that the first, third, fourth, and fifth amendments were intended to serve the same ideal of individual happiness, and even if "the people" of 1868 maintained this general value of individual happiness as an ideal of self-constraint for which they were willing to endure everyday political pain, there is no evidentiary basis for inferring that "the people" today are willing to endure more democratic pain in the service of that ideal than were "the people" of 1868, who purportedly identified that ideal. There is no basis for rebutting the Hamiltonian premise of constitutional continuity.

in which Justice Douglas posits that "the people" of 1868 chose to protect individual happiness do not suggest an additional common characteristic. See supra note 197.

Compare this to the relatively easier resolution of an analogous question in the context of equal protection. See infra text accompanying notes 235-441; cf. infra note 380.

212. See supra note 164.

213. A change in national political values requires a commensurate development of constitutional mandates of self-constraint in order to satisfy the Hamiltonian premise of constitutional continuity. See supra note 208; infra note 362.


A first amendment that prohibits only laws restricting criticism of governmental officials would be far less intrusive on majoritarian preferences than is the amendment as interpreted today. An antisedition law doctrine seeks only to preserve governmental accountability, and is thus decidedly promajoritarian. The first amendment as it currently is interpreted restricts the discretion of majorities to silence minority viewpoints they find offensive. See, e.g., Cohen v. California, 403 U.S. 15 (1971) (offensive language); American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), 771 F.2d 323 (7th Cir. 1985), affirmed, 106 S. Ct. 1172 (1986) (mem.) (pornography). Professor Bollinger has made this point with notable clarity. See L. BOLLINGER, supra note 56, at 50-51.

3. Constraint of Others: Judicial Enforcement of a National Political Consensus Against Dissenting Localities

If based on a theory that posits privacy as a general norm of self-constraint derived from the logical implications of the first, third, fourth, and fifth amendments, Griswold fails to satisfy a goal of identifying the constitutional values of "the people" today. Yet, the result in Griswold, in which Connecticut's prohibition of the use of contraceptives by married couples was invalidated, might have satisfied that interpretive goal on other grounds. Rather than postulate a privacy ideal of self-constraint, one might postulate ordinary national political judgments about certain marital concerns, and a concomitant desire to impose those national values on dissenting localities. In other words, one might turn to the other basic motivation for constraining democratic discretion—constraint of others.

This was the essence of Justice Goldberg's concurrence in Griswold and Justice White's majority opinion in Hardwick. In Justice Goldberg's view, Connecticut's choice to prohibit the use of contraceptives by married couples offended the "traditions and [collective] conscience of our people." In Hardwick, Justice White found that Georgia's prohibition of sodomy, at least as applied to homosexuals, does not violate liberties that are "deeply rooted in this Nation's history and tradition."

Both Goldberg and White looked toward the nation's relevant statutes and practices, rather than the logical implications of constitutional values limiting democratic discretion. In Griswold, Justice Goldberg noted that the "traditional relation of the family [is] as old and as fundamental as our entire civilization" and on that basis declared, "I cannot believe that [the Constitution] offers these fundamental rights [of privacy in marriage] no protection." In Hardwick, Justice White noted the "ancient roots" of proscriptions against sodomy. 

216. Griswold v. Connecticut, 381 U.S. 479, 487, 493 (1965) (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). The word "conscience" relates ambiguously to the distinction between values intended to constrain the political discretion of only others, and values intended to constrain the political discretion of both others and self, as well. Indeed, because the word evokes an attitude of self-constraint, one might infer that Justice Goldberg's analysis was predicated on the implications of constitutionally mandated restrictions on local discretion. Despite this import of "conscience," the thrust of Goldberg's analysis concerned the traditions of the people as reflected in their daily practices. His analysis concerned the centrality of marriage and family to Western civilization. Id. at 495-96 (Goldberg, J., concurring). The pursuit and protection of marriage and family hardly have been vulnerable to the ordinary, everyday concerns of "the people;" rather, they have been the focus of humanity's daily concerns. Thus, if any constraints were needed to protect these values, those needing constraint are not the bulk of society, but isolated pockets of dissenting minorities—one of which, apparently, was the state of Connecticut.

217. Bowers v. Hardwick, 106 S. Ct. 2842, 2842 n.2 (1986) ("The only claim properly before the Court . . . is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.").

218. Id. at 2846.

219. Griswold, 381 U.S. at 496 (Goldberg, J., concurring).

220. Id. at 495 (Goldberg, J., concurring).

221. Bowers, 106 S. Ct. at 2844.
provide criminal penalties for sodomy performed in private between consenting adults."222 He concluded that, against this background of statutes and practices, "[t]he claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' . . . is, at best, facetious."223

This rationale is implicitly predicated on a motive among "the people" of constraining only others, rather than the compound motive of self-constraint, and suggests that a court properly constricts local discretion only to the extent that it accurately identifies a rough national consensus, and only if it identifies a rough national consensus that a national majority, through Congress,224 would want to impose on dissenting localities.225 The

222. Id. at 2845.
223. Id. at 2846.
224. Cf. Wellington, Notes on Adjudication, supra note 14, at 222-29. In this article, Dean Wellington distinguishes between "principles" and "policies," and the relative competence of courts and legislatures to define each. A "principle" is a norm of conduct valued for itself. It reflects some intrinsic notion of good or bad. A "policy" is a norm of conduct valued for its instrumental role in promoting some goal. Id. at 222-25.

Policies, in Wellington's view, are not absolutes; they are evaluations of expedience and convenience, and are properly compromised with competing concerns. Principles, on the other hand, as moral judgments, should be treated as relatively immune to compromise. Principles should be defined in terms of general application, and should not be undermined by competing considerations. Given these characteristics distinguishing principles from policies, Dean Wellington concludes that legislatures are better equipped to pursue policies, and that courts are better situated to protect principles. Id. at 235-49.

All of this assumes that "the people" do not want principles to be subject to ad hoc compromise in the legislative process. This may or may not be true. See supra note 30. I suggest that people are perhaps more likely to want coherence with respect to policies than principles, even if it means giving up more preferences, precisely because policies are instrumental and principles are intrinsically valued ends. In a dispute between adherents of two competing economic theories, for example, people might deem it wise to choose one theory or the other, instead of taking bits and pieces from each. There is something to be said for each coherent theory, but no one has suggested a theory that corresponds to whatever ad hoc compromise that would emerge if each combatant held his ground. Thus, perhaps to give his theory a chance to work, Democrats voted to give President Reagan his entire economic package in 1981. Despite their doubts, many might have recognized that he could be right.

On the other hand, individuals are less likely to defer—more likely to be rigid—in their principles, and therefore, compromise is more likely to characterize a corporate norm. If I believe that marijuana should be legal, while you believe that it should not be legal, neither of us is likely to forego our option of ad hoc compromise based on the possibility that the other might be right. I will want to gain as much liberty as I can with my political power, and you will want to get as much criminal sanction as you can, given your political power. The Missouri Compromise over slavery and the Civil Rights Act of 1866 tend to support this general proposition.

The issue is of relatively limited significance if the question concerns issues about which courts should feel free to make common law. Id. at 249-64. Yet, when the question concerns disabling local or national majorities from achieving their preferences, rather than establishing some starting-point subject to change by legislative choice, cf. G. Calabresi, supra note 14, at 59-60, it becomes far more important to determine whether and how "the people" want courts to develop the coherence of principle.

225. The judicial role in vindicating a postulated rough national consensus concerned only with constraining the discretion of dissenting localities would be analogous to its role under the dormant commerce clause, where a court's task is to evaluate the contemporary will of a national majority. When acting pursuant to the dormant commerce clause, a court's determination is subject to correction by congressional action, since a legislature, presumptively in this system, best reflects prevailing political values. Similarly, when the desire to constrain democratic discretion is concerned only with dissenting localities, and not with self-constraint
search for such "traditions of the Nation" does not require identifying the logical implications of certain constitutional values of self-constraint, but involves feeling the present political pulse of the nation. Marital contraception is protected against local intrusions, while homosexual sodomy is not, because marital contraception is treasured by a political majority of the nation, while homosexual sodomy is not. Thus, given the Goldberg and White view of privacy, Mr. Hardwick can establish that Georgia lacks discretion to prohibit homosexual sodomy only if he can establish that an everyday national political majority wants to secure the individual's freedom to engage in such activities, despite the Georgia legislature's contrary preferences.

Assume, however, that Mr. Hardwick does establish this national political preference. Indeed, assume that Congress passes a statute protecting homosexual sodomy. Assume also that Justice Goldberg correctly sensed a rough national consensus that marital privacy interests should be protected from Connecticut's prohibition of contraceptives. What is the significance of such national political preferences in determining the constitutionality of Georgia's and Connecticut's idiosyncratic moral judg-

in service of some constitutional ideal, a court's task is to help an ordinary national majority achieve its will. In this sense, the court acts as a quasi-legislature. The basis for restricting local discretion is a hypothetical congressional statute. This judicially constructed statute must be subject to congressional correction if the court erroneously identifies the nation's conventional morality. See supra text accompanying note 156.

This nonconstitutional nature of restricting local discretion in the name of conventional morality raises questions about whether a court should take the sort of activist stance that it has assumed for the dormant commerce clause. Why should a court act in any particular context—for example, that of a postulated rough national consensus about marital privacy—subject to legislative correction? In the context of marital privacy, as opposed to the dormant commerce clause, one might argue that a court should act because Congress lacks explicit constitutional authority to legislate. Such an argument would be misplaced. Courts also lack explicit constitutional authority to disable local discretion in the name of marital privacy or conventional morality. A court must postulate that "the people" wish to augment national legislative discretion—congressional discretion—to reach issues of marital privacy, as a logical prerequisite to judicial invalidation of local discretion in the name of national conventional morality. Thus, a more direct approach, and one no more intrusive on the constitutional value of federalism, would have the Court declare simply that the Constitution is now interpreted as granting Congress the discretion to legislate in the area of marital privacy. Such a notion of augmented congressional authority should be a matter of considerable concern for constitutional analysts. See supra note 154; infra note 223.

Besides raising doubts about its wisdom, quasi-legislative judicial action implicates other constitutional concerns, such as separated powers and delegation. See generally Schoenbrod, supra note 74 (discussing legislative and judicial role in delegation doctrine).

226. There is evidence of an emerging consensus that sexual activity between consenting adults, even of the same gender, should not be prohibited. Although all states criminalized "sodomy," variously defined, until 1961, see Bowers v. Hardwick, 106 S. Ct. 2841, 2845 (1986), twenty-six states have since removed criminal sanctions for such sexual activities. See Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. M I A M I L. REV. 521, 524 (1986) (currently 24 states and District of Columbia criminally penalize homosexual sodomy). Furthermore, of the twenty-four states that maintain such criminal statutes, only six explicitly prohibit homosexual sodomy while permitting heterosexual sodomy. The remaining eighteen states criminalize all sodomy. See id. at 524-25.

Whether this apparent trend also supports the antifederalism view that dissenting or lagging populations should be prohibited from continuing to criminalize sodomy, however, is quite a different question. See infra text accompanying notes 224-29.
ments.\footnote{227}

If there is a rough national consensus holding that homosexuals should be free to engage in consensual sodomy, or that married couples should be free to use contraceptives, a court following Goldberg's and White's approach may properly impose the consensus against contrary local judgments only if a national majority, through Congress, would want to disable such local democratic discretion,\footnote{228} only if "the people" would want to empower Congress with \textit{new} constitutional authority to legislate family morality.\footnote{229} One must, in other words, postulate a contemporary constitutional desire for national legislative power that the framers and ratifiers chose not to delegate. Except by a pretextual use of the commerce

\footnote{227}This assumes that Connecticut's electorate, whether on moral or other grounds, believed in 1864 that married couples should not use contraceptives. Dean Wellington questions this assumption, in part because the statute was enacted in 1879, and in part because the statute seems so out of step with contemporary conventional morality. See Wellington, \textit{Notes on Adjudication}, supra note 14, at 291. He implies that the statute should be struck down because it is unlikely to reflect the mores of contemporary Connecticut. See supra note 147; cf. supra note 152. If the Court were to strike down the statute under this rationale, it would not be acting in a constitutional sense at all. Rather, the Court would be finding that the statute probably no longer reflects the state's majoritarian preferences. Under this reasoning, the state legislature should remain free to correct an erroneous judicial finding. This is a decidedly promajoritarian rationale for judicial intervention. See generally G. Calabresi, supra note 14.

\footnote{228}A national majority may hold values it does not want to impose on dissenters.

\footnote{229}A national political majority might want to impose values on dissenting localities, but a constitutional majority \textit{(i.e., "the people" when thinking in constitutional terms)} might not want to empower the political majority to do so. This is the essence of restrictions on congressional authority rooted in the value of federalism. See supra note 86.

\textit{Cf.} Garcia \textit{v.} San Antonio Metro. Transit Auth., 495 U.S. 528, 550-52 (1985). This case concerned the challenge of a congressional statute on federalism grounds. In upholding the statute, Justice Blackmun, following Herbert Wechsler's lead, reasoned that the structure and processes of national politics sufficiently protect the constitutional value of federalism. \textit{Id.}; see also J. Choper, supra note 73, at 175-90 ("the federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-a-vis the states"); Wechsler, \textit{The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government}, 54 \textit{Columbia L. Rev.} 543, 547 (1954) ("[T]o the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.").

This assertion would have startled the framers and ratifiers of 1787, who, precisely because they viewed the national political process as inadequate to protect local concerns, created the federal government with limited and enumerated powers rather than with general powers. The Wechsler-Garcia notion of federalism destroys any distinction between a national majority's desire to pursue policy and the limits of constitutionally delegated legislative authority. Whether today's federalist values no longer have \textit{constitutional} (as opposed to mere political) significance to "the people" is the essential question that the Wechsler-Garcia theory must confront. \textit{Cf. supra} note 155; \textit{infra} notes 232, 233.

Although this issue has been joined in the context of federal regulation of state employees and state property, \textit{see} National League of Cities \textit{v.} Usery, 426 U.S. 833, 836-37 (1976) \textit{(overruled by Garcia \textit{v.} San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985)}) it is implicit as well in Congress' discretion to regulate private persons and property pursuant to the commerce clause, \textit{cf.} United States \textit{v.} Darby, 312 U.S. 100, 114-15 (1941) (regulations of interstate commerce that are not constitutionally prohibited, \textit{whatever their motive or purpose, are within plenary power of commerce clause}); \textit{see infra} note 230.
power,\textsuperscript{230} or through suasion by use of the taxing and spending power, Congress lacks constitutional authority to regulate family morality.\textsuperscript{231} Thus, only if a court concludes that a constitutional majority of “the people,” thinking with a constitutional frame of mind, would want to augment national legislative power, despite not having resorted to the article V amendment process, would it be proper to intrude on local discretion in the name of the “traditions and collective conscience of our people.”\textsuperscript{232}

Characterized in these terms, reliance on conventional morality for constraining local discretion, although it may vindicate the preferences of everyday national majorities, is hardly constitutionally innocuous.

* * *

The foregoing analysis of the judicially developed right of privacy suggests that if one pursues a goal of identifying the constitutional values of “the people” today, Mr. Hardwick did not have a valid claim. Indeed, it suggests that Mr. Griswold, and any married couple in Connecticut wanting

\textsuperscript{230} See infra text accompanying notes 153-56. Since United States v. Darby, 312 U.S. 100 (1941), the commerce clause has been interpreted as according Congress discretion to regulate for any policy objectives, so long as the subjects of regulation have some vaguely defined connection to “interstate commerce.” “Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.” Id. at 115 (emphasis added); cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819). In McCulloch, Justice Marshall established congressional purpose as the essential element for defining the limits of constitutionally delegated legislative authority. “Should Congress ... under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal ... to say that such an act was not the law of the land.” Id. at 423.

\textsuperscript{231} One might suggest that some issues of family morality, such as protection for homosexuals, protection of a woman's choice regarding abortion, or even protection of a fetus from abortion, could be packaged as matters for congressional concern under § 5 of the fourteenth amendment. Cf. J. Choper, supra note 73, at 216 (Court has broadly defined Congress' discretion under § 5 of fourteenth amendment).

\textsuperscript{232} This observation applies with equal force to Dean Wellington's methodology of judicially restricting local democratic choice in the name of "conventional morality." See Wellington, Notes on Adjudication, supra note 14, at 265-311. It applies as well to Alexander Bickel's observation that "even if the task of the Court were ... to follow the election returns, surely the relevant returns would be those from the nation as a whole ...." A. Bickel, supra note 11, at 250; see also supra note 155.

It may be easier for a court to determine that "the people" of the nation today want legislative discretion that "the people" yesterday wanted constitutionally to deny to national majorities, than it is to conclude that "the people" today want constitutional mandates of self-constraint that "the people" yesterday did not choose. This is so simply because of the different relationship between constitutional values of self-constraint and values intended simply to restrict the discretion of dissenting localities. There may be ample evidence that a national majority wants to go beyond federalism limitations on national authority. Congress might, as it often has, enact statutes that transgress existing limits on congressional power; it might, as it often has, seek to pursue values by the carrot of federal funds rather than the stick of regulation. This is to be contrasted with the slim chance that members of a national majority will manifest, in everyday politics, a desire to restrict their own democratic discretion. See supra text accompanying notes 211-14. Nevertheless, exclusive reliance on such ordinary political pressure for augmented national legislative authority provides only an incomplete argument. One must determine, as well, that a constitutional majority of "the people," thinking in a constitutional frame of mind, wish to augment national legislative power. See infra note 233.
to use contraceptives, might not have had a valid constitutional claim. Douglas' and Blackmun's pursuit of normative coherence toward a putative constitutional ideal of individual happiness seems to violate the Hamiltonian premise of constitutional continuity. There is no evidence that "the people" of 1987 are willing to endure more political pain of self-constraint in the name of individual happiness than were "the people" of 1868. Similarly, the Goldberg and White rationale, which prohibits states from regulating marital concerns, while leaving them free to regulate homosexual sodomy, seems to violate the Hamiltonian premise as it relates to constitutional federalism. Although one might speculate that "the people" today no longer value constitutional federalism as did the framers and ratifiers of 1787 or 1868—that "the people" today want Congress to have constitutional authority to regulate just about anything that states can regulate—one must make such an argument, while showing how the Hamiltonian premise is either satisfied or not relevant, to justify Goldberg's and White's approach.233 This neither Goldberg nor White has done.

233. This is essentially the argument Bruce Ackerman intends to make about the political struggle over the constitutionality of the New Deal. See Ackerman, supra note 33, at 1055. Because the Supreme Court had repeatedly struck down elements of the New Deal as unconstitutional, id., at 1053-54, by 1936, a fundamental question of principle had been raised so decisively as to be obvious even to private citizens whose principal concerns were far removed from the daily struggles of Washington, D.C. . . . Rather than acting under the explicit procedures established by Article V, however, We the People of the United States expressed its will through a higher lawmaking process that relied primarily upon the structural interaction of articles I, II, and III of the Constitution. Id. at 1054-55. Ackerman suggests that because the terms of office are staggered among the three branches of the national government, intense dialogue that yields a new consensus among all three branches provides adequate evidence of a new constitutional order to constitute constitutional amendment. Id., at 1055-56. The overwhelming election in 1936 of representatives, both legislative and executive, who supported a vigorous national response to the Depression, followed by judicial acquiescence, completed the "structural amendment." Id. at 1056-57.

Although provocative and ingenious, Ackerman's resort to activity in the forums of ordinary national politics to signal constitutional amendment undermines his earlier attention to the dualism between constitutional values and ordinary political values—between highly self-conscious constitutional choicemaking and ordinary legislative choicemaking focusing on the expedience of the moment. See supra note 56. Resort to choices made in ordinary national political forums as evidence that "the people" have chosen to abandon constitutional limits on national discretion, is problematic. The sort of evidence on which Ackerman relies has otherwise been viewed as precisely the political excess—the "lower track" impulse—that the "higher track" principle, id. at 1040-43, of constitutional federalism was intended to constrain. See supra note 229. Beyond this, even if one accepts the potential import of the 1936 elections as a "structural amendment," one is left with little evidence suggesting what new constitutional principles "the people" were intending to frame. Thus, did the "structural amendment" of 1936 endorse, the proposition that Congress could intrude as deeply as it deemed necessary into traditional state affairs to serve the purpose of restoring national economic health, or did it endorse the much broader proposition, that Congress can legislate for any purpose, to serve any policy—that the principle of limited powers was dead? Or did it endorse a principle somewhere in between? See supra notes 230-32.

Perhaps more difficult to support than a national rejection of constitutional federalism based on the 1936 elections is a national rejection of Lochnerian limits on state and national legislative discretion. Ackerman's argument in support of recognizing "structural amendment" here assumes for the sake of argument that the Court's laissez-faire contractualism in Lochner
Thus, whether predicated on a motive of self-constraint, or on a motive of constraining only others, both notions of constitutional privacy seem to exceed the implications of actual constitutional choices, and fail to satisfy convincingly the goal of identifying the constitutional values of "the people" today.234

B. Equal Protection, Self-Constraint, and Homosexual People: Coherence at the Painful Frontiers of Constitutional Intent

1. The Issue

Donald F. Baker, a resident of Texas, is a homosexual person. Mr. Baker's interests conflict with a policy choice made by a majority of the Texas electorate. Under the Texas Penal Code, it is a misdemeanor for any person to engage in "deviate sexual intercourse with another individual of the same sex."235 The Texas electorate has not proscribed "deviate sexual
intercourse"236 between individuals of different sexes. Although this issue has been viewed as discrimination between homosexuals and heterosexuals,237 the issue can be conceptualized as one of sex discrimination. A man, unlike a woman, is prohibited from performing certain sexual acts with a man. A woman, unlike a man, is prohibited from performing certain sexual acts with a woman. Thus, people are being treated differently because of sex.238

Mr. Baker framed his constitutional claim as one arising under the equal protection clause of the fourteenth amendment,239 which was ratified in 1868. It seems quite clear that "the people" of 1868 disagreed among themselves about what local democratic choices should be prohibited by the fourteenth amendment.240 It also seems clear that at least in part because of this disagreement, the "original understanding" as to the immediate impact of the amendment—what would be prohibited, and what would be permitted—resembled a jumble of compromises, rather than a coherent philosophy of justice.241

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236. The Texas legislature has defined "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person." Id. § 21.01.
238. Some might counter that prejudice against homosexuals is different from ordinary sexism. Many regard homosexuals as a species apart, so different that their violation of traditional sex roles is viewed not as a man feeling or doing what a woman should not, or a woman feeling or doing what a woman should not, but as a person feeling or doing what a person should not—a per-on malformed and in need of repair or destruction.
Although this may be a difference in the intensity with which sexism is felt, and relevant for some purposes, see infra text accompanying notes 371-90, a difference in intensity is not relevant for determining whether the view logically falls within a definition of sexism. Sexism is a perception that men \textit{because men}, and women \textit{because women}, have different moral statuses, different essential natures, and different proper roles. A value condemning sexism logically extends to homophobia. See infra note 381.
239. Baker, 553 F. Supp. at 1125. Mr. Baker also argued that the statute violated his constitutional right of privacy. For analysis of this claim, see supra text accompanying notes 169-234.
240. For the views of commentators, see generally R. Berger, supra note 15; Bickel, \textit{The Original Understanding and the Segregation Decision}, 69 Harv. L. Rev. 1 (1955); Frank & Munro, \textit{The Original Understanding of "Equal Protection of the Laws."}, 50 Colum. L. Rev. 131 (1950). All of these commentators agree that the framers and ratifiers understood that the equal protection clause did not render many racially discriminatory laws unconstitutional. \textit{But see} Loving v. Virginia, 388 U.S. 1 (1967). In \textit{Loving}, Chief Justice Warren, after noting that historical materials "at best, . . . are inconclusive" for determining whether the equal protection clause was intended to prohibit racial segregation in public education, \textit{id.} at 9, declared that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official sources of invidious racial discrimination in the States." \textit{Id.} at 10 (emphasis added).
241. See Frank & Munro, supra note 240, at 133. Frank and Munro asserted:
The generalities of the Fourteenth Amendment, as reported from Committee, were voted upon by 218 Congressmen, were discussed in hundreds of speeches and countless editorials in the election of 1866, and were thereafter voted upon by some thousands of state legislators. Even if the times had been calm and conditions static, the general phrases of the Amendment could not have meant even approximately the same thing to all who voted upon them; and in fact, interpretations did diverge widely.

