

SUPER-STATUTES
AMERICA'S STATUTORY CONSTITUTION
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Introduction: America's Statutory constitution

In 1968, the state of California offered income support for employees who lost their jobs or were laid off temporarily because they were disabled; this program applied to almost any kind of physical disability but did not cover layoffs because an employee was pregnant. Many school districts in the state required pregnant teachers to take an unpaid leave of absence for the duration of their pregnancies. Would these governmental discriminations be constitutional today? Do they violate constitutional rights that women in general or mothers have in our constitutional system? Do they cut against fundamental norms that we now consider instinct in our political system?

Most Americans would say *yes* to at least one of these questions, and perhaps to all three. So would most law students, based upon the following reasoning: (1) The Fourteenth Amendment of the U.S. Constitution requires the states to provide every person with the "equal protection of the laws." The Supreme Court has interpreted the Equal Protection Clause to require state sex-based discriminations to be supported by a substantial state interest that cannot easily be met by an ungendered law. (2) State discrimination because of pregnancy is a discrimination because of sex and, for that reason, must be supported by a substantial state interest that an ungendered law would not meet. (3) The state cannot easily make such a showing, because it deploys pregnancy exclusions either for administrative convenience (which the Court has held is not a substantial state interest) or to prevent pregnant women from being publicly visible (almost a disqualifying state interest under today's jurisprudence). Therefore, these pregnancy-discriminatory policies are inconsistent with the U.S. Constitution.

The foregoing argument was the basis for a Constitutional challenge by Cleveland schoolteachers to a policy conclusively presuming that they were unable to conduct their classes during and shortly after pregnancy. The U.S. Supreme Court in *Cleveland Board of Education v. LaFleur* (1974) ducked that argument and decided the case on due process arbitrariness grounds: the strict mandatory leave periods had no rational connection to the state's asserted interest in effective classroom management. Concurring only in the result, Justice Powell wondered whether equal protection was not the appropriate framework, and the Court answered his question later in the year, when it evaluated the California unemployment insurance exclusion for pregnant workers in *Geduldig v. Aiello* (1974).

The Court's answer was no. A 6-3 majority (including Justice Powell) ruled that pregnancy-based discrimination is not sex discrimination *per se*, because it does not categorize

by sex: while pregnant women are excluded from state benefits, the people included are non-pregnant women as well as men. And the Court further ruled that the state discrimination, however described, was justified by the large costs that pregnancy coverage would impose on the state program, assertedly rendering it financially unsupportable. The Supreme Court has never overruled or even softened its *Geduldig* holdings. In *General Electric Co. v. Gilbert* (1976), the Court followed and expanded upon *Geduldig*, when it ruled that Title VII's rule against workplace sex discrimination did not bar employers from discriminating because of pregnancy. The Court presumed that Congress intended to follow the Constitutional understanding of sex discrimination when it enacted Title VII (in 1964), and therefore *Geduldig* was a presumptive guidepost; because there was almost no useful legislative history of the sex discrimination provisions of Title VII, the Court more or less deployed *Geduldig* as the primary legal basis for its interpretation in *Gilbert*. Almost two decades later, in *Bray v. Alexandria Women's Health Clinic*, the Court applied *Geduldig* to hold that pregnant women are not a protected class for purposes of the Civil Rights Act of 1866.

Notwithstanding *Geduldig*, *Gilbert*, and *Bray*, Americans are correct in thinking that women do have a fundamental right to be free of discrimination because they are pregnant. Although that right has not found recognition in judicial constructions of the Constitution and certainly has no basis in the common law, it has been recognized by statute, namely the Pregnancy Discrimination Act of 1978 (PDA), and the EEOC's regulations issued pursuant to that statute. It may strike some gentle readers as anomalous and wrong-headed, that fundamental anti-discrimination rights find their positive origin in a statute and administrative regulations, and not in the Constitution and its precedents. The purpose of this Article is to demonstrate that the United States now enjoys, and has long enjoyed, a *statutory constitution*. That is, legislation and its regulations are, and long have been, the primary source of constitutional structures, rules, and rights in our polity. Indeed, the process typified by the PDA is a better methodology for constitutional elaboration than the process typified by *Marbury v. Madison*.

Consider this: If all you read was the United States Constitution, you would not know where most legal rules come from, how democratic our polity is, and what principles represent our highest aspirations; nor would you have any idea about the details of institutional arrangements and public values. You can only know those things by reading Supreme Court interpretations of the Constitution, as the conventional wisdom teaches, *and*, as our book will also argue, by studying America's *super-statutes* and their implementing regulations.

For example, the Constitution's text gives us the basic structure of government (three-branch national government; bicameralism and presentment for statutes; federalism) and sets forth some qualifications for officials. But statutes and non-Constitutional rules make three important contributions to American governance: they fill in important details of the constitutional structure (such as the rules for House electoral districts), they alter that structure (as the statutes creating the First and Second U.S. Banks did), and they have ultimately created a new structure centered around administrative law (notably, statutes broadly delegating lawmaking authority to administrative agencies, under the framework of the Administrative

Procedure Act).

Another example: The U.S. Constitution is less clearly democratic than most Americans assume. We the People, in 1789, did not mean All of Us. The Constitution of 1789 provided what Aristotle would have called a mixed government: the House of Representatives was largely majoritarian, but with a small portion of the population allowed to vote; selected by elites, the Senate and Supreme Court were oligarchic; and the President chosen by a largely unspecified Electoral College was potentially monarchical. Amendments to the Constitution have opened up the franchise, but our current status as a democracy with wide participation is mainly a creature of statute and state constitutional provisions. Rules as to who can vote, the tabulation of votes, and political and campaign activities are largely creatures of super-statutes.

The Constitution is most famous for its protection of individual rights, notably those enumerated in the Bill of Rights and the Fourteenth Amendment. As the PDA suggests, however, statutes typically play an important role here as well—and sometimes they are the exclusive mechanism by which public norms have formed around the protection of individual or minority rights. Indeed, the concept of “rights” is impoverished if all you read are the Constitution and Supreme Court precedents; once super-statutes are consulted, entitlements relating to broader economic as well as non-economic security come into play. Community and group entitlements become central.

What are *super-statutes*? Much of our book will be occupied with elaborating as well as justifying it, but the idea itself can be stated simply: A super-statute is a law or series of laws that (1) seek to introduce or consolidate a norm or principle as fundamental in our polity, (2) over time do “stick” in the public culture even as the norm evolves through a series of debates and even conflicts about its elaboration or specification, (3) such that the super-statute and its normative principle have a broad effect on the law—including effects beyond the four corners of the statute. Examples of such statutes include the Sherman Act of 1890, the Federal Reserve Act of 1913 (as importantly amended in 1935), the Social Security Act of 1935, and the Civil Rights Act of 1964. Such laws not only reflect and help instantiate American public values, but those values have driven American Constitutional law, rather than vice-versa.

Super-statutes and related phenomena have given rise to what we call a *new American constitutionalism*. Unlike the standard account of American Constitutionalism, this new constitutionalism maintains that changes in public norms and constitutional principles occur outside of the Article V process for changing the Constitution, are developed in legislatures and agencies rather than in courts, and are incremental and continuous rather than dramatic and episodic. We defend the normative superiority of the new American constitutionalism and explore some of its ramifications for the operation of public law in the new millennium.

1. The constitution of Equality and the Limits of *Marbury* (The Pregnancy

Discrimination Act of 1978)

Carolyn Aiello was caught in a Constitutional transition. Living in the Bay Area of California, Aiello supported herself as a hairdresser. But her livelihood was (temporarily) cut off when complications associated with her pregnancy required her to take a medical leave on June 21, 1972. The doctors discovered that Aiello had an ectopic pregnancy and performed surgery to terminate her pregnancy. Although she would ultimately return to work on July 28, she could not afford the loss of even a month's income. Like millions of other Americans, she applied for unemployment benefits on the basis of her physical disability—but, unlike most other applicants having serious even if temporary disabilities, her claim was denied. California's unemployment compensation program excluded from its coverage disability claims based upon pregnancy.

This was a state discrimination affecting thousands of working women like Aiello. Represented by San Francisco civil rights attorney Wendy Webster Williams, Aiello and three other women sued the state to overturn this discrimination in its unemployment compensation law. Their argument was that the exclusion of pregnancy-based claims from the unemployment program violated the Equal Protection Clause. Speaking for a three-judge federal court, Judge Zirpoli ruled the exclusion unconstitutional—but the Supreme Court reversed. It held, in *Geduldig v. Aiello* (1974), that pregnancy-based exclusions are not subject to heightened equal protection scrutiny and that the California exclusion was a rational means for the state to tailor its program and, essentially, save money.

Given this result, which the Supreme Court has never revisited, one might conclude that women have no fundamental right not to be discriminated against on the basis of their pregnancies. One would be wrong. The right of women to equal treatment is foundational in American society, and that foundational right entails the right not to be discriminated against on the basis of pregnancy. But the right has not been derived from the Constitution. It is embedded in a statute. *A super-statute*.

Just because Carolyn Aiello lost her Constitutional case before the Supreme Court does not mean that she and her lawyers lost their normative campaign to establish pregnancy as a category that should, as a matter of fundamental right, not be the basis for state (or even private) discrimination. Our view is that fundamental rights are not exhausted by Constitutional claims recognized by courts. Furthermore (and more iconoclastically), we maintain that fundamental rights at the dawn of the new millennium are more firmly and legitimately rooted in statutory claims recognized by legislatures and agencies as well as courts. The process by which fundamental norms stick in our society through statutory enactment, implementation, and interpretation is the heart of our project. Super-statutes have changed the way American public law evolves and ought to evolve.

The Standard Account. Attorney Williams sought relief for Carolyn Aiello under the auspices of the standard account of American constitutionalism. The standard account was, and to some extent remains, the conventional wisdom of legal professionals, has long been thought to

reflect the understanding of the Framers of the U.S. Constitution and the Reconstruction Amendments (which added the Equal Protection Clause to the Constitution), and has enjoyed elaborate explanation by the leading academic theorists of the twentieth century—the likes of Alex Bickel, Charles Black, John Hart Ely, and Bruce Ackerman. The standard account rests upon three premises:

- *Documentary Premise, with Focus on Judicial Review.* Focus on the document and original meaning. Supreme Court is privileged interpreter.
- *Document Hard to Change; Big Showdown Premise.* Article V makes the U.S. Constitution very hard to change. Change usually occurs only after a big showdown, where popular supermajorities vanquish defenders of the status quo.
- *Rights Understood as Governmental Non-Interference..*

The standard account will no longer do. It has never completely described American constitutionalism, and its lack of descriptive power is now clear. Its positive inadequacy is related to its normative inadequacy.

Positive Problems with the Standard Account. As Larry Kramer has shown in a series of articles, the text-only and jurocratic assumptions of the standard account were not ones actually held by the Framers of the Constitution of 1787, nor were they consensus assumptions during Reconstruction. The Framers did distinguish between fundamental law and statutes, but they understood legislatures as important fora for articulating and elaborating fundamental law. Recall the famous debate in the Cabinet and Congress regarding the federal power to establish a Bank of the United States. No less a judicialist than John Marshall considered the principle substantially settled by the political process by 1819. Recall, too, the great debate over the Sedition Act of 1798. Presiding over trials of political critics of the Adams Administration, federal judges found no violation of the First Amendment. It was the legislatures of Virginia and Kentucky that announced important First Amendment problems with laws seeking to suppress political dissent. Their point of view prevailed in the critical election of 1800.

