

## REVERSING TIME'S ARROW: LAW'S REORDERING OF CHRONOLOGY, CAUSALITY, AND HISTORY

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### I. INTRODUCTION

At the outset of his first term, President George W. Bush simultaneously disparaged and defended his immediate predecessor's use of the constitutional pardoning power.<sup>1</sup> Almost in the same breath, Bush did something far more remarkable and unsettling: he gave voice to a provocative way of reexamining the nature of time.

In a January 2001 meeting with the press, Bush criticized former President Bill Clinton for essentially erasing criminal indictments against financier Marc Rich.<sup>2</sup> But Bush also defended the presidential prerogative of issuing pardons.<sup>3</sup> While he was "troubled" by Clinton's decision regarding Rich, Bush asserted that:

a decision on pardons, is inviolate, as far as I'm concerned. It's an important part of the office. I am mindful not only of preserving executive powers for myself, but for predecessors as well. And that's why I made the decision.<sup>4</sup>

Taken at face value, Bush's fretting about his impact on the powers of his "predecessors" (rather than "successors") appeared based on a reversal of the standard sequence of cause and effect, and a somewhat

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1. See U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

2. George W. Bush, U.S. President, Remarks by the President in Question and Answer Session with the Press, (Jan. 29, 2001), <http://www.whitehouse.gov/news/releases/20010129-7.html>.

3. *Id.*

4. *Id.*

curious vision of institutional influence.<sup>5</sup> We might understandably dismiss the President's remark as a mere gaffe with no deeper meaning. But this Article urges us to use the President's unintended comments as a prompt for reconsidering how we ordinarily talk about and conceive time and causality<sup>6</sup>—especially in thinking about law.<sup>7</sup> Through a series

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5. Had the President publicly worried about affecting the “political authority” of his predecessors, one might have charitably understood him to be rhetorically gesturing to his ability to tell or affirm a particular story of precedent—about prior executive use of the pardon. Since “authority” implies exercises of power that can claim legitimacy from others, we could imagine that Bush might strive to preserve the influence of past presidents on the present by drawing a line between their (appropriate) use of the pardon and his own understanding, while casting Clinton as an aberrant figure. Stated somewhat differently, Bush might legitimately claim to have some capacity to affect the authority of his predecessors in recovering a history of the pardon power, so that the examples and patterns established by past presidents would not be tainted by Clinton's alleged misdeeds. But, in emphasizing “executive powers,” the President arguably made a different and seemingly more dubious claim about his potential impact on the formal legal capacities of prior chief executives.

6. As indicated, this Article's rethinking of traditional chronology and causation, while largely unfamiliar in legal scholarship, is not entirely alien to other fields. As discussed below, some fields of physics do not insist that time can only be conceived as running one way—from past to present. In the humanities, there is also some tradition of explicitly presuming that the present can affect the past. *See, e.g.*, T.S. ELIOT, *Tradition and the Individual Talent*, in *SELECTED ESSAYS* 3, 5 (1950) (“[W]hat happens when a new work of art is created is something that happens simultaneously to all the works of art which preceded it.”). *See also* JORGE LUIS BORGES, *Kafka and His Precursors*, in *LABYRINTHS: SELECTED STORIES & OTHER WRITINGS* 193, 195 (Donald A. Yates & James E. Irby, eds., James E. Irby, trans., 1962) (arguing that Franz Kafka created a set of “precursors,” or literary affiliates, who would not have been grouped and considered together without Kafka's writings); DAVID LODGE, *SMALL WORLD* (1995) (using a character who employs postmodern literary theory to examine the impact of T.S. Eliot on Shakespeare, inverting the traditional lines of influence).

7. There is relatively little scholarship directly addressing the relationship between unconventional accounts of time and legal categories, topics, and problems. *See* Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663, 663 (2001) (“Time is always necessary in the law, yet it is rarely examined.”). There are some important exceptions. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 124-27, 152-53 (2000) (discussing how legal narratives construct sequences of time); JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 3-5 (2001) (examining how constitutional interpretation is distorted by “the demand to live in the present”); Norman J. Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction*, 74 NEB. L. REV. 742, 744 (1995) (discussing the merits of challenging the normal deployment of “time's arrow” to give us “radically different ways of construing time, provocation, passion, memory, motive, action - and hence manslaughter”); French, *supra*, at 663; Robert W. Gordon, *Critical Legal Histories*, in *CRITICAL LEGAL STUDIES* 79 (Allan C. Hutchinson ed., 1989) (reviewing different approaches to legal history adopted by adherents of the critical legal studies movement).

In political science, the recent flourishing of scholarship on “American political development” has induced somewhat greater self-consciousness of how time is conceived and ordered in political contexts. *See, e.g.*, KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT I* (2004) (“[A]fter several decades during which history was relegated to a decidedly minor role in the study of American politics, interest in historical approaches is resurgent.”); PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL*

of brief case studies culled from politics, culture, and law, this piece begins mapping the frequency, range, and significance of circumstances in which we can claim that the hands of the present grasp and transform the past.

This seemingly peculiar reconfiguring of our temporal order is useful in helping us understand and grapple with distinctive features and problems inherent in U.S. law.<sup>8</sup> Indeed, this Article contends that the American legal system's common law foundations, as well as its formality and commitment to serving as both a constitutive and aspirational endeavor, make it especially conducive to meaningful reversals of the traditional path of "time's arrow."<sup>9</sup> Among other

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ANALYSIS 8-9, 134-42 (2004) (discussing "historical institutionalism" in political science); Andrew J. Polsky, *No Tool is Perfect: Periodization in the Study of American Political Development*, 37 POLITY 523, 523 (2005) (discussing how different "periodization schemes" assist scholars with their investigations of American politics).

8. This Article focuses on the U.S. legal system, but one might extend some of this analysis to other nations. See Kwesi Baffoe, *Cultural Eclipse: The Effect on the Aboriginal Peoples in Manitoba*, 5 TRIBAL L.J. 2 (2004/2005) (discussing different cultural conceptions of time and their effect on the legal system); Brian Havel, *In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust*, 80 IND. L.J. 605, 620-31 (2005) (discussing how Austria used law and politics to construct, retrospectively, an "official memory" of Nazism).

Given the growth of international legal structures in recent years, and the consequent necessity of reconciling existing national laws and traditions with emergent international ones, the themes of this Article may be especially pertinent in analyzing legal relations between nations. To take just one example, the Special Court in Sierra Leone has recently and successfully overseen criminal convictions against individuals who recruited child soldiers, finding them in violation of the Rome Statute for the International Criminal Court, which became effective in 2002. DAVID M. ROSEN, *ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM* 147 (2005). A ruling on May 31, 2004 upheld these convictions against the argument that they were based on prosecuting crimes that took place prior to 2002, and therefore, purportedly did not exist as a legal matter at the time of their commission. *Id.* 147 & 181 n.40. The Special Court countered that "the war crime of recruiting children under fifteen existed as a customary norm of international law even prior to the adoption of the Rome Statute . . ." *Id.* at 147. While the Special Court claimed that "the Rome Statute merely codified, but did not create, this norm," it seems equally plausible to argue that the Court reached into the past to create this legal norm, the existence of which the defendants denied. *Id.* I thank David Rosen for pointing me to this fascinating legal debate.

9. The phrase "time's arrow" is associated with Arthur Eddington, an astrophysicist who used the concept to "represent the apparent one-way property of time" with respect to Newton's "second law of thermodynamics"—which observes that physical processes move in the direction of increasing loss or energy, that is, towards greater entropy. Victor J. Stenger, *Time's Arrows Point Both Ways: The View from Nowhen*, 8 SKEPTIC 90, 90 (2001). Interestingly, modern physics does not seem premised on this view of time's passage. See PETER COVENEY & ROGER HIGHFIELD, *THE ARROW OF TIME: A VOYAGE THROUGH SCIENCE TO SOLVE TIME'S GREATEST MYSTERY* 23 (W.H. Allen 1990). Newtonian mechanics and Einstein's relativity theory, for example, "appear to work equally well with time running in reverse . . . . Uni-directional time, in fact, comes to appear as simply an illusion created in our minds." *Id.*

Outside of theoretical physics, "time's arrow" has typically been invoked to describe a more conventional view of chronology and causation and the seemingly inescapable flow of events from the present to the future. See, e.g., STEPHEN JAY GOULD, *WONDERFUL LIFE: THE BURGESS SHALE*

benefits, greater awareness of this underappreciated aspect of American legalism can assist scholars and citizens in shedding new light on enduring and important debates involving such areas as constitutional interpretation and judicial confirmation hearings.