\textit{Id.}
Thus, the equal protection clause, as originally understood, prohibited only particular forms of discrimination against blacks. Blacks were to have, at minimum, the same rights as whites in making and enforcing contracts, suing, being parties, giving evidence, inheriting property, purchasing property, selling property, and in being protected by the criminal laws of the states. The notion that the equal protection clause would immediately invalidate state laws prohibiting miscegenation, denying blacks the right to vote, or mandating racial segregation, was a hope for some, but a nightmare for many.

Despite this original conception of laws prohibited by the equal protection clause, modern Supreme Court doctrine suggests that any governmental action undertaken because of racial prejudice—including antimiscegenation statutes, racially discriminatory voting laws, and laws requiring racial segregation—is constitutionally prohibited. Furthermore, despite the absence of evidence that the framers and ratifiers of the fourteenth amendment had any notion about challenging the deeply entrenched sex roles that then pervaded the American populace, modern Supreme Court doctrine suggests that the equal protection clause also prohibits governmental actions predicated on gender prejudice.

242. According to Frank and Munro:

The equal protection clause was ... originally understood to mean the following: all men, without regard to race or color, should have the same rights to acquire real and personal property and to enter into business enterprises; criminal and civil law, in procedures or penalties, should make no distinctions whatsoever because of race or color; there should be no segregation of individuals on the basis of color in the use of utilities, such as transportation or hotels; with reservations, for here there is substantial divergence, there should be no segregation in schools. It was generally understood that Congress could legislate to secure these ends, without regard to whether the particular objective was frustrated by state action or by state inaction. On the other hand, the clause was meant to have no bearing on the right to vote; the evidence of its contemplated effect on state anti-miscegenation laws is unclear; and it was generally understood to have no bearing on segregation of a purely private sort in situations fairly independent of the law, as in churches, cemeteries, or private clubs.

Frank & Munro, supra note 240, at 167-68 (footnotes omitted); cf. R. Berger, supra note 15, at 166-69 (equal protection of blacks was limited to rights enumerated in Civil Rights Act of 1866); M. Konvitz & T. Leskes, A Century of Civil Rights 51 (1961) (fourteenth amendment intended to eliminate constitutional objections to Civil Rights Act of 1866); Bickel, supra note 240, at 58 ("Section 1 of the fourteenth amendment, like section 1 of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation.");

243. See, e.g., Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The Constitution cannot control [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); see infra note 434.

244. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). In Hogan, the plaintiff challenged a policy of excluding males from a state school's nursing program as a violation of equal protection. After noting that gender-based classifications are subject to so-called "middle tier scrutiny," Justice O'Connor elaborated: Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the
Thus the Supreme Court has augmented the mandates of the equal protection clause beyond the "original understanding" of the framers and ratifiers—blacks are protected from more forms of discrimination than contemplated by "the people" of 1868, and blacks are not the only group protected from discrimination motivated by prejudice.\textsuperscript{243} Mr. Baker relies on this modern equal protection doctrine and seeks to pursue its putatively coherent implications even further. To establish Mr. Baker's claim—indeed, to justify modern Supreme Court doctrine itself—one must confront the central question posed by this Article. Can one justify judicial pursuit of constitutional coherence or, alternatively, a judicial goal of enforcing the specific constitutional compromises struck by the framers and ratifiers, consistent with a goal of identifying the constitutional values of "the people" today?\textsuperscript{246}

Following the Hamiltonian premise of constitutional continuity, past constitutional choices provide evidence of present constitutional values.\textsuperscript{247} Thus, as a basis for ascertaining the implications of the equal protection clause for the constitutional values of "the people" today, we turn again to the past.

2. The Choices of "the People"—There and Then

a. Conflict

i. Who Were "the People" of 1868?

There is an essential tension between the Civil War and a premise that "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness."\textsuperscript{248} "The people" of the South—at least the white majority—wanted to divorce themselves from a national community in which they would be subject to the anti-slavery views and votes of the Northern states.\textsuperscript{249} The North refused to allow these Southerners their desire for self-determination and in this sense compromised, or at least begged the statute objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

\textit{Id.} at 724-25.

245. Discrimination prohibited by the equal protection clause has been defined in terms of prohibited legislative purposes. \textit{See} Washington \textit{v.} Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.... [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact"); \textit{see also} J. Ely, \textit{supra} note 148, at 136-48.

246. \textit{See supra} text accompanying notes 103-07.


248. \textit{See supra} note 5.

249. In early 1861, for example, the citizens of Texas, acting by referendum, overwhelmingly ratified an ordinance of secession by a vote of 34,794 to 11,235. \textit{See} Texas \textit{v.} White, 74 U.S. (7 Wall.) 700, 704 (1868).
meaning of, a notion that “the people” have the right to establish principles of government for their own happiness. For resolving the issue of secession, “the people” were the military victors of the North.

Similarly, for ratification of the fourteenth amendment, “the people” were those of the North. The principles of government established by the fourteenth amendment made the Southern electorate decidedly unhappy. It was, in part, against such principles that the South had rebelled with military force. The Southern states did not ratify the amendment voluntarily, but were required to ratify the amendment as a condition for readmission to the Union.250 Indeed, their votes to ratify were secured not by organic governments, but by state legislatures reconstructed pursuant to Northern specifications.251

Thus, for constitutional analysts, the Civil War must be a complication. While no one seriously questions the authoritative status of the fourteenth amendment today,252 some still entertain sufficient doubt to address the issue.253 More significantly, the amendment's military pedigree and its

250. See, e.g., M. KONVITZ & T. LESKES, supra note 242, at 51-52 (“Before Reconstruction governments took over the states of the South, the amendment was rejected in late 1866 and early 1867 by all the Southern states but Tennessee...”). Following these actions, Congress passed the first Reconstruction Act on March 2, 1867. It made readmission of representatives from the Southern states conditional... on ratification of the Fourteenth Amendment by the new state legislature.”), Ackerman, supra note 33, at 1068-69. Recognizing this, what does it mean to say that “the people” have a right to establish principles of government for their own happiness? See infra note 443.

251. See, e.g., M. KONVITZ & T. LESKES, supra note 242, at 52-53.

252. Cf. Call, The Fourteenth Amendment and Its Skeptical Background, 13 BAYLOR L. REV. 1, 14 (1961) (Southern ratification of fourteenth amendment achieved through “a war on the Constitution itself, and upon all of the fundamental and essential principles on which the entire fabric of American free institutions was based.”); Suthon, The Dubious Origin of the Fourteenth Amendment, 28 Tul. L. Rev. 22, 44 (1953) (“Article V of the Constitution was violated and flouted by the 1868 coerced ratifications of the Fourteenth Amendment...”).

253. Bruce Ackerman's effort to legitimate the fourteenth amendment by reference to his notion of "structural amendment," see supra note 233, is, in my view, unsuccessful. Ackerman recognizes that the exclusion of Southern representatives from the Thirty-ninth Congress (not to mention that the Southern states were required to ratify the fourteenth amendment as a condition for readmission to the Union) undermines the contention that the amendment was ratified pursuant to valid article V procedures. See Ackerman, supra note 33, at 1066. Such disenfranchisement of the South thus vitiates the legitimacy of the fourteenth amendment, if satisfaction of article V is necessary for authoritative constitutional amendment.

But Ackerman points to the congressional elections of 1866 as validating the process leading to ratification of the fourteenth amendment, otherwise problematic from the perspective of article V.

It was the results of these elections that decisively shifted the balance of authority between the President and Congress. Despite the unprecedented effort by President Johnson to generate a new political party in support of conservative Unionist principles, the Republicans emerged from the 1866 elections with an overwhelming victory throughout the North.

Id. at 1068.

Despite Ackerman's assertion that the electorate blessed this “rump Congress” with a "mandate" sufficient to substitute for regular article V procedures, id. at 1068-69, the fact remains that the 1866 elections only confirmed the desire of the North to impose its will on the South. The normal ratification procedures prescribed by article V were followed (if not the procedures related to framing); article V's underlying premises related to democracy and community were not. The fourteenth amendment was no less a spoil of war because the
consequent tension with the vague notions of democracy and popular determination on which the American constitutional system otherwise is predicated, present unique interpretive wrinkles.254

The following discussion will proceed from three premises: first, the fourteenth amendment reflected the preferred constitutional values of the Northern electorate;255 second, the Northern electorate required the Southern electorate to ratify the fourteenth amendment as constructed and understood by the North; and third, the Southern electorate, voluntarily or not, did so. One is compelled from these premises to examine the constitutional values of "the people" of the North in 1868. Only by considering their constitutional choices can an analyst begin to infer the related constitutional values of "the people" today.256

ii. Constraint of Self or Constraint of Others?

Earlier analysis suggested that a choice by the national electorate to limit local discretion by a constitutional mandate, rather than by simply authorizing Congress to legislate, provides evidence that "the people" maintain an ideal of self-constraint.257 We suggested that a national majority would pursue a national policy against contrary local choices with
a constitutional mandate, rather than congressional legislation, if it wanted
to ensure that some value will be respected to a greater extent than
Congress could be trusted to achieve.258

Because there was such a severe cleavage between Northern and
Southern views on race, however, and because the Southern electorate
eventually had to be readmitted to Congress, one might suggest that
although the framers and (Northern) ratifiers of the fourteenth amend-
ment were trying to ensure that certain values were protected to a greater
extent than Congress could be trusted to achieve, they did so only to prevent
their preferred notions of racial justice from congressional erosion once the
South was fully reintegrated as part of the national electorate.259 Such a
motive would have to be characterized not as self-constraint, but the
ultimate in constraining the political discretion of others—policymaking by
disenfranchising those dissenting localities whose political discretion the
electorate intends to bind.

It is undeniable that the fourteenth amendment was motivated at least
partially to thwart Southern participation in making the nation's racial
policies. Nevertheless, it is not necessarily true that this motive to constrain
the South—to constrain the discretion of dissenting localities—was the only
motive underlying the choice to pursue national racial policy by constitu-
tional mandate, rather than by authorizing Congress to legislate. Indeed, in
the absence of unanimity, the ordinary political motive of constraining the
political discretion of others always supplements the constitutional motive
of constraining one's own political discretion.

Beyond the bare fact that the equal protection clause framed constitu-
tionally mandated limits on local discretion, its broad language also
suggests that "the people" of the North acted not only with the desire to
constrain the South's political discretion, but also with an aspirational
motive to constrain their own political discretion. Those who framed and
ratified the amendment strongly disagreed among themselves about the
extent to which blacks should be accorded legal protection.260 In the face of
such disagreement, political combatants must compromise.261 In any given
political community, a legislative compromise reflects the best that each
member of the majority, given his limited political power, believed was
possible.262 Thus, to the extent that each individual seeks to maximize his
interests, a political compromise about intensely controversial concerns
should be framed as precisely as possible.263 The Civil Rights Act of 1866,
enacted by Congress to protect the interests of blacks, reflects the kind of
detailed compromise that is likely to emerge from people, intensely

258. See supra text accompanying notes 91-92.
259. Cf. C. BLACK, supra note 56, at 131-32 ("The debates on the Fourteenth Amendment
... express the thought that the Amendment was being adopted, in part, because of a desire
to put its guarantees out of the reach of future Congresses.").
260. See infra text accompanying notes 267-86.
261. See supra text accompanying notes 67-74.
262. See supra text accompanying notes 70-71.
263. See id.
disagreeing among themselves, who have no concerns of self-constraint.\textsuperscript{264} If, however, members of a political majority are dissatisfied with their own abilities to accommodate their internally conflicting concerns, and \textit{want to be forced to respect an ideal to a greater extent than they otherwise would in everyday decisionmaking}, like the client who hired a coach, they have reason to frame their constitutional instructions more vaguely—more broadly—reflecting their aspiration toward that ideal.\textsuperscript{265}

Thus, because it is implausible that people, disagreeing intensely among themselves about moral concerns, and acting only with the motive of constraining others, would frame a political compromise in vague terms, and because a choice to define constitutional instructions vaguely is more consistent with an aspirational motive of self-constraint, this Article will proceed from the premise that “the people” of the North who ratified the fourteenth amendment acted with a motive of self-constraint, as well as the more obvious motive to constrain the political discretion of the vigorously dissenting South. This premise is far from incontrovertible, but its implications are worth pursuing, if only as an exercise in analysis.\textsuperscript{266}

\textsuperscript{264} See infra note 269. Vigorous political competition about matters of great controversy makes people jealous of whatever they gain through political compromise. To fail to articulate one's victories in precise terms is to risk losing them, if only by judicial interpretation. Thus, even with respect to the Civil Rights Act of 1866, constructed with language far more precise than that of the fourteenth amendment, some expressed fears that the courts would accord blacks more rights than the polity would choose as appropriate. See infra notes 289, 291.

\textsuperscript{265} See infra note 333.

\textsuperscript{266} If one presumes that the fourteenth amendment was ratified simply with the motive of protecting the North's everyday political preferences regarding race from erosion by Southern participation in Congress (constraint of others), one might pursue an equally interesting and challenging analysis. Did “the people” of the North intend to authorize the Court to vindicate their \textit{everyday political preferences} regarding race at any given time, like a continuing “rump Congress”? Cf. Ackerman, supra note 33, at 1066 (In framing the fourteenth amendment, " 'Congress' excluded the Southern representatives from its ongoing deliberations. In so acting, the rump 'Congress' was, of course, perfectly aware that it was taking an action that rendered its constitutional authority legally problematic . . . ."). If so, “the people” of the North would have authorized the Court to ascertain the North's ordinary political concerns about race at any given time, and to impose those views in the form of a constitutional mandate. Without being able to exclude the South from Congress, this would be the only way in which the Northern electorate might establish continuing legislative authority for itself over issues of racial discrimination. Such a scheme would place the Court in a relationship with the Northern electorate under the equal protection clause analogous to the relationship between the Court and the national electorate under the dormant commerce clause. See supra notes 156, 225. But because the Court's rulings under such a "dormant equal protection clause" must be insulated from correction by a Congress that includes the South, as indeed such rulings would be if issued in the form of a constitutional mandate, the Northern electorate would lack any means to correct judicial rulings when the Court has inaccurately divined their present political pulse. In this sense, the analogy to the relationship between the Court and Congress under the dormant commerce clause would be incomplete. See id.

Beyond this, or perhaps before this, the Court must determine principles for defining the relevant electorate each generation. By what right does the North impose its will without Southern participation? When new states are added to the nation, do they become part of the authoritative North, whose everyday values on race count for defining the content of the "dormant equal protection clause," or part of the defeated South, whose values on race do not count? Is the Southern electorate ever to be reintegrated into the national electorate for purposes of defining the mandates of the "dormant equal protection clause"? For examination of related issues in the context of an equal protection clause presumed to have been ratified with the motive of self-constraint, see infra notes 306, 318, 325, 370.
iii. Racism and the Conflict Within Us

Before considering the manner in which the constitutional choices of the North might be related through the Hamiltonian premise of constitutional continuity to the constitutional values of "the people" today, one must probe the values motivating "the people" of the North toward an ideal of self-constraint. What was the perceived moral evil of discrimination against blacks?

Among the most radical abolitionists, it seems rather clear that the motivating norm consisted of a prescriptive twist to the slogan "all men are created equal." It was immoral to view people as inferior—as less than full human beings—because of their race. It was immoral to view people as having restricted roles in society because of their race. In other words, the radical abolitionists were radical anti-racists. For these radicals, it easily followed that any action undertaken because of racism was immoral and should be prohibited. Any discrimination based on normative judgments about race violated the notion that race is irrelevant to human worth.

Not everyone, of course, was a radical abolitionist. Others held less absolute views about the evil of laws and practices that discriminated against blacks. Some believed that such discrimination was unacceptable only in certain contexts—for example, those covered by the Civil Rights Act of 1866. In other contexts—voting, marriage, and other circumstances that would involve social interaction between black people and white people—racial discrimination was quite acceptable and, indeed, desirable. Still

If the South ever were reintegrated as part of the "the people" whose everyday political values regarding racial equality determine the content of the equal protection clause, the analogy to the dormant commerce clause would be complete. After all, given our premise that "the people" of the North acted only with the motive of constraining the political discretion of the South, and not with the additional motive of self-constraint, they simply wanted ordinary legislative discretion. If in interpreting the Northern electorate's values, a court determines that the Southern electorate should be reintegrated for defining the meaning of the equal protection clause, the original reason for denying legislative authority to the whole Congress—for creating an elitist "rump Congress" with special legislative prerogatives (albeit exercised by the Court)—no longer would exist. Judicial finality here, like judicial finality in the name of the dormant commerce clause, would be perverse. See supra notes 156, 225.

267. See J. TENBROEK, EQUAL UNDER LAW 19 (1965) (originally published as THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT). TenBroek stated that "understanding of this subject begins with the simple distinction between declarative and imperative sentences. 'All men are created equal' is not a declarative sentence; it is an imperative. It is not a statement but an exhortation. It is not an affirmation or description. It is a command. Whatever its form, its function is directive. It says in substance, within certain limits and for certain purposes, that we should treat men as if they were the same, although we know full well that they are not." Id. (emphasis added). Of course, the question of what kinds of discrimination the equal protection clause prohibits is a function of those "certain limits" and "certain purposes" for which people were deemed to deserve equal treatment.

268. This view was expressed by Charles Sumner, a central participant in the struggle to draft the fourteenth amendment. See Frank & Munro, supra note 240, at 137 ("This principle of equality of rights, Sumner declared, was the real meaning of the Massachusetts Constitutional provision which gave equal rights to every human being. No distinctions whatsoever could validly be made because of race, and hence separate schools were illegal.").

269. The Civil Rights Act of 1866 reflected a prevailing view that while blacks should enjoy "civil equality," they should not be granted either "political" or "social equality." Raoul Berger
others had no qualms about racism. The races simply were, by nature and God's will, on different tracks. Any conjunction of the tracks would derail the white race from its destiny. Any effort to join the tracks was a sinful sabotage of God's plan. There could be no compromise.270

Among these three camps, the most interesting and analytically significant is the second. This camp's position reflects the most obvious internal conflict. Its members' choices in rationalizing and accommodating their internally competing values are essential to the original meaning of the fourteenth amendment. It was because those of the second camp, rather than the radicals, were predominant that "the people" originally understood the equal protection clause as not immediately prohibiting all racial discrimination, but as prohibiting racial discrimination only in limited contexts.271 Similarly, it was because those of the second camp, rather than the radical racists, were predominant that the fourteenth amendment was ratified at all.

One must, therefore, consider how these people perceived their internally conflicting preferences. What value did they hold as an ideal? To what extent did they want their Constitution, through the courts, to force them to approach the coherent implications of that ideal at the expense of other conflicting concerns?

One might infer values that motivated this middle group by considering why people might have viewed the thirteenth amendment as inadequate to vindicate the warranted rights of blacks. There was far less

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relays the following explanation of the Bill's terms "civil rights and immunities," as explained by House Chairman James Wilson:

What do these terms mean? Do they mean that in all things, civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed . . . Nor do they mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights and immunities. Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as "The right of personal security, the right to acquire and enjoy property."

R. BERGER, supra note 15, at 27(quoting remarks of House Chairman Wilson, CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866)). For further discussion of the distinction between "social" and "civil equity," and its implications, see infra text accompanying notes 275-86.

270. Senator Saulsbury of Delaware, reacting to a proposal that would have prohibited segregated transportation in the District of Columbia, declared that such a measure would be "a war against nature and nature's God." Frank & Munro, supra note 240, at 151. Similar ambivalence about the limits of acceptable and appropriate racial equality was expressed by Andrew Rogers, a member of the House of Representatives, in debates over the fourteenth amendment:

Sir, I want it distinctly understood that the American people believe that this Government was made for white men and white women. They do not believe, nor can you make them believe—the edict of God Almighty is stamped against it—that there is social equality between the black race and the white.

I have no fault to find with the colored race . . . I wish them well, and if I were in a State where they exist in large numbers I would vote to give them every right enjoyed by the white people except the right of a negro man to marry a white woman and the right to vote.

Bickel, supra note 240, at 49.

271. "The plain fact, as Senator Fessenden, the respected chairman of the Joint Committee said, was that 'we cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions.' ” R. BERGER, supra note 15, at 164.
controversy about the thirteenth amendment than the fourteenth among "the people" of the North—far more consensus that something about slavery was morally evil. The terms of the thirteenth amendment suggest that slavery was viewed as a moral evil not merely because it deprives people of liberty. Slavery and "involuntary servitude" were prohibited, "except as a punishment for crime whereof the party shall have been duly convicted." 272 Thus, whatever deprivation of liberty is inherent in slavery was viewed as morally acceptable when imposed as criminal punishment.

Some people might have viewed slavery based on race, as opposed to slavery as punishment for a crime, as morally evil, because one has no choice about being black, whereas one does have a choice about whether to obey a criminal statute. 273 This notion, however, could not have motivated those in the middle group. Because those in the middle group wanted the fourteenth amendment to prohibit some laws discriminating against blacks—laws that blacks had the choice to obey or disobey—they must have had some notion that racial discrimination is morally wrong. They must have believed that for some purposes it is wrong to treat people differently because of value judgments about race. Thus, members of this middle group might well have had a partial commitment to the abolitionist notion of intrinsic racial equality—that it is wrong to treat people as possessing different moral worth as a function of race.

By positing a normative motivation for the equal protection clause, one can consider why people adhering to that norm might want to limit its application. Once a person accepts that it is wrong to treat people differently in one context because of moral judgments about race, he or she begs the question of why that norm should not apply to all contexts. What makes the context of interracial marriage different from the contexts of contractual relations or property ownership, such that racial discrimination is acceptable in the first context, but unacceptable in the latter two?

There are three related answers. First, one might acknowledge competing values, and declare that in different circumstances, different values have different weight. A person might have an intellectual notion that race should be irrelevant in evaluating the worth of another human being, yet continue to feel the emotion of racism. That racist emotion may be more or less important in different contexts. For a significant number of people, racism in the "social" realm was more significant than racism in the "civil" realm. 274 Discrimination that perpetuated physical separation—such as segregation and antimiscegenation statutes—served the overpowering emotion of racism. Discrimination in other contexts, such as making contracts, owning property, and imposing criminal penalties, may have been less emotionally significant. The intellectual ideal of racial irrelevance

272. U.S. Const. amend. XIII (emphasis added).
273. One might take another view. Slavery—imprisonment and hard labor for being black—also may be conceived as the criminalization of doing anything while being black. Indeed, some of the black codes enacted by Southern states after the Civil War suggest such a view. See M. Konvitz & T. Leskes, supra note 242, at 14 (1865 Mississippi vagrancy law applicable to "Negroes" over eighteen years old, not lawfully employed or "found assembling themselves together").
274. Cf. infra text accompanying notes 277-81.
was relatively more important in these latter contexts, and therefore could prevail.275 We will call people who thought this way the "Balancers."276

Second, one could deny that one's value scheme is composed of competing values, and thereby define away any concern with logical incoherence. Such an obfuscatory approach for coping with internal conflict was reflected in the otherwise incomprehensible distinction between "civil equality," which many viewed as morally mandated, and "social equality," which many viewed as a matter of individual taste, at best, and morally reprehensible at worst. Although not contemporaneous with debate among the framers and ratifiers of the fourteenth amendment, Justice Brown's opinion in Plessy v. Ferguson277 presents a revealing application of this purported distinction toward justifying the constitutional permissibility of racial segregation.278 Justice Brown stated that:

\[ \text{the object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.} \]

Note that, on the one hand, Justice Brown articulates the coherent

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275. Although today it might seem odd to postulate that the same individual holding an intellectual ideal of racial equality—even in limited circumstances—might simultaneously harbor an intense emotion of racism, this general phenomenon of individuals with inconsistent values is common. Consider, for example, the phenomenon of religious guilt. Religious beliefs often define activities or attitudes that are somehow "bad." Nevertheless, those very activities or beliefs that religion brands as bad often bring a great deal of immediate satisfaction and happiness. For six days during the week, many might engage in those activities, or think those thoughts, that on the seventh day, they solemnly remind themselves are "bad." Indeed, even while sitting in their house of worship on the seventh day, solemnly reaffirming their belief in the religious strictures, their eyes might wander to the attractive person in the next row, and they might have lustful thoughts, violating those religious mandates that they simultaneously reaffirm.