Whatever ambiguities there were in the accuracy of the standard account during the late eighteenth and the nineteenth centuries, it has proven wholly unreliable as a description of the constitutionalism of the United States in the modern era. The conditions of American government and society have changed radically from the Founding and even Reconstruction periods. On the one hand, these changes have made constitutionalism more important to Americans, for pervasive government pervasively threatens liberties and status. This has fueled demand for judicial review based upon authoritative texts. On the other hand, these changes have paved the way for fundamental law to be articulated through statutory enactment, implementation, and interpretation. In short, the same general historical developments that have fueled the text-only and jurocracy assumptions of the standard account (assumptions that we believe are chimerical) have undermined the statutes-are-irrelevant assumption.

The Constitution plus Reconstruction, as understood in the standard account, accommodated a constitutional law that strictly confined federal regulation to the movement of goods in interstate commerce and both state and federal regulation to common law nuisances. This constitutional regime ensured that the common law would set the baseline for public as well as private rights. But common law baselines were insufficient for the governance of an industrializing America, and those baselines were superseded by a series of statutory landmarks—the Interstate Commerce Act of 1887 and its periodic amendments, the Sherman Act of 1890 and the Clayton Act of 1914, the Pure Food and Drug Act of 1906, and so forth.

The modern regulatory state rejected the jurisdictional limits of the original Constitution—and it was the Constitution, as interpreted by the Court, that acquiesced in a new order that accorded great power to Congress and rendered the states marginal players as to many policies. Even more radically, the modern state was administrative, and the agencies created throughout the twentieth century doomed original constitutional models of strict separation of powers, nondelegation of legislative authority, and even conceptions of procedural due process. All of these changes have been delivered through the mouths of Supreme Court Justices, even though they originated from other sources. Constitutional meaning has proven highly dynamic, incremental but increasingly divorced from the document and driven by social movements and legislative change, with “landmark” judicial opinions either confirming what has already occurred or yielding to popular responses or political fait accomplis. So the jurocracy and Constitution as text assumptions have evanesced together.

They virtually disappeared in the wake of Earth Day 1970 and the environmental movement. Starting during the Nixon Administration, Congress enacted one landmark statute after another setting unprecedented restrictions on the freedom of businesses and private persons to dump chemicals in the nation’s bodies of water, air, and landfills. The contours of those statutory schemes were set by Congress and the President, and their details carried out by the EPA and other agencies, with very little important input by the judiciary. Even constitutional requirements, such as the jurisdictional limits on Congress directed by Article I and the just compensation requirements of the Takings Clause, retreated in the face of the National Environmental Crisis and Green Property.

The big exception to the decline of jurocracy has, allegedly, been in the field of individual rights, epitomized by *Brown v. Board of Education* and the triumph of the anti-apartheid principle. We join those who consider *Brown* a great judicial achievement, but its elaboration and consolidation depended more on Congress, the President, and agencies (HEW as well as DOJ) than the Supreme Court. Indeed, the integration principle—the idea that the state is obliged to integrate and not just avoid explicit segregation—is more a product of Congress, Presidents Johnson and Nixon, and the EEOC than it is a product of judicial norm entrepreneurship.

Stated at a more general level, we submit that the great identity-based social movements of the latter half of the twentieth century required this country to rethink its fundamental law to accommodate previously marginalized citizens. In this great rethinking, the Court has usually

played the follower rather than leader role. For example, women’s constitutional rights were all but ignored by the judiciary until the 1970s—long after President Kennedy’s Commission on the Status of Women boldly endorsed the idea that “equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land,” and well after Congress assured women of equal treatment in the workplace with the Civil Rights Act of 1964 and the Equal Pay Act of 1963. The Supreme Court announced heightened equal protection scrutiny of sex-based classifications only after Congress had passed the ERA, and most rights women have today are based upon statutes and not the Constitution.

Aiello’s case illustrates that pattern. After losing *Geduldig*, Wendy Webster Williams argued that the jobs title of the Civil Rights Act of 1964 bars employment discrimination based on pregnancy, but lost again before the Supreme Court, which blunderingly followed the reasoning as well as result of *Geduldig*. Still confident of the validity of their norm, Williams and her allies turned to Congress and made a powerful case for the proposition that women’s equal opportunities in the workplace are systematically and significantly compromised by pregnancy-based discriminations. Employers, insurance companies, and a few states made a rather half-hearted case for such exclusions. After an intense and public debate, Congress repudiated the Court’s understanding of non-discrimination and equal treatment, and it amended the statute to include pregnancy-based discriminations as “sex discrimination.”

The Pregnancy Discrimination Act of 1978 (PDA) powerfully illustrates how even in the field of individual rights, where the Court does have some genuine advantages, the evolution of fundamental public norms has occurred more responsively as well as deeply in legislatures and agencies rather than in courts. This has occurred for epistemic as well as legitimacy reasons. This requires some discussion, as follows.

Normative Problems with the Standard Account. Even if it better described the evolution of American public law, the standard account is bedeviled by normative problems. (The normative problems are probably related to the fact that the standard account does not provide a better positive description.) The normative problems arise out of the standard account’s focus on judges interpreting constitutional texts to trim back legislative enactments. This focus invites difficulties of institutional legitimacy and competence.

- *The Inadequacy of the Written Constitution – Too Old and Too Hard to Change.* The standard account owes many of its problems to the document to which it is tethered. The U.S Constitution is a wonderful document and an infuriating one, and for the same reason: It speaks in such generalities that almost anything can be teased (or tortured) out of it and almost nothing can be added to it. This has contributed to our current dilemma, where judges lacking both legitimacy and competence read their own political judgments into such open-textured provisions as the Speech Clause, the Equal Protection Clause, and the Due Process Clause—and We the People feel frustrated that We cannot correct the judges through constitutional revisions, given the now-impossible standards of Article V (two-thirds of each chamber of Congress and three-quarters of the state

legislatures).

- *Democratic Legitimacy.* The standard account, especially as it has been articulated by law professors, places too much weight on judges and judicial appointments, and too little emphasis on popular input into public norms. This has, misleadingly, been dubbed “the countermajoritarian difficulty.” The legitimacy advantage that legislatures have over courts owes less to the supposition that legislatures better reflect majority desires than courts (although that is often the case), and more to the factors that render legislative value-elaboration as to fundamental norms more acceptable to We the People, including those in the minority.

(a) *Accessibility.* Courts are shrouded with technicalities and mysteries, and ordinary people do not think judges listen to them. So their decisions affecting ordinary people lack the perception that everybody has had a chance to be heard; legislatures, in contrast, are more open fora. Legislators acknowledge constituent letters and are more likely to be perceived as paying attention to them. The PDA hearings were a classic example of how a social group was able to present a compelling normative case, and legislators actually heard what women were saying.

(b) *Accountability.* Legislators are distinctively accountable, not only because they are chosen by the people, but also because they are subject to removal or defeat if they fail to represent the people intelligently and sensitively. If working women believe they are being discriminated against because of pregnancy rules, they will petition legislators to enact a statutory response—and legislator failure to be responsive to reasonable demands will be met with electoral retribution. So even legislators interested only in re-election try to be responsive to genuine social needs. (Emmanuel Celler learned this in 1970, when his sexist views, including his opposition to the ERA, cost him his long-time seat in the House; he was defeated by Liz Holtzman.)

(c) *Diversity.* Because of their larger size and less constraining membership rules (judges pretty much have to be lawyers), legislatures usually reflect the differing viewpoints in the community much better than courts do. Perspective makes a big difference in both the content and the legitimacy of public policy choices; a decision coming from a diverse group of decisionmakers is likely to be more legitimate than one coming from a more homogeneous group. The Supreme Court that decided *Geduldig* and *Gilbert* consisted of nine elderly men; that alone created a stench for their pregnancy decisions. In the debates leading up to the PDA, the Court’s opinions carried no weight, and many witnesses even disrespected them as a matter of legal interpretation: Just a bunch of guys who don’t understand and don’t care. (The internal records of the Justices’ Conference, now available, provide unfortunate confirmation. The Chief Justice of the United States found no connection between sex and pregnancy. He found the exclusion easily justified on the ground that pregnancy is simply a “different kind of illness” than, say, “prostate problem,” which is similar to “hysterectomy” but not pregnancy.)

- *Institutional Capacity: The Superiority of Legislatures and Agencies.* The standard account, especially as it has been articulated by law professors, valorizes and even fetishizes judges way beyond what history (or common sense) supports. Apart from questions of legitimacy, norm-entrepreneurship by the judiciary has a problem of comparative institutional capacity and competence. Academics overstate judges' genuine advantages—their inability to control their own agendas, the requirement that they give reasons, and their relative insulation from normal politics. (Almost all legal academics worked for judges as law clerks; almost none have worked with legislators in drafting or enacting statutes.) Like judges, legislators are forced to grapple with issues thrust upon them by circumstances and are certainly required to advance reasons for laws they adopt. More important, legislatures have their own comparative advantages over courts in their deliberation about fundamental norms:
 - (a) Information and resources. It is commonplace to say that legislatures and agencies have greater access to resources and differing points of view than courts do—but most legal academics take positions that slight this universally conceded fact. (The fact is even more impressive if one includes the factfinding efforts of agencies charged with implementing most statutory schemes.) In exploring normative debates, and especially in developing the contours of what Henry Richardson calls “deep compromises,” information is key. A well-informed institution is better able to cut away issues that should not be a matter of dispute and to reconcile colliding norms.
 - (b) Implementation Flexibility. It was long axiomatic that judges are not well-equipped to deal with polycentric problems. Many normative debates have this feature, and in that event legislatures have further advantages over courts. Their biggest advantage is that legislatures can address several features of a problem at once and can vest further elaboration of a norm in an agency.
 - (c) Diversity. In the spirit of Jeremy Waldron, we believe that heterogeneity of viewpoint (diversity) is not only a legitimacy advantage of legislatures, but a functional advantage as well. To be sure, diversity of opinion often leads to impasse or raw unprincipled compromises—two of the admitted drawbacks of the legislative process when it comes to normative dialogue—but on issues where the public itself is engaged, and the media watching attentively, legislators tend to step up to the plate and engage in a process that is more like Richardson's deep compromise (where difference of opinion is ameliorated by each side's normative evolution and is accommodated by mutual exploration of a principled resolution).

We shall conclude this chapter with a detailed examination of the prominent Constitutional theories of such disparate thinkers as Bruce Ackerman, John Yoo, and Mark Tushnet. All three thinkers transcend the difficulties of the standard account by jettisoning important features of it and linking the evolution of fundamental values and foundational structures to popular or departmental processes.

So let's stop the charade of that accompanies debates about the proper meaning judges should torture out of the Constitution. Let's return to first principles—not just those that were available to the Framers, but also those that we can see in other countries or even within individual states.

2. The Democratic constitution (The Voting Rights Act of 1965)

The standard account reflects the dominant tradition of American constitutional theory—Constitution as a Social Contract. Such a written Constitution enforced by judicial review has been America's great contribution to constitutional theory, but our own constitutionalism might be understood in a more sophisticated way if we expanded our focus to consider other perspectives. Do these other perspectives suggest solutions to some of the problems we have identified for the standard account of American constitutionalism?

This chapter will be largely conceptual, but we shall organize much of the discussion around the Voting Rights Act of 1965, an important super-statute that has become the focal point for our national commitment to universal suffrage (itself a relatively recent historical phenomenon), what that might entail, and the tremendous administrative effort our country devotes to this project. (The conceptual summary below does not incorporate our VRA example, but the draft we have developed for this chapter does so.)