## II. REVERSING TIME'S ARROW?

### *A. Different Ways of Ordering Time*

Typically, we think of time as moving from the present into the future and, relatedly, we imagine that the things we do today plausibly affect what happens tomorrow.<sup>10</sup> But there are other ways of ordering time and causality<sup>11</sup> that are both familiar and important.<sup>12</sup>

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AND THE NATURE OF HISTORY 278 (1989) (discussing how prediction in the social sciences may be impossible given “time’s arrow of irreversibility”); Sanford Levinson & Jack M. Balkin, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison: Marbury as History: What are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255, 279 (2003) (“Time’s arrow, though beginning in the past, flies forward into the future.”). This Article suggests that even these social, psychological, or subjective senses of time can be effectively reversed in some contexts. *Cf. id.* at 278-80.

10. See, e.g., Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 6 (1991) (arguing that the mind structures reality through narratives defined by, among other features, “diachronicity”—a specific sequence of time).

To be clear, in seeking to reverse “time’s arrow,” this Article focuses specifically on the assumption that it is commonplace and uncontroversial to think of our lives as proceeding from the past to the present to the future—with seemingly no chance for the present (or future) to alter the past. Scholars operating within the traditional model of the overall path of time have certainly offered different accounts of how time unfolds into the future. Stephen Skowronek, for example, argues that presidential authority is both bounded and enhanced by the executive’s involvement in both “secular” and “political” time, but his work does not directly challenge an underlying assumption that time flows from the past to the future. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 30 (1997) (distinguishing between “secular” and “political time”).

Thought of somewhat differently, we might distinguish between the “flow” of time’s arrow (describing how time moves with respect to past, present, and future and the links between them) and the “direction” in which it points, that is, towards what outcomes or contexts. See J.B. Ruhl & Harold J. Ruhl, Jr., *The Arrow of the Law In Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society*, 30 U.C. DAVIS L. REV. 405, 409-10. As J.B. and Harold Ruhl argue:

All complex dynamical systems have an arrow of irreversibility; their evolutionary processes cannot be put into reverse so as to re-create the past. Law shares this property. It unfolds as part of a sociolegal system that could no more return to a prior point on its path than could the weather be reversed. Hence the weather and other complex dynamical systems, such as ecosystems, economies, brains, and, we posit, the law, all have their directional arrows. The challenge is determining the directions in which the arrows point.

*Id.*

11. See Michael Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 SAN DIEGO L. REV. 1181, 1213-15 (discussing a “counterfactual theory of causation”).

We are accustomed, for example, to imagining and discussing how the past affects (and even effects) the present. The famous epigram of George Santayana—“[t]hose who cannot remember the past are condemned to repeat it”<sup>13</sup>—is one of the more popular forms of this view of chronology and change. But this positioning of time's arrow is also embedded in specific social scientific theories, such as path dependency<sup>14</sup> (which holds that prior individual and institutional decisions shape or foreclose present or future choices), and in legal concepts such as precedent.<sup>15</sup> Indeed, some scholars have argued that

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12. See STEPHEN HAWKING, A BRIEF HISTORY OF TIME 139, 152 (1996) (discussing concepts of time in physics); HUW PRICE, TIME'S ARROW AND ARCHIMEDES' POINT 3 (1996) (discussing themes such as “What is the difference between the past and the future? Could—and does—the future affect the past? What gives time its direction, or ‘arrow’?”); Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in RESPONDING TO IMPERFECTION 164-172 (Sanford V. Levinson ed., 1995) (discussing “the problem of time” in law).

13. GEORGE SANTAYANA, THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS 284 (2d ed. 1936).

14. See generally DOUGLAS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 99 (1990) (discussing path dependency); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 434-35 (2002) (making the case that the Rehnquist Court's federalism decisions reflect elements of path dependency); Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 925 (2005) (describing path dependency as presupposing “that what came before has some definitive or measurable effect(s) on what follows”); Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1170-71 (2005) (providing a general discussion of scholarly accounts of path dependency); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643-44 (1996) (discussing path dependence); Ruhl & Ruhl, *supra* note 10, at 414-15 (using the writings of Oliver Wendell Holmes to describe legal path dependency “in that, at any moment, law's position along its path of change is the result of many prior choices of direction at forks along the way.”); Keith E. Whittington, *Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 616 (2000) (“Institutions are relatively persistent, and thus both carry forward in time past political decisions and mediate the effects of new political decisions.”).

15. As discussed, one view of precedent is that it represents our acceptance of being bound by past decisions in the present so that we might promote important legal “values” such as “consistency, coherence, fairness, equality, predictability and efficiency.” Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748-56 (1988); see also *United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989) (noting that appellate panels are “bound by decisions of prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions.”); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111-12 (1977) (arguing that judges attempt to bring their decisions into conformity with past precedent); Gerhardt, *supra* note 14, at 933-34 (discussing precedent in light of jurisprudence related to the Constitution's Eleventh Amendment); Ronald Kahn, *Interpretive Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 175, 180-82 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing how judges are bound by the principles announced in prior judicial decisions). Some scholars contend that precedent has minimal effect on the present day judgments of the courts. See David Kairys, *Legal Reasoning*, in THE POLITICS OF LAW: A

the signature feature of constitutionalism is its conceit that by binding ourselves during a moment of cogency and foresight, we can foreclose, or at least limit, the perils of future crises.<sup>16</sup> As John Finn puts it, “constitutions, much like promises, are nothing less than attempts to fashion the future—to forge the institutional patterns and cultural folkways of political and social experience.”<sup>17</sup>

We also readily conceive of ways in which judgments about the future can affect the present.<sup>18</sup> In the legal context, judicial opinions often reference a responsibility to protect the rights and privileges of future generations.<sup>19</sup> Jack Balkin has advocated that Supreme Court Justices seeking “greatness” should engage in a kind of “constitutional prophecy” based on articulating “a vision of the country and what it means . . . a vision of what America is and what its future and its destiny should be . . . .”<sup>20</sup> Moreover, as some scholars have noted, popular “three strikes” legislation and similar habitual offender sentencing laws are premised on an assessment about the future dangerousness and likely criminality of a defendant.<sup>21</sup>

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PROGRESSIVE CRITIQUE 11-17 (David Kairys ed., 1982) (questioning the power of precedent); Lindquist & Cross, *supra* note 14, at 1172 (arguing that the accumulation of precedent actually frees the hands of contemporary jurists).

16. See JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 3-9 (1991); see also THE FEDERALIST NO. 73 (Alexander Hamilton) (“[E]very institution calculated to restrain the excess of lawmaking, and to keep things in the same state in which they happen to be at any given period [is] much more likely to do good than harm; because it is favorable to greater stability in the system of legislation.”); John Harrison, *Time, Change, and the Constitution*, 90 VA. L. REV. 1601, 1602 (2004) (“But the present is the future’s past, and just as Americans operate under constitutional constraints created in past times, so they often create—and even more often consider creating—constraints that will operate in the future. Every generation does some framing, changing the entrenched rules that bind ourselves and our posterity.”).

17. FINN, *supra* note 16, at 4; see also Harrison, *supra* note 16, at 1608 (“[A main reason for constitutions is that they are enterprises for] collective self-binding, the constitutional analogue to putting the alarm clock on the other side of the room to make yourself get out of bed.”).

18. See generally DEREK PARFIT, *REASONS AND PERSONS* 357-61 (1987) (discussing, from a philosophical perspective, how we make decisions when taking into account their effect on persons who do not yet exist, but might exist in the future).

19. See, e.g., *Weems v. United States*, 217 U.S. 349, 373 (1910) (“The future is [the distinctive] care [of constitutions] and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124 (1866) (“[I]f the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted [sic] with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.”).

20. Jack M. Balkin, *The Use that the Future Makes of the Past: John Marshall’s Greatness and its Lessons for Today’s Supreme Court Justices*, 43 WM. & MARY L. REV. 1321, 1335-36 (2002). [hereinafter Balkin, *The Use the Future Makes*].

21. See PAUL H. ROBINSON, *WOULD YOU CONVICT?: SEVENTEEN CASES THAT CHALLENGED*

But what, if anything, are we to make of the chronological disorder implicit in President Bush's malapropism about the pardoning power? As indicated, this Article sets out examples from different aspects of American social, political, and legal life to suggest that the President's inadvertent reordering of time is hardly alien to our ways of thinking about prior events and people.<sup>22</sup> Indeed, American history is replete with episodes in which today's decisions and priorities meaningfully alter what we regard as the past, and how this past is organized and understood.<sup>23</sup>

### *B. Parsing Change: Interpretation and Amendment*

Students of law, history, and other fields may respond that these general claims are largely unremarkable. Most scholars acknowledge that politicians and judges constantly reinterpret the past in light of the agendas, problems, disputes, pressures, and demands of the present day.<sup>24</sup> As Walter Murphy has noted, we regularly "acknowledge that the present and the future may change views we hold about the past, [although] we nonetheless would reject the notion that the [present or] future can affect the past."<sup>25</sup> Many thinkers also concede that while we may attempt to recreate past decisions, environments, institutions,

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THE LAW 28-43 (1999) (discussing the case of William J. Rummel and the logic behind habitual offender statutes).