276. On Oct. 16, 1854, while campaigning against Stephen Douglas, Abraham Lincoln spoke the Balancers' ideology as he juxtaposed an ideal of justice against the feelings of racism. Considering available options once the slaves were freed, Lincoln said:

\[ \text{What next? Free them, and make them politically and socially, our equals? My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not. Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well or ill-founded, can not be safely disregarded. We can not, then, make them equals. It does seem to me that systems of gradual emancipation might be adopted . . . .} \]


277. 163 U.S. 537 (1896).

278. Lincoln also manifested this malady at times. See 2 CONG. REC. 376 (1874) (quoting Lincoln that the "negro" is entitled to the natural rights of life, liberty, and the pursuit of happiness as found in the Declaration of Independence but not necessarily political and social equality): infra note 284.

279. Plessy, 163 U.S. at 544 (emphasis added).
implications of the view that it is wrong to regard people as inferior because they are black. This notion, applied to one context, logically extends to all contexts. Along the lines of this general principle, Justice Brown acknowledges that laws denning “the absolute equality of the two races before the law,” or implying the inferiority of either, would violate the amendment. Implicitly, any law based on the view that blacks are of a different intrinsic moral worth compromises the underlying norm of racial equality.

On the other hand, Justice Brown suggests that the amendment “could not have been intended” to require “social equality.” He recognizes that whites still had an intense aversion to associating with blacks—that this interaction would be “unsatisfactory,” perhaps to both blacks and whites, but certainly to whites. The essential premise of Justice Brown’s conclusion that the doctrine of separate but equal does not offend the fourteenth amendment’s underlying principle of “the absolute equality of the two races before the law” rests on the view, incredible today, that intentional segregation does not imply black inferiority.

Thus, rather than clearly acknowledge that the emotional flare of racism fell in the social context competed with the absolute ideal of racial equality acknowledged in the civil context, Justice Brown denied any conflict. He might not have perceived that he was carving an exception to the norm of racial equality. Similarly, some framers and ratifiers in the middle group who adhered to the distinction between “civil equality” and “social equality” might not have perceived that they were carving an exception to an ideal of racial equality. We will call these people the “Perception-Impaired Absolutists.”

280. Id. (emphasis added).
281. Id. at 544.
282. It is also possible that Justice Brown disingenuously tried to hide that he was carving an exception to the general principle of “absolute equality of the two races before the law.”
283. The purpose of examining Justice Brown’s reasoning, which acknowledges a general principle of racial equality, while accepting laws that treat people differently because of race, is to illustrate the different manner in which intrapersonal normative conflict might be acknowledged, perceived, and evaluated. Understanding how individuals might have perceived and evaluated their competing ideals of racial equality, on the one hand, and the pressing emotions of racism, on the other, is essential for evaluating whether, and the extent to which, they would have authorized courts to pursue the coherent implications of one value, at the expense of the other, in the name of the Constitution. See infra text accompanying notes 287-300.
284. Justice Brown’s opinion also reflects an element of balancing. His observation that, “in the nature of things,” the fourteenth amendment “could not have been intended” to enforce social equality “or a commingling of the two races upon terms unsatisfactory to either,” Plessy, 163 U.S. at 544, suggests a recognition that legally enforced social inequality is, in fact, inequality before the law—but is an inequality that the framers and ratifiers wanted to retain because mandated equality would have been intolerably painful for them. This attitude of balancing (and its implicit recognition that legally enforced social inequality is inequality before the law) occurs in the midst of a predominantly Perception-Impaired Absolutist position, see supra text accompanying notes 277-81, suggesting that my distinction between Balancers and Perception-Impaired Absolutists does not necessarily mean that individuals were exclusively one or the other.

Indeed, it was quite possible—perhaps probable—that people who were so troubled and confused by racism, yet so drawn to it, could manifest both attitudes at once. One might call such people “Perception-Impaired Balancers.” These people might deny that a certain
There is a third way of thinking which denies that conflicting values are the basis for carving exceptions to a norm of intrinsic racial equality. Those who believed that God mandated racial segregation, but not slavery or discriminatory criminal penalties, had no further need to justify qualifications to the principle that race should be irrelevant in evaluating human worth or mission. God made all the necessary determinations, which were not to be altered by mere human beings. Apparently, in this view, God's law looks more like an intricate legal code than a corpus of intrinsically compelling principle. We will call these people the "Theists."

Constitutional mandates pursued with the motive of self-constraint suggest that "the people" want courts, like a coach, to help them vindicate some preferred yet vulnerable constitutional ideal. Assuming that "the people" of 1868 acted with the motive of self-constraint in adopting the equal protection clause, one must determine the extent to which they wanted courts to pursue their preferred ideal of intrinsic racial equality. Did "the people" of 1868 want courts eventually to impose the principle that all governmental actions undertaken because of racial prejudice are unconstitutional? Did "the people" of 1868 want courts eventually to impose the principle that governmental actions undertaken because of gender prejudice are unconstitutional?

In addressing these questions, consider the implications of each normative matrix that might account for an individual's desire to favor a limited ideal of racial equality. The Balancer acknowledges both an ideal of
intrinsic racial equality and conflicting racist concerns that have their own allure. To what extent would this individual, adhering to the notion of intrinsic racial equality as an ideal, authorize a court to pursue its progressive coherence against his competing racist concerns?

One cannot answer this question without additional information about the Balancer's value scheme. For example, a person desiring something sweet might be asked to choose between an apple and a piece of candy. Both are logically and indistinguishably related to the articulated criterion of "something sweet." One can distinguish between the apple and the piece of candy only on the basis of additional criteria—for example, something very sweet, or something wholesome and sweet.

The need for additional information about the value scheme of the Balancers who supported the fourteenth amendment might be satisfied by referring to constitutional language—the manner in which they chose to express their constitutional ideals of self-constraint. The people of 1868 did not express their dedication to an ideal of intrinsic racial equality by framing the specific terms of the Civil Rights Act of 1866 as a constitutional mandate. Rather, their constitutional choices were expressed in the broadest possible terms. Even the credulous should doubt that Balancers who did have cherished competing values that they wanted forever to protect even against their ideal of intrinsic racial equality would fail to express those treasured reservations in plain terms. Thus, assum-

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289. The issue addressed in the text is analogous to the earlier comparison of an employer who viewed physical well-being as a static concern for which he was willing to forgo certain specific pleasures, and an employer who viewed physical well-being as a developmental concern for which he was willing to expend a constant amount of effort. See supra text accompanying notes 58-61, 257-66 & note 59.
290. See, e.g., R. Dworkin, supra note 23, at 133-37 (framers did not articulate particular "conceptions" of equal protection, but appealed to general "concept" of equal protection); J. Ely, supra note 148, at 30 ("We know from its history that [the equal protection clause] was meant particularly to combat inequality toward blacks. We also know, however—and would rightly presume it even if we didn't—that the decision to use general language, not tied to race, was a conscious one."); Bickel, supra note 240, at 63 (framers chose "language capable of growth"); cf. supra note 59.
291. Indeed, even with respect to the relatively precise Civil Rights Act of 1866, some expressed concerns about the possibility for a broad judicial construction. For example, Anthony Thornton, a Democrat from Illinois, cautioned:

"With the loose and liberal mode of construction adopted in this age, who can tell what rights may not be conferred by virtue of the terms as used in this bill? Where is it to end? Who can tell how it may be defined, how it may be construed? Why not, then, if it is not intended to confer the right of suffrage upon this class, accept a proviso that no such design is entertained?"

Bickel, supra note 240, at 19. The significance of this fear regarding judicial interpretation of a statute must have been exacerbated with respect to the equal protection clause. Unacceptable interpretations of statutes can be legislatively corrected, cf. supra note 266; unacceptable interpretations of constitutional provisions cannot. See also Dworkin, supra note 24, at 494 ("It is highly implausible that people who believe their own opinions about what counts as equality or justice should be followed . . . would use only the general language of equality and justice in framing their commands.").

This argument obviously applies only to constitutional provisions that are articulated with apparently open-ended language. There are, of course, provisions somewhat more specific than the equal protection clause, see supra text accompanying notes 190-215 (discussion of
ing that “the people” of 1868 acted with a motive of self-constraint, the language with which the Balancers chose to express their constitutional ideal of intrinsic racial equality suggests no exceptions that the judiciary—their coach—would be required to respect in (someday) developing the coherent implications of their constitutional ideal.292

Consider the implications of the value scheme held by a Perception-Impaired Absolutist who acted with a motive of self-constraint. This person, like Justice Brown in Plessy v. Ferguson, acknowledges that the constitutional ideal, without exception, should prevail over any conflicting majoritarian choice.293 Yet, the Perception-Impaired Absolutist might honestly believe that segregation and antimiscegenation statutes do not violate the ideal of intrinsic racial equality. Thus, for the Perception-Impaired Absolutist, the question is not whether the ideal of intrinsic racial inequality should prevail against any competing value; it should. Rather, the issue concerns who should determine whether a particular democratic preference conflicts with the constitutional ideal.

The postulated motive of self-constraint suggests that those Perception-Impaired Absolutists supporting the equal protection clause did not trust themselves to determine whether some everyday desire or perception violated their moral ideal—that they recognized the power of their racism to distort perception. Thus, because these people apparently envisioned an absolute ideal of intrinsic racial equality,294 and because they apparently recognized the pernicious influence of racial prejudice on their everyday perceptions, it would make sense for them to authorize judges to determine whether particular democratic preferences violate their constitutional ideal.295 This would make sense, at least, for one who accepts the Hamiltonian justification of judicial review—that judges, better than the electorate and its representatives, can dispassionately discern and apply

privacy as derived from first, third, fourth, and fifth amendments), and provisions that are apparently clear and precise—e.g., that the President shall be at least thirty-five years old. For some implications of these precise provisions, giving analytical perspective about the vague provisions, see Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 YALE L.J. 821, 853-72 (1985) (arguing that Constitution's more determinate provisions should be used to justify process of interpreting Constitution's less determinate provisions).

292. This analysis may respond to Ronald Dworkin's question about whether the framers' "concepts" or their "conceptions"—or both—should count when interpreting constitutional meaning. See Dworkin, supra note 24, at 496.

This analysis suggests that both must count, because by acting with the motive of self-constraint, "the people" who framed and ratified the equal protection clause manifested a desire to count both "concepts" and "conceptions." Their "conceptions" should govern immediate constitutional meaning, because they had a limited commitment to the "concept," but their general "concept" suggests the ideal to which they apparently aspired, as the pain of forgoing the exceptions was reduced to tolerable levels. See infra text accompanying notes 299-300.

293. The language of the amendment—its failure to specify exceptions—supports Justice Brown's articulation of the "absolute equality of the two races before the law" as the applicable constitutional ideal. See Plessy v. Ferguson, 163 U.S. 537, 544 (1896); supra text accompanying notes 257-66; notes 59, 290.

294. Plessy, 163 U.S. at 544.

295. The Perception-Impaired Balancer would resolve conflicts between his or her ideal of racial equality and his or her emotion of racism—once conflicts are acknowledged—as would a Balancer. See supra note 284; infra note 299.
"the people's" chosen constitutional values. Assuming this normative matrix, Justice Brown's error was not one of legal principle, but one of failing to transcend the prejudices and perceptions of his mind and his era.

Finally, consider the implications of the value scheme held by a Theist. This person believes that God made the races equal for some purposes, but not for others. A person whose values are rooted in God's will is not likely to believe that God's meaning should be changed by judicial development. Exceptions to a principle of intrinsic racial equality are God's exceptions, and hence inviolable. Thus, a person with this normative matrix would probably want to specify the circumstances in which racial discrimination should be prohibited and those circumstances in which it should be permitted. Such a person would have sought to frame the fourteenth amendment with the specificity of the Civil Rights Act of 1866. The general terms of the fourteenth amendment suggest that this normative matrix did not motivate a substantial portion of "the people" in 1868. From the language of the amendment, one might conclude that the votes of the Theists were not necessary for ratification.

Thus, despite their intrapersonal conflicts, the radical antiracists, the Balancers, and the Perception-Impaired Absolutists apparently envisioned a fully realized ideal of intrinsic racial equality tainted by no exceptions. Despite the racist impulses compelling the original understanding that the fourteenth amendment, as of 1868, would prohibit only certain forms of racial discrimination, all relevant points of view apparently converge on the proposition that the amendment should, ultimately, prohibit all racial discrimination that denies intrinsic racial equality.

A question remains: When was that uncompromised ideal to be realized?

c. Coherence—When?

The fourteenth amendment does not provide any explicit guidance on the issue of when racial discrimination denying intrinsic racial equality should be prohibited in contexts beyond those recognized in the original

296. See supra text accompanying notes 53-56.

297. It was inexcusable that Justice Brown failed to recognize the logical conflict between the ideal of intrinsic racial equality and legally imposed racial segregation. Although a person's analytical capacity may be limited by the perspective of the era, some people in the mid-nineteenth century were able to discern the logical conflict between laws requiring segregation and the ideal of intrinsic racial equality. The radical abolitionists had long advocated this position. A judge could fail to perceive the logical relationship for only two reasons. First, the judge's analytical capacity may have been clouded by his own prejudices. Alternatively, the judge might have perceived the logical relationship, yet dishonestly failed to acknowledge it. One cannot do much about such gross departures from the ideal judicial role, whether intentional or unintentional, except to identify and criticize them. Cf. infra notes 377-78, 390-441.

298. This conclusion applies to the Northern electorate of 1868. The Southern electorate may well have consisted overwhelmingly of racist Theists. See supra text accompanying notes 248-56.
understanding. One might, however, generate relevant criteria by further analyzing "the people's" ambivalent feelings about the equality ideal. The radical antiracists had no qualms about immediately prohibiting all laws based on racial prejudice. Similarly, the Perception-Impaired Absolutists had no qualms about immediately realizing their ideal of intrinsic racial equality.299

Thus, accepting all premises established or assumed so far,300 the Balancers must have been responsible for any choice to delay fully realizing the constitutional ideal of self-constraint. The Balancers were apparently unwilling to forgo all laws based on racism because in certain contexts racism was just too important. There was apparently a certain amount of pain in ordinary politics that the Balancers were willing to endure in the name of intrinsic racial equality, and an amount beyond which they were not willing to go. Despite this reservation, they seemed to manifest a desire to realize the full implications of their constitutional ideal someday by adopting the general language of the equal protection clause. Thus, to the extent that the meaning of the fourteenth amendment in 1868 was a function of the Northern Balancers' constitutional ideals and racist reservations, the question of proper timing must have been a function of circumstances that would change the internally competitive balance between their constitutional ideal of intrinsic racial equality301 and their everyday emotions of racism.

We know, for example, that "the people" of 1868—the Balancers, at least—did not want laws mandating racial segregation to be immediately invalidated by the equal protection clause.302 But consider the following scenario: A case is brought in 1872 challenging the constitutionality of racial segregation. Assume that by 1872, fewer Northern states and local majorities than in 1868 had impulses to pass racist laws in those contexts that the equal protection clause originally was intended to affect. Under these circumstances, the clause would have become less significant for constraining ordinary democratic discretion than it originally was in 1868.

299. See supra notes 293-97. Any reluctance to authorize courts to enforce their determinations that a democratic choice violates the constitutional ideal of intrinsic racial equality would reflect the Balancers' ideology, rather than that of the Perception-Impaired Absolutist. Although there might have been Perception-Impaired Balancers—people who denied the existence of conflict, and if convinced that conflict existed, would have chosen racism rather than racial equality—they are properly categorized as Balancers for purposes of this analysis. See supra note 284.

300. Specifically: that constitutionally mandated restrictions on local discretion can serve a motive of self-constraint among "the people" of the nation, see supra text accompanying notes 67-90; that a motive of self-constraint among "the people" of the nation suggests the desire to favor some value to a greater extent than "the people" could achieve in ordinary congressional politics, see supra text accompanying notes 91-92; that "the people" of the North who framed and ratified the fourteenth amendment acted with a motive of self-constraint (as well as the more obvious motive of constraining the racist South), see supra text accompanying notes 257-66; that the dominant ideal underlying the equal protection clause was a notion of intrinsic racial equality—that people should be viewed as morally indistinguishable despite differences in race, see supra text accompanying notes 257-86; and that "the people" authorized the courts, ultimately, to pursue that ideal without exceptions, see supra text accompanying notes 287-98.

301. See supra text accompanying notes 273-84, 287-92.

302. See supra text accompanying notes 241-44.
The Balancers less frequently would have been denied their preferred racist policy choices, because they had fewer racist policy choices that they wished to vindicate. Under these circumstances, therefore, if a court interpreted the fourteenth amendment as having the same meaning as it had in 1868, the amendment would have imposed less ordinary, everyday political pain on “the people” of 1872 than they originally chose to endure for the sake of intrinsic racial equality.

Thus, if one accepts that “the people” whose values count for defining the fourteenth amendment’s original meaning were “the people” of the North, and that “the people” of 1868 expressed an aspiration to achieve an ideal of intrinsic racial equality tainted by no exceptions, one might conclude that a court should compensate for “the people’s” changed everyday political values—their less intense racism—by prohibiting racist choices in some additional context(s). Only in this way can “the people’s” original constitutional commitment to an ideal of intrinsic racial equality be maintained intact and undiluted.

This analysis can be expressed in terms of the “constitutional equation” as applied to the hypothetical circumstances of 1872:

\[ \text{ord. nt'l prefs. : const'l choices}(1868) \parallel \text{ord. nt'l prefs. : const'l values}(1872) \]

303. See supra text accompanying notes 248-56.

304. More precisely, “the people” of the North expressed this ideal, see supra text accompanying notes 287-97, and the Southern white majority, voluntarily or not, ratified the Northern ideal as the price for readmission to the Union, see supra text accompanying notes 248-56.

305. Cf. supra note 209. The premise of constitutional continuity is far less problematic when applied to a person, or a group of people, who actually made particular constitutional choices, than it is when applied across the generations. The premise becomes ever weaker as more time passes, and “the people” live in an environment increasingly detached from that in which the original constitutional choices were made. For considerations in support of the premise of constitutional continuity, see supra text accompanying notes 114-23. For considerations questioning the usefulness of the premise, see infra text accompanying notes 306, 318, 325, 370.

306. It might be more accurate to describe the constitutional equation in terms of the constitutional choices and the ordinary political values of the North:

\[ \text{ord. pol. prefs. : const'l choices}(North 1868) \parallel \text{ord. pol. prefs. : const'l values}(North 1872) \]

In plain language:

The relationship between the ordinary, everyday political preferences and the values underlying choices of constitutional self-constraint among “the people” of the North in 1868 reflects the relationship between the ordinary, everyday political preferences and the values underlying constitutional mandates of self-constraint desired by “the people” of the North in 1872.

Note that because “the people” whose values were relevant in creating the fourteenth amendment were the Northern electorate, this “constitutional equation” differs from that based on the nation’s constitutional values and the nation’s ordinary political preferences discussed earlier. Cf. supra note 164. One can, however, express the same idea with the “true” national constitutional equation, simply by recognizing the severe dichotomy between Northern and Southern values in 1868. One can presume that the South in 1868, voluntarily or not, recognized the constitutional ideals as framed and understood by the North, see supra text accompanying notes 255-56, and toward determining “the people’s” contemporary constitutional values, one can evaluate the development of each region’s ordinary political concerns
The analysis requires quantification of the total amount of everyday political pain "the people"—the Balancers—originally chose to endure, \( (Pt_{1868}) \). \( Pt_{1868} \) can be broken down and expressed as the sum of everyday political pain that "the people" of 1868 chose to suffer by being denied the discretion to pursue their racist impulses in those particular contexts originally subsumed under the equal protection clause. \( (Pt_{1868}) = P_c_1 + P_c_2 + \ldots + P_c_n \) (1868). The analysis also requires quantification of the everyday political pain "the people" actually suffered in 1872 in those contexts originally addressed by the amendment, \( (Pt_{1872}) = \{P_c_1 + P_c_2 + \ldots + P_c_n\} \) (1872); the extent to which the everyday political pain they actually suffered in 1872 is less than the amount of everyday political pain they chose to suffer in 1868, \( (Pt_{1868}) - (Pt_{1872}) \); and the amount of everyday political pain they would have suffered from being constitutionally disabled from pursuing racist impulses in a new context, \( (P_c_{n+1} (1872)) \)—for example, racial segregation. If \( P_c_{n+1} (1872) \) is equal to \( (Pt_{1868}) \) minus \( Pt_{1872} \)—or, to put it another way, if \( (P_c_1 + P_c_2 + \ldots + P_c_n) \) (1868) is equal to \( \{P_c_1 + P_c_2 + \ldots + P_c_n + P_c_{n+1}\} \) (1872)—the Court would then have a basis consistent with the premise of constitutional continuity to interpret the amendment as now prohibiting racist policies in that new context of racial segregation.

It is, of course, far easier to suggest the need to quantify these variables than actually to quantify them. At minimum, one must meaningfully quantify how much everyday political pain "the people" of 1868 chose to endure, \( Pt_{1868} \). Despite the premise that their original understanding viewed the immediate impact of the fourteenth amendment as roughly similar to that of the Civil Rights Act of 1866, it is a difference in coverage between the two provisions—a degree of somewhat greater immediate coverage by the fourteenth amendment—that could suggest the amount of pain in ordinary politics that "the people" of 1868 were willing to endure for their ideal of self-constraint. We simply do not know what their through time, and the relationship between those ordinary political concerns and the constitutional judgments each region made in 1868.

By assuming that the relevant electorate in 1872 remains only "the people" of the North, I am "fudging" the difficult question of whether (and when) the values of the Southern electorate become relevant for interpreting the fourteenth amendment's meaning. Because 1872 is so close to 1868, the continued exclusion of the South seems, at least in a visceral or intuitive sense, little more problematic than its original exclusion from meaningful participation in creating the fourteenth amendment. Nevertheless, this question of reintegrating the South exists for 1872, as it does for 1896, 1954, and 1987. For a consideration of this question in these latter three contexts, see infra notes 318, 325, 370.

307. There seems to be a scholarly consensus that among those contexts originally intended to be covered by the equal protection clause were the right to make and enforce contracts (for the sake of illustration, one might call this \( P_c_3 \)); the right to sue (call this \( P_c_2 \)); and the rights to purchase, sell, and inherit property (call these \( P_c_5, P_c_4, \) and \( P_c_3 \)). There may have been more. See supra note 242. The precise extent of the amendment's intended immediate reach, \( \{P_c_1 + \ldots + P_c_n\} \), is not known. See infra note 309. It is rather clear, however, that the context of racial segregation was not originally covered by the fourteenth amendment's mandates. See supra text accompanying note 242. Thus call racial segregation \( P_c_{n+1} \).

308. Cf. infra note 309. If one could know precisely what contexts the equal protection clause was originally understood as reaching, cf. infra text accompanying note 309, one might devise some rough measure for the everyday political pain "the people" of 1868 chose to suffer by identifying how many Northern jurisdictions then favored racist policies in those contexts, and
chosen measure of self-constraint was.309

However difficult these questions might be to answer with respect to "the people" of 1868 and 1872, one confronts additional complications as the electorate of 1868 dies away and, pursuant to the premise of constitutional continuity, becomes an evidentiary proxy for "the people" of 1896, 1954, and 1987.

3. The Becoming of Constitutional Meaning

The following sections will apply the foregoing analysis to several significant constitutional conflicts—*Plessy v. Ferguson,*310 *Brown v. Board of

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Education, Mississippi University for Women v. Hogan and, finally, Baker v. Wade. Each of these cases presented a claim that the Court should declare unconstitutional local policies that were permissible according to the original understanding of 1868. Thus, each posed the interpretive problem of determining whether “the people” want a particular exercise of democratic discretion to be invalidated toward serving the coherent implications of the equal protection clause’s ideal of self-constraint and, if so, whether “the people” want to be denied the discretion to pursue their competing everyday political impulses today.