Aristotelian Perspective: Constitutionalism as Expression of a Polity's Fundamental Commitments. Aristotle would have been baffled by the notion of a written Constitution whose precise words act as constraints on the state. Aristotle, in the *Politics*, understood a constitution not as a set of limits or as a political straightjacket, but as a description of normal governmental practices. This is not to say that he refrained from normative judgments as to which kind of constitution would be best for a people. Rather he was concerned to describe the way a government functioned, that is, to describe the real constitution of a nation and not to focus on a document or collection of written texts. What is important about the Aristotelian conception is its implied distinction between the constitution of a government and a written constitution. Or, even better, the distinction between small “c” constitutionalism and large “C” Constitutionalism. Large C Constitutionalism might be identified with the official way that a people and their officials interpret and apply the Constitution. Small c constitutionalism is concerned with the actual arrangement of governmental institutions relative to each other and to the people whose government they form.

Aristotle's conception of constitutionalism has been pervasively important in western history, influential such thinkers as Polybius, Montesquieu, and many early Americans. The American colonists who declared their independence from Great Britain in 1775 acted in part on the ground that Parliament's claims upon them were inconsistent with their fundamental rights as Englishmen. Some of the founding generation, including supporters of the Constitution like James Madison and James Wilson, were students of Montesquieu.

We are not interested in the precise descriptions found in Aristotle, who believed the

constitution reflected the different classes of society, or in Montesquieu, who correlated constitutions with fixed geographic terrains. What we like about their general conception is its openly normative aspiration: Rather than expressing a set of positive rules negotiated by long-deceased Framers, the central metaphor of a large C Constitution as social contract, Aristotelian small c constitution embodies fundamental values to which our polity is committed. And constitutionalism is reasoning from those values to address new problems confronted by the nation.

Aristotle himself had a rather static understanding of the constitution, but a neo-Aristotelian perspective need not have that quality. America's unwritten constitution as well as the Constitution of 1787 acquiesced in the institution of slavery. In 1856, the Supreme Court applied these commitments in *Dred Scott v. Sandford* to rule that African Americans could not be "citizens." Chief Justice Taney's *Dred Scott* opinion deftly appealed to both the original expectations of the Framers of the Constitution of 1787 and to an Aristotelian understanding of natural law and social order. Set against this understanding, however, the Abolitionists invoked Aristotelian arguments for the proposition that America's most fundamental commitments were to universal human liberty and the idea that all men are created equal. Whereas Taney emphasized original expectations, texts, and norms of the founding generation, the Abolitionists reasoned from the great principles of American constitutionalism. They found those principles not only in the Constitution, but also in the Declaration of Independence and in features of America that made us a City upon a Hill. The danger of a static constitutionalism, therefore, may not be inevitable if one takes an Aristotelian point of view.

Deliberative Perspectives: Constitutionalism as Dialogues Generating or Elaborating on New Fundamental Commitments. Deliberative perspectives approach constitutionalism as a process by which our fundamental commitments are articulated and evolve. Examples include Aristotle's theory of practical reasoning as the way human societies address values and problems over time; the political theory of Edmund Burke, who saw the English constitution as rooted in an always-evolving tradition; hermeneutical approaches such as that of Hans-Georg Gadamer, who maintains that interpretation is a synthetic process reconciling past and present; and theories of direct democracy such as that of Mark Tushnet, where constitutional change is driven by popular discourse and initiatives elaborating on the grand norms of what Tushnet calls the "thin constitution." The virtue of these models is, for us, quite substantial. They are not only more dynamic than Aristotelian or social contract models, but they insist on a process of publically accountable reasoning to elaborate on the nation's values. Tushnet's theory has the added virtue of insisting that We the People be centrally involved in those debates.

Deliberative theories may be seen as functional theories. Constitutions, and constitutional practices that we call constitutionalism, have the effect of permitting the "people" to deliberate about shared values and rights. Whether they do this well or badly matters for how we evaluate them. So one way of justifying a constitutional practice is that it effectively brings We the People into a deliberative process in ways that recognize important ethical values. Our problem with the leading deliberative theories is they do not give enough attention to the legislature as a forum for deliberation. Philosophers Jeremy Waldron and Henry Richardson

have begun to address this defect. Both authors maintain that legislatures should be the chief forums for norm elaboration in a democracy—yet neither relates legislative activities to constitutionalism (large C or small c).

Nonetheless, Waldron's and Richardson's central argument relates very nicely to constitutional practices common in the West. The constitutions in Canada, several European countries, and some states in this country give proper due to the legislature as a forum for constitutional deliberation. Constitutions in these countries are more detailed than the U.S. Constitution but easier to change through legislation and/or popular vote. In Hawaii, for example, the state constitution can be changed through initiatives proposed by the legislature and then ratified by a majority of voters in the next general election. This is the process by which Hawaii rejected same-sex marriage: The legislature in 1997 created a new institution (reciprocal beneficiaries) for same-sex couples and proposed a constitutional amendment to override a trial judge's decision that the exclusion of same-sex couples from marriage violated the Hawaii Constitution; by a 70-29% margin, the voters approved the constitutional amendment in November 1998.

The virtue of parliamentary models is that they engage both the legislature and the people in constitutional dialogue. (Nor does this approach render courts irrelevant. Their edicts are just not final.) Our concern here is that constitutional change comes too easily, and the advantages of deliberation *over time* are lost. The Hawaii same-sex marriage debate illustrates this problem. The quality of discourse was low, with opponents demonizing gay people as sexual predators and threats to the family. If the debate had been strung out, we believe the quality would have been higher, because people could have reflected on these charges.

The Constitutions of Vermont and Massachusetts are slightly different. To amend those constitutions, the legislature in two successive sessions must recommend a constitutional amendment, and then the voters must ratify it in the next general election. This kind of process has the advantages of popular as well as legislative involvement, without as many risks of speedy and perhaps ill-considered amendment of the foundational document. We admire this most of all but admit that it, too, lacks a feature that the modern administrative state has taught us to valorize—the input of agency experts.

The New Deal Perspective: Commitments to Economic and Non-Economic Security as well as Non-Interference. A social contract perspective emphasizes limits that a written Constitution places on the state. The standard account is most emphatic about this. It was willing to entertain (and reject) Carolyn Aiello's grievance only because she complained that the state unemployment plan discriminated against her without justification. American constitutionalism generally focuses on state action. Supreme Courts as diverse as the Marshall Court, the Waite Court, the Warren Court, and the Rehnquist Court have been in agreement about that and have strictly limited constitutional doctrine and discourse to state action. If Aiello's pregnancy had been the occasion for her employer to fire her, for her landlord to evict her, or for a restaurant to refuse her service, the standard account does not consider her grief a constitutional one. To the contrary, we do.

One lesson our nation has learned from the New Deal is that the state structures the economy, the environment, politics, and even the family. The state creates status as well as rules and crimes. In this process, it establishes duties and rights we all have vis-a-vis one another and the environment as well as vis-a-vis the state. Even during the minimalist state of the founding era, the common law—a form of state regulation—pervasively structured human affairs. It has never been the case in American history that the state has been anything but pervasive, but this fact was not widely recognized until after the New Deal replaced many of the common law baselines with statutory ones.

A further lesson of the New Deal is that a political community might take on responsibility for helping its citizens achieve their goals and fulfilling their human potential. The modern regulatory state might contribute to human flourishing by assuring citizens security under circumstances of illness or decline, creating and conveying useful information and social knowledge, providing common experiences, and so forth. So in the modern regulatory state, we should want to assure citizens more than the protection against arbitrary or oppressive state interference; we should want to assure what classic republican theory calls citizens' *security*, which we should read broadly to include economic as well as non-economic conditions for flourishing.

This has traditionally *not* been the project of American constitutionalism. Even the occasional exception proves the rule. To remedy the ongoing effects of educational apartheid, federal courts required once-segregated school districts not only to de-segregate (negative liberty), but also to restructure themselves in a way that assured integrated schools for all (positive liberty). For various reasons, this judicial experiment has been a failure in most school districts. After almost 40 years of federal judicial remediation, school districts remain segregated; even the original *Brown* districts have re-segregated. Where there has been actual integration, the agents of change have been Congress, the President and his Cabinet, and local legislatures. Indeed, recent developments make this clear. As a matter of Constitutional doctrine, the U.S. Supreme Court has been encouraging federal trial judges to give up long-held jurisdiction over school districts, even when they remain actually segregated by race. In the teeth of this Constitutional development, enforced by federal judges, many communities have engaged in their own constitutional activism, creating inter-district exchange programs that have modestly advanced the broader constitutional goals of actual integration and diversity. Surveys have suggested that students, parents, and teachers of all races positively value the experiences of these programs.

3. The Safety-Net constitution and a Model of Super-Statute (The Social Security Act of 1935)

In this chapter, we shall use the Social Security Act of 1935 as a case study from which we shall develop a model for super-statutes – how to recognize them and how they typically evolve. (The Social Security Act norm we take for granted today did not spring full-grown, like Athena from the brow of Zeus, but rather evolved between 1935 and 1950, by which point it had become axiomatic in our society. The norm then expanded to cover other safety-net concerns,

such as the Medicare Act of 1965, itself a super-statute. We shall draw from the rich political science literature on Social Security in writing this chapter.)

First, a super-statute seeks to introduce or consolidate a norm or principle as fundamental in our polity. The legislature does not enact such laws by accident or on the sly. Such laws are a response to a normative social movement or a popular demand for change, and the legislatures enacting them understand that they are propounding a fundamental normative commitment (often a new one) for the polity. The Social Security Act (SSA) illustrates this feature. Almost all the states in the 1920s adopted some form of old-age assistance, but came nowhere close to solving an important national problem, one that grew worse during the Great Depression. In extensive committee hearings in the late 1920s and early 1930s, Abraham Epstein and his allies demonstrated to Congress and ultimately President Roosevelt (who had worked on the issue as Governor of New York) that a national plan was necessary. Roosevelt ultimately proposed and Congress enacted a modest law that was significantly expanded in 1939.

Not all statutes that propound fundamental normative commitments end up being super-statutes, for in many cases the statutory principles do not have legs. Agencies and judges might retreat from or even ignore the norm, and the legislature might allow it to languish as popular support for strengthening it does not materialize. Our second criterion, therefore, is whether the new statutory principle or norm “sticks” in the public culture in a deep way, becoming foundational or axiomatic to our thinking. The super-statute that emerges from Congress is not a completed product. Its norm requires specification and elaboration from administrators and judges, whose work is then subject to meaningful scrutiny and correction by the legislature and the citizenry. The process of elaboration will alter the norm, and may well strengthen it, as has occurred with the SSA. Each super-statute has a post-enactment history that is more important than its enactment history.

Even in 1939, the social security idea was far from entrenched in our political culture. The politics by which normative entrenchment occurred, roughly between 1939 and 1954 (when President Eisenhower considered and publicly rejected proposals to dilute Social Security), was dominated by agency maneuvering and political strategy as much as by commitment to a principle that its supporters considered both humanitarian (it helped people lead flourishing lives) and practically useful (it solved a problem the market was not addressing). Entrenchment did *not* involve Big Showdowns between supporters and opponents, but instead involved ongoing normative debates within the government as well as outside it, experiments floated and sometimes accepted, and feedback suggesting what was flying and what was not practical. By 1954, the idea was so entrenched that even a GOP takeover of the federal government not only failed to dislodge it, but reaffirmed the norm. (A later GOP takeover, in 2001, mounted a more sustained, but no more successful, assault on the norm.)