22. See *infra* Parts II.B, III.

23. It is beyond the scope of this Article to discuss fully whether the United States is somehow particularly open to reversals of time's arrow. For some preliminary clues, see ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 3-9 (Sanford Levinson ed., 2000), for an argument that American constitutional law is largely defined by our dualistic commitment to "higher law" and "popular sovereignty" (perhaps facilitating alterations of fundamental law by present generations) and RUBENFELD, *supra* note 7, at 3-7 for a discussion of how we are a present-oriented people whose liberty still depends upon the passage of time.

24. See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 5 (2004) (arguing that the indeterminacy of constitutional law allows for social and political forces to shape how it is interpreted). Cf. Balkin, *supra* note 20, at 1333 (contending that the greatness of Supreme Court Justices "is a function of [their] political usefulness to later generations, not whether they conformed to currently fashionable theories of good legal craft and judicial prudence.").

25. Murphy, *supra* note 12, at 171-72; see also David Lewis, *Counterfactual Dependence and Time's Arrow*, 13 *NOÛS* (SPECIAL ISSUE) 455, 462 (1979) ("The past would be the same, however we acted now. The past does not at all depend on what we do now. It is counterfactually independent of the present."); Ruhl & Ruhl, *supra* note 10, at 409-10 ("[C]omplex dynamical systems . . . cannot be put into reverse so as to re-create the past."). *But cf.* Moore, *supra* note 11, at 1230 ("Two of our bedrock intuitions about causation are that it is asymmetrical (if c causes e, e does not cause c) and that it has a one-way direction in time (causes must not succeed their effects in time). An embarrassment for the counterfactual theory of causation is that, at least prima facie, counterfactual dependence does not seem to be bound by these limitations.").

structures, or relationships, we cannot actually return to a prior historical moment. As J.B. Ruhl and Harold Ruhl, Jr. argue, “[w]hen society wants to change the direction of law,” for example, “it can make a sharp turn towards the path that might have been, but it can not retrace its steps. The path of the law is a ‘one-way street; it has an arrow’ that points only in one way, viz., from the past to the future.”<sup>26</sup>

But this piece implicitly challenges these conclusions of Murphy, Ruhl, and other thinkers, by arguing for the capacity of the present to alter, in an enduring way, what we think of as past. There is a category of circumstances—especially prominent in the field of law—where individuals and institutions in the present arguably go beyond mere reinterpretation of the past to actually amending it, producing genuine change not inherent in the preexisting political and legal order.

This parsing of legal change is adapted from Sanford Levinson’s investigation of how many times the Constitution has been amended.<sup>27</sup> In dismissing the conventional answers (either 26 or 27) as “almost literally thoughtless,”<sup>28</sup> Levinson distinguishes between legal interpretation and amendment.<sup>29</sup> The former consists of ordinary, anticipated readings of the law, consistent with, or at least allowed by, what is “already immanent within the existing body of legal materials.”<sup>30</sup> Legal development or refinement through interpretation is “generated in substantial part by the [law’s] internal structure,” which remains intact after the change.<sup>31</sup>

In contrast, an amendment consists of “a legal invention not derivable from the existing body of accepted legal materials.”<sup>32</sup> It is an “extraordinary development” or even an “outright mutation generated by exogenous causes.”<sup>33</sup> After an amendment, the old (legal) order does not remain intact—as Levinson puts it, the “preexisting legal reality” is no more.<sup>34</sup> This Article seeks to identify instances in which this latter, stronger version of amendatory (as opposed to interpretive) change takes place, impelled by forces, actions, individuals, and institutions from the

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26. Ruhl & Ruhl, *supra* note 10, at 416.

27. Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) < 26; (B) 26; (C) 27; (D) > 27: *Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION*, *supra* note 12, at 20-21.

28. *Id.* at 25.

29. *Id.* at 14-15. In fact, Levinson eventually develops a more complex taxonomy of change including “revolution” and “revision.” *Id.* at 20-21.

30. *Id.* at 20.

31. *Id.* at 14.

32. *Id.* at 16.

33. *Id.* at 14.

34. *Id.* at 26.

present operating on the past.

### *C. Three Cases*

In the social and cultural case studies that immediately follow, this Article further explains, justifies, and grounds the counter-intuitive claim that the ordinary deployment of the arrow of time can be reversed. In each of these episodes or examples, the present so transforms our sense of the past that it is difficult to retrieve our understanding of the past prior to this change.

#### 1. An example from university life

Consider, for the moment, a “hypothetical” university. Northern Yankee University is located in a major urban center on the east coast. Imagine that you graduate from Northern Yankee as an undergraduate in the late 1970s, when the university has a reputation as a regional commuter school whose constituency includes well-heeled students unable to gain admission elsewhere. At times, over this period, N.Y.U. has trouble meeting its budget.<sup>35</sup>

But over the next two decades, in part through the energy and leadership of a new University president, the school engages in a sustained, concerted, and successful effort to boost its profile and academic reputation. From 1981 – 2001, N.Y.U. increases its endowment through a massive capital campaign, hires more and better regarded faculty, expands its campus size and resources, including its dorm availability, and becomes increasingly selective and geographically diverse. By 2005, the school can lay legitimate claim to being a peer to its neighbor, Prestigious Ivy U.; indeed by some measures Northern Yankee is even more selective and competitive than PIU.

As a graduate of Northern Yankee, you have experienced some of these developments in a rather immediate and peculiar way. The attitude of friends and colleagues towards your degree (and intellect) has shifted over time from indifference or polite acknowledgement, to active interest, even admiration. Prospective employers, who may have once passed over the subject of your education, now respectfully note your pedigree.

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35. See William H. Honan, *Buying Excellence: How N.Y.U. Rebuilt Itself—A Special Report: A Decade and a Billion Dollars Put N.Y.U. with the Elite*, N.Y. TIMES, Mar. 20, 1995, at A1 (discussing the emergence of New York University as a national research institution).

What has happened to bolster the value of your academic credentials, earned over two decades ago? The basic terms of your degree do not seem to have changed. You have not, of course, somehow taken additional or more rigorous courses during the period of your prior matriculation, nor have you performed more adroitly in your completed coursework. Your enhanced status does not seem based on an assumption that you have somehow utilized your past degree more effectively or sagely over time by, for example, carefully reflecting upon your completed coursework or the lessons learned.

Instead, what seems to have occurred is that widespread, positive regard for your degree has flowered over time—reflecting, in part, actual changes in your graduating school's profile, structure, and "outputs." Stated slightly differently, relatively recent decisions and actions taken with respect to N.Y.U. have altered the character of your institutional credentials earned in years long past.<sup>36</sup> In this context, the chronological disorder inherent in Bush's worries about affecting his predecessors is anything but idiosyncratic; instead, it is as commonplace as the U.S. News and World Report's annual educational rankings.<sup>37</sup>

## 2. An example from professional athletics

In December 1919, Boston Red Sox owner Harry Frazee sold his star player, George Herman "Babe" Ruth to the New York Yankees for \$100,000.<sup>38</sup> The Red Sox, previously the most successful franchise in professional baseball, subsequently suffered over eight decades without a world championship, while the Yankees famously went on to achieve baseball's ultimate prize a record 26 times.

One popular account of this turn of events holds that Frazee's sale prompted the "curse of the Bambino," a spell of misery that stretched from the Red Sox World Series victory in 1918 until their next

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36. One should note that the effects of this shift could be quite material. While essentially illogical, it is not difficult to imagine that one will have expanded professional opportunities based on the present's burnishing of the past. It is also not difficult to imagine these basic dynamics unfolding in a way that diminishes the value of a degree already earned. *See, e.g.*, Robert Strauss, *Grade Point Angst At Princeton*, N.Y. TIMES, Feb. 13, 2005, at 14NJ (discussing Princeton University's new, more demanding grading policy as an effort to maintain the value of a Princeton degree).

37. James Monks & Ronald G. Ehrenberg, *U.S. News and World Report's College Rankings: Why Do They Matter*, CHANGE, Nov.-Dec. 1999, at 42 (analyzing empirically the impact of the U.S. News and World Report ranking of colleges).