In each of these constitutional conflicts, the courts have faced a national political context somehow different from that in which constitutional choices—evidence of “the people’s” values of self-constraint—were made in 1868. To what extent can a court determine whether the constitutional values of “the people” today require invalidating a policy that “the people” of 1868 apparently wanted to reserve as a matter for ordinary local discretion?

a. Reeling in the Rope of Reserved Racism

Racial Segregation and “the People” of 1896

Plessy v. Ferguson involved a challenge to a Louisiana statute that required “equal but separate” railway coaches for white and “colored” passengers. The fourteenth amendment was understood by “the people” of 1868 as not prohibiting racial segregation. Despite this, racial segregation conflicted with their apparent constitutional ideal of ultimately prohibiting all policies undertaken because of racial prejudice. Thus, this case presented the question of timing. On what basis could a court have determined that toward serving their constitutional ideal of intrinsic racial equality, “the people” today—in 1896—wish to endure the political pain of self-constraint in this context, previously reserved by “the people” of 1868 for ordinary local discretion?

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314. 163 U.S. 537 (1896).
315. The statute provided the following: “[A]ll railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.” Id. at 540 (quoting Act of July 10, 1890, § 1, 1890 La. Acts 152, 153 (repealed 1972)).
316. See supra text accompanying notes 240-44, 302-09.
317. See supra text accompanying notes 287-98.
318. Who are “the people” of 1868 with respect to the values underlying the equal protection clause? This question, if it had been asked by a court in 1896, might have undermined the authority of the amendment altogether. The Southern electorate in 1868 did not voluntarily embrace an ideal of intrinsic racial equality, and probably would not have done so in 1896. See supra text accompanying notes 248-56.
Yet, if a court had applied the premise of constitutional continuity to this issue, cf. supra note 122; infra notes 325, 376, it might have concluded that “the people” of the North in 1896, like
those in 1868, would have chosen to exclude the Southern electorate from "the people" whose values were relevant for defining the fourteenth amendment's meaning in 1896. Because including the South as part of the relevant electorate in 1896 would have raised doubts about the contemporary validity of the fourteenth amendment, and because "the people" (of the North) in 1868 apparently decided that their concerns for racial equality were more important than their competing concerns for democracy and community reflected in article V, it would have followed from the premise of constitutional continuity that the non-Southern electorate in 1896 would make a similar judgment. Thus, "the people" of the North might have concluded that the South must remain excluded in 1896 if the constitutional ideal of intrinsic racial equality were to remain intact.

Thus, a court in 1896 might have determined that as in 1868, the North and the South still disagreed about whether the fourteenth amendment should be law. But to have questioned the amendment's continuing authority based on the proposition that "the people" of the nation today—1896—would not ratify the fourteenth amendment through regular article V processes essentially would have been to reconsider issues otherwise decided by the Civil War. No amount of philosophy could have resolved these issues to the satisfaction of either side. Either the South had the "right" to secede and, if not that, to block ratification of the fourteenth amendment, or the North had the "right" to force the South to remain part of the Union and to force the South to accept Northern views of racial morality. Cf. infra note 443.

This problem, central for interpreting the fourteenth amendment's meaning to "the people" of 1896, was the matter of dispute that in 1868 could not be resolved by established political processes. "The people" of the North won this dispute. One struggles to identify a basis since 1868 from which the constitutional analyst in 1896 could have determined that the Southern majority had developed some right independent of Northern suffrage to be included among "the people" whose values counted for interpreting the contemporary meaning of the fourteenth amendment. Cf. infra notes 325 (same question in 1954), 370 (same question in 1987).

One might characterize this proposition in a startling way: "the people" in 1896 who had the right to establish principles of government for their own happiness, relevant to the values underlying the fourteenth amendment, did not include the Southern electorate—at least in the view of "the people" of the North. Cf. infra notes 325, 370. The South in 1896, as in 1868, remained bound by the values underlying the Northern electorate's choices to constrain itself and the South—values presumably still held, pursuant to the premise of constitutional continuity, by the North's progeny. See infra text accompanying notes 257-66. For some difficulties with the premise of constitutional continuity in this context, see infra notes 325, 370, 376.

This analysis defines "the people" as a function of power and inheritance. Cf. infra note 443. It in no way develops criteria beyond these for a judge concerned with justifying his or her working definition of "the people." See infra text accompanying notes 455-59. Despite this, however, the analysis at least suggests that a conflict might have remained between the Southern electorate and the non-Southern electorate with respect to the fourteenth amendment. It suggests a method for ascertaining the constitutional values of each electorate. And it suggests the need to choose between the two electorates for defining "the people" relevant to the fourteenth amendment.

That "the people" of 1896, as those of 1868, might not have included the South is troublesome. But this concern is separate from the problem that courts might have failed to serve their employer's values—assuming that their employer was "the people" who militarily took the right to assert their values, that is, the Northern electorate and their progeny. Cf. infra note 443. Courts might have pursued the coherent implications of constitutional ideals further and faster than even "the people" of the North—and their progeny—would have wanted; on the other hand, courts might not have pushed "the people's" ideals of self-constraint far enough or fast enough. The first potential error would have been doubly significant, for the courts would have been distorting the values of both the South, which was being carried along grudgingly in any case, and the North, whose limited ideals of self-constraint the courts had been charged to serve. The second potential error would have been more significant from the perspective of the North and its progeny than that of the South. Any failure to push the North's ideals of self-constraint far enough, or fast enough, only could have been welcome relief to the South and its progeny, which probably preferred not to be pushed at all. For further problems in identifying the progeny of 1868's Northern electorate, see infra notes 325, 370, 376.
This Article has posited that the development of ordinary, everyday political values is the source for the development of constitutional coherence, so that "the people" maintain their level of commitment to their ideal of self-constraint, yet are not forced to exceed their level of commitment. Thus, if a court could have established that "the people" of 1896 felt less everyday political pain from the fourteenth amendment's original mandates than "the people" of 1868 chose to endure (that is, \( P_{c1} + P_{c2} + \ldots + P_{cn} \) [1896] was less than \( P_{c1} + P_{c2} + \ldots + P_{cn} \) [1868]), and that the everyday political pain that "the people" of 1896 would have felt from having been denied the discretion to segregate, plus the amount of everyday political pain "the people" of 1896 did endure in those contexts originally covered by the equal protection clause, was equal to the amount of pain "the people" of 1868 chose to endure toward serving their ideal of intrinsic racial equality (that is, \( P_{c1} + P_{c2} + \ldots + P_{cn} \) [1896] was equal to \( P_{c1} + P_{c2} + \ldots + P_{cn} \) [1868]), there would have been a justification for a finding that today—1896—is the proper time to interpret the equal protection clause as prohibiting racist policies in the new context of racial segregation.

To have established this proposition, however, would have required quantification of variables that could not have been precisely quantified. Without such quantification, this question of timing could not have been precisely answered for Plessy—or, indeed for any particular case.

It would, however, be remarkable to speculate that ordinary political values among "the people"—even among non-Southerners—had changed so much between 1868 and 1896 that the pain engendered by a constitutionally mandated prohibition of racial segregation—apparently unbearable to the framers and ratifiers in 1868—could have diminished to

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319. See supra text accompanying notes 164, 306.
320. Even if a court could have determined that these conditions were satisfied in 1896, and that the premise of constitutional continuity therefore suggested that "the people" required a prohibition of racist policies in the new context of segregation to serve their ideal of intrinsic racial equality, it still would have had to determine whether the imposition of this applicable constitutional principle could be accommodated in particular localities, or whether the imposition of mandatory remedies in certain vigorously dissenting localities should wait, because of the potential for civil strife—even as a function of "the people's" values. See infra notes 323, 406.
321. See supra text accompanying notes 306-09.
322. See supra note 318.
the point of acceptability in 1896. Little had occurred between 1868 and 1896 to mitigate the racism endemic even among "the people" of the North. On this basis, one might postulate that the lure of racist segregation had roughly the same political status in 1896 as it did in 1868 and, in turn,

323. One cannot pass without noting the potential significance of the Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875), which provided as follows:

[All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.]

Id. If this statute had been understood to prohibit racial segregation in transportation facilities, then the analysis presented in this Article would suggest that Plessy was, in fact, wrongly decided. Assuming that ratifying constitutional restrictions on local discretion reflects a desire to favor a value to a greater extent than would national political majorities, a national political majority's desire to prohibit racial segregation would suggest that to maintain the tension of self-constraint, the Constitution itself must prohibit at least state laws requiring segregation in transportation facilities.

There is some question, however, whether the statute was concerned with racial segregation per se. The bill was introduced by Senator Charles Sumner—the radical antiracist. It is rather clear from legislative debate that Sumner wanted to prohibit all manifestations of racism, including racial segregation. "I will say that when this bill shall become a law, as I hope it will very soon, I know nothing further to be done in the way of legislation for the security of equal rights in this Republic." Cong. Globe, 41st. Cong., 2d Sess. 3434 (1870).

There was, however, debate about whether segregation denies "equality of right." Senator Edmunds of Vermont, referring to segregated schools, said that there is no "equality of right when you declare that you will put the black sheep in one place and the white sheep in another." Cong. Globe, 42d Cong., 2d Sess. 3190 (1872). Senator Ferry of Connecticut responded with the theory that separate but equal facilities do provide "equality of right." Id. "The Senator from Vermont insists that it is a denial of equality of right to have different rooms for the education of the races. I assert that it is not a denial of equality of right." Id.

The distinction between "civil" and "social" equality was pressed more strenuously as the bill progressed toward passage. Representative Buckner of Missouri charged that "[i]t is not civil rights but social rights that it seeks to enforce and protect. It is not equality before the law, but equality in society, that Massachusetts hankers after with such avidity." 2 Cong. Rec. 428 (1874). Other supporters of the bill denied that the law related to "social equality." Representative Rainey, a black Republican from South Carolina, assured moderates that "the negro is not asking social equality." Id. at 344 (1873). Representative Walls stated:

That social equality will follow the concession of equal public rights is about as likely as that danger will come to the Republic because of a general amnesty. None present this unreasonable and unnatural argument but those whose political life depends upon the existence of a baseless prejudice wholly unworthy a civilized country and disgraceful to the American people.

Id. at 416 (1874). Finally, Representative Butler of Massachusetts, Sumner's ally, said:

Social equality is not effected or affected by law. It can come only from the voluntary will of each person. Each man can in spite of the law, and does in spite of the law, choose his own associates.

But it is said we put them into the cars. That men are put into the cars and the women that are put into the cars I trust are not my associates. There are many white men and white women whom I should prefer not to associate with who have a right to ride in the cars. That is not a question of society at all; it is a question of a common right in a public conveyance.

3 Cong. Rec. 940 (1875).

There is a fundamental ambiguity in the message of those who denied the relevance of "social equality." It was never entirely clear whether Butler, and other supporters of the
conclude that 1896 was probably not the right time to deem racial segregation in public transportation prohibited by “the people’s” constitutional preferences of self-constraint.324

ii. Racial Segregation and “the People” of 1954

Consider the interpretive question posed by Brown in 1954. Is it constitutionally permissible for local majorities to vindicate their racist preferences in the context of segregation? Superficially, this might appear identical to the question of timing presented by Plessy in 1896. One might suggest, however, that everyday political perceptions of racism had changed by 1954, that racism and segregation were viewed as morally unacceptable by a greater portion of “the people” than in 1896.325 Indeed,
Previous analysis has suggested that unless conflicts otherwise resolved by the Civil War are to be re-solved in court, any decision to include Southern values into the constitutional equation must be a function of the values of the non-Southern electorate. See id. One might therefore conclude that for purposes of analyzing the fourteenth amendment's meaning as of 1954—the extent to which "the people's" ideals of self-constraint had to be realized in 1954—"the people" of 1954 still excluded the Southern electorate. Southern majorities were still intensely racist; there was no evidence, such as voluntary votes to ratify the fourteenth amendment, that the Southern electorate endorsed the fourteenth amendment's ideals. Thus, to have included the Southern electorate of 1954 as part of "the people" whose values count for interpreting the amendment's contemporary meaning would still have raised doubts as to whether the fourteenth amendment should have had any legal force at all. Cf. supra note 318.

Furthermore, to have included the values of Southern majorities in determining "the people's" ordinary political values—to have determined whether the everyday political pain "the people" would feel today, in 1954, from being denied the discretion to segregate exceeded the amount of political pain "the people" of 1868 chose to endure—would have been to place a significant drag on the rate at which "the people" could have achieved the ideals apparently articulated in the fourteenth amendment. To have added Southern values regarding racial segregation would have required accommodating a racism of greater intensity than that prevalent in the North. Again, however, this method for defining "the people" of 1954 rests primarily on the results of power—the Civil War—and a concept of inherited rights. See supra note 318.

The validity of these criteria for defining "the people" is an issue open for dispute. See infra text accompanying notes 455-59.

Thus, for an analyst in 1954, as for one in 1896, the Hamiltonian premise of constitutional continuity might have suggested that because "the people" of the North in 1868 chose to exclude Southern participation in articulating the Constitution's racial ideals—toward preventing Southern participation from excessively diluting the North's ideals of self-constraint, see supra text accompanying notes 257-66, and despite compromising the values of democracy and community—so the non-Southern electorate in 1954 would make a similar decision to maintain their commitment to the racial ideal intact, despite continuing to compromise the values of democracy and community. Accepting this, a decision to accommodate Southern values would have been a function of practical concerns among the non-Southern electorate to avoid civil strife. Cf. supra notes 320, 323; infra note 406.

I have thus far referred rather glibly to the "Southern electorate" and the "non-Southern electorate," and assumed from the Hamiltonian premise of constitutional continuity that the constitutional values of each in 1954 were fairly represented by the choices made in 1868. Although the Southern electorate might have been defined by those residing in the same eleven states from 1868 through 1954, see supra note 255, the premise of constitutional continuity applied in this regional fashion assumes that any movement of people into the Southern states from the non-Southern states, carrying their non-Southern values with them, was insignificant. Furthermore, the premise of constitutional continuity assumes that any categorical additions to the electorate—such as blacks and women—did not have a significant impact on the continuity of constitutional values from 1868 to 1954. See supra note 122.

These problems are compounded when the premise of constitutional continuity is applied to the non-Southern electorate, the definition of which after 1868 becomes progressively more complicated as each new state is added to the Union. The analyst in 1954 would have had to consider whether the thirteen state electorates added to the Union since 1868 should be included among "the people" whose values count for inferring the contemporary meaning of the fourteenth amendment. One would have had to determine whether these new state electorates more reflected the values of the Southern electorate or the non-Southern electorate. This might have been done by examining patterns of migration and legislation.

Although facing problems similar to those confronting the analyst in Brown's era who might have tried to identify the non-Southern electorate of 1954, the analyst today might be better able to identify the non-Southern electorate of 1987. Today, the analyst might examine the response of these thirteen new states to the Equal Rights Amendment, which may be a normative analogue of the fourteenth amendment. See infra text accompanying notes 361-79. Such an examination suggests that the thirteen states added to the Union since 1868 are far more dedicated to constitutional ideals of intrinsic human equality, see infra note 373, than are the Southern states, and somewhat less dedicated to such ideals of self-constraint than are the
one might suggest that "the people" were less likely in 1954 than in 1896 to pursue racist impulses in those contexts originally covered by the equal protection clause, and that Justice Warren in Brown therefore had a stronger basis than did Justice Brown in Plessy to determine that "the people" were ready to endure this new source of ordinary political pain toward serving their constitutional ideal of intrinsic racial equality.326

original Northern states of 1868. Nine of the thirteen states admitted after 1868 voted to ratify the Equal Rights Amendment (69.2%). In contrast, of the Northern and Southern states existing in 1868, only two of the Southern states (18.2%), but a resounding twenty-three of the twenty-six Northern states (88.5%) voted to ratify the Equal Rights Amendment. See infra note 376.

Thus, the premise of constitutional continuity is vulnerable because the flow of history, at least superficially, seems to change as much as it preserves. It must be applied with some sensitivity to change—especially to changes in the electorate's composition. In short, the Hamiltonian premise is just that—a premise, a point of departure. To depart from the premise is not to refute it, but to refine it. See supra note 122; infra notes 370, 374; cf. infra note 376. 326. There is evidence of voluntary political action at both the local and national levels to combat racism. In 1935, the Congress of Industrial Organizations (CIO) established a Committee to Abolish Racial Discrimination. See United States Commission on Civil Rights, Freedom to the Free: A Century of Emancipation 112 (1963) [hereinafter Freedom to the Free]. Grass roots organizations were formed in the late 1930s to challenge racial segregation in the South. See id. at 113. During the course of World War II, racial discrimination in the army was scaled, but by no means eliminated. See id. at 114-17. In 1946, President Truman announced a policy prohibiting segregation in the military. See id. at 127. In 1950, the President's Committee on Equality of Treatment and Opportunity in the Armed Forces concluded that "a policy of equality of treatment and opportunity will make for a better Army, Navy, and Air Force. It is right and just." See id. at 126. After earlier efforts to prohibit racial discrimination by government contractors during World War II, President Truman issued Executive Order 10,308, articulating such a policy and creating the Committee on Government Contract Compliance. See id. at 128.

President Truman felt sufficient political pressure to create the President's Committee on Civil Rights, which in 1947 recommended a range of federal statutory and administrative provisions "to safeguard the civil rights of the people." See id. at 118-19; see also M. Konvitz & T. Leskes, supra note 242, at 70-72. Ironically, the Committee recommended "enactment by the states of laws guaranteeing equal access to places of public accommodation, broadly defined, for persons of all races, colors, creeds, and national origins." Freedom to the Free, supra, at 182. But for the Court's invalidation of the Civil Rights Act of 1875, such legislation might have been unnecessary. See supra note 323. Although eighteen states had enacted such legislation after the federal Act was invalidated in 1883, only Oregon, in 1953, had since enacted such legislation before the Brown decision. See M. Konvitz & T. Leskes, supra note 242, at 157. The Committee also recommended desegregating the District of Columbia, as a "symbol to our own citizens and to the people of all countries [of] our great tradition of civil liberty." Freedom to the Free, supra, at 122-23; see also M. Konvitz & T. Leskes, supra note 242, at 157. In 1953, President Eisenhower declared his commitment to a desegregated District. Ironically, early federal efforts to desegregate the District relied on an ordinance enacted in 1873. See Freedom to the Free, supra, at 123.

One wonders whether the national political view of racism had truly changed since 1896 or whether the nation had simply recaptured the lost spirit of 1875, perhaps thwarted by the Supreme Court with the Civil Rights Cases. Whatever progress against racism there was before 1954 occurred primarily after 1940. It intensified dramatically after Brown, culminating in 1964 with sweeping federal civil rights legislation.

This positive response to Brown suggests that 1954 was not too early to impose the pain of self-constraint from a constitutional mandate prohibiting racial segregation—a mandate that "the people" of 1868 apparently were unwilling to endure. Whether 1954 might have been fifty-eight years too late—whether the nation would have responded to the Court's coach-like lead after 1896, as it did after 1954—is again, a question answerable only with guesses and speculation. See infra text accompanying notes 331-34. Indeed, one wonders whether the
To say that it was more plausible in 1954 than in 1896 to believe that "the people's" constitutional values extended toward prohibiting racial segregation,\textsuperscript{327} however, is not to establish that "the people's" constitutional values in 1954 were properly interpreted as prohibiting racism in this new legal context. The latter proposition can be "established" only by determining that "the people" of 1954 suffered less everyday political pain from the fourteenth amendment's \textit{original mandates} than "the people" of 1868 chose to suffer, and that by having been forced to suffer everyday political pain in the \textit{new context} of racial segregation, "the people" of 1954 would have suffered the same amount of everyday political pain that "the people" of 1868 chose to endure for their constitutional ideal of self-constraint.\textsuperscript{328} But because this analysis requires reference to unquantifiable historical and contemporary variables, a court in 1954, as in 1896 and 1872, could not have been confident whether it properly has determined that \textit{today} is, or is not, the proper time to push constitutional mandates a new step further toward "the people's" untainted constitutional ideal.\textsuperscript{329}

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Even accepting its premises, one might find the foregoing analysis troublesome for at least two reasons. First, the analysis suggests that if ordinary, everyday political values do not change from those which prevailed when "the people" made their constitutional choices of self-constraint, there is no basis for a court to impose additional constitutional mandates against "the people's" contrary exercise of democratic discretion. Unless people feel less need to vindicate their racist impulses through law, \textit{unless everyday political majorities are less likely to want to vindicate racist impulses through law}, there is no basis for determining that "the people" today are willing to endure constitutional constraints on their democratic discretion that "the people" of 1868 chose not to endure.\textsuperscript{330} In short, evolution of "the

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\textsuperscript{327} The issues posed by \textit{Brown} and \textit{Plessy} were different in a manner that cuts the other way. At least to the Congress of 1875, racial segregation in education was more desirable than racial segregation in transportation facilities. The Civil Rights Act of 1875 prohibited discrimination in the latter context, but not in the former. See The Civil Rights Cases, 109 U.S. 3, 9 (1883). Earlier drafts of the bill also would have applied to discrimination in education. These provisions were dropped before the bill was passed. See Avins, \textit{The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations}, 66 COLUM. L. REV. 872, 876-77 (1966) (unsuccessful bill provided for equal enjoyment of schools and public institutions).

\textsuperscript{328} Thus, if $\{pc_1 + pc_2 + \ldots + pc_n\} [1868]$ was equal to $\{pc_1 + pc_2 + \ldots + pc_n + pc_{n+1}\} [1954]$, then there would have been a basis for determining that 1954 is the proper time for interpreting the equal protection clause as prohibiting laws enacted because of racism in the previously uncovered context of racial segregation. \textit{Cf. supra} text accompanying notes 314-20 (same analysis applied to 1896), 302-09 (same analysis applied to 1872).

\textsuperscript{329} See \textit{supra} text accompanying notes 308-09, 321.

\textsuperscript{330} One must distinguish the concepts of ordinary political pain the framers and ratifiers "chose not to endure" and ordinary political pain the framers and ratifiers "did not choose to
people's" everyday political values toward the constitutional mandates established by the original understanding is a prerequisite for the development of new constitutional mandates that go beyond the original understanding by more effectively vindicating the ideals underlying "the people's" desire for self-constraint.

Second, it is hardly comforting that a court can determine only on the basis of probabilities and rough evaluations—otherwise known as guesses—whether the ordinary political values of "the people" have changed sufficiently to warrant the determination that racist policies, previously reserved by "the people" as constitutionally permissible, should today be struck down to vindicate the ideals of the contemporary constitutional electorate. This is especially troublesome when a court must decide such momentous questions as those presented by Plessy and Brown.331

We might temper any sense of despair with the following two observations.332 First, although the answers might be essentially intuitive endure." See supra note 59; infra note 362. The first suggests a real choice, a self-conscious weighing of values. The second may suggest no choice at all, but absence of deliberation, either because an issue did not exist at the time (discrimination against blacks on golf courses, see supra note 131) or because the issue was not seriously confronted (discrimination based on national origin, see infra note 340).

To make a determination contrary to what the framers and ratifiers chose not to endure requires some indication that "the people's" values have changed. One might posit that either "the people's" constitutional values have changed, such that they are willing to endure more everyday pain toward serving some ideal, or that their everyday values have changed, such that the line between constitutional mandates and aspirations must be shifted in order to maintain intact the original commitment to the constitutional ideal. Cf. supra text accompanying notes 203-15 (analysis applied to constitutional privacy). The former course contradicts the premise of constitutional continuity; the latter course helps to satisfy the premise of constitutional continuity.

To make some determination about an issue that the framers and ratifiers did not consider requires that one place the issue in the context of what is known about their values from the choices they did make. For example, would a prohibition of discrimination based on national origin have presented a significant amount of ordinary political pain, such that "the people," already choosing to endure so much ordinary political pain in the context of racial discrimination, would have chosen not to endure so much more? Would "the people," had they thought about it, have chosen to prohibit discrimination based on race and national origin in particular contexts, or to take the progressive step-at-a-time approach with respect to discrimination based on national origin as with racial discrimination in those racial contexts originally chosen not to be covered by the amendment? Cf. infra text accompanying notes 339-79 (equal protection and sexism). Perhaps one cannot confidently answer these questions, but by recognizing their relevance, one at least has criteria for addressing the interpretive problems posed by issues "the people" did not consider. See infra note 362; cf. Brest, supra note 59, at 211 (when lawmaker's intent is indeterminate, "the judge's decision must be rooted elsewhere"). 331. Cf. C. Black, supra note 56, at 140 ("[e]very great constitutional decision is debatable"). 192 ("[e]nstitutional questions that reach the courts are rarely if ever free from doubt").