Third, and finally, a successful super-statute will have an effect beyond its four corners—including an effect on large C Constitutionalism. We see this in the pregnancy discrimination example. In the wake of the triumph of the anti-discrimination norm in the PDA, even the conservative Roberts Court would be reluctant to reaffirm *Geduldig*. In the context of

Social Security, the original Act did occasion a Constitutional debate—and one that was rapidly and decisively settled in favor of the federal government’s power to insure workers’s old age through payroll and employer taxes. Previously suggested Constitutional limits on Congress’s Spending Clause power fell away almost completely, and with lasting effects on Constitutional law and Congress’s role in our society.

Our further claim is that super-statutes contribute to American constitutionalism in multiple ways. One, they are foci for norm expression, articulation, and elaboration over time. Two, they are legally enforceable norms, and so they generate private as well as public conversations. Three, they have a gravitational force outside their own legal ambits. Super-statutes usually affect constitutional discourse and doctrine in courts as well as in legislatures. Perhaps surprisingly, this claim can be illustrated with an example from the beginning of the American republic, which we pursue in the next chapter. Meanwhile, here is a model for how super-statutory norms evolve, a very different one from the *Marbury* model we criticized in Chapter 1.

Responding to a normative social movement and after careful and public deliberation,
Congress enacts a statute embodying a norm



Statute is implemented by judges and/or agencies, with feedback from Congress.
Implementation gives the norm specificity but also changes the norm



Normative conflict, where one institution seeks to narrow the statute and compromise the norm

- Legislature bows to pressure to create special interest exceptions
 - Court narrowly construes the statute
- Agency is captured by the regulated group or a special interest



- Public debate about the attempted narrowing
- Critical outrage, seeking to engage the public
 - Institutional opposition
 - Statutory narrowing may become an election issue



Responsive to the normative debate, the legislature or agency reaffirms or adapts the
core principle of the statute



More crises, especially as statute is adapted to ever newer circumstances

4. The Monetary constitution and the Politics of Entrenchment (The Federal Reserve Act of 1913)

You have the starting point for our chapter on the “Monetary constitution.” It is a political account for the evolution of the structure by which the federal government regulates the money supply and other financial matters in our society. This will hardly be a comprehensive study of the law of banking or even central banking, but is instead an effort to tie our themes to an economic subject matter and to deepen our themes thereby.

The entrenchment of the social security idea is a neat story, the basis for Chapter 3, but it is perhaps too much of a success story, as the administrators of this originally-quite-modest

statute enjoyed a string of political coups as they expanded the statute, won over the American people to the idea, and vanquished the business foes. The central bank idea had a much longer history at the national level and had a much rockier history, as told in the draft you have. So the politics of entrenchment are much messier, which is good. Unlike the anti-discrimination and social security norms explored in earlier chapters, the norms in this chapter are not entrenched through enactment of a super-statute that evolves quasi-continuously. The history of the United States Bank is broken in 1812, and of course the Bank itself withered away after Jackson's attack on it in the 1830s.

Because the inflation-control purpose of the Federal Reserve Act is often going to be unpopular in the short term, the normative entrenchment story here is particularly interesting. Unlike social security, whose political entrenchment rests in large part on its short-term as well as long-term popularity, the inflation control norm is at odds with short-term political pressures, which the federal banking laws resist through institutional design and structure (a radically independent agency staffed largely with bankers or economists acceptable to the banking community).

Given the long and heterogeneous history of federal banking law, it is striking how supine the Constitution has been—repeatedly acquiescing in whatever experiment the political process found useful in the different eras. So the dearth of formal Constitutional challenges to the First Bank, the unsuccessful challenge to the Second Bank, the Supreme Court's volte-face in the Legal Tender Cases, and its timidity even in the early New Deal are quite remarkable examples of how the Large "C" Constitution morphs to fit the Monetary constitution.

The law creating the first Bank of the United States was adopted only after a great normative debate: Hamilton and his allies maintained that a federal bank was necessary for the orderly operation of the government and to foster commerce and industry in the new republic, while Jefferson and his allies maintained that the bank was ultra vires the national government and contrary to the arcadian republic of small farmers and shopkeepers that they envisioned. The arguments against the Bank's constitutionality were those of normal social contractarian interpretation: Because a federal bank would go well beyond the common law and would be inconsistent with state statutes, such a power needed to be explicitly named in Article I, Section 8's comprehensive listing of national powers, which of course it was not. Defending the Bank, Hamilton started from a different interpretive baseline: A fundamental project of American constitutionalism is to create institutions that facilitate the operation of national commerce, banking, and economy. In light of *that* fundamental commitment, the written Constitution should not be interpreted stingily or even literally to thwart the creation of a national bank. Hamilton persuaded the President that his vision was correct, and a similar debate in Congress culminated in the creation of the Bank of the United States in 1791.

The Bank debate prefigured an enduring contrast between laws that have dramatically shifted national policy or norms and those which have followed or marginally altered common law and other well-trod furrows. Most proposals for dramatic shifts have in fact been defeated, but Hamilton persuaded the President and Congress to support his plan for the Bank of the

United States, which operated successfully for more than two generations. The law met the first criterion for super-statutes in setting an important national policy, and the second for enduring (albeit not for as long as most of the other super-statutes discussed in this book). The national bank policy stuck in public culture in ways other Hamiltonian policies did not. When the first bank act expired in 1815, Congress voted to renew the institution, but President Madison vetoed the law, for practical reasons; even though he had vigorously opposed the Bank for constitutional reasons in 1791, Madison in 1815 accepted its legitimacy but not its necessity. He reconsidered the latter conclusion in the next year, and the second Bank of the United States was created in 1816, at Madison's own urging. The most skeptical Framer had become a convert to that part of the Hamiltonian program.

Whereas Madison and Jefferson had maintained that the Bank idea must give way to the Constitution, it was ultimately the Constitution which gave way to the Bank. By the time the issue finally reached the U.S. Supreme Court, in *McCulloch v. Maryland* (1819), Chief Justice John Marshall was able to start his opinion with the observation that decades of experience with and acquiescence in the Bank of the United States gave it a heightened presumption of constitutionality. Not only did Marshall then proceed to sustain the Bank against constitutional objections, but he set forth the most expansive theory for interpreting the Constitution ever penned by a U.S. Supreme Court Justice. After broadly construing Article I, Section 8, along the purposive and liberal lines originally suggested by Hamilton, Marshall then invalidated Maryland's effort to tax the bank as unconstitutional. Presumably, the latter holding represented a judgment that state taxation was inconsistent with the efficient operation of a federally chartered bank – but that was a judgment not made on the face of the statute and which Marshall teased out of the nature of things.

In *Osborn v. Bank of the United States*, Marshall created out of the Bank's authorizing statute an implied grant of federal jurisdiction over lawsuits in which the Bank was a party. This was not only a dynamic construction of the statute, which only said that the Bank could "sue or be sued" in state or federal circuit courts, but was a preface to another breathtaking interpretation of the Constitution. Marshall construed Article III's "arising under" grant of jurisdiction to extend so far as to include cases where federal law is "an ingredient" of the cause of action. All of this was extraordinary and amounted to a dramatic judicial extension of both the statute and the Constitution. Yet, as Justice Johnson's (legally cogent) dissent wearily observed, "I have very little doubt that the public mind will be easily reconciled to the decision of the Court here rendered * * *. The Bank of the United States, is now identified with the administration of the national government. * * * [S]erious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned." (Yet in the next decade the Second Bank was dealt a fatal blow by the Jackson Administration.)

5. The constitution of the Marketplace and Statutes That Are Not Super (The National Recovery Act of 1935)

Not all laws expressing fundamental commitments will become super-statutes. Recall that we pose the three criteria that distinguish super-statutes from ordinary statutes:

1. Super-statutes establish fundamental values.
2. Super-statutes satisfy more process requirements than ordinary statutes (because of the serial deliberative processes by which agencies, courts and the people themselves come to accept and rely upon them).
3. Super-statutes are stable, especially if they establish a fundamental value that satisfies the process requirement in 2.

Seeing things this way allows us to speak to whether, for example, the first and second Bank Acts were super-statutes (or a single super-statute). One can object that the Bank Acts (1) did not establish a fundamental value, or (2) did not derive popular support through a public deliberative process over time, or (3) ultimately proved not to be a robust contribution to small c constitutionalism. We are relatively agnostic as to whether the Bank Acts meet all three of these requirements, though on balance we believe that they do.

There are some good examples of super-statutes in the constitution of the Marketplace as well. The best example—and a classic super-statute in general—is the Sherman Anti-Trust Act of 1890. Another example is the Bankruptcy Act of 1978 (and previous incarnations). We shall examine the Sherman Act’s interesting history, in a brief and stylized way, and then turn to a few examples of important statutes that are, for various reasons, not super-statutes.

Most laws reported in the Statutes at Large are easy calls, because they represent policy decisions and compromises needed to keep the government operating in the normal way (especially appropriations measures) or to resolve local or short-term problems (most other statutes enacted by Congress). Thus, they do not meet our first, and most important, requirement of fundamental values. They are, at best, *pseudo super-statutes*. The Federal Arbitration Act of 1926 is an example. This statute trumped the common law procedural rule against enforcing compulsory arbitration clauses, and its principle has stuck in our *legal* culture. Specifically, the Burger and Rehnquist Courts treat the FAA’s deference to private dispute resolution principle as axiomatic. But we are doubtful that the FAA’s principle has been the situs of enough political conflict to have risen to the level of super-statutedom. It is what we would call a “pseudo super-statute.” Recent Supreme Court interpretations imposing arbitration on American citizens wanting their day in court may yet produce a political showdown where the statutory principle triumphs, but until that happens we are reluctant to find the FAA to be a super-statute.

Other statutes meet the first requirement of a super-statute (they are normatively ambitious) but do not stick, often because they meet resistance from judges or administrators and do not receive the popular reinforcement that save super-statutes from such resistance. These *putative super-statutes* may be killed at birth (and so *stillborn*) or over time (and are *failed*

super-statutes). The National Recovery Act of 1935 trumped the common law freedom of contract with a principle of industry-developed regulatory norms. It was a linchpin of the New Deal and was adopted with strong support from Congress and the President (himself elected by a large majority in a critical, realigning election). But the NRA was decidedly not a super-statute, because the Supreme Court killed it at birth, unanimously striking it down in *Schechter Poultry*, and unlike the phoenix this statutory idea never resurfaced. So this was a “stillborn super-statute.” A recent example of this phenomenon was the Religious Freedom Restoration Act of 1993, which sought to override the constitutional baseline that the state can adopt neutral rules having incidental and unintended burdens on religious free exercise. The Supreme Court struck down the law on federalism grounds in *City of Boerne v. Flores* (1997), and its proponents have been unable to muster public excitement to override or resist the Court.