38. GLENN STOUT & RICHARD A. JOHNSON, RED SOX CENTURY 145-47 (2000) (detailing the sale of Ruth to the Yankees).

championship in 2004.<sup>39</sup> During the intervening 86 years, “the curse” supposedly induced critical miscues and untimely failures by Red Sox players, creating an insurmountable barrier to World Series success.<sup>40</sup>

Reexamining the origins of the curse provides another example of how conventional chronology can be overturned by a contemporary narrative that effectively reconfigures the organization, meaning, and even content of historical events.<sup>41</sup> The idea that Red Sox players, management, and fans were “cursed” by a longstanding pall created by Ruth’s sale did not actually find developed articulation until the 1980s and 1990s, when several sports columnists began retelling the history of the franchise.<sup>42</sup> Prior to this period, sportswriters and fans did not systematically speak or think of themselves as tormented by a curse created by Frazee’s greed and Ruth’s vengeance.<sup>43</sup>

But despite its somewhat recent vintage, the allure of the story of the curse transformed vital elements of baseball history. For example, in the typical version of the oft told tale, Frazee’s blunder gave rise to his personal misfortune and financial ruin.<sup>44</sup> In fact, after Ruth’s sale, Frazee continued to be a successful Broadway producer whose estate was valued at \$1.3 million upon his death.<sup>45</sup> Seen through the screen of the curse, the facts surrounding Harry Frazee and Ruth have become shaded.

Additionally, a vital element of the “curse” legend that made it compelling for both friends and foes of the Red Sox was that it supposedly unified and intensified the pain of fans denied a

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39. SETH MNOOKIN, *FEEDING THE MONSTER: HOW MONEY, SMARTS, AND NERVE TOOK A TEAM TO THE TOP* 46-48 (2006) (discussing the “Curse of the Bambino”); MIKE VACCARO, *EMPERORS AND IDIOTS: THE HUNDRED-YEAR RIVALRY BETWEEN THE YANKEES AND RED SOX, FROM THE VERY BEGINNING TO THE END OF THE CURSE* 130-32 (2005) (discussing the origins of the “curse”). My thanks to Sam Mnookin and the Sons of Sam Horn website for some of the ideas in this discussion. Sons of Sam Horn, <http://www.sonsofsamhorn.com> (last visited Apr. 9, 2007).

40. BILL NOWLIN & JIM PRIME, *BLOOD FEUD: THE RED SOX, THE YANKEES, AND THE STRUGGLE OF GOOD VERSUS EVIL* 28-60 (2005) (detailing the supposed effects of the curse on the Red Sox misfortunes).

41. Adherents of the curse, for example, typically identify it as commencing immediately following the Red Sox 1918 World Series championship. But Ruth’s sale only occurred after the infamous Black Sox 1919 World Series. Thus, the traditional timeline depends upon Ruth’s hex, ostensibly triggered by his sale at the end of 1919, somehow working its black magic retrospectively for a year. MNOOKIN, *supra* note 39, at 46.

42. MNOOKIN, *supra* note 39, at 46-48; NOWLIN AND PRIME, *supra* note 40 at 27-8, 52 (tracing the curse to George Vecsey and Dan Shaughnessy in the 1980s).

43. MNOOKIN, *supra* note 39, at 46-48; NOWLIN AND PRIME, *supra* note 40 at 43 (discussing the birth of the curse in 1986).

44. STOUT & JOHNSON, *supra* note 38, at 147 (discussing the “long accepted interpretation of the sale of Ruth.”).

45. *Id.* at 148-49, 151.

championship through its power.<sup>46</sup> But here, too, one should keep in mind that the “curse” was a relatively recent tale threaded backwards through time.<sup>47</sup> Since the idea of the curse only achieved widespread circulation seventy years after it was supposedly initiated, Red Sox fans were not collectively immiserated under its terms; if the curse was in effect, it was so without a knowing audience. But after the curse narrative took hold, it was sufficiently gripping and pervasive to transform the subjective experiences of the past—both as these experiences were chronicled by some journalists and even as they were recalled by many fans themselves.<sup>48</sup>

### 3. An example from politics

In his now revered Gettysburg Address (1863), President Abraham Lincoln attempted to honor soldiers slain on the field of war and redirect a nation sundered by bloody conflict.<sup>49</sup> Lincoln’s famous speech began with an invocation of the past—specifically, a prior occasion of political (re)dedication, a previous moment when the nation’s leaders tried to account for America’s commitments and identity.<sup>50</sup>

But Lincoln’s reference to “four score and seven years ago” bypassed what had been, alongside the elusive concept of “the Union,” the most prominent object of the president’s custodianship in previous speeches—the U.S. Constitution.<sup>51</sup> Instead, Lincoln’s Gettysburg

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46. See DAN SHAUGHNESSY, *REVERSING THE CURSE: INSIDE THE 2004 RED SOX 2* (2005) (discussing how each Red Sox failure was compounded by prior “decades of misery”); LEIGH MONTVILLE, *WHY NOT US?: THE 86-YEAR JOURNEY OF THE BOSTON RED SOX FANS FROM UNPARALLELED SUFFERING TO THE PROMISED LAND OF THE 2004 WORLD SERIES 15* (2004).

47. MNOOKIN, *supra* note 39, at 46-48.

48. See, e.g., SHAUGHNESSY, *supra* note 46, at 213 (discussing Johnny Pesky’s view of “the Curse”); MONTVILLE, *supra* note 46; NOWLIN & PRIME, *supra* note 40 at 51-52 (discussing fans’ perspectives on the curse).

One should note that many Red Sox fans undoubtedly believed that their team received more than its share of bad luck, and that the Sox franchise was ill-fated, even if they did not attribute this misfortune specifically to the “Curse of the Bambino.” Since at least the 1970s (when an injury to star left fielder Jim Rice kept him out of the American League Championship Series and World Series), many fans began to think of themselves as being afflicted, and long-suffering—although more from the ineptitude of management than from some mystical curse dating back to Babe Ruth. See generally MNOOKIN, *supra* note 39.

49. ABRAHAM LINCOLN, *ADDRESS AT GETTYSBURG, PENNSYLVANIA* (Nov. 19, 1863), in ABRAHAM LINCOLN, *SPEECHES AND WRITINGS, 1859-1865*, at 536 (Don E. Fehrenbacher ed., 1989).

50. GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 79-89* (1992) (discussing Lincoln’s use of the phrase “our fathers” and invocation of the past in the Gettysburg Address).

51. LINCOLN, *supra* note 49, at 536; see WILLS, *supra* note 50, at 38-40, 130-133 (discussing Lincoln’s views on the Constitution and the Declaration of Independence).

remarks drew upon the Declaration of Independence as the inspiring touchstone of “a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.”<sup>52</sup>

One gloss on Lincoln’s speech is that it strove to reshape the republic, creating a “new founding of the nation, to correct things felt to be imperfect in the founders’ own achievement.”<sup>53</sup> Lincoln accomplished this goal by circumnavigating the legal and political authority of the Constitution and its implicit support for slavery and injustice<sup>54</sup>—no small task given the Constitution’s self-declared status as “supreme law.”<sup>55</sup> By invoking the Declaration, and its seemingly categorical embrace of equality, Lincoln told a new story about the origins and purposes of the republic, and indirectly built the case that only by ending slavery could the nation live up to its founding ideals.<sup>56</sup>

In this way, then, the Gettysburg Address seems to have been a concerted effort to redefine the terms under which the Civil War was being waged, and to account for the “unfinished work” of the soldiers who filled the Pennsylvania battlefield.<sup>57</sup> In claiming that the war’s underlying “great task” was to realize the principles of the Declaration, Lincoln performed what Garry Wills calls “one of the most daring acts of open-air sleight-of-hand ever witnessed.”<sup>58</sup> His speech transplanted his audience into “a different America” and “revolutionized the Revolution, giving people a new past to live with that would change their future indefinitely.”<sup>59</sup> Lincoln boldly reached from 1863 to shape not only the meaning of the past but the story Americans would tell

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52. LINCOLN, *supra* note 49, at 536; WILLS, *supra* note 50, at 101-07, 145-47 (examining Lincoln’s views on the Declaration “as the statement of a permanent ideal” of American government).

53. WILLS, *supra* note 50, at 39.

54. *Id.* at 38-40.

55. See U.S. CONST. art. VI, § 2 (“This Constitution . . . shall be the supreme Law of the Land”).

56. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 11-12 (1999) (discussing how the Constitution was supposed to further the commitments of the Declaration, and arguing that equality was one of these ideals). This project, of course, required some creative and nimble political reconstruction on Lincoln’s part. See *id.* at 11-13. As numerous commentators have noted, a strong case could be made that protecting inequalities and “ascriptive . . . Americanism” has been a prominent part of our legal and political traditions, on par with our somewhat paradoxical impulse of realizing a liberal vision affirming the equal worth of persons. See, e.g., Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 549-50 (1993) (identifying “multiple traditions” in American politics including “liberalism” and “ascriptive forms of Americanism”).