332. The foregoing analysis has not attempted to account for the relative prevalence of radical anti-racists, Perception-Impaired Absolutists, and Balancers. Given the premise of popular determination, the extent to which a court should delay the coherent development of intrinsic racial equality is related to the proportion of Balancers among the framers and ratifiers of the fourteenth amendment. Only the Balancers would have sought to delay realization of intrinsic racial equality. See supra text accompanying notes 299-300. This bit of information is also probably unknowable. 333. The issue might be illuminated by returning to the analogous situation involving Coach and her ambitious boss. The boss has given Coach ambiguous instructions—"Help me develop
and speculative, one at least has identified questions that might enrich analysis. Second, by recognizing the analytical significance of factors related to the issue of timing—for example, a development of “the people’s” ordinary political values—one might develop new approaches that simultaneously mitigate the potential costs of judicial error and more effectively serve “the people’s” ideals of self-constraint, by making it more likely that “the people’s” everyday political values do, in fact, progress toward their constitutional ideals. \(^{334}\)

**b. Sexism and the Constitutional Values of “the People”—Here and Now**

Since 1954, the Supreme Court has determined that *any* law based on racial or ethnic prejudice is constitutionally prohibited,\(^{335}\) whether or not prohibited according to “the people’s” original understanding of the fourteenth amendment. Beyond this, the Court has held that the Constitution prohibits laws enacted because of sexism.\(^{336}\) This doctrinal move-
sexism, one is left without direct evidence that "the people" today adhere to such a constitutional ideal.

This is where the analysis of interpretivists such as Raoul Berger, Henry Monaghan, and Justice Rehnquist ends. But having suggested a goal of identifying the constitutional values of "the people" today, and that past constitutional choices are direct evidence of present constitutional values based on a premise of constitutional continuity, one can view the interpretivist approach from a fresh perspective.

One might begin by considering what an interpretation of equal protection that prohibits all—and only—governmental actions based on racial or ethnic prejudice would imply about contemporary constitutional

340. Indeed, even the issue of discrimination based on national origin was not central in debates about the equal protection clause. Discrimination against racial groups other than blacks was not an issue of particular concern. Justice Rehnquist, dissenting in a case that recognized special equal protection concern for traits other than race or ethnicity, justified the application of the equal protection clause to races other than blacks, and to traits other than race (national origin) on the basis of logic. See Trimble v. Gordon, 430 U.S. 762, 780 (1977).

He stated:

The essential problem of the Equal Protection Clause is . . . determining where the courts are to look for guidance in defining "equal" as that word is used in the Fourteenth Amendment. Since the Amendment grew out of the Civil War and the freeing of the slaves, the core prohibition was early held to be aimed at the protection of blacks. If race was an invalid sorting tool where blacks were concerned, it followed logically that it should not be valid where other races were concerned either. A logical, though not inexorable, next step, was the extension of the protection to prohibit classifications based on national origin.

Id. (citations omitted) (emphasis added). Justice Rehnquist here acknowledges that the logical extension of some norm may be, but is not necessarily, appropriate for analyzing who is covered by the equal protection clause and for determining the extent of that protection.

Justice Rehnquist's analysis is incomplete on two grounds. First, he employs the method of logic without any normative predicate. Justice Rehnquist never identifies what value is being logically extended from race to national origin. To say that race is logically like national origin, one must identify the purposes of comparison. Race may well be logically equivalent to national origin when considered in the context of a value that rejects normative judgments about people based on characteristics of birth or chance. Race, however, is not the logical equivalent of national origin when considered in the context of a Hitlerian norm advocating that people of one biological stock join together to form a great new nation.

Second, Justice Rehnquist never presents an analysis for determining when the logical implications of a value are properly pursued, and when they are not. Such is a task undertaken by this Article.

341. Concluding that "the people" of 1868 intended eventually to reach sexism, as well as racism, based simply on the general language of the fourteenth amendment, elevates form over substance. Cf. supra text accompanying notes 257-66. This conclusion also substitutes word games for analysis of human motivation, which should be at the center of constitutional analysis.

For consideration of the interpretive possibilities that would be posed if "the people" of 1868 had specified race, see infra note 362.

342. See supra text accompanying notes 95-109.

343. See supra text accompanying notes 114-23.

344. I recognize, of course, that even apart from gender discrimination, the equal protection clause has been interpreted as prohibiting more than all laws enacted because of racial and ethnic prejudice. Those other contexts, such as "substantive equal protection" for speech interests, see, e.g., Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."), involve values unrelated to the racial judgments that
values. 345 As earlier suggested, 346 one has three categories of evidence that can be quite helpful for inferring present constitutional values, given the premise of constitutional continuity: 347 first, the constitutional choices of the past; second, the context of everyday political values in which those choices were made; and third, the context of everyday political values today. Our examination of the first two categories has suggested that although "the people" of the North in 1868 were clearly concerned about constraining the political discretion of the racist South, they apparently acted with a motive of self-constraint as well, expressing an aspiration to reach toward an untainted ideal of intrinsic racial equality, despite their own intense racism. 348 Thus, "the people" of the North understood the fourteenth amendment as originally prohibiting racial discrimination in particular contexts, yet expressed that understanding with broad and general language. 349 One can now turn to the third variable—the context of ordinary political values today.

The evolution of local, state, and national legislation—reflecting everyday political values—suggests that there has been a radical change in the political status of racism since 1954. Most of contemporary society agree, even in the forums of rough and dirty everyday politics, that law should not reflect racist attitudes. 350 National majorities, through Congress, have enacted federal legislation prohibiting racial discrimination in many contexts. 351 Most states and localities do not need constitutional constraints

have been a focus of this Article. Indeed, one might suggest that "substantive equal protection" is not a function of the equal protection clause itself, but instead a function of values derived from other specific constitutional contexts—for example, as in Mosley, the first amendment. See id.

"Rationality review" under the equal protection clause—a doctrine holding that laws must have a rational relationship to permissible ends—also reaches well beyond the contexts of racial and ethnic prejudice, but is profitably understood not as a true constitutional doctrine at all, but a promajoritarian doctrine that encourages legislatures either to define their objectives honestly, or to pursue their honestly defined objectives more efficiently. See, e.g., Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 216 (1976) (responsible lawmaking may be premise of rationality review). In any event, my reference to an interpretation of the equal protection clause as prohibiting all—and only—laws enacted because of racial and ethnic prejudice should be viewed in the context of those values underlying the racial judgments made by "the people" of 1868. See supra text accompanying notes 283-309. Cf. supra note 340.

345. For considerations relevant for identifying "the people" of 1887 whose values count for inferring the fourteenth amendment's contemporary meaning, see infra note 370.

346. See supra text accompanying notes 95-106.
347. See supra text accompanying notes 162-65.
348. See supra text accompanying notes 237-66.
349. See supra text accompanying notes 260-66.
350. Thus, the question of timing posed by Brown, if presented today, would be easier to answer than it was in 1954. The political context has changed, such that the vast bulk of the nation would feel little or no pain of self-constraint by being denied the political discretion to pursue racism through law. Indeed, delaying the Brown decision until 1987 would more likely have been a woeful failure to vindicate "the people's" ideals of self-constraint than an excessive intrusion on discretion that they wanted to retain. One might suggest, however, that Brown itself played a crucial role in fostering the near universal, contemporary political view that racism is an unacceptable predicate for laws. For further discussion about the relationship between judicial decrees and the evolution of public values, see infra text accompanying notes 391-441.

on their democratic discretion so far as racism is concerned, because most state and local political majorities today apparently are comprised of people who would not likely seek to vindicate racist impulses through law.\textsuperscript{352}

U.S. Commission on Civil Rights. See id. at § 101(a). The Act also created the Civil Rights Division in the Department of Justice. See id. at § 111; see also Subcommittee on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess., Federal Civil Rights Laws: A Sourcebook 14 (Comm. Print 1984) [hereinafter Sourcebook].

In 1964, Congress passed the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). Title II prohibited discrimination based on “race, color, religion, or national origin” in various places of public accommodation. Id. at tit. 2, 78 Stat. at 243 (codified as amended at 42 U.S.C. §§ 2000a to 2000a-6 (1982)). Title III authorized the Attorney General to institute legal proceedings when people were denied the equal use of any public facility on the basis of race, religion or national origin. Id. at tit. 3, 78 Stat at 246 (codified as amended at 42 U.S.C. §§ 2000b to 2000b-6 (1982)). Title IV prohibited discrimination based on “race, color, religion, or national origin” in all public schools, and schools supported with government funds. Id. at tit. 4, 78 Stat at 244 (codified as amended at 42 U.S.C. §§ 2000c to 2000c-9 (1982)) Title VI prohibited discrimination based on “race, color, or national origin” in “any program or activity receiving Federal financial assistance.” Id. at tit. 6, 78 Stat. at 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-5 (1982)) Thus, with Titles II, III, IV, and VI of the Civil Rights Act of 1964, the ordinary political values of the nation had turned against racial segregation—which, of course, was a significant realm of racism that the framers and ratifiers of 1868 apparently wanted to reserve from the fourteenth amendment’s mandates. See supra text accompanying notes 239-44. Title VII prohibited employment discrimination based on “race, color, religion, sex, or national origin.” Id. at tit. 7, 78 Stat. at 255 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).


Let me emphasize that reference to this record of national legislation is not meant to deny that racism continues to infect a substantial portion of the American population. See, e.g., McCleskey v. Kemp, 107 S. Ct. 1756, 1781 (1987) (statistical evidence of racism in imposing death penalty insufficient basis for invalidating sentence imposed in particular case). The significant point, however, is that it no longer infects a majority of the electorate to such an extent that the electorate wants to vindicate racist impulses through law. To the contrary, the ordinary political values of national majorities seek to thwart racism, not to vindicate it.

352. Quite the contrary, most states have enacted their own statutes prohibiting racist discrimination in many private contexts. All fifty states, for example, have enacted legislation prohibiting racial discrimination in employment. See Sourcebook, supra note 351, at 139-42. Thirty states “have been determined by the Department of Housing and Urban Development to have fair housing laws that provide rights and remedies ‘substantially equivalent’ to those provided by title VIII of the Civil Rights Act of 1968 [42 U.S.C. §§ 3601-3619].” Id. at 142-43. The difference in the extent of consensus between the contexts of employment and housing may reflect remnants of the distinction between “civil” and “social equality.” See supra text accompanying notes 276-84. Regardless of this apparent difference, it is clear that a national majority views racial discrimination in the contexts of employment and housing as immoral, or at least undesirable, and that the members of that national majority have expressed their views both together in Congress, see supra note 351, and separately in their respective states. For
Because racism is so unpopular today in ordinary politics, because so many states and localities are unlikely today to enact statutes because of racism, and because Congress has prohibited racial discrimination in contexts that go well beyond those covered by the equal protection clause, one might conclude that an interpretation of the equal protection clause as prohibiting all—and only laws enacted because of racial and ethnic prejudice would invalidate little, or nothing, that Congress would not choose to prohibit, and therefore would impose little or no everyday political pain on “the people” today. If this is true, an interpretation of the equal protection clause as prohibiting all—and only—laws enacted because of racial and ethnic prejudice would coincide more with a desire among the people to impose their everyday political values on dissenting localities in which racism is still a majoritarian impulse—than with a constitutional desire among the people for self-constraint.

What follows from this is significant. The meaning of equal protection as defined by Berger, Monaghan, and Rehnquist is implicitly predicated on a matrix of putative contemporary constitutional values that is radically different from the constitutional intent apparently manifested by “the people” of 1868. From a painful and active provision for self-constraint, the fourteenth amendment in 1987, as interpreted by the “interpretivists,” has become a comfortable and passive affirmation of ordinary political values prevailing throughout the nation—values that could today be as effectively vindicated through authorizing Congress to legislate. Thus, these “interpretivists,” in the name of preserving the constitutional values of “the people” and adhering to the meaning of past choices, may have reconstructed society’s fundamental constitutional motivation. According to the implications of “interpretivist” judgment, constitutionally rooted moral growth has stopped because the motivational foundation of constitutional norms has changed—from self-constraint to simply constraining the offensive political discretion of others.

This potentially significant discontinuity between the value choices made by “the people” of 1868 and the constitutional values of the modern era implicit in “interpretivist” judgments suggests that Berger, Monaghan, and Rehnquist are uncomfortable inferring from the motive of constraining others that the Court, in enforcing the equal protection clause, is—or should be—serving as Congress’ quasi-legislative front.
and Rehnquist may have failed their premises. These "interpretivists" may have failed by confusing continuity of form with continuity of substance by confusing continuity of language and a continuity of values, which language helps to express. One denies meaningful continuity—a continuity of constitutional values by "interpretation" that changes the basic motivation of "the people" from the aspirational self-sacrifice of self-constraint to the inert self-satisfaction of national legislative discretion. Yet, one poses a difficult problem by positing that the fundamental motive of self-constraint has not changed, and by recognizing that an equal protection clause interpreted as prohibiting only laws based on racism cannot reflect a motive of self-constraint among "the people" today. The Hamiltonian premise of constitutional continuity suggests that some value should be deemed to maintain the constitutional tension of self-constraint. Should that value be a constitutional concern for laws based on sexism?

359. "[T]he principal anti-activist argument is that the Constitution confers no judicial power to revise it." Berger, supra note 5, at 31.

360. See supra note 208. One might conceive of the basic motivation in 1868—an ideal of self-constraint—as represented by a rubber band, tensely pulling against tempting but disfavored contrary political impulses. Once the goal of moral development has been reached, in the sense that today "the people," by and large, are far less racist than in 1868, the rubber band relaxes. The tension is gone. If the court does not stretch the rubber band again, exerting an additional source of tension against everyday political preferences, the court must posit that the fundamental constitutional intent of "the people" has drastically changed, thereby contravening the premise of constitutional continuity.

361. See supra note 209. After all, if "the people" of 1868 did choose to endure everyday political pain toward serving a constitutional ideal, Pt (1868), and if "the people" of 1987 feel no ordinary political pain from the equal protection clause interpreted as prohibiting all—and only—laws enacted because of racism, \( P_{c1} + \ldots + P_{c_{n+1}} + \ldots + P_{c_{all races}} \), the premise of constitutional continuity is not satisfied unless the clause is interpreted as reflecting a more fundamental value, directly underlying the constitutional ideal as originally conceived, see infra text accompanying notes 362-68, capable of generating new contexts, logically related to the original contexts, in which the denial of ordinary democratic discretion will engender a pain of self-constraint equal to that which "the people" of 1868 chose to endure, Pt (1868). Cf. infra note 374.

One might, however, question the premise of constitutional continuity applied to circumstances so far removed from those in which the constitutional choices of 1868 were made. Cf. supra notes 122, 325; infra notes 370, 374, 376.

362. Commentators have erected a distinction between the framers' intent not to prohibit something, and the absence of an intent to prohibit something—the first reflecting a choice with force, to the extent that any constitutional choice has force, and the latter reflecting either the choice to leave the matter to other decisionmakers (most likely legislators), or the absence of consideration, hence the absence of choice altogether. See, e.g., Dworkin, supra note 24, at 485-87; Perry, Interpretivism, Freedom of Expression, and Equal Protection, 42 Ohio St. L.J. 261, 299-300 (1981). Implicit in such discussions is the view that if the framers and ratifiers intended not to prohibit something, such a choice presumably would be binding on judicial interpretation today. See Perry, supra at 419. Cf. supra notes 59, 330.

The analysis presented by this Article suggests that the framers' and ratifiers' choice not to prohibit something does not necessarily foreclose a subsequent interpretation holding that "something" to be constitutionally prohibited. The issue depends on a determination of why a given subject was left for democratic discretion. If, to use Perry's example, "the people" intended the Constitution to require that blacks and whites be provided with equal schools, but also decided to leave segregated schools as a matter for local discretion because "the people" were willing to endure only a certain amount of the ordinary political pain, their choice to

361. See infra note 374.
To consider this question, one must return to the structure of competing values that past constitutional choices imply and that the Hamiltonian premise makes relevant to modern political combat. A motive of self-constraint implies a desire to pursue the coherent implications of some ideal to a greater extent than "the people" would choose in everyday congressional politics. It implies a competition between the quick and intense gratification of ordinary politics and a fragile aspiration to attain constitutional ideals through choices of self-constraint.

Thus, we saw earlier that the value scheme among those who supported the fourteenth amendment probably reflected competition between an ideal of intrinsic racial equality and the alluring emotion of racism. We also saw that the central issue of debate in 1868—how much discrimination the Constitution would prohibit—was a function of the relative weights that people we called Balancers placed on these competing concerns. In determining which of these competing values was to prevail in particular contexts, "the people" of 1868 struck a balance between their constitutional ideal of self-constraint and their intense emotions of racism. The change in political values between 1868 and 1987, the substantial mitigation of intense racism in "the people's" everyday politics, requires maintaining this balance of self-constraint if the Hamiltonian premise of constitutional continuity is to be satisfied. To recreate this balance, one must consider both competing sides—that which motivates the constitutional ideal, and that which motivates the political reservations.

Pursuing sexism through the law has potential constitutional significance if sexism is logically related to "the people's" value that deems racism morally unacceptable. If one believes that characteristics of birth should not be the basis for prescriptive judgments about people, and that it is therefore wrong to discriminate against black people based on a judgment that blackness establishes something prescriptively distinct about people, then one should recognize that discriminating against people based on a view that gender establishes something prescriptively distinct about people is similarly problematic. Indeed, if one considers only the constitutional value that people should not be treated differently based on moral

exempt segregated schools from the constitutional mandate would become an open question if, and when, "the people" no longer felt ordinary political pain from being constitutionally required to provide blacks with equal schools—if, in other words, it would be unthinkable in ordinary politics to deny blacks equal—yet separate—schools. See Perry, supra at 419.

This sort of inquiry, questioning even affirmative choices to exempt certain activities from constitutional prohibition, is inevitable once one accepts that the goal of constitutional analysis must be to identify the constitutional preferences of "the people" today, that constitutional restrictions on local discretion reflect a motive of self-constraint, and that past choices are analytically significant as evidence of present values of self-constraint. Thus, even if "the people" of 1868 had specified that the equal protection clause was intended not to prohibit laws based on sexism, it would not necessarily contravene their wishes, or in Perry's words, it would not necessarily be "contraconstitutional," id., to prohibit laws enacted because of sexism, given the changed national political climate.

364. See supra text accompanying notes 267-98.
365. See supra text accompanying notes 287-300.
366. See supra note 209.
367. See supra text accompanying notes 267-86.
judgments about characteristics of birth, then racism and sexism— notions that some people, because black (or women), are unfit to do certain things that other people, because white (or men), are fit to do—are indistinguishable, just as candy and apples are indistinguishable with respect to the value of "something sweet." Thus, with respect to the constitutional side of the balance, racism and sexism are logical equivalents.

Establishing a logical relationship is the first necessary analytical step. Examining only the constitutional ideal, however, is not enough. This Article has stressed that judicial pursuit of normative coherence potentially thwarts the political compromises that otherwise would be made at the constitutional level. Thus, although both racism and sexism are manifestations of the same evil—assigning moral status to individuals based on characteristics of birth—it is not necessarily true that because "the people" of 1868 chose to forgo the emotion of racism motivated by an ideal of intrinsic human equality, "the people" of 1987 would choose to forgo the emotion of sexism for the sake of that same ideal. One must, therefore,
turn to the side of political reservation in the constitutional equation—
the competing values that limit the extent to which “the people” are willing
to endure the everyday political pain of self-constraint for the sake of an
elusive ideal.

If sexist laws are to be deemed constitutionally insignificant today,
given the premise of constitutional continuity, it must be because the emotion of
sexism—unlike racism in 1868—outweighs the constitutional ideal, either
because sexism is more important to “the people” of 1987 than racism was
to “the people” of 1868, or because the ideal of intrinsic human equality is
clearly less important to “the people” of 1987 than it was to “the people” of 1868.
One can plausibly suggest that “the people” of 1987 do not value their
emotions of sexism more than “the people” of 1868 valued their emotions
of racism. The idea that women should not emerge from the home into the
world at large—or that men should not pass them in the other direction—
is widely held and emotionally rooted. But this idea is rarely held with the
violent intensity that marked pervasive notions of proper social distinctions
among the races in the mid-nineteenth century. Thus, assuming that “the people” of 1868 expressed a constitutional ideal ultimately prohibiting all
governmental actions based on racism, that sexism today is generally felt
with no more intensity than that underlying racism in 1868, and that racism
and sexism are logically equivalent with respect to the relevant ideal of
self-constraint, one might conclude, applying the Hamiltonian premise of
constitutional continuity, that “the people” of 1987 adhere to an ideal of
intrinsic sexual equality, ultimately prohibiting all governmental actions
based on sexism.

cannot be answered. One knows only that the degree of cleavage in 1868, apparently
somewhat greater than the degree of cleavage today, was important enough to the victorious
Northern electorate to compromise notions of democracy and community. Ironically, and
revealingly, this analysis suggests the principle that the South can regain its status among “the
people” for purposes of equal protection—at least so far as the non-Southern constitutional
electorate is concerned—only when its contribution to public values makes little difference. Cf.
infra note 376.

371. The “constitutional equation,” again, is the following:
[ord. nt'l prefs. : const'l choices](past) || [ord. nt'l prefs. : const'l choices](pres.)

See supra note 164. In view of the peculiar circumstances in which the fourteenth amendment
was ratified, we have modified the constitutional equation as reflecting the tension between the
constitutional ideals and the ordinary political values of “the people” of the non-Southern
electorate. See supra note 306.

372. This task has been neglected by such philosophy-oriented analysts as Ronald Dworkin
and David Richards.

373. The phrase “intrinsic human equality” is used simply as a label for the notion that it is
too wrong to treat people as possessing different moral worth or different social roles based on
prescriptive judgments about characteristics of birth. See supra text accompanying notes
367-372.

374. The shift to a deeper level of values—intrinsic human equality as the norm motivating
“the people’s” concern for intrinsic racial equality in 1868—adds a new layer of vulnerability
to the premise of constitutional continuity. Cf. supra notes 122, 325, 373. There may have been
something special about the context in which racism was evaluated in 1868. The black victims
of racism in the mid-nineteenth century suffered a degree of deprivation since unmatched by
other racial or ethnic groups, and by those victimized by sexism. One might suggest, therefore,
that both the consequences of their racism, and the intrinsic immorality of their racism, were
elements of the normative calculus among “the people” of 1868.

This may be true, cf. infra note 380, and one’s view of whether “the people” of 1868 were
concerned at all with the intrinsic immorality of racism alone, or in conjunction with its particu
The narrow failure of the Equal Rights Amendment, however, raises questions about the manner in which "the people" of 1987 adhere to their competing concerns for intrinsic human equality and their emotion of sexism—indeed, whether a concern for intrinsic human equality is less important to "the people" of 1987 than it was to "the people" of 1868. Some might argue that "the people" of 1987, because they did not ratify the Equal Rights Amendment, hold no ideal of self-constraint with respect to sexism. This argument is vulnerable. Although it is true that the requirements of article V were not satisfied during the attempt to ratify the ERA—thirty-five rather than the required thirty-eight states voted to ratify—the fact that thirty-five states did vote to ratify hardly suggests that "the people" are uncommitted to a constitutional ideal of intrinsic sexual equality. Indeed, given the fourteenth amendment's own problematic relationship to article V, the "failure" to satisfy article V in ratifying the Equal Rights Amendment has even less potential to rebut the Hamiltonian premise of constitutional continuity with respect to the contemporary meaning of the equal protection clause.

larly atrocious effects, might shape one's evaluation of the contemporary constitutional significance of sexism. It is important to note, however, that this variation in the analysis uses the premise of constitutional continuity. It simply characterizes the constitutional values and choices of 1868 somewhat differently from that suggested in the text.