An example of a failed super-statute is the Americans with Disabilities Act of 1990. Adopted by lopsided bipartisan majorities and enthusiastically signed by the first President Bush, this statute trumped the common law freedom of contract with a principle of non-discrimination on the basis of disability. More important, the ADA rested upon a re-conception of the non-discrimination idea, as entailing accommodation of disability. The judiciary has been exceedingly stingy in construing and applying this potentially revolutionary statute. Since 1991, a Supreme Court that has been liberal in applying Title VII’s sex discrimination protections and new race discrimination rules, has been very conservative (often unanimously so) in applying the ADA. The Court’s opinion striking down the ADA’s application to the states denigrated the statute’s asserted public value. Disability rights advocates have protested these decisions, but without any significant political effect. The ADA is an important statute, but until it shows more normative legs it is far from being a super-statute. It may become an example of a “failed super-statute,” one with a promising birth but unimpressive life cycle.

6. The Workplace constitution, Deep Compromise, and American constitutionalism (Title VII of the Civil Rights Act of 1964)

Title VII of the Civil Rights Act of 1964 evolved as it was applied to issues such as pregnancy-based discrimination, which was not discussed in the elaborate legislative history of the law. Indeed, there was very little public discussion of Title VII’s bar to employment discrimination “because of * * * sex,” which had been added in an odd procedural gambit by a civil rights opponent in the House (Judge Smith of Virginia). It is not inevitable that discrimination because of sex includes pregnancy-based discrimination. An opinion letter from the EEOC General Counsel opined on October 17, 1966, that employer exclusion of pregnancy from disability programs was not sex discrimination illegal under Title VII.

The Johnson Administration EEOC was notoriously uninterested in enforcing the sex discrimination bar, and that reluctance directly stimulated feminist political activism. The National Organization of Women was formed in 1966 by feminists who walked out of a government-sponsored conference on employment discrimination to protest the EEOC’s lack of receptivity to their concerns. NOW and other feminist groups insisted that open discrimination

against women was only part of their problems in the workplace; structural barriers to women's employment opportunities were just as serious a problem. Feminists backed up their analysis with examples and studies—and once the agency started listening to women's stories of genuine employment disadvantage as a result of pregnancy rules, it rethought its interpretation. In 1972, the EEOC issued a guideline to employers which took the position that pregnancy-based workplace exclusions or discriminations violate Title VII. The agency was in the process of rethinking the 1964 norm: Sex discrimination entails policies that affect only women, even if they do not formally target women per se. The feminist position also rejected employer claims that disability or health insurance policies excluding pregnancy are sex discriminations even if the policies on the whole generate as many monetary benefits to women as they do to men. (This was the employer's main defense in *Gilbert*.)

These are all issues worth debating in a public manner—and the debate was more satisfyingly normative in the legislative process than in the judicial process. The Supreme Court in *Geduldig* and *Gilbert* agreed with the employer perspective, but with virtually no reasoning about the non-discrimination norm and no apparent recognition that there were two ways of reading that norm. The Justices gave no recognition to feminist claims that pregnancy-based discrimination marginalized women in the workplace and impeded their integration. Between 1976 and 1978, Congress gave both perspectives full consideration and noticed that many public as well as private employers agreed with Williams and her allies. The PDA was the result. It not only confirmed the EEOC's 1972 guideline, but gave it much greater legitimacy because the American people and the media got involved and their elected representatives chose the feminist version of the norm after full debate.

At precisely the time the non-discrimination norm was being elaborated in the PDA, Catharine MacKinnon was putting the finishing touches on her book, *Sexual Harassment of Working Women* (1979), where she argued that another way women are denied workplace opportunities was that they are pervasively harassed. Although ridiculed and dismissed as too radical, MacKinnon's elaboration of the non-discrimination norm had enormous resonance with people who were familiar with patterns of harassment when women entered workplaces, especially when they did so in token numbers. Sexual harassment was outrageous from a feminist point of view, but also was indefensible from the point of view of the managerial workplace. In 1980, the EEOC adopted MacKinnon's framework as the basis of guidelines for employer liability under Title VII if supervisors or co-workers engage in sexual harassment or create a hostile workplace.

The EEOC's Sexual Harassment Guidelines were a different kind of norm elaboration than the PDA and the 1972 guideline had been. As before, the core instances of discrimination were being expanded to consider the effect of workplace practices on women's opportunities. Unlike the earlier elaboration, the 1980 guidelines put employers on notice that their own inaction or lack of a policy could subject them to liability for acts of supervisors or co-workers. (The pregnancy cases involved affirmative employer policies or practices.) The 1980 guidelines also insisted that the non-discrimination norm had to be concerned about the sexualized workplace. Like the pregnancy guideline, the sexual harassment guidelines revealed

that women's physical differences from men, their great virtue from a traditionalist point of view, was a source of disadvantage and marginalization in the modern Weberian workplace. Both legal elaborations required that the non-discrimination norm address issues of sexuality and gender role—and that dialectic committed the statutory principle to a fascinating political and normative evolution.

As before, these statutory interpretive issues went to the Supreme Court, which handled them with much greater normative awareness than it had shown in the pregnancy cases. In *Vinson v. Meritor* (1986), the Rehnquist Court upheld the EEOC's guidelines as a defensible application of Title VII. Specifically, the Court held that quid pro quo harassment of a female employee by a male supervisor was a violation of the non-discrimination norm. It is notable that a very conservative and text-oriented Supreme Court followed the liberal and dynamically interpreting EEOC when it ratified, at least in part, the 1980 Guidelines. It is also notable that when Congress rebuffed the Court on its conservative interpretations of Title VII in race discrimination cases, both popular and legislative discussions supported the EEOC's and the Court's dynamicism in sexual harassment law. Not surprisingly, the agency and the courts continued the process.

In *Burlington Industries, Inc. v. Ellerth* (1998), the issue was what responsibility an employer has under Title VII for a supervisor's unwelcome sexual advances and threats of retaliation. If Title VII were a criminal statute, the employer would not be liable for such advances absent a more specific scienter showing. If Title VII were an ordinary statute, it is not clear that courts should fashion detailed rules for figuring out when supervisor advances (unknown to the employer) constitute "discrimination * * * because of * * * sex"; it would be well within our legal process tradition for the Court to insist that any such rules be fashioned by Congress. It is notable that no Justice in *Ellerth* took this position; all nine Justices – none of whom is an open activist – were willing to fashion specific rules, common law style, to guide the agency, courts, and attorneys to determine when the employer should be liable. The debate within the Court was entirely over what detailed set of rules the judiciary should read into the open-textured statutory text. Justice Kennedy's opinion for the Court came up with some relatively tough rules: when the harassing supervisor visits a tangible employment action on the employee, both the policy of Title VII and principles of agency render the employer vicariously liable; when there is no tangible employment consequence, Title VII policies suggest there should sometimes be liability for the employer, subject to a defense that the employer took due care to prevent harassment (such as through an anti-harassment policy and complaint procedure) and the employee failed to take advantage of the employer's internal protections.

Although the rules developed by Justice Kennedy are not the most liberal, pro-plaintiff rules the Court could have derived, choosing such rules is not entailed by our theory. Conservative judges and commentators are certainly correct to point out that no principle must be pursued at any cost and even the most important public policy runs up against others that set limits on it. These kinds of trade-offs and judgments have been the life of the common law. Thus, our super-statute rule of construction requires that interpreters develop the statute, common law style, to carry out its robust principle and purposes, but cognizant of cross-cutting

costs and countervailing policies. *Ellerth* is a classic case for this kind of reasoning.

* * *

Super-statutes such as those we examine in earlier chapters have reconfigured public law in the United States. This reconfiguration has been so pervasive as to justify our calling the resulting model, a *new American constitutionalism*. While we call this conception of constitutionalism “new,” it certainly has distinguished antecedents. Justice Harlan Fiske Stone and other early legal process thinkers understood statutes as potential sources of principle and public values. They did not, however, tie this idea to a robust constitutionalism with institutional legitimacy and capacity advantages over the standard account. Political scientists and sociologists have demonstrated that social movements often, perhaps typically, seek statutory as well as judicial recognition of their norms. These lines of scholarship have suggested concrete ways in which legislatures can be not only sources of principle, but also fora for fundamental normative transformation. Professors Jerry Mashaw and Henry Richardson have suggested ways in which administrative agencies can and ought to be fora where important public values are not only applied to concrete issues and facts, but also where they are sharpened, refined, and even transformed.

Our project is, in part, a drawing together of these different strands of thought to identify a new conception of constitutionalism. Under our account, super-statutes and debate about their values inform fundamental law. Legislators, executive officials, and popular social movements drive the evolution of public law more than judges do. Like the standard account, this new account is text-based and documentary, but the constitutional canon, the sacred text is not limited to the Constitution. Instead, it includes statutes as well as their penumbras. The institutional focus of our new American constitutionalism is legislatures and agencies, as well as courts.

There is a deeper relationship between super-statutory and Constitutional law in our country, and it has to do with the way the large C Constitution changes. Compared with the constitutions of other nations and of our own states, the U.S. Constitution is relatively short, old, and hard to change through the formal Article V process. These three facts about the Constitution have supported its updating through dynamic judicial interpretation of its provisions. This perception of judicial updating has called forth thousands of articles and books justifying or indicting or seeking to define the limits of judicial review. Professor James Bradley Thayer’s classic criticism of judicial review is that it supplants or drains energy from popular (We the People) participation in governance. This criticism continues to have bite, perhaps now more than before.

Many theorists have tackled the problem of reconciling the Constitution’s meta-principle of popular sovereignty with the apparent reality of extensive and hard-to-check constitutional lawmaking by unelected judges who enjoy life tenure, but they have done so within the standard account, which has tended to defeat such projects. A few authors are breaking through the standard account to think more usefully about the relationship of constitutional norms and political mobilization.

In a series of books collectively entitled *We the People*, Bruce Ackerman maintains that Article V's rule of recognition is not necessary to change the Constitution even in a formal sense. Really fundamental constitutional enactments can occur outside the Article V procedures in special periods – *constitutional moments* – when the whole people are engaged and attentive to the establishment of a new constitutional ordering. For Ackerman, what is crucial is not a detailed set of institutional requirements, but the purpose served by such requirements: that the people, responding to a crisis pitting one institution against others, are engaged actively and purposively in re-shaping the constitutional order. Whether or not they meet the Article V requirements, fundamental constitutional moments, according to Ackerman's theory, ought to attract great deference from courts because they effect a change in the constitutional text, guided by deeply held principles of political morality, and because they are put in place deliberative by an aroused and serious public. Note how Ackerman's theory is responsive to some of the problems we identified with the standard account's focus on constitutional text definitively interpreted by judges.

An extension of Ackerman's theory would be to understand some constitutional law to have been created by what one might, playfully, call *super-statutory moments*. Thus, the Civil Rights Act can be read as representing a show-down between a normatively engaged political coalition of civil rights reformers and their allies in Congress, versus the determined southern Democrats in the Senate, who had repeatedly blocked strong civil rights legislation during the Eisenhower Administration. The election of 1960 offered proponents an opportunity to break this impasse, as it brought to power the Kennedy-Johnson Administration, which pushed hard for civil rights legislation. In 1963-64, the debate over the civil rights bill engaged the entire country, with religious, business, and union groups joining civil rights groups in pressing for the adoption of this important legislation. The determined southern opposition was decisively defeated by a coalition assembled by President Lyndon Johnson and Senate Majority Whip Hubert Humphrey. In the election that immediately followed in 1964, Johnson (with Humphrey as his running mate) won a great landslide over a Republican who had voted against the Act for reasons of "states' rights." This scenario roughly follows Ackerman's formula for *higher lawmaking*, whereby the people are engaged in constitutional moments.¹ We the People had arguably endorsed civil rights over states' rights – a principle that has altered policy as well as constitutional discourse ever since. 1964 might be regarded as a super-statutory moment permanently altering the normative foundations of public discourse.