57. See LINCOLN, *supra* note 49, at 536.

58. WILLS, *supra* note 50, at 38.

59. *Id.*

themselves about their national aspirations and the purposes of their internecine struggle.<sup>60</sup>

### III. REORDERING CHRONOLOGY AND THE LAW

As these cases suggest, in different areas of American social and political life, the present arguably impacts not only how we organize and make sense of the past and its significance, but also how we comprehend the very nature, content, and status of prior actions, institutions, commitments, and persons. In the remainder of this Article I surface additional examples to develop a more specific argument that this seemingly reversed model of chronology and causation appears with some regularity in the field of law. I further contend, this recurrence is both explicable and important.<sup>61</sup>

#### A. *The Second Amendment*

Since the Reagan “revolution” of the 1980s, and with the concomitant rise of a sustained and politically successful conservative movement,<sup>62</sup> the Second Amendment of the Constitution has received increased emphasis and given rise to a vibrant debate amongst scholars, citizens, and members of various interest groups over the meaning and scope of the amendment.<sup>63</sup> Among other points of contention is whether the amendment refers to an individual or collective right, how far this right extends, and whether its ultimate objective is to promote self defense or a more sweeping “insurrectionist” right to resist tyrannical

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60. See *id.* at 38-40. Cf. Deborah Sharp, *Deadliest Hurricane Began Century*, USA TODAY, August 30, 1999, at A3 (reporting on author Erik Larson who notes that the Galveston storm of 1900 was, unlike other calamities, “bleached from the national psyche” because it could not easily be incorporated into a narrative of American triumphalism).

61. The ensuing discussion of “reversed chronology” in the law is not meant to be exhaustive, but merely suggestive of 1) some of the more salient elements of law that arguably involve this dynamic, and 2) some of the features of law that make this temporal disorder likely to occur. There are certainly other examples and explanations worth exploring. Brian Havel, for example, has argued that states use a number of “public law devices” to create an “official public memory” based on “elite” memories and objectives, the latter including “social control and stability” and the suppression of alternate accounts of the past. Havel, *supra* note 8, at 608, 689-90.

62. See Ted V. McAllister, *Reagan and the Transformation of American Conservatism*, in THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES 40, 40-60 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003) (discussing the legacy of Reagan on the American conservative movement).

63. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639-42 (1989) (comparing popular discussions of the Second Amendment with a relatively limited judicial and scholarly commentary).

government.<sup>64</sup>

Regardless of where one stands on the particulars of these issues, it seems reasonable to posit that ascertaining the meaning, impact, and even purposes of the Second Amendment cannot be divorced from developments since the eighteenth century. As Daniel Farber has convincingly argued, analysis of the Second Amendment's underlying rationale and legal reach is surely impacted by at least two crucial developments since the amendment's inception: the Civil War (in which, as both a legal and political matter, the U.S. government ultimately quashed the efforts of the Confederate states to engage in armed rebellion) and the rise of the modern "regulatory state."<sup>65</sup> With this background in mind, we might cogently assert that these "recent" developments in our political expectations and national power can lay a legitimate claim to affecting the nature of a constitutional amendment ratified in the eighteenth century.

### *B. Cruel and Unusual Punishment and the Eighth Amendment*

Like the Second Amendment, the Eighth Amendment, prohibiting the imposition of "cruel and unusual punishments," was part of the package of legal protections included in the Bill of Rights.<sup>66</sup> Since the early twentieth century, the Supreme Court has explicitly invoked attitudes and mores of the present in applying the clause to particular cases.<sup>67</sup> In *Weems v. United States*,<sup>68</sup> for example, the Court held that the nature of cruel and unusual punishment was not restricted to the views held by those who proposed, ratified, or even inherited the Eighth Amendment.<sup>69</sup> Writing for the Court in *Weems*, Justice Joseph McKenna stated,

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64. See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 3-25 (2000) (providing an historical narrative of different arguments about the meaning of the Second Amendment).

65. Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 190-192 (2000) (discussing the impact of the Civil War and the rise of the modern administrative state on our understanding of the Second Amendment).

66. See PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 5 (1992) (discussing the Bill of Rights).

67. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 1014-15 (1991) (invoking precedent to affirm the Court's commitment to viewing the "cruel and unusual" clause as evolving) (White, J., dissenting); *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958) (noting that the meaning of "cruel and unusual" is not "static"); *Weems v. United States*, 217 U.S. 349, 368-79 (1910) (discussing the meaning of "cruel and unusual punishment").

68. 217 U.S. 349.

69. *Id.* at 368-79.

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital must be capable of wider application than the mischief which gave it birth . . . . The meaning and vitality of the Constitution have developed against narrow and restrictive construction.<sup>70</sup>

Nearly half a century later, in *Trop v. Dulles*,<sup>71</sup> the Court rearticulated this sense that the definition of “cruel and unusual” punishment derives not from “static,” past views, but the “evolving standards of decency that mark the progress of a maturing society.”<sup>72</sup>

More recently still, discussion of the application of the Eighth Amendment has centered around the death penalty, and the Court has consistently turned to the notion that contemporary views inform the parameters of constitutionally permissible punishments.<sup>73</sup> As Justice Stevens wrote in *Atkins v. Virginia*,<sup>74</sup> decided in 2002,

[In recent years,] the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are “cruel and unusual punishments” prohibited by the Eighth Amendment to the Federal Constitution . . . . A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the “Bloody Assizes” or when the Bill of Rights was adopted, but rather by those that currently prevail.<sup>75</sup>

Justice Stevens’ subsequent scrutiny of the contemporary actions of state legislatures and public opinion polling led him to rule that the decisive issue in the case was that a “national consensus” had developed against execution of the mentally retarded.<sup>76</sup> In light of these arguments,

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70. *Id.* at 373.

71. 356 U.S. 86 (1958).

72. *Id.* at 101.

73. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 169-74 (1976) (discussing the evolution of interpretations of “cruel and unusual” punishment and the role of public perceptions in shaping that meaning); *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005) (arguing that the Court, in construing “cruel and unusual punishment” looks not to its “own conceptions of decency, but to those of modern American society as a whole”).

74. 536 U.S. 304 (2002).

75. *Id.* at 307, 311.

76. *Id.* at 316.

it does not seem unfair to say that the content of the Eighth Amendment, ratified in 1791, was determined by views and policy judgments developed over two centuries later.

### *C. Constitutional (In)eligibility and Vice President Clinton*

Since 2000, legal and political commentators have, somewhat fitfully, engaged the question of whether former President Bill Clinton (or any other twice-elected president) could serve as a vice presidential running mate in a future presidential election.<sup>77</sup> While this prospect generated consensus that it would create significant political obstacles for those occupying the top spot on this hypothetical presidential ticket, opinion was more divided on the question of whether Clinton was legally allowed to serve as vice president.<sup>78</sup>

Those objecting to a Vice President Clinton on constitutional grounds traced their opposition to two sources: the Twenty-Second and Twelfth Amendments.<sup>79</sup> Upon initial consideration, the Twenty-Second Amendment, which bars a person from being “elected” to the office of president more than twice,<sup>80</sup> would only seem to prohibit Clinton (or any other twice-elected president) from seeking another elected presidential term.<sup>81</sup> Thus, Clinton would appear to be free to run as vice president.

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77. *E.g.*, Michael C. Dorf, *Why the Constitution Permits a Gore-Clinton Ticket*, CNN ONLINE, Aug. 2, 2000, <http://archives.cnn.com/2000/LAW/08/columns/fl.dorf.goreclinton.08.01/>; Scott E. Gant & Bruce G. Peabody, *How to Bring Back Bill: A Clinton-Clinton 2008 Ticket is Constitutionally Possible*, CHRISTIAN SCI. MONITOR, June 13, 2006, available at <http://www.csmonitor.com/2006/0613/p09s02-coop.html?s=t5>; Stephen Gillers, *The Next Best Thing to Being President*, N.Y. TIMES, Mar. 3, 2004, A23 available at <http://www.nytimes.com/2004/03/03/opinion/03GIL.html?ex=1393650000&en=2667b709bb523c93&ei=5007&partner=USERLAND>. See generally Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty Second Amendment*, 83 MINN. L. REV. 565, 565-67 (1999).

78. See THOMAS H. NEALE, PRESIDENTIAL AND VICE PRESIDENTIAL TERMS AND TENURE 4-5 (Cong. Research Serv., CRS Report for Congress Order Code RS 20827, Feb. 26, 2001), available at [http://lugar.senate.gov/CRS%20reports/Presidential\\_and\\_Vice\\_Presidential\\_Terms\\_and\\_Tenure.pdf](http://lugar.senate.gov/CRS%20reports/Presidential_and_Vice_Presidential_Terms_and_Tenure.pdf) (discussing the historical background of the Twenty-Second Amendment and the debate about its legal significance).

79. *Id.* at 5; Peabody & Gant, *supra* note 77, at 618-20 (discussing the relationship between the Twelfth and Twenty-Second Amendments).

80. The Twenty-Second Amendment to the United States Constitution states, No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

U.S. CONST. amend. XXII, § 1.