Nevertheless, the premise of constitutional continuity is vulnerable because values do change. Everyday political values clearly have changed since 1868. Cf. supra note 122. There is no reason that constitutional values cannot change as well. Indeed, the article V amendment process presupposes that constitutional values can change through time. Cf. supra text accompanying notes 103-07. Despite the manifest imperfection of the Hamiltonian premise, one is left with other options that may be more imperfect—strict (or closed) interpretivism and a concomitant Jeffersonian rejection of self-constraint, see supra text accompanying notes 129-39; unguided lax (or open) interpretivism, see supra text accompanying notes 140-44; or Bruce Ackerman's "structural amendment," see supra note 233. Excessive constitutional politics vitiates the psychology of special choicemaking otherwise implicit in constitutional judgments; sparsely sporadic constitutional politics strains the courts' interpretive capabilities as the premise of constitutional continuity is stretched tenuously thin through time. At issue is how one can best approach an impossible ideal—the identification and protection of "the people's" fragile values of self-constraint. See supra note 122.

For significant evidence supporting the premise of constitutional continuity, see infra note 376.

375. See G. GUNThER, CONSTITUTIONAL LAW 668 (11th ed. 1985) (Congress extended ratification period and unsuccessfully attempted to reintroduce ERA); Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 HARV. L. REV. 386, 385 (1983) (discussing extension of ratification period and state attempts at revision of prior approval).

One must, indeed, consider the manner in which the formal requirements of article V should govern the meaning of a failed amendment process. This requires addressing questions considered supra text accompanying notes 95-166, such as whether identifying past or present constitutional values is the theoretically precise goal of constitutional analysis; why one examines past constitutional choices; and whether "the people" today want the article V requirements to be viewed as rigidly precluding consideration of any constitutional politics unless the process of ratification is pursued toward a positive conclusion. See supra note 233. In any event, article V is a rule of recognition, and as such, is not self-justifying. See Ackerman, supra note 33, at 1057-70 (as Constitutional Convention of 1787 revised preexisting formal procedures, future Conventions might modify article V formalities); Dworkin, supra note 24, at 496 (stressing importance of general constitutional intent over specific intent of framers).

376. It is important to emphasize that the question concerns how the failed Equal Rights Amendment should affect interpretation of the equal protection clause. Two aspects of this question must be considered: first, the relationship between the Southern electorate and the
It may be more plausible to suggest that the failure of the Equal Rights Amendment was a consequence of the relatively limited extent to which modern Balancers are willing to endure the pain of self-constraint for intrinsic sexual equality.²⁷⁷ Sexism, in some contexts, may simply be too

²⁷⁷ There was a fear, for example, that the proposed amendment would prohibit “separate but equal” public bathrooms. See G. Gunther, supra note 375, at 669 n.15. Ruth Ginsberg’s response to this argument is similar to arguments made in 1868, opposing the application of the equal protection clause to racial segregation. See supra note 284. “Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle.” G. Gunther, supra note 375, at 669 n.15 (quoting Ginsburg, The Fear of the Equal Rights Amendment, The Washington Post, Apr. 7, 1975, at A21, col. 1); see also Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 900-02 (1971) (right to privacy would ensure “separate but equal” bathrooms after passage of ERA).

Of course, this “privacy” label was a mask for sexism. The issue was not privacy, in the sense that individuals need insulation from other individuals. The issue was that people feel discomfort in associating with people of the other sex under circumstances in which they feel
important to too many people to forgo at this time. Thus, like their racist counterparts of 1868, who wanted to retain the discretion to pursue their racism in social contexts despite their intellectual ideal of intrinsic racial equality, "the people" of 1987 also seem to be committed to competing concerns—the ideal of intrinsic sexual equality and the insistent emotion of sexism. Thus, rather than rebut the Hamiltonian premise of constitutional continuity, this nation's struggle with the Equal Rights Amendment can serve as confirmation.379

If the Court has properly extended the meaning of equal protection to embrace the ideal of ultimately prohibiting all governmental actions based on sexism,380 one is still left with the vexing problem of timing. When should

perfectly comfortable in associating with people of their own sex. In the context of racial segregation, people had similar "privacy" concerns—a feeling of discomfort in associating with people of another race under circumstances in which they felt perfectly comfortable in associating with people of their own race. Indeed, the "privacy" argument presented by such liberal advocates as Thomas Emerson is remarkably reminiscent of the erstwhile distinction between "civil" and "social equality" with respect to racial segregation. Id. at 902-03. See infra note 381. The unisex public bathroom issue is, therefore, one example of the normative symmetry of the equality versus racism issues of 1868 and the equality versus sexism issues of 1987.

378. Public bathrooms were apparently one context, see supra note 377, and the army another, see Brown, supra note 377, at 967-80. Sexual orientation may have been yet another. Thomas Emerson, for example, was emphatic that "in view of the legislative history, the courts are not going to say that the ERA requires homosexual marriages. If you can be sure of one thing in the law, I would be sure of that." R. Lee, A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT 85 (1980) (citing Professor Emerson's testimony at Senate Hearings, Equal Rights Extension: Hearings on S. J. Res. 134 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 114-41 (1978)).

379. See supra note 376. This conclusion is particularly compelling if one considers the judicial context in which the political battle over the Equal Rights Amendment was fought. The Supreme Court, after deciding Frontiero in 1973, had been moving toward a Constitution concerned with governmental sexism. It was widely perceived that the ERA, proposed by Congress in 1972, would accelerate the normative movement that the Court had set in motion. Indeed, the failure to ratify might suggest that "the people" were vaguely satisfied with the Court's development of the relationship between the equal protection clause and gender discrimination. Cf. Van Alstyne, Interpreting THIS Constitution: The Unhelpful Contributions of Special Theories of Judicial Review, 35 U. FLA. L. REV. 209, 212 (1983) ("My own sense of the ill-fated Equal Rights Amendment . . . is that it became a casualty to the apprehensions of persons who frankly fear not what it said, but how it might be judicially construed."). Whether people viewed the Amendment as superfluous, or feared too many consequences too quickly, neither point of view necessarily rejects the ideal of intrinsic gender equality.

380. One might ask why the relaxation of self-constraint, implicit in the remission of national racism, should be invigorated by an anti-sexism principle, rather than, for example, a principle restricting democratic discretion to enact laws that have a discriminatory impact on blacks. Cf. Washington v. Davis, 426 U.S. 229, 234-35 (1976) (involving employment examination disproportionately disqualifying black candidates). For an analysis that seeks the constitutional values of "the people" today, and that accepts the premise of constitutional continuity, the answer depends on identifying the values of self-constraint that motivated "the people" of 1868.

If one posits that the value motivating "the people" of 1868 concerned the evil of moral judgments based on race, and if limits on the extent to which "the people" were willing to vindicate that ideal concerned the emotional pull of racism, then one has no basis for determining the extent to which, if at all, laws with a discriminatory impact on blacks might compromise "the people's" constitutional ideals. Even if it is the result of past racism, discriminatory impact is not racism itself. Thus, a decision to disfavor laws having a discriminatory impact on blacks must involve a normative determination beyond the evil of racist judgments. See Chang, The Bus Stops Here: Defining the Constitutional Right of Equal
the influence of sexism in particular public contexts be deemed constitutionally impermissible?

This question brings us back to the plight of Mr. Baker. Indeed, Mr. Baker's case is essentially Mr. Plessy's case. This is so for several reasons. First, in both cases, the challenged governmental policy lies in the path of a constitutional norm of self-constraint, apparently—or presumably—valued by "the people." Assuming that "the people" wanted someday to attain an untainted ideal of intrinsic racial equality, Mr. Plessy's case challenged a local majority's preference that violated the ultimate constitutional ideals of "the people." Similarly, if one accepts the suggestion that "the people" today want someday to attain an untainted ideal of intrinsic gender equality, then Mr. Baker's case also challenges a local majority's preference that violates the ultimate constitutional ideals of "the people."

Educational Opportunity and an Appropriate Remedial Process, 63 B.U.L. Rev. 1, 7-12 (1983). If, therefore, "the people" of 1868 were motivated by a notion that racism itself is morally evil, one has no basis consistent with the premise of constitutional continuity from which to conclude that "the people" of 1868 would adhere to an additional norm of self-constraint regarding the evil of non racist laws having a discriminatory impact on blacks. In contrast, still assuming that the motivating norm in 1868 concerned the evil of making moral judgments about people on the basis of race—because such characteristics of birth should be deemed irrelevant to moral status—and assuming that the competing norm of political reservation was the emotion of racism, the logical relationship between the antiracism and antisexism principles, as well as the parallel relationships between these two principles and the competing emotions of racism and sexism, respectively, enables the analyst to develop an antisexism constitutional principle toward satisfying the Hamiltonian premise of constitutional continuity.

If, however, one posits that the motivating norm in 1868 was not the evil of racism, but the evil of its effects on its victims, cf. supra note 374, and concludes that "the people" on this basis sought to constrain themselves from discriminating in certain areas, such as contract law and property law, then laws having a discriminatory impact on blacks are logically related to that motivating norm. If the countervailing value limiting the application of the constitutional ideal to particular contexts in 1868 was the emotion of racism, then the diminution of racism might suggest that "the people" need new avenues of self-constraint.

Here again, however, the premise of constitutional continuity has complex implications. Cf. supra note 374. Although racism has abated, and "the people," therefore, feel little or no pain of self-constraint from an antiracism constitutional principle, the status of blacks is far better in 1987 than it was in 1868. Thus, not only has the pull against the constitutional ideal abated, the pull of the constitutional ideal may have abated as well.

Second, even if the pull of the constitutional ideal has not abated, additional values pulling against the constitutional ideal are entirely different from the emotion of racism—for example, the social costs and inconveniences that would be engendered by a principle restricting discretion to enact laws with a discriminatory impact on blacks. As the Court stated in Washington v. Davis, 426 U.S. 229 (1976):

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 248 (footnote omitted). Because this competing value in 1987 has a different relationship to the assumed constitutional ideal than did the competing value of racism in 1868, one cannot justify developing constitutional meaning as a function of the Hamiltonian premise of constitutional continuity.

381. Discrimination based on sexual orientation is discrimination based on sex. See supra text accompanying notes 236-38. See also R. Lee, supra note 378, at 64 ("Homosexual conduct laws involve the clearest possible kind of classification based on sex. Those laws permit Bob to
Second, Mr. Baker's claim seems to implicate precisely the sort of emotionally wrenching reservations about the ideal of self-constraint that Mr. Plessy's case presented nearly a century ago. Some, suffering from sexism's version of perception-impairment, might deny that laws discriminating on the basis of sexual orientation are laws discriminating because of sexism.\textsuperscript{382} Even for those who acknowledge that the ideal of intrinsic gender equality is contradicted by discrimination on the basis of sexual orientation, modern Balancers might feel the emotion of homophobia so intensely that they are willing to compromise their intellectual ideal in favor of their emotional compulsion.

Because Baker's case and Plessy's case present similar constitutional conflicts for their respective eras, one would expect that they present similar problems in determining whether today is, as a function of "the people's" constitutional preferences, the right time to take a step further toward "the people's" constitutional ideal by recognizing a new and controversial constitutional prohibition. Previous analysis has suggested that constitutional mandates can properly be extended into new contexts only to maintain the amount of everyday political pain that "the people" of the past, as evidentiary proxy for "the people" today, chose toward serving their constitutional ideal of self-constraint.\textsuperscript{383} Thus, only if "the people's" everyday political values change, only if existing constitutional mandates become less relevant for overturning local democratic choices, could there be a basis for determining that the Constitution's mandates reach into new contexts, further vindicating the coherent implications of "the people's" ideals of self-constraint.\textsuperscript{384}

Unfortunately, as previously suggested, an analyst cannot determine in any meaningful way how much pain of self-constraint "the people" of 1868 chose to endure at any given time and, implicitly, from the premise of constitutional continuity, how much everyday political pain "the people" of 1987 would choose to endure.\textsuperscript{385} Thus, even accepting the Article's characterization of "the people's" constitutional intent in 1868, and even assuming that "the people" of 1987 adhere to the matrix of conflicting concerns about gender with the same respective intensity as "the people" of 1868 adhered to the matrix of conflicting concerns about race, one cannot confidently determine whether "the people's" constitutional values of self-constraint today would, for the sake of intrinsic gender equality, autho-

\footnotesize
marry Carol and Ted to marry Alice. But they prohibit Bob from doing what Alice may do, namely, marry Ted. Why? Solely because of his sex."). Denial of this point would suggest a Perception-Impaired Absolutist, or a Perception-Impaired Balancer, with respect to the repudiation of sexism. See infra note 382.

\textsuperscript{382} See Brown, Emerson, Falk & Freedman, supra note 377, at 962 ("[A] legislature intent on retaining criminal penalties for sodomous or adulterous conduct could easily bring the laws into line with the Equal Rights Amendment by extending them to apply equally to men and women."). This argument is remarkably reminiscent of Virginia's contention that its antimiscegenation statute did not discriminate on the basis of race because it punished the white member and the black member of the offensive couple equally. See Loving v. Virginia, 388 U.S. 1, 8 (1967).

\textsuperscript{383} See supra text accompanying notes 301-09, 319-24, 325-29.

\textsuperscript{384} See supra text accompanying notes 330-31.

\textsuperscript{385} See supra text accompanying notes 299-309.
rize a coach-like court to revoke local democratic discretion to vindicate the popular emotion of homophobia. 386

To the extent that an answer is demanded, the recent failure of the Equal Rights Amendment suggests that Mr. Baker may have little better claim to victory in 1987 than did Mr. Plessy in 1896. 387 But to the extent that the question of timing is a matter of rough guess work, 388 there is significant room for doubt about any answer. Given this doubt, this potential for judicial error, this potential for “judicial tyranny,” 389 Mr. Baker—and all of us—would do well to look even more closely at two old constitutional questions. Was Plessy v. Ferguson wrongly decided? And if so, what was Plessy v. Ferguson’s error? 390

4. To Recognize, Yet Challenge, the Expedience in Principle: Rediscovering Marbury’s Path Not Taken

Alexander Bickel was deeply concerned with what he termed the problem of “ripeness” in constitutional decisionmaking. By “ripeness,” he meant a prospect for adequate popular acquiescence following a court’s decision to enforce unpopular constitutional principle. If a judicial decision, mandated by principle, would engender significant resistance and raise questions about judicial authority to make binding constitutional decisions, Bickel advocated what he termed the “passive virtues.” Rather than expend judicial credibility by remaining true to principle, and rather than undermine principle by upholding a challenged public decision that, according to principle, should be struck down, Bickel counseled the use of devices by which the Court could avoid stirring excessive political unrest, and also avoid explicitly endorsing a violation of principle. 391

This notion of “ripeness” might seem to parallel the issue of timing considered in the two previous sections. Assuming that a constitutional provision reflects a motive of self-constraint, that “the people” want courts to help them pursue the coherent implications of some ideal against contrary democratic discretion, and that a case presents an issue lying

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386. See supra text accompanying notes 331-34.
387. Indeed, Mr. Baker might have a weaker claim, for there is no modern day equivalent of the Civil Rights Act of 1875 with respect to discrimination based on sexual orientation. See supra note 323.
388. See supra text accompanying notes 299-334.
389. See supra text accompanying notes 100-11.
390. A. BICKEL, supra note 11, at 197 (emphasis added).
391. See generally A. BICKEL, supra note 11. Bickel was led to this inquiry, one would suspect, largely because Brown v. Board of Education, 347 U.S. 483 (1954), was decided during his formative years. For scholars of that generation, there was a need to confront Plessy v. Ferguson; there was a felt obligation to justify Brown’s departure from Plessy by some theory of principled constitutional analysis; and after that, there was a need to determine whether, and if so, why, implementation of the Brown principle should accommodate inevitable popular resistance. Thus, the troublesome analytical questions of Bickel’s era: Was Plessy correctly decided, in the sense that the public in 1896 would not have accepted (or endorsed?) a judicial ruling based on the Harlan dissent? Was Brown correctly decided, in the sense that the public in 1954 was then ready to accept (or endorse?) that application of the constitutional principle? Should the Court have decided the constitutionality of antimiscegenation statutes before 1967?
directly in the path of coherence along which courts have been authorized to go, is now the proper time to impose the principle's next coherent development against democratic discretion?

Despite the apparent similarity, there are significant differences between Bickel's notion of "ripeness" and the question of timing that plagues a court in determining whether it has been authorized to develop the coherent implications of constitutional values. The question of timing, generated by the analysis in the previous sections, does not assume the present existence of principle. Indeed, the issue concerns whether the principle, relevant for overturning the challenged exercise of democratic discretion, can now properly be declared. This issue is interpretive and theoretical. It is a question of defining constitutionally mandated principle and a function of certain premises about the constitutional intent of "the people." Bickel's notion of "ripeness," however, is one of practicality and power. Principles exist—derived and defined somehow—but may be so politically vulnerable as to warrant an invisible retreat in the face of political challenge.392

In Bickel's view, the applicable constitutional principle at the time Plessy was decided would have held that "race is a proscribed ground of legislative classification."393 Bickel believed that Plessy, as well as cases upholding racial segregation in other contexts, "was no more defensible on principle then than it is now."394 Any assertion that this principle could have exceptions—that "race is a proscribed ground of legislative classification, except that it may be used sometimes"395—was not, in his view, a matter of principle, but "a device of expediency."396 Immediately preceding that passage, however, Bickel notes that a principle may be defined in a way that reflects some degree of "flexibility." He said:

A true principle may carry within itself its own flexibility, but—and this is the important thing—flexibility on its own terms. For example, one may lay it down that in all criminal proceedings the accused must have the assistance of counsel in order to ensure the protection of his rights. Or one may say, as the Court has in fact said, that the assistance of counsel is constitutionally required in all cases, except in relatively simple ones in the state courts, where the accused seems to have been able to cope for himself, so that his rights were in fact adequately protected. This is not a mere device of expediency; it is a principle with flexibility built in, within its

392. Despite these differences, Bickel's suggestion that a court can do more than explicitly uphold or explicitly strike down a challenged exercise of democratic discretion, even in the face of clearly applicable principle, see infra note 417, may suggest approaches for coping with the vexing question, "when?", posed by the absence of clearly applicable principle. When the issue concerns doubt about when the coherent implications of some constitutional ideal of self-constraint should be imposed on contrary democratic discretion, there may be options other than explicitly upholding or explicitly invalidating the challenged majoritarian choice. Indeed, there may be an appropriate option other than Bickel's preferred strategy of quiet retreat and polite avoidance. See infra text accompanying notes 416-25.
393. A. BICKEL, supra note 11, at 59.
394. Id. at 71.
395. Id. at 59.
396. Id.
Thus, Bickel seems to view principle as a matter of internal consistency. The qualified right to counsel reflects a flexible principle because all components of the right seem to be a function of its purpose—to ensure that the accused receive "effective" representation. On the other hand, a qualified right against being victimized by a choice based on race is not a matter of principle, because the exceptions—at least those Bickel contemplates with respect to Plessy—seem to violate its underlying rationale. The racial segregation challenged by Plessy was a function of racism. Racism contradicts the principle, and, therefore, any accommodation to racism must be a function of expediency.

Although Bickel lamented that principle was compromised by Plessy and other cases of the era, Plessy's error, for him, was not the failure to strike down legally mandated racial segregation, for such an action would have stirred a popular backlash that the Court might not have survived. Rather, the error was in affirmatively and explicitly upholding legally mandated racial segregation.

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397. Id. at 38-59.
398. According to Professor Kronman:

Principles may, of course, be complex—they may have exceptions, provisos, and qualifications, and be subject to higher-order norms for the resolution of conflicts between competing principles. But according to Bickel, every complexity in a principle must itself be principled, that is to say, it must have been introduced for a moral reason similar to that which led to the adoption of the principle itself in the first place, and not simply because popular opinion requires it. Thus, it is never principled either to limit or extend a constitutional norm merely to reflect existing majoritarian views, even if the limitation or extension is cast in general terms that give it a principled appearance.


This Article's analysis, undertaken from "the people's" perspective, departs from this view by emphasizing the proper source for principles, and seeks to define principle in a manner consistent with source as well as with content. Thus, given a premise that principle must emerge from "the people," compromise and incoherence may be perfectly principled in the definition of principle, while an unauthorized pursuit of consistency may be judicial excess. See infra text accompanying notes 404-16. According to Bickel:

By principle is meant general propositions, as Holmes called them, deeming their formation the chief end of man, though he felt obliged at the same time to spray them with his customary skeptical acid; organizing ideas of universal validity in the given universe of a culture and place, ideas that are often grounded in ethical and moral presuppositions. Principle, ethics, morality—these are evocative, not definitional, terms; they are attempts to locate meaning, not to enclose it.

A. BICKEL, supra note 11, at 199. Bickel's "principle" thus foreshadows Dworkin's "integrity." See supra note 30. Yet, only by considering whence principle comes can one determine what principle may contain, for the difficult truth is that there are few "ideas of universal validity." Cf. infra note 456. Whatever such ideas there may be are not the subjects of constitutional adjudication, which, after all, is a function of deep normative conflict. See supra note 1.

399. See A. BICKEL, supra note 11, at 71 ("The Supreme Court made the grave error of lending its affirmative sanction to the practice of segregation in the nineteenth century, and doing so on principle, across the board. This was the error, not failure at the early date to strike down segregation as unconstitutional.").
Bickel's argument for passive avoidance is predicated on a premise that judicial reasons and rulings become part of political debate. For Bickel, the real error of Plessy was in sanctifying legally mandated racial segregation with robes of constitutional legitimacy. "Plessy v. Ferguson's Error" was tragic because it fortified those forces of racist resistance, and thereby delayed the development of social circumstances in which considerations of expedience would not mandate a retreat from principle. The Court could have avoided "Plessy v. Ferguson's Error" by not deciding the case—by employing one of Bickel's devices of passive avoidance.

The argument that the Plessy Court could not have successfully enforced an invalidation of official racial segregation is convincing. The argument that such statutes violated constitutional principle, and that the Court should not have explicitly upheld them, needs further consideration. Indeed, as suggested by this Article, Bickel's criterion of internal consistency—or logical coherence—is problematic for defining applicable principle in the context of analyzing constitutional mandates. By questioning the premise that courts should pursue normative coherence in interpreting constitutional mandates, we have concluded that values which Bickel termed considerations of "expedience" are, in fact, fundamental components for defining legally applicable principle.

In 1868, the fourteenth amendment, according to the understanding and the corporate wishes of "the people," and as Bickel himself acknowledged, did not prohibit laws requiring segregation. Segregation was too important to too many people in 1868, even though it did compromise the ideal of intrinsic racial equality.

400. As Bickel put it, "the Court, when it legitimates a measure, does insert itself with significant consequences into the decisional process as carried on by other institutions. This is a necessary consequence of the Court's power to define and apply society's basic principles." Id. at 70. Furthermore, "[t]he Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception, or that are on the verge of abandonment in the execution." Id. at 129; cf. Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1, 8-9 (1964). Professor Gunther questions the extent to which subtle aspects of Supreme Court opinions shape public opinion. "[T]here is something to the legitimation notion, just not that much; there is some difference in political impact between sustaining a statute on the constitutional merits and staying the Court's hand, just not that much." Id.

401. A. BICKEL, supra note 11, at 197.

402. Id. at 69. Plessy probably could not have involved only a short-term postponement, unlike Bickel's other examples of judicial passivity in the service of political colloquy. See id. at 111-98.

403. See Bickel, supra note 240, at 58.

404. In seeing constitutionally applicable principle as prohibiting racial segregation in 1896, Bickel apparently left the realm of legal analyst and entered the domain of moral philosopher. Cf. supra note 30. The philosopher's principle and the constitutional analyst's principle are functions of different criteria. The former is concerned primarily with content, while the latter must be concerned primarily with source. Cf. supra note 398. Given the manner of compromise by which individuals make internal choices and groups make corporate choices, competing values must be accommodated, to the extent that they are valued by "the people," if the task of the Court is to effectuate the constitutional values of the people.