¹ Ackerman's formula for constitutional moments is this: Interbranch Impasse → Decisive Election → Reformist Challenge to Conservative Branch → Switch in Time. See Ackerman, *Foundations* 49-50. The Civil Rights Act as a super-statutory moment might look like this: Interbranch Impasse on civil rights legislation during the Eisenhower Administration, with the Senate blocking it → Decisive Election of Kennedy-Johnson in 1960 → Kennedy-Johnson Reformist Challenge to Conservative Branch (Senate), with 1963-64 civil rights bill, greeted by the public with strong and growing support → Switch in Time, when the Senate finally breaks the Southern filibuster in 1964.

The idea of super-statutory moments along Ackermanian lines is a neat project, but it is not exactly our project. Our new American constitutionalism motored by super-statutes idea is broader. Descriptively, the main difference between a concept of super-statutory moments (our imaginative adaptation of Ackerman) and dynamically applied super-statutes (the approach we endorse) is that the latter acquire their normative force through a series of public confrontations and debates over time and not through a stylized dramatic confrontation. Thus, the Civil Rights Act of 1964, which was enacted in a particularly dramatic and publicly absorbing way, acquired only some of its normative force in 1964. The Act immediately transformed public culture in some ways but not in others. So there was indeed a great national debate in 1963-64 that settled many issues of race discrimination—but the debate settled virtually no issues involving sex discrimination. Only Title VII prohibited sex discrimination, and then only by an adventitious confluence of interest between southern opponents and feminist supporters of the civil rights bill. There was little public discussion as to what the prohibition would entail.

So the Civil Rights Act of 1964 did little to transform the workplace for women, in part because sex discrimination issues played almost no role in the great public debate surrounding that super-statutory moment of 1964. But the fact that Title VII did prohibit sex discrimination provided a focus and a legal forum for feminists to develop the contours of a robust norm of sex non-discrimination. As we have already seen in this book, feminists like Wendy Williams and Catharine MacKinnon, working within Title VII, opened a series of public debates and confrontations in the 1970s and 1980s. One might consider the PDA a super-statutory moment, but the 1980 Sexual Harassment Guidelines were not such a moment. They were rather more consensual than conflictual: Informed by feminist work, the EEOC developed the Guidelines; Congress was aware of them and left them alone with some degree of positive acquiescence or even approval; the Supreme Court endorsed them as law in 1986. All three branches of government were working together on this one. This is rather amazing in light of the way judges and policymakers dismissed women's concerns in the 1970s, and the major changes in American life that sexual harassment law has occasioned.

In any event, the important point is not some stylized model which tries to parallel Article V. The important point is that serious feminist thinkers and their critics advanced ideas and norms as a framework for implementing the sex discrimination bar in Title VII. The EEOC and Congress were important fora for deliberation about these ideas, and We the People were continuously involved rather than mobilized only in one politically charged moment. The result was a public consensus that the anti-discrimination principle ought to have bite for women in the workplace – and that the bite entailed protections against discrimination on the basis of pregnancy or through sexual harassment in the workplace. The super-statute evolved through a series of debates and confrontations.

Like Ackerman, we understand lasting public norms to grow out of conflict (the 1978 PDA). Unlike Ackerman, we understand lasting public norms to form under conditions of consensus, too (the 1980 Sexual Harassment Guidelines). Most unlike his theory, ours emphasizes evolution rather than revolution. A super-statute is not a moment, nor is it even a series of moments. Rather, it is an ongoing process of deliberation, consensus-building as to

some issues, conflict as to other issues—and resolution of conflict by resort to popular feedback (again, often over time).

But, again like Ackerman, we think that this process of norm-elaboration, occurring outside the Article V framework, creates fundamental law. Return to Carolyn Aiello’s case against Gilbert Geduldig. Long ago, California repealed the pregnancy discrimination in its unemployment compensation program, and the idea is so discredited that other states have followed suit, while none has accepted the Supreme Court’s invitation to discriminate along these lines. But assume that the Governor of State X proposes such a discrimination as part of a budget-balancing law. Legislators as well as citizens would inevitably, and we think quite properly, object that the discrimination violates fundamental public norms and is, in effect, unconstitutional. The Governor might respond that *Geduldig v. Aiello* upheld such a discrimination, but citizens would easily respond that the discrimination surely violates the state constitution. If they were advised by savvy law professors, they would also say, “In light of the PDA and the Court’s aggressive sex discrimination jurisprudence after 1974, the Supreme Court would not follow *Geduldig* today.” We think the Justices would not—they would overrule the 1974 precedent quicker than you can say “*Bowers v. Hardwick* was overruled by *Lawrence v. Texas*.”

Indeed, if the Justices in our hypothetical (and most unlikely) scenario did *not* overrule *Geduldig v. Aiello*, there would be hell to pay (just as they learned after *Hardwick*). Just as gay rights advocates delivered a constant drumbeat of horror stories and criticisms to discredit *Hardwick*, feminists would pound away at any reaffirmance of *Geduldig*. And some of the most ardent critics would be middle-aged guys such as ourselves. The critics would make their case to an overwhelmingly receptive public audience. Most of the states would join them. Big business would applaud them and reject cost-benefit arguments for such policies. Social scientists would discredit the empirical bases for the policy. Virtually no major public figure would dare defend the Court. Many would complain that the Justices are not doing their job, are biased against women (“they just don’t get it”), and so forth. Once fundamental law has shifted, even the Supreme Court must follow.

* * *

Most of the foregoing chapters reflected our *descriptive* theory of how super-statutes evolve and have contributed to a new American constitutionalism. Chapter 1 set forth a *prescriptive* case for why the standard account is insufficient and simultaneously provides reasons for accepting the new American constitutionalism as a good way for fundamental law to develop in the new millennium. This Chapter elaborates on the normative case and considers a few objections.

Super-statutes are a better way for fundamental public law to evolve than formal constitutional amendments, constitutional moments, or unconstrained judicial review. Formal constitutional amendments are impractical and hard to accomplish, for reasons that Professor David Strauss has set forth; constitutional moments come too infrequently as well and leave

judges unconstrained in the interim; unconstrained judicial review is both an illegitimate and institutionally inferior way to advance the nation's fundamental law. Stated affirmatively, the new American constitutionalism is democratic and therefore legitimate, draws productively upon the normative capacity of the legislature, and solves the Article V problem (the Constitution is too hard to amend under the existing Article V structure) without resorting to judicial activism.

Constitutional Amendments, Judicial Activism, and Super-Statutes. The structure of our short, old, and hard-to-amend Constitution makes its dynamic interpretation inevitable—which runs the risk of a jurocracy, because it leaves judges unconstrained as they interpret the many open-textured provisions of the Constitution. Furthermore, it is super-statutes instead of constitutional moments that save us from a gerontocracy of judges and best replicate the legitimacy-enhancing features of Article V. Consider an example.

Feminists' struggle to add the Equal Rights Amendment to the Constitution was a great normative campaign that fell short of the 38 states required under Article V. Yet the Supreme Court has since the 1970s interpreted the Equal Protection Clause to strike down most state sex discriminations. While the ERA's failure left a yawning gap in the Constitution, the Court's activism might have been an illegitimate way to fill that gap. The best response to this conundrum is our theory, which was the basis for the Court's only articulation for heightened scrutiny of sex-based classifications. Justice Brennan's plurality opinion in *Frontiero v. Weinberger* (1973), justified heightened scrutiny of sex discriminations in part by analogy to the race cases and in part by the fact that Congress had strongly endorsed such a norm in a series of powerful enactments—the Equal Pay Act, Title VII, Title IX, and the ERA, all of which passed Congress by larger than two-thirds majorities required by Article V.

So judicial review of state sex discriminations was carefully tied to deliberations and endorsements of the non-discrimination norm in Congress between 1963 and 1972. This gave the Court greater confidence that the norm was one it should give constitutional teeth. And the doctrine that state sex discriminations must be substantially related to important state interests, which they rarely are, is one that has proven acceptable to the nation's public culture. (The Court's only misstep came in *Geduldig*, where there was no congressional guidepost—though Congress speedily created one when it enacted the PDA four years later.)

Contrast the Court's successful activism in the sex discrimination cases with its less successful activism in the abortion cases. In retrospect, *Roe v. Wade*'s broad pro-choice rule was handed down too early. Evidence of its normative prematurity was the dearth of supporting signals from Congress, in contrast to *Frontiero*. (Indeed, Congress had in 1970 adopted an abortion-regulatory statute for the District of Columbia; thus, its main signal was one that went against the broad rule of *Roe*.) The illegitimacy and institutional clumsiness of *Roe v. Wade* have a direct connection, in our view, with the lack of deliberation about abortion deregulation at the national level. When the Court strikes out wholly on its own, without support from Congress, its efficacy as well as legitimacy will be limited. The normative conversation will immediately become more contentious, and the nation will suffer.

Chapter 1's analytical critique of the standard account helps explain why the *Frontiero* line of fundamental law has been more successful than the *Roe v. Wade* line. Because the Court was following and indeed synthesizing congressional super-statutory enactments in *Frontiero*, that case's non-discrimination principle was much more likely to have normative legs than *Roe v. Wade*'s liberty of abortion choice principle. There had been a deeper deliberation as to non-discrimination than as to abortion choice, and the legitimacy of the Court's action was vastly greater because it followed the actions of the national legislature, which was theoretically accountable and actually responsive to popular thinking when it passed Title VII, Title IX, and the ERA.

One twist gives us some pause at this point. If the Supreme Court had refrained from scrutinizing judicial review of sex discriminations in the 1970s, a modified version of the ERA would surely have resurfaced and might well have been adopted. This is the best argument against *Frontiero* and subsequent sex discrimination cases: Heightened scrutiny would have been more legitimate under the ERA than under the Equal Protection Clause, even if the latter is guided by congressional signals. Relatedly, the combination of the failed ERA and heightened scrutiny anyway has been devastating for Article V, for it signals future norm entrepreneurs that Article V is not only hard to meet but unnecessary to achieve changes in fundamental law. Not coincidentally, social movements have largely abandoned Article V and have focused their energies on judicial review and influencing the choice of judges.

Replicating the Legitimizing Features of Article V. The decline of the precise mechanism entailed in Article V may not doom legitimate changes in fundamental law. Article V does not require a popular vote on constitutional amendments, and so the legitimacy of changes to the Constitution is not directly popular. Because amendments must normally be adopted by super-majorities in Congress and then ratified by three-quarters of the states, they entail a lengthy deliberative process, and their animating principles must be broadly acceptable to different kinds of states or regions. That lengthy deliberative process and the requirement of a robust principle give constitutional amendments a legitimacy that both augments and transcends the rule of recognition available under Article V. We would maintain that super-statutes of the sort noted in *Frontiero* largely replicate the advantages of the Article V structure, for super-statutes require deliberation in multiple bodies with multiple constituencies over a period of several years (and sometimes decades).