81. Peabody & Gant, *supra* note 77, at 565-66 (sketching the argument that the Twenty-

But critics of the Clinton proposal argue that the Twenty-Second Amendment must be read alongside the Twelfth Amendment to the U.S. Constitution,<sup>82</sup> which states that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”<sup>83</sup> In this view, constitutional “ineligibility” with respect to the Vice Presidency is critically defined by the restrictions of the Twenty-Second Amendment; since Clinton was supposedly “ineligible” to the office of president, he was barred from serving as vice president as well.<sup>84</sup>

Although this argument about vice presidential (in)eligibility is flawed,<sup>85</sup> it serves to illustrate the extent to which some legal arguments implicitly assume that contemporary legal structures can transform the original content and significance of past law. Whatever the Twelfth Amendment’s eligibility restrictions meant when it was formally approved in 1804, they presumably did not include the terms of the Twenty-Second Amendment—ratified almost 150 years later.<sup>86</sup> Nevertheless, arguments that Clinton is ineligible to serve as vice president seem based on an assumption that the ratification of the Twenty-Second Amendment altered the basic, initial terms of the Twelfth Amendment’s eligibility provisions; the claim is not that the Twenty-Second Amendment simply legally amended or supplemented the existing language of the Twelfth Amendment, but that it helped to define the very parameters and authority of the earlier provision.<sup>87</sup>

#### *D. The Fourteenth Amendment and Originalism*

Originalism, a theory of constitutional interpretation based on attempting to reconstruct and adhere to the intentions of our supreme law’s original authors, has been widely debated, defended as the best and even sole method for arriving at proper constitutional outcomes,<sup>88</sup>

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Second Amendment does not bar a twice elected person from again serving as president).

82. NEALE, *supra* note 78, at 4-5; Eugene Volokh, *Bill Clinton for Vice-President?*, VOLOKH CONSPIRACY, June 19, 2006, <http://www.volokh.com/posts/1150738214.shtml> (discussing the potentially relevant constitutional provisions that relate to this discussion).

83. U.S. CONST. amend. XII.

84. Peabody & Gant, *supra* note 77, at 619-20.

85. *Id.*

86. See NEALE, *supra* note 78, at 4-5.

87. See *id.*

88. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 160, 167, 177-78, 351-52 (1991) (defending an approach to constitutional interpretation that relies upon the “original understanding” of the text).

and dismissed as an exercise in futility.<sup>89</sup> Among one of the more seemingly awkward challenges facing proponents of this interpretive methodology is what to do with *Brown v. Board of Education*.<sup>90</sup> Although the *Brown* opinion is widely hailed as a morally and legally “correct” decision<sup>91</sup> there is a widespread (but certainly not unanimous) sense that the framers of the Fourteenth Amendment, the constitutional provision at the heart of *Brown*, actually favored the kind of public school segregation at issue in the famous case.<sup>92</sup> As John Harrison summarizes,

[I]f American constitutional theory has a cliché of clichés, it is the argument over whether the general acceptance of *Brown* means that it is now unacceptable to interpret the Constitution according to its original intention or understanding. The idea is that the drafters of the Fourteenth Amendment did not want to forbid separate but equal education, and more generally had no trouble with race-conscious but symmetrically discriminatory laws.<sup>93</sup>

These issues moved from being grist for scholars’ mills to the forefront of public affairs in 1987, when Robert H. Bork (then sitting as a Judge on the Court of Appeals for the District of Columbia Circuit) was nominated for a seat on the United States Supreme Court.<sup>94</sup> During

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89. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 237-38 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

90. 347 U.S. 483 (1954); see BREST & LEVINSON, *supra* note 66, at 589-603.

91. Edward Whelan, *Brown and Originalism*, NAT’L REV. ONLINE, May 11, 2005, <http://www.nationalreview.com/comment/whelan200505110758.asp>. Whelan writes:

The [political] Left’s ‘killer’ argument against an originalist reading of the Constitution is that adherence to the original meaning of the Fourteenth Amendment purportedly would not have yielded the just result—the end to the evil of segregated public schools—mandated by the Supreme Court’s landmark 1954 ruling in *Brown v. Board of Education*.

*Id.*

92. Compare RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 10-11 (2d ed. 1997) (arguing that the Fourteenth Amendment must be interpreted in light of the racial prejudice of its framers) with Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953-54 (1995) [hereinafter McConnell, *Originalism and the Desegregation Decisions*] (challenging the view that the “originalist” readings of the Fourteenth Amendment support segregation), Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1937-38 (1995) (same), and Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger’s History*, 54 N.Y.U. L. REV. 651, 656-659 (1979) (book review) (criticizing Berger’s argument).

93. Harrison, *supra* note 16, at 1601; McConnell, *Originalism and the Desegregation Decisions*, *supra* note 92, at 953-55 (discussing the problem of *Brown* and originalism, but arguing that the decision is consistent with the intentions of the Fourteenth Amendment’s authors).

94. BREST & LEVINSON, *supra* note 66, at 599; KEVIN T. MCGUIRE, *UNDERSTANDING THE*

his hearing before the Senate Judiciary Committee, Bork was asked directly about his views on *Brown*, given scholarly contentions about the intentions underlying the Fourteenth Amendment and Bork's stated position that "interpretation of the Constitution according to the original understanding . . . is the only method that can preserve the Constitution" and its underlying values.<sup>95</sup> Bork's response was cautious and studied, suggesting he had anticipated this line of inquiry:

I think it may well be true . . . [that the framers of the Fourteenth Amendment] had an assumption which they did not enact, but they had an assumption that equality could be achieved with separation. Over the years it became clear that this assumption would not be borne out in reality ever. Separation would never produce equality.

I think when the background assumption proved false, it was entirely proper for the Court to say "we will carry out the rule they wrote" and if [the authors of the Fourteenth Amendment] would have been a little surprised that it worked out this way, that is too bad. That is the rule they wrote and they assumed something that is not true.

. . . .

By 1954 it was perfectly apparent that you could not have both equality and separation.<sup>96</sup>

What does Bork's analysis mean? It does not seem unreasonable to recast Bork's remarks as advocating for the following rule of constitutional interpretation: the Constitution is best understood as whatever its framers intended unless subsequent developments prove their background assumptions to be false, in which case an interpreter should adhere to a strictly textual reading of the Constitution.<sup>97</sup> In other words, our understanding of the Constitution is dependent upon the past, unless the framer's intentions and presumptions are proven false, in which case they can be modified by the present. Even Bork, one of the most devoted adherents to originalism, seems to concede that the Constitution's past meaning and content is contingent.<sup>98</sup>

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U.S. SUPREME COURT 18-21 (2002).

95. BORK, *supra* note 88, at 159.

96. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong., 286 (1987) (statement of Judge Robert H. Bork).

97. *See id.*

98. *See id.*; Monaghan, *supra* note 15, at 744 (discussing the *Legal Tender Cases* and the Supreme Court's validation of "paper" money despite the clear intentions of the Constitution's

### *E. Creating Legislative Intent Ex Post Facto*

Bork's treatment of *Brown* in light of the intentions of the framers of the Fourteenth Amendment points us to a related area of law in which we might again argue that the present can have a decisive impact on the past. Courts frequently, and often without controversy,<sup>99</sup> attempt to articulate legislative intent when interpreting statutes.<sup>100</sup> Typically, we think of Congress passing a law with some more or less specific purpose outlined in the text of the bill that can also be traced to the debates surrounding the proposal and passage of the measure.<sup>101</sup> Courts use this legislative history to fill in interstices in the law, and to understand, more generally, what the measure was intended to accomplish.<sup>102</sup> If Congress disagrees with the courts' construction of a federal law, it can always re-pass the measure or otherwise clarify its intentions, correcting mistaken judicial understandings.<sup>103</sup>

One might imagine that the relationship between Congress's initial legislative intent and these ensuing efforts to apply or clarify these purposes is not difficult to describe. Presumably, using Levinson's vocabulary, these moves are either interpretations (carving out a meaning that is "immanent within the existing"<sup>104</sup> legislative record) or evident (and presumably impermissible) amendments of an identifiable preexisting legislative intent.<sup>105</sup>

There are sound reasons for believing, however, that in many cases,

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founders that "only metal could constitute legal tender").

99. While, in principle, many legal commentators presume that determining legislative intent is defensible, there is certainly debate about the proper approach to this task. *See, e.g.*, Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 87-89 (1984); Peabody & Gant, *supra* note 77, at 614-17 (describing the problems of construing intent and using legislative history).

100. LAWRENCE BAUM, *THE SUPREME COURT* 175-76 (8th ed. 2004) (discussing statutory interpretation).

101. *See* AHARON BARAK, *JUDICIAL DISCRETION* 61-62 (Yadin Kaufmann trans., Yale Univ. Press 1989) (1987) (discussing "legislative purpose"); WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 31-34 (2002) (discussing "intent" as a type of legal argument); DAVID M. O'BRIEN, *JUDGES ON JUDGING: VIEWS FROM THE BENCH* 213 (David M. O'Brien ed., 1997) (describing the "intent" of Congress and how it is determined).