It is particularly interesting that Bickel would present this view, given his careful and sensitive evaluation of the original understanding about racial segregation. See generally Bickel, supra note 240. He noted that deviation from that original understanding about the permissibility of legally mandated segregation must, somehow, be a function of "the trend in
and effectuating the corporate will of "the people," the applicable principle in 1868—and 1896—may well have contained the segregation exception. 405 Under such circumstances, the segregation exception would indeed have been a matter of expediency—not in the sense of concessions to limited power, but in the sense of normative compromise chosen by "the people" as they defined their preferred principle. 406

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public opinion." Id. at 63-64. He concluded that the decision in Brown was properly "based on the moral and material state of the nation in 1954, not 1866." Id. at 65. This suggests that, at least in 1955, Bickel regarded constitutionally applicable principle in 1868 as permitting legally mandated racial segregation. One doubts whether he believed that the "material and moral state of the nation" had so changed by 1896 to warrant the view of principle he suggested in The Least Dangerous Branch. Cf. supra note 323.

405. Cf. supra note 323. Herbert Wechsler admonished that judicial decisions "be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved." Wechsler, supra note 11, at 15. He contrasted the obligations of courts and legislatures with respect to this criterion of principle:

No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that I have suggested is intrinsic to judicial action—however much we may admire such a reasoned exposition when we find it in those other realms.

Id. at 15-16.

Although Wechsler's insistence on neutral principles might be taken simply as an apology for judicial pursuit of normative coherence in defining legal content, the requirement of neutrality is not necessarily related to a philosophical style of judicial analysis. Indeed, by juxtaposing legislatures and courts, and suggesting that courts have a special burden of justifying their decisions, the import of Wechsler's analysis establishes the judicial obligation to justify the source of its favored values primarily, and the content of those values secondarily and derivatively. See supra notes 398, 404. If one asks why courts should intervene in legislative decisions, one does not provide an adequate response simply by noting that courts will favor one value more than a legislature would. One does provide an adequate response with a reasoned explanation relating to the preferences of "the people" who want certain values discerned and implemented in one type of forum or another. Thus, the special psychology of self-constraint can explain why people might want courts, rather than legislatures, to vindicate certain values, and why "the people's" chosen concerns competing with their values of self-constraint—their reservations about the ideal—suggest the limits of authorized coherence.

406. In a recent article, Professor Gewirtz builds on Alexander Bickel's concerns with the possibility that judicial decrees could be popularly resisted. See Gewirtz, Remedies and Resistance, 92 YALE L.J. 585 (1983). Although he provides an illuminating analysis of issues central to a construction of remedies, Gewirtz, like Bickel himself, does not distinguish between considerations that should govern the articulation of rights, applicable throughout the nation, and those that should govern the imposition of remedies, applicable in particular contexts. One example is Gewirtz's discussion of Brown, in which he predicates the propriety of announcing Brown's principle on the prospects for ultimate acquiescence:

The right declared in Brown I was not simply an abstract "ideal" in the sense of a utopian possibility; it became the sort of ideal that we call a legal right only because the courts were convinced that it was an ideal that could become real in our society. Moreover, in giving birth to Brown I, the Court took account of strategic factors much as it did in thinking about remedies in Brown II. Before deciding Brown I, the Court strategically prepared the country through . . . a purely instrumental strategy designed to promote public acceptance of the rights in question.

Id. at 676 (emphasis added).

Yet, as I have suggested, the definition of "principle" requires a sensitive inquiry into the constitutional values of "the people," in order to determine what constitutional ideals they might hold, how far they want to pursue those ideals, and how quickly they want their ideals realized against competing political concerns. Gewirtz's reference to "utopia" begs the question of whose utopia. His suggestion that this ideal properly was transformed into a "right" "only"
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If one does not define constitutional "principle" applicable in 1896 as Bickel did—if, in other words, the Constitution, in principle, was properly interpreted in 1896 as permitting laws that mandated racial segregation—then Bickel's notion of "Plessy v. Ferguson's Error," and his recommended solution, become problematic and require re-examination. Assuming this applicable constitutional principle—one that permitted public policies of racist segregation—Bickel's rationale for avoidance no longer applies.

Indeed, assuming that the Constitution of 1896 was properly interpreted as permitting segregation, a failure to "legitimate" this discretion, by avoiding decision on the merits, cannot be justified consistent with the goal of vindicating the constitutional values of "the people," and the Hamiltonian rationale for judicial review. Democratic discretion is the norm, but because "the people" have values that they want to protect even from themselves, courts, rather than decisionmakers closer to the passions of everyday politics, have been delegated special authority to interpret and apply values designated by "the people" through their constitutional

because the ideal might be accepted by a passive electorate, again, fails to confront the distinction between considerations of expediency in defining principle, and such considerations in applying principle. A court might do many unprincipled things (i.e., inconsistent with the limits of its role), yet still enjoy the acquiescence of a quietly dissatisfied public. See supra note 111.

It is essential to note that the criteria are different for determining whether racist resistance is a matter for the definition of constitutional principle, or for its application in particular contexts. For the former, the question relates to national values. By "national" values, I mean the values held by "the people." As was the case in 1868, "the people" might not encompass the entire nation. See supra text accompanying notes 248-56; notes 306, 318, 325, 370. This question of defining constitutional principles compares the extent of ordinary democratic pain that "the people" today would endure from the potential constitutional principle, \(\{P_{c_1} + P_{c_2} + \ldots + P_{c_n} + P_{c_{n+1}}\}^{[1954]}\), with the extent of ordinary democratic pain that "the people" who actually made constitutional choices chose to endure, \(\{P_{c_1} + P_{c_2} + \ldots + P_{c_n}\}^{[1868]}\). See supra text accompanying notes 302-09, 318-29, 350-79.

For the latter issue of remedies, the question is one of power and feasibility. When a principle is applicable, based on a determination that a constitutional majority wants to constrain itself (and others), a court, nevertheless, might be unable to impose the principle in particular local circumstances because it does not have the cooperation of local or national authorities. Thus, enforcing applicable principle may not be feasible in all contexts, while the imposition of all that is feasible—al that the Court could get away with—might not necessarily reflect principle.

The difference, I suggest, is illustrated by comparing the two different questions of timing posed by Plessy and Brown II. Plessy posed the question of defining applicable constitutional principle. Brown II posed the question of whether, where, and when previously defined constitutional principle should be enforced. Alexander Bickel and Paul Gewirtz treat these two separate questions as one. See A. Bickel, supra note 11, at 132 (the "deliberate-speed formula" was a measure of accommodation to the needs of "expediency"); id. at 197 (Plessy was wrong as a matter of "principle," yet applicable "principle" should not have been enforced as a matter of "expediency"); cf. supra note 402.

407. It might be that constitutional principle applicable in 1896 would have invalidated racial segregation in public transportation. See supra note 323. Such a proposition must be established by accounting for the complex values of "the people," however, not by a simple standard of normative coherence.

408. Bickel noted that when a court upholds a democratic choice as being consistent with constitutional principle, or otherwise within constitutional bounds, it "legitimates" that legislation, thereby giving it weight in the political process. See A. Bickel, supra note 11, at 69.

409. See Gunther, supra note 400, at 22-23 ("Bickel's prescription to avoid the 'grave error' of legitimation [for contexts in which principle demands upholding an exercise of democratic discretion] is not only unjustifiable, it is incomprehensible.").
choices.\textsuperscript{110} That function of delineation, of distinguishing the permissible from the impermissible, is left unfulfilled if a court fails to provide the reasons for its decision and, indeed, is violated if the reasons for the court’s action are unrelated to popularly chosen constitutional constraints on democratic discretion.\textsuperscript{411} If a court avoids explicitly upholding democratic discretion based on considerations unrelated to the constitutional values of “the people,”\textsuperscript{412} it reduces itself to playing the role of just another political competitor whose agenda is set by judges’ personal goals, thus violating its assigned role as good faith guardian of “the people’s” constitutional ideals.\textsuperscript{413}

\textsuperscript{410} See supra text accompanying notes 52-57.

\textsuperscript{411} Cf. A. Bickel, supra note 11, at 203 (“A constitutional adjudication, I am saying, is required to be principled because it is binding. But its \textit{effectiveness} as a binding adjudication, and perhaps even its capacity to bind at all, are themselves functions of its foundation in principle.”) (emphasis added). Professor Gunther views this premise as fatal to Bickel’s doctrines of avoidance:

Ultimately, it is Bickel’s starting point—his rigorous insistence that constitutional adjudication must be truly principled—that gives his thesis such importance and that proves to be its undoing. The predilectional school of Court criticism, the vacuous commentary which is content with reciting agreements and disagreements with particular results, would have no difficulty with the problems posed by Bickel—indeed, they would hardly recognize his concerns as problems.

Gunther, supra note 400, at 24.

\textsuperscript{412} Cf. C. Bickel, supra note 56, at 52 (recognizing argument that Court’s most important role is as legitimator of the government by validating laws and thereby satisfying people that government has stayed within its bounds). Bickel has argued:

The rule that the Court must legitimate whatever it is not justified in striking down fails to attain its intended purpose of removing the Court from the political arena; rather, it works an uncertain and uncontrolled change in the degree of the Court’s intervention, and it shifts the direction. . . . At the root is the question—in the large—of the role of principle in democratic government.

A. Bickel, supra note 11, at 131. It is this question, I suggest, that Bickel largely overlooked by apparently defining principle simply as a matter of normative coherence.

\textsuperscript{413} One might make an analogy to a hypothetical variation on the question faced by the Court in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Imagine that a majority of the Justices believed that while the National Labor Relations Act of 1935 was a constitutionally permissible exercise of congressional discretion, such congressional programs were bad policy. These Justices, let us say, feared that the Court’s imprimatur of approval on such legislative efforts would encourage unwise exercises of congressional power. Therefore, to avoid the undesirable political consequences of judicial “legitimation,” the Court exercised Bickel’s option of passive avoidance and let the statute stand without explicitly endorsing it as constitutionally permissible.

For one concerned about identifying the constitutional values of “the people” today, this strategy is problematic to the extent that the Court fails to validate democratic discretion based on considerations unrelated to “the people’s” preferred constitutional principles. Although judges cannot always control the quality of their analysis, they are the masters of their own integrity. Wechsler noted the dangers of result-oriented judgments:

The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law. If he may know he disapproves of a decision when all he knows is that it has sustained a claim put forward by a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist—he acquiesces in the proposition that a man of different sympathy but equal information may no less properly conclude that he approves.

Wechsler, supra note 11, at 12; see also Van Alstyne, supra note 379, at 226-27 (“If the Constitution contains clauses not always the most noble (as of course it may), clauses that may
The foregoing sections should suggest, however, that although racist exceptions to the antiracism principle were intended components of the constitutional principle adopted by "the people" in 1868, these were values that "the people" wanted ultimately to fall to their constitutional ideal of self-constraint.414 "The people" of 1868 manifested deep conflict within themselves over an intellectual ideal of intrinsic racial equality and the emotional compulsion of racism. They apparently favored both competing values in different ways at the constitutional level. The value of racism was given some constitutional status—the discretion to pursue the emotion was left undisturbed in some contexts—but, following the analysis in this Article, could be eroded by the courts as the everyday political pain felt by "the people" in those previously reserved contexts diminished to acceptable levels.415

Based on this understanding of the constitutional principle framed in 1868—warts and all—I suggest that "Plessy v. Ferguson's Error" was not that it declared an erroneous doctrine that violated applicable (yet unenforceable) constitutional principle, but that it declared an incomplete doctrine that was only part of applicable (and eminently enforceable) constitutional principle. In Plessy, the Court incompletely declared applicable constitutional principle in recognizing only one of "the people's" competing concerns—discretion to pursue racist impulses—as constitutionally significant. The Court ignored the constitutional ideal of self-constraint that "the people" apparently wanted ultimately to prevail.416 By doing so, as Bickel suggested, the Court gave weight and status to the idea of racial segregation, so that it could flourish in everyday political debate, unchallenged by constitutional aspirations. This judicially conferred weight and status was unfortunate not simply for those who did not want majorities to exercise their racist discretion. It was unfortunate—indeed, a tragic failure—for "the people" and their constitutional ideals.

This analysis suggests that there are four courses open to a court exercising its function of constitutional review.417 First, a court might strike weigh too heavily on a judge's conscience, he or she may reassess the personal acceptability of the judicial task. . . . That it is a Constitution being expounded readily explains why one should be especially conscientious about its determination. . . . That because it is a Constitution being expounded judges should therefore feel more free than otherwise to fudge its interpretation, however, is a proposition that though argued often, has never been argued convincingly.42). 414. See supra text accompanying notes 287-98.
415. See supra text accompanying notes 299-309, 318-21, 325-29, 350-79.
416. See supra text accompanying notes 287-97.
417. Cf. A. Bickel, supra note 11, at 69. Bickel suggested: The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or, in Charles L. Black's better word, "legitimate" legislation as consistent with principle. Or it may do neither. It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency. Id.

Bickel's characterization of what a court does when it fails to strike down a statute is revealing. Bickel suggests that when a court upholds a statute, it "validates" or "legitimates" the statute as consistent with principle. Although this might describe Justice Brown's opinion in Plessy, it does not have to characterize the import of upholding a statute as constitutionally permissible. Rather, to uphold a statute is to find that it does not violate constitutional mandates, which themselves contain elements of normative aspirations and exceptions that are concessions to competing concerns. To recognize that constitutional principle is not philosophical principle, as Bickel conceives principle, is to lay the foundation for a more sensitive
down a statute as a violation of constitutional principle. Second, it might uphold—and legitimate—a statute as permitted by constitutional principle. Third, as Bickel counseled, it might do nothing. Finally, in the context of a progressive principle of self-constraint, a court might uphold a statute as constitutionally permissible today, while declaring that the statute violates ultimate constitutional ideals and future constitutional mandates.418

By taking the fourth option and completely explaining the constitutional reasons both for upholding a challenged statute and for having constitutional reservations about the challenged statute, a court can more effectively serve the complex constitutional values of “the people” in two important ways.419 First, this course of action mitigates the potential costs of judicial error—of “judicial tyranny”420—if a court erroneously determines that the constitutional preferences of “the people” today do not yet extend to prohibiting the exercise of local discretion in certain contexts previously reserved by the framers and ratifiers. If a court erroneously determines that constitutional principle today permits a challenged democratic choice, but simultaneously discredits the choice as contrary to ultimate constitutional ideals, “the people,” reminded of their values of self-constraint, may be less likely to choose to exercise their problematic discretion. This is not to say that the route of suggestive judicial declaration can eliminate the costs of erroneous judicial failures to recognize new constitutional mandates. After all, many localities, despite judicial suggestions that the challenged statutes compromise constitutional ideals, could choose to enact—or retain—and enforce statutes that should have been deemed constitutionally prohibited. But at

and precise manner of expressing a conclusion that a statute is not unconstitutional. See infra note 423 and accompanying text.

418. Cf. Gewirtz, supra note 406, at 672-73. Professor Gewirtz develops this option in the context of imposing remedies for violations of established constitutional rights. He states:

Even though we may not vindicate a norm today, it is not necessarily an exaggeration to affirm that norm as an ideal if we understand the ideal as an aspiration—as something that we hope to be able to vindicate more fully in the future. Preserving the ideal maintains a tug towards a more ideal world. . . . A subterfuge that compromises an ideal without saying so creates a risk that the ideal will be weakened, that people will come to think that the ideal means only what has been imperfectly realized.

Id. at 672-73.

This notion of expressing the remedial ideal, while permitting its violation, applies with equal force to the task of defining applicable constitutional principle. See supra note 406 (discussion of fundamentally different considerations involved in defining, as opposed to applying, constitutional principle).

419. Professor Bickel suggested that “[t]he Court does not sit to make precatory judgments.” A. BICKEL, supra note 11, at 246. This simply is not so if one accepts the notion that “the people” have constitutional ideals of self-constraint that they have authorized the courts to help them attain. Whether or not “the people” today would choose to endure coherent development of constitutional mandates toward invalidating their competing everyday political concerns, their ideal still exists. Courts can help “the people” reach that ideal not only by imposing its coherent implications against contrary democratic discretion, but also by declaring the ideal and reminding the electorate that their choices do compromise their own higher concerns. Such “precatory” judgments not only might themselves sway the opinions of political resisters, but could encourage the forceful debate of those who would benefit from judicial imposition of the potential principle. Cf. Gewirtz, supra note 406, at 672-73.

420. See supra text accompanying notes 101-07.
least to the extent that localities are persuaded not to exercise constitutionally problematic discretion, the erroneous judicial failure to deem such discretion constitutionally impermissible becomes largely irrelevant.

Second, and perhaps more significant, when a court correctly determines that the constitutional preferences of "the people" today do not yet extend to previously unrecognized constitutional mandates, the posture of suggestive declaration enables courts to play an essential role in generating a predicate for the development of constitutional mandates, by providing impetus for the development of "the people's" everyday political values. Recall that constitutional mandates chosen by "the people" are a function of both their ideals of self-constraint and their ordinary political values, as a constitutional motive of self-constraint reflects a desire to protect certain values to a greater extent than "the people" could achieve through ordinary national politics.421 "The people's" choices to vindicate constitutional ideals in particular contexts suggest both the existence, and the limitations, of their commitment to values of self-constraint. Thus, based on the Hamiltonian premise of constitutional continuity,422 we concluded that from "the people's" perspective, a court cannot properly generate everyday political pain by imposing constitutional mandates in new contexts unless "the people" are no longer inclined to violate constitutional mandates in previously chosen contexts.423 But by pursuing a route of suggestive

421. See supra text accompanying notes 91-92; cf. supra text accompanying notes 257-66.
422. See supra text accompanying notes 115-23.
423. Again, recall the constitutional equation, supra text accompanying notes 164-66. See also supra text accompanying notes 306-09. A premise that Supreme Court opinions can and do affect public values was a cornerstone of Bickel's work. Eugene Rostow also has noted the Court's influence on public values:

The prestige of the Supreme Court as an institution is high, despite the conflicts of the last fifteen years, and the members of the Court speak with a powerful voice. Can one doubt, for example, the immensely constructive influence of the series of decisions in which the Court is slowly asserting the right of Negroes to vote and to travel, live, and have a professional education without segregation? These decisions have not paralyzed or supplanted legislative and community action. They have precipitated it. They have not created bigotry. They have helped to fight it.


Some might doubt that judicial opinions, especially the subtle nuances of presentation envisioned by my fourth option, can affect crude public debate in any significant way. See, e.g., Gunther, supra note 400, at 8-9 (questioning significance of "legitimating" function); Levine & Becker, The Impact of Supreme Court Decisions, in The Impact Of Supreme Court Decisions: Empirical Studies 230-36 (1973) (positing reasons explaining Supreme Court's limited impact on public values). Some studies have suggested, nevertheless, that Supreme Court opinions do affect public values, in large part because of a so-called "halo effect" by which the Supreme Court's authoritative aura lends status to the values it endorses. See Dolbeare, The Supreme Court and the States: From Abstract Doctrine to Local Behavioral Conformity, in The Impact of Supreme Court Decisions: Empirical Studies 202-07 (1973) (giving empirical evidence of Court's effect on public values).

One can hardly doubt that Supreme Court opinions have a "halo effect" on some people. Indeed, it is possible that the emotions of prejudice, centrally relevant to the equal protection clause, are particularly sensitive to exacerbation or mitigation, according to whether authority figures promote or discourage prejudiced attitudes. See, e.g., T. Adorno, E. Frenkel-Brunswik, D. Levinson & R. Sanford, The Authoritarian Personality 222-79 (1960) (considering correlation between prejudice and sympathies with authority); see also G. Allport, The Nature
declaration when new constitutional mandates cannot be imposed as a function of "the people's" values, a court can augment the status of the relevant constitutional ideal in political debate, help mitigate "the people's" impulses to violate that ideal in previously chosen contexts, and, thus, over time, help "the people" develop everyday political values such that judicial enforcement of constitutional mandates in new contexts will be necessary to satisfy the premise of constitutional continuity. In short, a court can contribute to constitutional evolution by injecting constitutional ideals into political debate.

Thus, a cure for "Plessy v. Ferguson's Error" was not avoidance, but greater assertiveness and completeness in explaining a rationale for the result. In the context of a case that asks, "When should the authorized implications of a norm of self-constraint be imposed against contrary democratic choices?" and answers, "Not yet," a cure for "Plessy v. Ferguson's Error" lies in exploring the competing values of "the people"—explaining the significance of their constitutional ambivalence—by identifying their ideal of self-constraint that they want ultimately to prevail, while upholding the emotional compulsion as a permissible, but self-defeating, compromise of that ideal.

The notion that the Court can and should engage the electorate in a constitutional "colloquy" is hardly new. Indeed, the notion has roots in

of Prejudice 429-43 (1958) (suggesting that laws prohibiting acts based on prejudice may undermine attitudes of prejudice).

One also might expect that combatants in political debate will seek to exploit the "halo effect." Indeed, New York City had recently passed a controversial ordinance prohibiting discrimination against gay people in housing and employment shortly before the Supreme Court's decision in Hardwick. The Court's decision gave impetus for a movement to repeal the antidiscrimination ordinance. Three significant opponents of the ordinance had been the New York Post, the New York Daily News, and City Council Member Noach Dear. The Post reported the Hardwick decision with a banner headline, "Top Court Hits Gay Lifestyle." N. Y. Post, July 1, 1986, at 1. The Daily News similarly proclaimed, "Top Court OKs Gay Sex Ban." N. Y. Daily News, July 1, 1986, at 1. Under a headline that read, "Ruling May Spur Drive For Gay Sex Ban Here," the Post reported that "Brooklyn Councilman Noach Dear, a staunch opponent of the city's recently passed gay rights law, said the Supreme Court action sends a message to 'all legislative bodies and the courts that traditional family values prevail.'" N. Y. Post, supra, at 3.

Such exploitation of Supreme Court rulings is natural and should be expected. Although such methods cannot ensure success, they must be recognized as an additional element of power in the struggle for persuasive political supremacy.

Dissents are exploited as well, but must be less effective since they lack the authoritative force of law. Thus, Justice Harlan's dissent in Plessy became a tool for both legal and political argument. This Article advocates an alternative approach for resolving constitutional conflicts in which the dynamic of conflict between constitutional ideals and values of political reservation—the dynamic of conflict within people, more than among people—is explicitly acknowledged. This approach, in effect, places a dissent within the Court's opinion, giving the constitutional ideal authoritative status, and tainting the status of the competing everyday political value, which has been upheld merely as a permissible compromise of those constitutional ideals. To the extent that Supreme Court opinions have any impact on public values—and few would deny that there is some impact—the opinions should be tailored to affect public values in the way that best serves "the people's" preferred constitutional ideals.

424. See supra text accompanying notes 302-07, 318-29, 344-79.

425. See Rostow, supra note 423, at 208 ("The discussion of problems and the declaration of broad principles by the Court is a vital element in the community experience through which American policy is made. The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.").
the nation's beginning. From the time of Marbury v. Madison,\footnote{426} when Justice Marshall suggested the judicial function of binding constitutional review, the notion that the Court might protect the constitutional ideals of "the people" through suggestive declaration, rather than through binding decree, was a possible alternative. The significant issues in Marbury were whether the Court had authority to address questions about the constitutionality of congressional acts, and whether the Court, based on a determination of unconstitutionality, had authority to deny legal effect to a congressional act. Justice Marshall suggested that it "would subvert the very foundation of all written constitutions"\footnote{427} and "reduce[] [them] to nothing," if courts did not have authority to invalidate statutes as violating the Constitution.\footnote{428} Justice Marshall's reasoning in Marbury implicitly rested on a premise that was addressed more explicitly by Alexander Hamilton in The Federalist No. 78.\footnote{429} In Hamilton's view, "the people" identified ideals in their Constitution, but recognized that those ideals would be vulnerable to everyday political passions. Thus, "the people" created federal courts, relatively unaccountable to the electorate, to protect those ideals from being compromised by problematic political pressures.\footnote{430}

It is, however, at least a plausible alternative to posit that "the people" were more confident about the democratic process—more confident in themselves—than all that.\footnote{431} Although recognizing that their constitutional ideals would be vulnerable in everyday politics, "the people" might well have viewed these ideals as vulnerable primarily because they would be forgotten, neglected, or otherwise obscured by the more immediately pressing issues of the day. "The people" might have wanted the Court to serve their constitutional ideals simply by declaring applicable principle, by demonstrating the relevance of their constitutional ideals to vulnerable statutes, while retaining for themselves the ultimate discretion to determine whether their constitutional ideals should prevail over the pressing concerns of the moment.\footnote{432} Such a scheme does give real meaning to a written

Paul Gewirtz has pursued the theme of colloquy and has advocated explicit judicial acknowledgement that constitutional ideals may be compromised in a given situation. Gewirtz limits the scope of his analysis, however, to the context of imposing remedies, rather than that of defining applicable constitutional principle. See supra note 406.