The foregoing argument is directly inspired by Ackerman's constitutional moments theory, which was the first to exploit the legitimacy-enhancing features of Article V (deliberation about an important principle) and to propose its operation without the now-unworkable Article V apparatus. Notwithstanding its genius, Ackerman's theory may in fact sacrifice popular sovereignty for the sake of constitutional updating. While there have been twenty-seven formal amendments of the Constitution, Ackerman identifies only three constitutional moments. In Ackerman's world, it is not clear how judges are constrained during the long periods between constitutional moments. The primary constraint seems to be the moral obligation of judges to engage in a process of *synthesis*, by which judges reconcile earlier versions of the Constitution (the Founding, Reconstruction) with the changes wrought by the most recent constitutional

moment (the New Deal and the Switch in Time). This methodology has not struck neutral observers such as ourselves as a very constraining one. If that is the case, Ackermanian judges can govern relatively unchecked for long periods of time, with no reason to fear popular intervention. And, remember, an Ackermanian judge is sure to be activist—in contrast to the Thayerite (non-activist) judge assumed by Article V.

The tension between the desirability of normative updating and the need for it to be legitimate along lines of popular sovereignty is a pervasive problem for modern representative democracies. The United States is unusual in requiring constitutional change to traverse so many potential roadblocks. Recall from Chapter 2 that constitutional lawmaking in Europe does not require either super-majorities or the assent of other governmental institutions or the people through referenda, but only the repeated agreement by successive parliaments. The normative advantage of such lawmaking is that it is not so difficult that it cannot be accomplished in the face of strong objection, yet the procedures (long deliberative history, repeated endorsement by differently constituted legislatures, multiple opportunities for critique and public feedback) vest its result with a great deal of legitimacy. This notion de-emphasizes the “momentary” aspect of constitutional or quasi-constitutional lawmaking. One reason for such a stance is that critical moments are as likely to be temporary and governed by passions as they are to be lasting and ruled by reason. Fundamental principles requiring constitutional protection are more likely to be discovered when the political process takes a more sober and reflective aspect. The point is that constitutional legislation is both principled and deliberative, even if it is not produced in a defined historical moment involving an institutional show-down.

To the extent that such iterated legislation also reflects (or comes to reflect) a fundamental principle, it will sometimes be the functional equivalent of a super-statute. Correlatively, the super-statute idea shares the virtues of this kind of constitutional lawmaking: It is both a feasible and legitimate way for new fundamental principles to work their way into public law. A super-statute embodies a fundamental principle that has a claim to be deeply embedded in our national aspirations. One test of a super-statute is that, whatever the circumstances of its enactment, it instantiates a principle that does pass the test of time: it works, it appeals to multiple generations, it sticks to the public culture.

Accordingly, super-statutes also satisfy a strong deliberative test, and a different kind of test from a statutory moments kind of model. Typically super-statutes are extensively relied on by the people and are repeatedly visited and endorsed by legislative, administrative, and judicial institutions in response to the actions taken by private as well as public actors. In that respect, super-statutes are not only expressions of deeply held principles, but are also shaped by the realities of administrative implementation and in light of repeated litigation and new legislation. So the general principle embodied in a super-statutory regime is revisited and crafted in light of experience. Such experience is necessary to fit the super-statute into the broader landscape of political principles reflected in the constitutional order. Also, because super-statutes grow and evolve through institutional conflicts, there is often a charged normative debate that makes the statute’s principle transparent to the populace and draws many citizens into the debate.

The absence of super-majoritarian requirements and the lack of formal requirements of state government approval are part of the attraction of the super-statute. Super-statutes reflect deliberative majority judgments in a way that counter-majoritarian constitutional law cannot. In the face of a determined and stable majority, small geographically concentrated minorities are not accorded the veto right they are given by Article V procedures.² Super-statutes have a claim to expression the considered judgment of the nation as a whole. While according quasi-constitutional status to expressions of majority will does risk injury to disadvantaged minorities, the fact that Congress, the Court, and agencies repeatedly revisit and revise the super-statutes in light of constitutional protections ensures that minority rights will not be lightly overridden in a super-statutory regime. But, in the end, if a super-statutory regime regularly violates constitutionally protected minority rights, it can be overturned by Congress or the courts.

In Summary . . . We have put forward a different model of deliberation than is found either in standard constitutional theory or in Ackerman. Our model emphasizes dispassionate consideration of circumstances of injustice, and careful, experimental attempts to ameliorate such circumstances. Such efforts at improvement need to draw from all the strengths of our democracy. We need the thoughtfulness of judges, the enthusiasm of interest groups, the policy expertise of agencies, and the moral concern (and sometimes outrage) of the people and their representatives. How these are to be integrated is a matter of meta-constitutional choice. Our constitution, at least as it is read by most lawyers, imposes a kind of rigid hierarchical mode of integration – the people, their representatives, and their delegates make policy under the shadow of the Constitution. The problem with such a model is the Platonic one: The Constitution is interpreted by judges who have powerful reasons to interpret it in terms of their own preferences and predilections. Given the uneven and glacial pace at which the Court’s personnel changes, the rigidity of such a model is obvious, as is the tectonic nature of ensuing constitutional change.

We think that this model is not very attractive. It leaves the people and their representatives in a subordinate role and discourages them from taking seriously their role as full citizens – as agents who are responsible for the evils and injustices that persist among us. And it puts judges in a position for which no one is well suited: it encourages them, falsely, to see

² Consider this thought experiment. Could the Civil Rights Act’s anti-discrimination principle have been adopted by a constitutional amendment? Almost inconceivable under Article V: the eleven states of the former Confederacy would never have ratified because their societies were built upon apartheid; it is doubtful many of the six border states, all with either apartheid laws or local practices, would have ratified; other states, such as those in the west or plains, might not have ratified for reasons of apathy or ambivalence. As the experience with the Equal Rights Amendment (which only applied to state action) teaches us, even the anti-discrimination norm is hard to add to the Constitution. A feature of Article V is that it prevents the Constitution from being amended over the intense objection of one region of the country. If one is worried about a region’s commitment to the federal arrangement, this is a genuine concern with our conception as well as Ackerman’s and others. If one is more worried about orderly change in fundamental law, this is a sticking point.

themselves as privileged guardians of a received constitutional order. They are encouraged to mask their influence on policy as the exercise of guardianship of a received sacred order and not to see themselves as citizens, no different really than the rest of us, who are privileged by their abilities and luck to occupy a valuable vantage point in the policy making process. The judicial role is, indeed, critical to how things go but not because of who judges are or because the people cannot be trusted to govern themselves. Rather, the value that judges bring is that they get to see how it is that law (super-statutes) intersects with the lives of ordinary people and, from that perspective, to work to develop and refine the super-statute in light of such experience. Judges can make policy more precise, more intelligent, and more just. But they do not do these things by themselves.

7. The Green constitution and the Dynamic Interpretation of Super-Statutes (The Endangered Species Act of 1973)

Because it is derived from the experience of the modern regulatory state, the implications of the new American constitutionalism are already working their way through American public law. We have already suggested that super-statutes ought to be, and usually are, applied evolutively to carry out their purposes and to implement their principles. We shall illustrate this idea through exegesis of the famous Snail Darter Case, where the Court interpreted the Endangered Species Act of 1973, a classic case of dynamic statutory interpretation.

The ESA of course is part of the Green constitution—statutes enacted to protect the environment. We shall use the Green constitution cases, chiefly the Spotted Owl Case (where the Supreme Court in 1996 interpreted the ESA to prohibit destruction of habitat for endangered species), to illustrate the general theme of dynamic statutory interpretation driven by agencies and public debate, with the Supreme Court as a secondary player. This will occasion an analysis of the Court’s famous *Chevron* decision (another Green case, construing the Clean Air Act Amendments of 1977) and the notion of judicial deference to agency interpretations.

In a final section, we shall then use the Spotted Owl Case to rethink statutory interpretation theory and doctrine more generally, addressing the following issues:

- *Textualism.* The Court and the lower federal courts have got to resist literalism, or even a stringent textualism of the sort that Justice Scalia insisted on in the Spotted Owl Case. The great issues raised by the Sherman Act, Title VII, etc. have not been, nor should they be, resolved by narrow readings of statutory texts or the mechanical application of the text-based canons of statutory construction. Textual analysis is important, but it must be informed by the norms underlying the statute.³

³ One popular canon is *inclusio unius est exclusio alterius*: The inclusion of one thing in a list suggests the exclusion of all others. Mother tells Sarah, “You may not kick or pinch your sister Marissa.” Thinking *inclusio unius*, Sarah hits her little sister. That is an abuse of both logic and the sister, for the normative baseline against which Mother was speaking was the

- *Legislative History.* An examination of legislative history must *not* be some kind of archaeological expedition seeking the “smoking gun” that reveals what the statutory authors originally meant about a statutory issue—but rather should focus on the original purpose and principle of the statute, and how the statute has changed and its principle has evolved. Spotted Owl Case illustrates this beautifully.
- *Stare Decisis.* Court should formally abandon the super-strong presumption of correctness in statutory cases. *Chevron* already demands greater flexibility in cases where agencies act within the zone of indeterminacy created by Congress, and the Sherman Act precedents provide a template for a flexible stare decisis rule that still protects reliance interests (especially public reliance).
- *Congressional Acquiescence.* The frequently derided but often applied notion of congressional acquiescence in administrative rules or interpretations is an important way that (subsequent) legislative history can influence the weight to stare decisis in statutory cases.
- *Substantive Canons.* Canons are *not* primarily surrogates for legislative intent *or* assurances of interpretive predictability in our rule of law regime. Instead, they are deliberation-forcing or normative thumbs on the scale. In a polity dominated by super-statutes, we would caution that the substantive canons must be applied with due

principle, “do not harm sister.” On the other hand, if Mother had told Sarah, “You may have one scoop of ice cream and one cookie,” *inclusio unius* properly suggests to Sarah that she is not authorized to snarf up that candy bar sitting on the table. The baseline is, “only a few teeth-destroying non-nutritious snacks for children.” This thought experiment suggests that, for super-statutes, *inclusio unius* only applies when the new item on a list would derogate from the principle or policy that is the baseline for that statute.

The Burger Court invoked this idea to apply Title VII to law firm partnerships in *Hishon v. King & Spalding* (1984). Title VII has an apparently broad coverage, but with several specific statutory exemptions. The Court properly reasoned from the *inclusio unius* maxim that partnerships were not excluded. “When Congress wanted to grant an employer complete immunity, it expressly did so.” This was a valid inference only because the statutory principle (non-discrimination) seems just as applicable to law firm partnerships as to other forms of business organization. Contrariwise, *inclusio unius* in *Weber v. Steelworkers* (1979), the affirmative action case, operated to trim back statutory coverage. Section 703(j) says that Title VII should not be applied to “require” employers to grant preferences based on race or sex. The Court reasoned from this prohibition that the statute could be applied to “permit” such preferences: Because Congress had only prohibited mandatory preferences, it had not prohibited voluntary ones. This is also a plausible use of the canon – but only if one assumes that the baseline norm of Title VII is to redress historic racial segregation in the workplace and exclusion of people of color from desirable jobs.

consideration of the statutory purposes and principle, and super-statutes ought not always bow to the substantive canons.⁴

⁴ The issue in *United States v. Aramco* (1991) was whether Title VII applied to an American company discriminating against an American employee in an office located overseas. The statutory language was broad enough to include such cases, and some of the provisions seemed to assume that firms could be liable for overseas discrimination under some circumstances—and what could be a clearer circumstance than alleged discrimination by an *American* company against an *American* employee? The EEOC read the law this way—yet the Court read Title VII more narrowly. Chief Justice Rehnquist’s majority opinion refused to defer to the agency or to follow the statutory purpose, and demanded a clearer statement on the face of the statute that it would apply extraterritorially.

The 1991 Civil Rights Act overrode *Aramco* and generally reaffirmed the anti-discrimination norm for employment. Has the 1991’s dramatic reaffirmation had an effect on the Rehnquist Court’s willingness to apply Title VII’s principle more expansively? Consider *West v. Gibson* (1999). Another of the Rehnquist Court’s favorite canons is its super-strong rule against waivers of federal sovereign immunity. The 1972 amendments to Title VII authorized the EEOC to enforce the anti-discrimination rule against federal and state agencies “through appropriate remedies.” The issue in *West* was whether that general provision authorized the EEOC to assess compensatory damages against the federal government for discrimination. Justice Kennedy’s opinion treated this as a routine case: the super-strong presumption requires more targeted statutory language than “appropriate remedies,” and so U.S. sovereign immunity was not affected. Moreover, in 1972, Title VII did not authorize compensatory damages, and so the original meaning of “appropriate remedies” did not include damages; that meaning was strongly reinforced by the canon *noscitur a sociis*, because all the remedies specifically mentioned in the 1972 amendments were equitable, nondamages ones. Concededly, the 1991 Act authorized compensatory damages – but only in court cases. Invoking the idea of negative implication, Kennedy contrasted new section 1981a(a)(1) which constituted a specific waiver of sovereign immunity in civil actions brought against the United States in court cases. So if Congress had wanted the EEOC to assess such damages, it could have used the same directed language. This is the Rehnquist Court’s normal deployment of this super-strong canon and some of the textual canons – but it was in dissent!

Justice Breyer’s opinion for the Court in *West v. Gibson* followed an interpretive approach more appropriate for a super-statute. First, he refused to read the 1972 language in a static way. “Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic.” Thus, “appropriate remedies” meant something different after 1991. Second, this structural and liberal reading of the statute is consistent with its strong anti-discrimination purpose. “To deny that an EEOC compensatory damages award is, statutorily speaking, ‘appropriate’ would undermine this remedial scheme.” Finally, Justice Breyer disposed, at the end of his opinion, of the substantive canon. Notably, he refused to require magic words on the part of Congress and

- *Avoidance Canon.* The interaction of statutory, constitutional, and Constitutional interpretation. Notion of Green property in the Spotted Owl Case.

8. The National Security constitution and Super-Statutes in Collision (The Uniform Code of Military Justice Act of 1950 and the Geneva Conventions)

The most dramatic examples of the complexity of our approach are cases where a super-statute hits up against other statutory schemes. The careful reader will not be surprised to learn that super-statutes can exert an influence on other statutory schemes. In the era of the modern regulatory state, super-statutes contribute to the overall coherence of public law in the same way that the common law, the law of nations, and canons such as the rule of lenity did during the Marshall Court—by providing pervasive background norms against which new statutes are read and understood. The common law and the law of nations, constitutional and common law canons, and super-statutes are certainly different from one another: the first is judge-made law which the legislature can override or ignore, the second is a body of interpretive precepts applicable to statutes the legislature enacts, and the third is adopted by the legislature but implemented by agencies and judges. What they have in common is that they form a normative backdrop, influencing the way statutes are read and applied; they constitute background principles without which statutory interpretation ought not proceed. These background principles might be called “fundamental law,” reflecting their kinship to ideas about interpretation held by the early English writers like Bacon and Hale.

Examples of the fundamental law notion abound in the National Security constitution. We shall briefly examine the case of the Foreign Intelligence Surveillance Act of 1978 that recently came under attack by the Bush 43 Administration.

Sometimes (and we should expect increasingly) super-statutes will collide with one another. (Recall the FDA Tobacco Case as a classic example of this.) Perhaps the most dramatic example, and the one we shall explore, is the clash between the Uniform Code of Military Justice Act of 1950 and the various Geneva Conventions protecting the rights of prisoners of war. The Bush 43 Administration construed the 1950 Act as codifying the Supreme Court’s broad decision in *Ex parte Quirin* and allowing the President great discretion in handling prisoners in the War on Terror. Yet that interpretation ran smack against the protections in the Geneva Conventions, which are also super-statutes. We shall use this case example to explore the ways in which super-statutes interact and how their intense public clashes are important moments for public deliberation about the norms embodied in them. (We are generally sympathetic to Justice Stevens’ resolution of these issues in *Hamdan v. Rumsfeld* (2006).)

found sufficient evidence of waiver from the statutory scheme as it has evolved, the purpose of the law, and common sense. In its attention to the statutory purpose and principle as well as its text and structure, Justice Breyer’s opinion is exemplary of how courts ought to interpret super-statutes, especially when they are confronted with substantive canons.

9. **The Punitive constitution and the Evolution of Modern Constitutional Law (The Controlled Substances Act of 1970)**

The new American constitutionalism has various descriptive and prescriptive implications for constitutional law in the United States. We shall illustrate these implications through examples from the criminal law—including both federal super-statutes such as the Controlled Substances Act of 1970 (CSA) and state statutory developments such as decriminalization campaigns for different-race marriage (1950s), consensual sodomy (1970s and 1990s), and aid-in-dying (1990s and today).

The descriptive implications are that constitutional law is going to be driven by three phenomena:

- *The Modern Administrative State as the Context.* The big shift in constitutional law in the twentieth century is not the famous showdown between the New Deal and the Old Court. That was but a point in the replacement of the laissez-faire Watchman State by the Modern Administrative State. The normative baseline is no longer the old rights of contract and property; instead, the baseline is state or federal regulation in the public interest. The regulatory baseline is no longer judge-driven common law, but is instead legislature-driven regulatory statutes. This has had and will continue to have implications for constitutional issues of federalism, separation of powers, and individual liberties such as the right to privacy. Examine the California Medical Marijuana Case and the Oregon Aid-in-Dying Case (both applications of the CSA) as an illustration.
- *Social Movements as the Engine.* As state regulation—rather than laissez-faire—has become the baseline, the motor for changing public norms has increasingly become social movements. Examples: populism and the progressive good government movement that produced the Sherman Act and the Federal Reserve Act, the humanitarian old-age assistance movement that produced the Social Security Act, the civil rights movement that produced the Civil Rights Act and the Voting Rights Act, the women's rights movement that produced the PDA, the environmental movement that produced the Endangered Species Act, the law and order movement that produced the CSA. These large-scale social movements were not only strongly normative, but their focus was changing state policy and their rhetoric was constitutional. The social movements in the early twentieth century sought to effectuate their normative programs through constitutional amendments; those in mid-century through judicial activism; those in the last third of the century through a combination of legislative, administrative, and judicial norm elaboration.
- *Super-Statutes as the Product.* As the previous point suggested, the goal of constitutional discourse is no longer to amend the Constitution, nor to create an Ackermanian constitutional moment, but to press for the adoption of super-statutes that

change public norms through an ongoing administrative-judicial-legislative dialogue. Increasingly, as in the California and Oregon cases, the normative conflict is being expressed through state departures from what some take to be entrenched national norms (the departure was unsuccessful in California and successful in Oregon, at least for now).

Prescriptively, the new American constitutionalism ought to be guided by the following meta-principles:

- *Legislatures for Positive Forward-Looking Goals, Courts for Caution and Sometimes Reversal of the Burden of Inertia.* The Supreme Court is hardly irrelevant or marginal in the new American constitutionalism, but its role is not nearly as glorious as the Warren Court's activism suggested it might be. The Warren Court and its successors have been most productive when they slow down or stop activist state regulation that unnecessarily trenches on individual or group liberties. A rich and enduring part of the new American constitutionalism is the array of constitutional or statutory protections Americans have against state intrusions into private spaces, criminal proceedings and state incarcerations, state censorship, etc. The judiciary really is the least dangerous—and least potent—branch, and so affirmative agendas must be pursued through legislatures and agencies. Fundamental redistributions of property or even status entitlements will not effectively come anywhere but from the legislature (the CSA) or through popular plebescites (the California and Oregon initiatives).
- *Agencies as Well as Courts as Fora for Norm Elaboration.* The Sherman Act essentially vested norm elaboration in federal judges, but the Department of Justice has in the last generation been the most productive force in thinking about the nation's anti-competition rules. The Civil Rights Act vested most norm elaboration in agencies. Even Title VII, which declined to give the EEOC substantive rulemaking authority, has been dominated by the EEOC, with the Supreme Court playing the role of a near-sighted referee in an NFL football game—sometimes getting it right, but suffering the indignity of rebukes and legislative overrides when it has strayed from consensus held by the EEOC, civil rights, and business groups. The Endangered Species Act gives almost all norm elaboration to agencies, with the Court episodically ratifying their decisions. For all the criticisms heaped upon agencies as frequently captured, these have performed rather well, combining expertise and informed discourse with attentiveness to popular attitudes. As the issue of pregnancy-based discrimination suggests, the agencies have engaged in fundamental lawmaking more maturely than the Supreme Court has. Even in the arena of criminal law, agency norm elaboration is increasingly common, as the Sentencing Reform Act of 1984 and the CSA have taught us.
- *Managing Pluralism.* The United States has always been a pluralistic political regime, but America's pluralism is more complex and its management trickier than ever before. Issues that divide social or normative groups in the short term are issues that cannot and ought not be definitively resolved by the political or judicial process. The new American constitutionalism is not a discourse that wants to create a lot of losers,

completely marginalized groups. The least that our government must do is to keep all social groups involved in the political process, but to insist that their actions and even rhetoric remain within the boundaries of public reason (understood roughly in the way articulated by John Rawls).

We shall use sodomy reform and gay people's privacy rights as an example of the last point.

At the national level, there is no fundamental law supporting gay rights, beyond the consensus view that the government ought not be able to outlaw people for their consensual sexual activities inside private spaces. This was the Supreme Court's holding in *Lawrence v. Texas*. The Court was on safe ground. Even the solid south fractured on the issue, with several states nullifying their own statutes as inconsistent with fundamental law. After a generation of grass-roots activism in state legislatures and courts, no major religion supported those criminal statutes, and some prominent religions filed *amicus* briefs against them. The Bush Administration, filled with fundamentalists and football-loving Texans, said not a word to support the statute. Texas itself declined to file a brief supporting its own law; poor Harris County carried the whole load, rather half-heartedly. All of this was plenty of evidence that fundamental law had already changed. The Supreme Court ratified that change, but a provocative dissenting opinion claimed that the country was on the brink of swallowing the entire "homosexual agenda," including same-sex marriage.

Don't believe it. There is a putative super-statute to the contrary—the Defense of Marriage Act of 1996 (DOMA). Supported by the Republican Party, most Democrats, and an adulterous, perjurous President, DOMA sailed through Congress with super-huge majorities. As of March 2004, thirty-eight states have copied its norm, legislating that civil marriage can only exist between a man and a woman and that foreign same-sex marriages will not be recognized by their courts. The national consensus reflected in DOMA is not limited to same-sex marriage. (Three years before DOMA, the spineless President and Congress enacted a law excluding openly gay, lesbian, or bisexual Americans from serving in the military.) Any policy that is understood as "endorsing" homosexuality is suspect in America. For the time being, We the People are normatively engaged—and their engagement supports No Promo Homo, rather than Gay Is Good.

So super-statutes are not necessarily engines of social liberalism or progressivism. Gay people (like one of your authors) believe that DOMA is only a pseudo super-statute or perhaps even a stillborn super-statute, but that remains to be seen. The fate of DOMA's no promo homo norm is in the hands of We the People, especially future generations. Although fraught with obvious constitutional problems, DOMA will be protected from Supreme Court invalidation until the nation's fundamental law changes.