Guido Calabresi also has expressed the view that courts should engage legislatures in dialogue. Calabresi did so, however, in the context of revealing present ordinary, everyday political preferences—legislative values—rather than that of revealing present constitutional values. See generally G. Calabresi, supra note 14.

\footnote{426} 5 U.S. (1 Cranch) 137, 176 (1803).
\footnote{427} Id. at 177.
\footnote{428} Id. at 178.
\footnote{429} See supra text accompanying notes 52-57.
\footnote{430} See supra text accompanying notes 55-56.
\footnote{431} Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). Chief Justice Marshall suggested that an obligation to enforce laws that courts deem unconstitutional would "reduce[] to nothing" the significance of a written constitution. Id. at 178. This, of course, is an overstatement. The question is who should determine when constitutional concerns have been violated. Such concerns may be written down simply as reminders to the electorate of their favored yet vulnerable ideals, without any desire to have those concerns enforced by a coach-like court.

\footnote{432} Cf. Eakin v. Raub, 12 Serg. & Rawle 330, 355 (Pa. 1825) (Gibson, J., dissenting) (expressing view that "it rests with the people, in whom full and absolute sovereign power..."
constitution—to purposeful and self-conscious political choices of especially important ideals called “constitutional”—yet it denies a desire among “the people” to bind themselves. Thus, Marshall was wrong in postulating that binding judicial review is a logically necessary concomitant to a written constitution. It is entirely plausible for people to hire a coach not to constrain them by decree, but to deter them by persuasion.

This Article has posited that “the people” adhere to values of equal protection with a motive of self-constraint, and that they have authorized courts to help them pursue the coherent implications of a favored constitutional ideal. This sort of normative matrix envisions certain elements of the ideal that “the people” want protected by constitutional mandate, and certain elements of the ideal for which they are not yet ready to eschew competing everyday political pleasures. Yet, despite wanting to maintain some competing political concerns, “the people” apparently recognize the compromised constitutional principle as a prelude to an uncompromised ideal to be attained—and ultimately to be imposed by decree. Given this normative matrix, the judicial function is to help “the people” achieve their constitutional ideals, and to impose the implications of those ideals against contrary democratic discretion only to the extent that the consequent everyday political pain of constitutionally mandated constraint is equal to—does not fall short of and does not exceed—that which “the people” have chosen to endure.

This view of constitutional intent bridges the gap between the Marshall-Hamiltonian perspective, in which “the people” want courts to protect their constitutional ideals by decree, and the alternative just presented, in which “the people” are willing to trust themselves to give adequate weight to constitutional ideals in the democratic process, so long as courts remind “the people” of those ideals, and demonstrate to “the people” the applicability of those ideals to particular exercises of democratic power.

desires to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act); see also Dworkin, supra note 30, at 355 (suggesting that “the Constitution might have been interpreted as laying down directions to Congress, the president, and state officials . . . , but making them their own judges”).

433. For a discussion of the vulnerability of this premise, see supra text accompanying notes 257-66. For a skeletal analysis of a premise that “the people” ratified the fourteenth amendment with the motive of constraining the political discretion only of dissenting localities, see supra note 266.

434. Cf. Palmore v. Sidoti, 466 U.S. 429 (1984). Here, the Court extended the antiprejudice principle again. The equal protection clause prohibits not only governmental decisions reflecting the prejudices of officials (whether they represent the majority or not), but also governmental actions pursuing permissible goals while accommodating private prejudices. Thus, in reversing a Florida custody decision predicated on the child’s mother having married a man of a different race, the Court determined:

The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Id. at 433.

435. The indeterminacy of this criterion is the root of the problematic issue of timing. See supra text accompanying notes 299-334 & note 309 and accompanying text.
discretion. The constitutional intent suggested by this notion of equal protection bridges the gap because it envisions both alternative functions of judicial review as desired by "the people." To the extent that both alternatives were plausible in 1787, or 1868, it should not be surprising that "the people" might want a forceful and mandatory judicial review for some questions of constitutional principle, yet a permissive and suggestive judicial review for others. To the extent that the constitutional choices of 1868 specifically imply a popular desire for judicial pursuit of normative coherence beyond that which was attainable in ordinary politics, the path of suggestive judicial review rejected by Marshall in Marbury, and by Hamilton in The Federalist No. 78, beckons all the more strongly. Because this interpretation of constitutional intent posits that "the people" do want to achieve the coherent implications of their constitutional ideal, and that they have authorized courts to help them do so, it follows that a court serves their constitutional desires by declaring ideals compromised, even when upholding an offensive exercise of democratic discretion as still permissible today.

This analysis brings us back to the heart of Mr. Baker's case. Even if one concludes that Mr. Baker is not entitled to vindication by judicial mandate today, one hardly is led to a judicial resolution brushing his claim aside as constitutionally irrelevant. After all, the foregoing analysis suggests that although "the people" today may not be ready to give up their emotions of sexism in certain cherished contexts such as, perhaps, sexual orientation, they nevertheless seem to adhere to a constitutional ideal of intrinsic gender equality. If a court, in resolving Mr. Baker's claim, were simply to uphold the challenged Texas statute, it will have repeated Justice Brown's tragic error in Plessy. Because the structure of Mr. Baker's claim is essentially the same as Mr. Plessy's, and assuming that the time for judicial mandate has not yet arrived, the constitutional ideals of "the people" still beg to be vindicated—for the sake of the claimant, and for "the people" as well.

Thus, if Mr. Baker's claim is not vindicated by judicial mandate today because constitutionally applicable principle does not yet extend so far toward the untainted ideal of intrinsic gender equality, "the people's" postulated desire for the progressive development of their ideal of self-constraint can still be served by the force and clarity of a court's reasoning. A court can declare the following message:

Although this court finds that the nation's everyday political values have not sufficiently developed to accommodate a constitutional prohibition of discrimination against homosexuals, we find, nevertheless, that discrimination based on sexual orientation compromises the constitutional ideal of intrinsic gender equality, that it offends ultimate constitutional principle, and that it someday will fall as constitutionally impermissible.

436. See supra text accompanying notes 380-90.
437. See supra text accompanying notes 344-79.
438. By this standard, the federal courts failed Baker's test. See supra note 237.
In this way, by more completely articulating relevant constitutional considerations, a court can protect democratic discretion that in principle still exists, while simultaneously serving the constitutional ideal of self-constraint. By serving both the impulse for ordinary political discretion and the constitutional ideal that views such discretion as problematic, a court can provide impetus for the development of a national political context in which the everyday political pain of self-constraint from a new judicial mandate is more likely to reflect that which "the people" want to endure.439

We can return, once more, to the analogy of Coach and her client. Having determined that there has been no authorization to prohibit a choice—at least for now—Coach might choose simply to leave her client alone, fully vulnerable to the temptation of a sugary delight. Yet, perhaps this self-indulgent client could resist, or could sooner viscerally feel the merit in resisting, thereby better approaching his own elusive ideals, if Coach chooses not to walk away, but instead to stay, and to pester, and to challenge the client, making him feel guilty, and shaping his everyday preferences.

Justice Brown, in Plessy, left to chance the development of a political context in which racial segregation, previously reserved as a desired

439. Such a course of judicial action does not involve an advisory opinion. A court still decides a real legal controversy, determines the enforceable rights of the litigants and, beyond this, acknowledges and serves its coach-like role in the constitutional system. Nevertheless, one might be concerned that a court following this suggested course of action would decide constitutional issues more broadly than necessary, violating the commonplace that courts should define and resolve constitutional issues as narrowly as possible. Justice Frankfurter expressed such a view:

The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court.


Yet, this notion begs the questions of what "kind of controversy" is before the Court and, therefore, what kind of judicial resolution is necessary. The controversy before the Court concerns which among contending values should prevail. The matter is one of profound social concern beyond the interests of individual litigants. The legal interests of individuals are significant and worthy of judicial enforcement because "the people" have deemed those individual interests to be significant. Indeed, the interests of individual litigants pale in importance when compared with a recognition that judicial decisionmaking involves the making of law, and therefore has systemic consequences in shaping the behavior of the many.

If "the people" have ideals of self-constraint, the same rationale underlying judicial recognition and protection of individual legal interests supports judicial protection of those constitutional ideals as well.

For constitutional values of self-constraint, determining which among contending values should prevail has an additional dimension—the dimension of time—and with that dimension comes the desire among "the people" for normative progress. The issue of which value is constitutionally favored, even if not a matter of constitutional mandate today, is immediate; the task of developing ordinary political values among "the people" as the prelude to the development of constitutional mandates is a matter for politics today. When one views litigation for its social significance—a battle for predominance among contending values—one must conclude that given "the people's" constitutional ideal of self-constraint, a designation of those values that "the people" want ultimately to prevail—despite remaining unenforced today—is truly, in Justice Frankfurter's words, an element of "the kind of controversy now before the court." Id. at 583.
compromise against the ideal of intrinsic racial equality, ultimately could be invalidated in the name of authorized constitutional self-constraint. Justice Brown left “the people” fully vulnerable to temptation by the racist demons in their minds. He recognized only the function of judicial fiat, and failed to exercise the implicitly authorized function of suggestive judicial declaration.

Such, at least, was Plessy’s error. It was an error that should be committed never again.

IV. Conclusion: Who Cares?

This Article has proceeded from “the people’s” perspective, and has employed a working definition of “the people” at every step. It is understandable that “the people” would assert the “right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness.” From “the people’s” perspective, it is laudable that Justice Marshall adopted this value as his own.

Toward serving the goal of identifying the constitutional values of “the people” today, the Article has examined the apparent tension between the political process by which constitutional provisions inevitably are created, and the quasi-philosophical process by which they often have been inter-

440. It is, after all, the development of everyday preferences that opens the way for additional constitutionally mandated constraints. See supra text accompanying notes 199-214, 314-90.

441. The error might have been one of result as well. Cf. supra note 323.

442. See supra text accompanying notes 248-56 (“the people” of 1868); notes 306 (“the people” of 1872), 318 (“the people” of 1896), 370 (“the people” of 1897), 376 (same).

443. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803); see supra note 5.

This premise of popular sovereignty may simply state the inevitable reality that power is the ultimate issue in any political system. If “the people,” or a portion of them with sufficient political power, are sufficiently displeased with government, they can topple government by brute force, and institute a more pleasing alternative. This practical root for the fundamental premise articulated by Justice Marshall in Marbury is consistent with the erstwhile colonies’ then-recent revolutionary experience. It is consistent with the Civil War as well. See supra text accompanying notes 104-07, 248-56; cf. supra notes 306, 318, 325, 370 (considering who are “the people”).

The notion that “the people,” or a physically powerful portion of them, have the “right” to establish their preferred principles of government simply because they have the power to do so is hardly an uplifting sentiment. Indeed, it is not necessarily consistent with the establishment or maintenance of democracy, since the masses are not necessarily physically powerful enough to thwart the will of certain minorities whose physical power has been technologically augmented. Thus, assuming that there is such a powerful minority, the existence of democracy must be a function of their belief that democracy serves their interests—whether moral concerns for others, or considerations of expediency. Consider South Africa.

Alexander Bickel asked: “Who will think it moral ultimately to direct the lives of men against the greater number of them? Or wise?” A. Bickel, supra note 11, at 28. Whether a governmental system that does not reflect the desires of a majority of “the people” is moral or wise involves two fundamentally different issues. The question of morality must be addressed separately from that of wisdom, if justification for a principle of self-determination is to be more than simply power. In the end, the “foundational” norm that “the people” have a “right” to self-determination begs the more fundamental question: Who has the “right” to determine what rights “the people” have? See infra text accompanying notes 455-59.
interpreted. The Article has suggested that the task of constitutional analysis might be enriched, and the goal of identifying "the people's" constitutional values better served, by exploring questions of basic political motivation: In what forums would different people prefer their conflicts to be resolved? Why would people prefer to have political conflict resolved by states and localities? Why would people prefer to have conflict resolved by the national electorate in Congress? Why would people prefer to have conflict resolved in the Constitution itself by constitutional mandate?

Constitutionally mandated restrictions on local discretion, like Congress' exercise of legislative discretion, reflect a national majority's desire to prevent local majorities from having their way. More than this, however, constitutionally mandated restrictions on local discretion also constrain national legislative discretion, since congressional majorities may not dilute that which the Constitution itself requires.\(^{444}\) Thus, constitutional restrictions on local discretion, chosen by "the people" of the nation, may reflect a national majority's desire for self-constraint—a desire to respect some norm to a greater extent than would be possible through ordinary, everyday national politics.\(^{445}\) If so, the essence of constitutionally mandated restrictions on local discretion is a relationship between the everyday political values held by a majority of the nation—values reflected in Congress—and the national electorate's chosen constitutional ideals.\(^{446}\)

Given a goal of identifying the constitutional values of "the people" today, one must evaluate different sources of evidence. The best evidence would be a recently ratified constitution. But "the people" do not engage in constitutional policymaking annually, or even each generation. Indeed, if "the people" did so, constitutional politics would become more like ordinary politics, thus undermining the possibilities for self-constraint. The United States Code, although perhaps often reflecting more recently chosen national policies than those framed in the Constitution, could not provide good evidence for identifying values of self-constraint, for, by definition, "the people" wish to protect such values to a greater extent than is possible in ordinary national politics.\(^{447}\)

The Hamiltonian premise of constitutional continuity provides a possible, but far from perfect, solution. It suggests that one might infer the constitutional values of "the people" today from the constitutional choices made by "the people" of the past. The Hamiltonian premise of constitutional continuity does not suggest that all values remain static through time. Rather, it posits that matters of basic political motivation, constitutional relationships, remain stable—that political relationships generating a desire

\(^{444}\) See supra note 81.

\(^{445}\) This is so at least when constitutional choices are made under circumstances of a stable national electorate. Cf. supra text accompanying notes 87-90. For the fourteenth amendment, ratified under potentially significant national electoral instability, additional analysis is required to determine whether the choice to pursue national values by constitutional mandate, rather than by authorizing Congress to legislate, reflected a choice of self-constraint, as well as a desire to constrain the discretion of dissenting localities. See supra text accompanying notes 227-66.

\(^{446}\) Again, one must modify the notion of "nation" in the context of the fourteenth amendment. See supra notes 306, 371.

\(^{447}\) See supra text accompanying notes 91-92.
among “the people” to have value conflicts resolved locally, or nationally by Congress, or nationally by the Constitution itself, persist through time.448 Thus, if “the people” have framed constitutional ideals with the motive of self-constraint, the premise of constitutional continuity relates to a particular kind of constitutional relationship. It suggests that the competition between an ideal, for which people are willing to endure everyday political pain, and conflicting daily preferences, which are the very reason that people feel the need for constraint, persists through succeeding generations.449 If that relationship persists, any development of ordinary, everyday national political values toward the ideal must push constitutional mandates of self-constraint toward the ideal as well. Thus is the tension between everyday political reality and constitutional aspirations maintained. By maintaining that tension courts might avoid Raoul Berger’s fear of “transforming” the Constitution through subterfuge or error. Thus, it is the development of ordinary, everyday political values throughout the nation,450 rather than judicial philosophizing abstracted from the four relevant forums for political conflict,451 that can provide an analytically supportable source for developing the coherence of constitutional meaning from “the people’s” perspective.452

448. For a consideration of the premise’s vulnerability, see supra note 122; cf. supra notes 208, 209, 376.
449. See supra note 208.
450. See supra text accompanying notes 164, 208-11, 301-06, 319-20, 325-28, 344-60.
451. I am speaking of the ordinary, everyday national political values existing at the time constitutional restrictions on democratic discretion were framed, the constitutional choices of self-constraint that actually were made, the ordinary, everyday national political values today, and the values of potential constitutional majorities today. Thus,

[ord. nt'l prefs. : const'l choices](past) || [ord. nt'l prefs. : const'l values](pres.)

See supra note 164 and accompanying text; cf. supra notes 306, 371, 445.
452. Some might argue that courts are simply incapable of determining the precise compromises that political majorities would reach, and therefore have no alternative to pursuing the logical implications of certain values. When statutory language is inconclusive, courts resolve questions of interpretation by reasoning from postulations about legislative purpose. Thus, judicial pursuit of normative coherence in constitutional interpretation is just another species of a pervasive phenomenon of judicial lawmaking. See, e.g., Cottrol, supra note 84, at 387 (“common law processes are inherent in constitutional interpretation”); Wellington, Nature of Judicial Review, supra note 14, at 494 (“It is standard and appropriate for courts to employ general legal principles to construe the open texture of statutes. This is not necessarily countermajoritarian, although sometimes statutory purpose and general legal principles pull in different directions.” (footnotes omitted)).

Even those who seek to minimize the differences between constitutional analysis and statutory interpretation acknowledge that there are differences. Harry Wellington characterizes the matter as one of “finality,” and suggests that while judicial interpretations of the Constitution theoretically are final, and statutory interpretation theoretically is subject to correction by Congress, any difference in fact is illusory. See Wellington, Nature of Judicial Review, supra note 14, at 487-88 (“One asks how final constitutional decisions really are . . . [and] wonders how transitory are other nonmajoritarian decisions of consequence.”).

The theoretical finality of constitutional interpretations, however, is a matter of no small consequence. See supra note 135. The issue concerns an erroneous distortion of the compromises that modern constitutional majorities would make. The concerns of modern legislative majorities are surely relevant, but only partially and indirectly so when defining modern constitutional values. See supra text accompanying notes 201-14, 302-07, 318-29, 344-79; cf. supra notes 233, 266. Thus, a court faces potential error when thwarting present political
Finally, this development of the "the people's" ordinary, everyday political values need not be left to chance. As suggested by the ability of most Americans today to feel offended by Plessy v. Ferguson, courts can play a role in the stagnation—and the development—of the nation's everyday political values. More than this, a recognition that constitutionally mandated restrictions on local discretion reflect a desire among "the people" for self-constraint—that such mandates reflect ideals to which "the people" aspire—implies that courts, in those constitutional contexts chosen by "the people," are authorized—and indeed required—to play a suggestive (as well as injunctive) role in shaping public values.

Thus, from "the people's" perspective, the Article has explored the gap between Raoul Berger and Chief Justice Rehnquist, on the one hand, who look to the past and see intricate political compromises forever defining constitutional meaning, and Justice Brennan and Ronald Dworkin, on the other, who look beyond politics and see philosophical visions of constitutional nirvana. For "the people's" benefit, one might

majorities, and when bowing to present political pressure at the expense of competing constitutional norms. Deciding when to bow, and when not to bow, requires criteria independent of the efficacy of political pressure.

Charles Black has posed a question of legal interpretation that can further illuminate distinctions between constitutional and statutory (or common law) analysis. He asks whether a property owner owes to one injured in his elevator the duty of a common carrier or the lesser duty of a property owner. See C. Black, supra note 56, at 162-66. The dilemma of judicial reasoning versus political compromise exists here, as it does in constitutional analysis. For this question of nonconstitutional policy posed by Black, a court might choose to favor either the policy underlying the property law, or that underlying the common carrier law, based on a view that in this context, one is more important to the majority than the other. A court also might try to imagine how this policy issue might be affected—if considered by the legislature—by other apparently unrelated community interests. In each of these approaches, the court's goal is to serve the contemporary majority's legislative will. If the court errs, the majority maintains corrective authority.

The analogous error in constitutional analysis is a distortion not of contemporary legislative compromises, but a distortion of the constitutional compromises "the people" today would strike. Of course, true constitutional correction, unlike the correction from political pressure envisioned by Dean Wellington, is difficult and rare. This problem might be mitigated by recognizing that the dynamic of self-constraint, to the extent manifested by "the people" of the past, can provide at least some rough indication of the extent to which "the people" today value the constitutional ideal, and the extent to which they value competing democratic discretion. This dynamic of self-constraint, related to the present with the premise of constitutional continuity, suggests "the people's" constitutional values in a way that statutory compromises, whether expressed vaguely or specifically, struck by those motivated by a desire to constrain the political discretion only of others, do not. The problem of constitutional correction might be further mitigated by the route of suggestive declaration presented in this Article, which openly recognizes the constitutional ideal, the competing desire for everyday democratic discretion, and the curse of judicial fallibility.

By recognizing the creative interaction between constitutional ideals and competing everyday political preferences, and pursuing the option of suggestive declaration, the real difference between constitutional and statutory interpretation might be narrowed. If the Court does follow the route of suggestive declaration, "the people" remain free to develop their ordinary, everyday political values as if the Court had been interpreting a statute. But my route of suggestive declaration can be invoked only with the risk of inadequately enforcing constitutional values of self-constraint. This theoretical wrong—whose actual commission may go undetected—confirms that the difference between constitutional and statutory interpretation, though narrowed by the route of suggestive declaration, remains as real and vexing as ever.
construct a bridge between Raoul Berger and Ronald Dworkin by acknowledging that the Constitution is created from the values of people—not those of demons, and not those of gods—to serve the values of people. 453 People are complicated, apparently possessing something of the demonic and something of the divine. It should not be surprising, therefore, that “the people’s” constitutional preferences might reflect something of an ideal aspiration, and something of a compromise to concerns which, by comparison, are perceived as mundane and shameful.

Raoul Berger’s approach makes the Constitution unrealistically irrelevant to modern conflict, because his is a Constitution of past people, and past conflicts. What Berger views as constitutionally prohibited in the realm of equal protection is today largely beyond the realm of credible political debate. He has thus defined away the conflict within individuals, which includes the essential aspirational quality of self-constraint. 454 Ronald Dworkin’s approach similarly makes the Constitution irrelevant to modern conflict by unrealistically abstracting analysis from the real people of the modern era, who are not philosophers after all, but ordinary people. He too has defined away the conflict within individuals, which compels people to limit their pursuit of higher ideals.

In short, from “the people’s” perspective, toward interpreting “the people’s” values, and given a definition of “the people”455—if only a group’s identification of itself as “the people”—the analysis presented in this Article could be helpful. But these qualifications suggest limitations. The analysis does not consider from the judge’s perspective whether and why any judge should adopt “the people’s” perspective, and do “the people’s” bidding. 456 It does not consider from the judge’s perspective the question of how a judge

453. Thaddeus Stevens, while lamenting that his high hopes for quick and radical justice were not met by the fourteenth amendment as submitted to the states, declared, “Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels . . . .” CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1865).

454. Cf. Cottrol, supra note 84, at 366 (“A significant failure in Berger’s discussion of the fourteenth amendment lies in his treatment of northern racism. . . . Berger’s is in large part a conceptual failure, an unwillingness to explore the subtle and delicate intermixtures of idealism and self-interest that brought about at least a temporary transformation in northern views concerning race.”).

One must stress, however, that the idealistic component must be neither overemphasized nor too broadly pursued—as it might be, for example, if based on Michael Perry’s rationale that Americans are a “religious” or aspirational people. See M. PERRY, supra note 11, at 97-100. Rather, one must seek to identify “the people’s” particular ideals of self-constraint, and one must account for their competing desires for autonomy in everyday political life.

455. See supra text accompanying notes 103-09 (past or present), 248-56 (“the people” of 1868); notes 306 (“the people” of 1872), 318 (“the people” of 1896), 325 (“the people” of 1954), 370 (“the people” of 1987), 376 (same).

456. This is essentially a matter of identifying one’s ideal of constitutional analysis—one’s goal in doing whatever one does when claiming to “interpret” the Constitution. Many apparently pursue the goal of finding “good” or “justice” when interpreting the Constitution. I suggest that given the problem of conflict that underlies any constitutional question, the first question must be: Whose notion of good or justice should the analyst be pursuing? Cf. infra note 459.
should define "the people" whose values should be served. Beyond this, and most fundamentally, the analysis leaves room for conflict about who "the people" are.

And this—the problem of conflict—brings us back toward the point at which we began. Progress is difficult indeed.