102. *See* BARAK, *supra* note 101, at 60-67 (discussing the judiciary's discretion in ascertaining and applying "legislative purpose"); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, in *JUDGES ON JUDGING*, *supra* note 101, at 230-236 (setting out arguments about the judiciary's role in using legislative history).

103. *See* LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* 206-09 (1988) (discussing "statutory reversals" of court decisions).

104. Levinson, *supra* note 27, at 20.

105. As a normative matter, one might presume that most would regard the former practice (retrospective interpretation) as acceptable and the latter (retrospective amendment) as dubious, particularly when practiced by judges.

the judiciary's *ex post facto* rendering of legislative intent and Congress's formal clarifications of its purposes actually create a congressional rationale that did not exist previously.<sup>106</sup> Members of Congress have sometimes contradictory and unformed reasons for voting for a bill.<sup>107</sup> Given the diversity and complexity of Congress and its motives, and the length (or paucity) of its deliberations, and the subsequent confusion these conversations create, in many cases it may be meaningless to talk about a single, coherent, readily identifiable legislative intention.<sup>108</sup> Such a purpose may only emerge after the fact, when a court or a later Congress explicitly and formally speaks to this issue.<sup>109</sup> These later interpretations, however, cannot claim reliable access to (or status as) the prior, undiscovered intent. Therefore, in some—perhaps most—instances, legislative intent will be fabricated by institutions and individuals temporally removed from the initial passage of a measure.<sup>110</sup> Again, in this way, the past is only created in the future.<sup>111</sup>

Consider a specific example. Three days after the terrorist attacks of September 11, 2001, Congress passed a joint resolution, an "Authorization for Use of Military Force" (AUMF), permitting President Bush

to use all necessary and appropriate force against those nations,

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106. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17-18 (1997) ("The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires . . ."). This discussion calls to mind a joke about baseball. Three umpires are discussing their strategies to calling balls and strikes. The first says: "I call them as I see them." The second: "I call them as they are." The third umpire: "Until I call them, they aren't." Jim Lindgren, *Roberts' Umpire Analogy is not Quite as Simple as it Seems*, VOLOKH CONSPIRACY, Sept. 12, 2005, [http://www.volokh.com/posts/chain\\_1126668043.shtml](http://www.volokh.com/posts/chain_1126668043.shtml). The retrospective reach of the third umpire captures some of the dynamics found in this discussion of legislative intent, and in this Article generally.

107. See, e.g., LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 63-67 (2000) (discussing the varied and sometimes contradictory rationale guiding members of Congress in voting for the War Powers Resolution); Bruce G. Peabody, *Congress, the Court, and the "Service Constitution": Article III Jurisdiction Controls as a Case Study of the Separation of Powers*, 2006 MICH. ST. L. REV. 269, 313-17 (2006) (outlining the rationale of members of Congress in proposing legislation).

108. See Easterbrook, *supra* note 99, at 88-89 (discussing some of the problems of construing legislative history).

109. See SCALIA, *supra* note 106, at 16-18.

110. Easterbrook, *supra* note 99, at 92.

111. See JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 158 (1986) (making a similar argument). "[W]e cannot know an aboriginal reality . . . any reality we create is based on a transmutation of some prior 'reality' that we have taken as given. We construct many realities, and do so from differing intentions." *Id.*

organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>112</sup>

Given 1) the fairly cursory and contracted nature of the discussion on the AUMF, largely carried out between the Bush administration and congressional leaders (“and not through the formal committee legislation review process”<sup>113</sup>), as well as 2) the near unanimity with which the measure was supported,<sup>114</sup> and 3) the sense of urgency that was coursing through the nation at the time the resolution was considered,<sup>115</sup> it is difficult to state clearly what Congress intended.<sup>116</sup> Did the resolution extend to Al Qaeda, the Taliban, or to anyone who provided aid and comfort, even of an indirect form, to members involved with the 9/11 attacks?<sup>117</sup> Did Congress hope to focus solely on the September 11 attacks, or a more general “war against terrorism?”<sup>118</sup> Did Congress wish to expand the President’s ability to use military commissions and electronic surveillance through the AUMF statute?<sup>119</sup>

These questions about legislative intent have been central to a number of legal struggles that have emerged since the law was signed by

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112. Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

113. RICHARD F. GRIMMETT, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2 (Cong. Research Serv., CRS Report for Congress Order Code RS 22357, Jan. 4, 2006) available at <http://www.fas.org/sgp/crs/natsec/RS22357.pdf>. Grimmatt writes:

The leaders of the Senate and the House decided at the outset that the discussions and negotiations with the President and White House officials over the specific language of the joint resolution would be conducted by them, and not through the formal committee legislation review process. Consequently, no formal reports on this legislation were made by any committee of either the House or the Senate.

*Id.*

114. Of the 531 members of Congress voting on the resolution, there was only 1 “no” vote, with 12 members not voting. See 147 CONG. REC. S9413 (daily ed. Sept. 14, 2001); 147 CONG. REC. H5638 (daily ed. Sept. 14, 2001).

115. 148 CONG. REC. S10145 (daily ed. Oct. 9, 2002). Senator Hutchison stated:

After the tragic events of 9/11, President Bush sought and received the authorization to use force to find and destroy the terrorists who had launched that heinous crime. There was no question in my mind and in the minds of most Members of Congress that our national security demanded our support of the President.

*Id.*

116. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2079-83 (2005) (discussing the legislative debates on the AUMF).

117. See *id.* (interpreting the AUMF).

118. See *id.*

119. See *id.*

President Bush on September 18, 2001.<sup>120</sup> In *Hamdi v. Rumsfeld*,<sup>121</sup> for example, the Supreme Court reviewed legislative history and other materials in ruling that Congress did not intend to use the AUMF to alter the rules governing military commissions found in Article 21 of the Uniform Code of Military Justice.<sup>122</sup> The Bush administration has also cited the congressional AUMF in defending a secret electronic surveillance program, essentially arguing that Congress intended to give sufficient power to the President to amend or expand existing eavesdropping statutes, such as the Foreign Intelligence Surveillance Act.<sup>123</sup>

While courts and lawmakers have sometimes characterized these debates as being about whether Congress specifically intended to support the President's actions with its AUMF measure,<sup>124</sup> we have good reasons to believe that the search for this "original" legislative intent may represent a quixotic errand.<sup>125</sup> The clearest articulation of the purposes behind the AUMF was provided by Congress (and the courts) long after it was passed into law.

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120. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a) 115 Stat. 224 (2001).

121. 542 U.S. 507 (2004).

122. See *id.* at 518. The Court attempted to clarify the individuals Congress aimed at under the terms of the AUMF:

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.

*Id.*

123. See Neil King Jr., *Wiretap Furor Widens Republican Divide*, WALL ST. J., Dec. 22, 2005, at A4; Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

124. See, e.g., Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, at A21 (denying Vice President Cheney's claim that the AUMF granted the President authority "to use all means necessary to take on the terrorists" and expressing confidence "that the 98 senators who voted in favor of authorization of force against al Qaeda did not believe that they were also voting for warrantless domestic surveillance"); Carol D. Leonnig, *Report Rebuts Bush on Spying; Domestic Action's Legality Challenged*, WASH. POST, Jan. 7, 2006, at A01.

125. Among the plausible evidence for this view is the contemporary deep division over what the AUMF authorizes, notwithstanding the near unanimity with which it was passed. See, e.g., Richard B. Schmitt, *Senate Panel Sends a Mixed Message on Wiretapping*, L.A. TIMES, Sept. 14, 2006, at A16.

#### IV. ACCOUNTING FOR REORDERED CHRONOLOGY IN THE LAW

These examples suggest, in an admittedly cursory way, that law may be especially conducive to modes of analysis and decision making that allow the present to disrupt not only how the past is understood and evaluated, but also how we regard the experiences of past historical subjects. The following discussion points to a number of features of American legalism that can induce this unconventional form of chronology and causation.<sup>126</sup>

##### A. *The Nature of the Common Law*

Among its other relevant features, the common law<sup>127</sup> reasoning marshaled by judges and justices relies upon an inductive process of deriving general, but sometimes quite specific, legal principles from prior cases.<sup>128</sup> A vital step in this process occurs when a legal interpreter culls doctrine from a body of existing case law. This inductive moment is crucial for several reasons: it determines which set of cases are consulted, establishes the framework through which these prior decisions are to be understood, and generates a new guiding legal rule (or at least modifies an old rule).<sup>129</sup>

Understood in this way, the importance and even the meaning of cases cannot be known at the time they are issued, but only after they have been interpreted, applied, and linked with other rulings.<sup>130</sup> Stated somewhat differently, the retrospective reach of common law reasoning includes a decision making process in which present judgments reconstruct the significance and authority of cases long past.<sup>131</sup>

Consider an example from constitutional civil liberties.<sup>132</sup> At the

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126. As noted, while I emphasize American constitutional law in this discussion to keep it somewhat focused, much of the logic of my argument might be extended to other areas of law and other nations.

127. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 7 (6th ed. 1993) (describing the common law by contrasting “bench” and “bar” made law).

128. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001) (defining common law adjudication as involving “a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage”).

129. See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 8-27 (Univ. of Chicago Press 1949) (describing the process of common law reasoning).

130. See K.N. LEWELLYN, *THE BRAMBLE BUSH* 61-77 (1951) (discussing the indeterminacy of the common law system); Hathaway, *supra* note 128, at 604.

131. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552-562 (1995) (drawing on the Court’s previous Commerce Clause decisions to construct a three part test for assessing the constitutionality of “commerce” legislation regulating private activity).

132. There is some dispute about the extent to which the federal courts can and have created a

time of its issuance in 1937, *Palko v. Connecticut*<sup>133</sup> was arguably a constrained, even conservative ruling that actually denied the double jeopardy claim of a criminal convict; it hardly represented a revolution in the judiciary's willingness to protect individual rights.<sup>134</sup> But over the next five decades, *Palko* became a vital cog in the legal machinery that transformed the scope and application of the Bill of Rights.<sup>135</sup> In an important sense, then, the *Palko* decision was only defined and completed as a legal matter by decisions that occurred long after the individual claims in the case had been settled, long after the opinion had been printed in the *United States Reports*.<sup>136</sup> We might make similar claims about *M'Culloch v. Maryland*,<sup>137</sup> *Brown*,<sup>138</sup> *Griswold v. Connecticut*,<sup>139</sup> and other "great cases" that serve as major precedents in our legal system.

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constitutional common law. Gerhardt, *supra* note 14, at 941-46 (outlining differences between "constitutional" and "common law adjudication"). Without delving into this controversy here, I simply note that American constitutional jurisprudence certainly shares some features of common law reasoning, such as a reliance on precedent and a refusal to render advisory opinions. Interestingly, to the extent that judges or justices accept the proposition that there is no constitutional common law, arguably, every time these jurists preside over a significant constitutional change they serve as a representation of the curious reversal of "time's arrow" portrayed in this Article. If there is no constitutional common law, then any judicial gloss on the Constitution is essentially an interpretation of what the Constitution actually says. Seen through this paradigm, shifts in constitutional doctrine created by judges effectively change the content of a document written over 200 years ago.

133. 302 U.S. 319 (1937), *overruled by* 395 U.S. 784 (1969).

134. *See id.* at 328.

135. 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 307-08 (2d ed. 1995) (describing the development of the *Palko* doctrine).

136. LLEWELLYN, *supra* note 130, at 52 (making a "distinction between the ratio decidendi, the court's own version of the rule of the case, and the *true* rule of the case, to wit, *what it will be made to stand for by another later court*"); *see also* Levinson & Balkin, *supra* note 9, at 280. Levinson and Balkin write,

Understanding what a case means often requires recognizing what happened after the decision was entered. This is so for two reasons. First, the consequences that the case sets in motion often help us understand the practical effect of the case, and whether the decision was wise or ill-advised. Second[,] the meaning of the case to later generations is produced by the later uses and interpretations of it, which continually reframe its meaning and significance in our eyes.

*Id.*

137. 17 U.S. (4 Wheat.) 316 (1819).

138. Levinson & Balkin, *supra* note 9, at 280 ("*Brown v. Board of Education* has acquired a whole host of meanings in the fifty years following the decision: It has become an icon of equality as well as a symbol of both what courts can do and what they cannot do in promoting important public values.").

139. 381 U.S. 479 (1965).

### B. Law as a Constitutive Enterprise

Among other functions, law settles disputes, identifies rights, coerces individuals, and helps to identify binding, enforceable norms.<sup>140</sup> But, as a number of commentators have noted, law is also constitutive, in the sense that it makes formative statements about who we are as a people.<sup>141</sup> Law tells stories about our identity.<sup>142</sup>

This dimension of law invites a remaking of the past when our current perceptions change and we wish to refurbish the existing national narrative. We reach into the past not merely to refine or amend our laws, but to “retell” the past in an authoritative way, on terms more favorable to our present sensibilities and judgments.<sup>143</sup> Lincoln’s emphasis on the equality principles embedded in the Declaration serves as one dramatic example of this recasting of American ambitions and tradition.<sup>144</sup> Legal institutions—and the decision makers who feed them life—frequently revisit settled judgments, at times in ways that effectively repudiate the terms of our past.<sup>145</sup>

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140. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 25-47 (rev. ed. 1954) (discussing the different “ends” of law).

141. J.M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167, 180 (1999) (“Constitutional stories constitute us as a people with a purpose and a trajectory: They remind us what we have done in the past and therefore what we should be doing today. They explain to us where we have been and therefore where we should be going.”).

142. *See id.*; AMSTERDAM & BRUNER, *supra* note 7, at 232-34 (examining how legal narratives contribute to the formation of our identity); HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1963) (“[S]ocial groups create deviance by making the rules whose infraction constitutes deviance.”) (emphasis omitted); W. JAMES BOOTH, *COMMUNITIES OF MEMORY: ON WITNESS, IDENTITY, AND JUSTICE* 125-27 (2006) (discussing the role of law, and specifically trials, in shaping national identity); ANNE NORTON, *REPUBLIC OF SIGNS: LIBERAL THEORY AND AMERICAN POP CULTURE* 11 (1993) (discussing how our constitutional traditions incline us to privilege a “written over a more corporeal identity”); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066 (1990) (“We must respect the past because the world of culture that we inherit from it makes us who we are.”).

143. NORTON, *supra* note 142, at 10 (discussing how Abraham Lincoln used law to remake himself and forget his past).

144. *See* discussion *supra* Part II.C.3.

145. *See* Balkin, *supra* note 20, at 1337.

Marshall, then, is great because he was a prophet of American nationalism. If the history of America had turned out differently, if the nation had fractured as a result of the Civil War, or if America had never risen to the status of a great power—his star might not shine so brightly today. Of course, that is always the case with prophets. Most prophets are false prophets. Their prophecies are discarded and soon forgotten. Even true prophets do not always understand the full import of what they are saying. That is largely because what they say is not true at the time, but is rather made true by later events. Prophets are the servants of the future, and prophecy is one of the uses that the future makes of the past.

*Id.* at 1338.

In recent years, for example, prosecutors have disinterred a number of criminal cases dating back to the civil rights era, resulting in indictments, convictions, and prison sentences for violent segregationists who had eluded the law's reach for decades.<sup>146</sup> These retrospective legal actions are partly driven by a sense that the fabric of our past historical and legal record needs to be mended or even re-stitched.<sup>147</sup> In the early 1960s, Byron De La Beckwith, a Mississippi Klansman, was arrested and twice tried for assassinating National Association for the Advancement of Colored People (NAACP) field secretary Medgar Evers.<sup>148</sup> Both proceedings resulted in mistrials after the juries, composed entirely of whites, were unable to reach a verdict.<sup>149</sup> At the time, Beckwith's actions and status made him something of an iconic figure amongst segregationists, such that Mississippi Governor Ross Barnett attended one of his trials, even shaking Beckwith's hand after it became clear that he would not be convicted.<sup>150</sup>

Three decades later, Beckwith was convicted of the murder of Evers and sentenced to life in prison.<sup>151</sup> Beckwith, while morally reprehensible, did not obviously represent an ongoing, direct threat to the public safety of his community.<sup>152</sup> What changed over time was a sense in the relevant legal and political arenas that Beckwith's status had to be moved from free citizen to convict, that his prior actions needed to be judged as criminal and reprehensible, rather than effectively condoned.<sup>153</sup> As Assistant District Attorney Bobby DeLaughter

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146. Editorial, *A Long Time Coming: But Sometimes Justice Delayed is Still Justice*, THE REGISTER-GUARD, June 23, 2005 at A10 (discussing the conviction of Edgar Ray Killeen for the murder of three civil rights workers killed four decades earlier); Eric Lichtblau, *Justice Delayed*, N.Y. TIMES, May 16, 2004, at § 4, at 2 (discussing the Justice Department's decision to reexamine the killing of Emmett Till); Kevin Sack, *Ex-Klansman is Found Guilty in '63 Bombing*, N.Y. TIMES, May 2, 2001, at A1 (discussing the conviction of Thomas Blanton for murdering four African-American girls in 1963).

147. Kevin Sack, *An Alabama Prosecutor Confronts the Burden of History*, N.Y. TIMES, May 5, 2001, at A8 (profiling Doug Jones, the lead prosecutor in the case involving Thomas Blanton, and discussing the purposes of pursuing the case).

148. TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963-65*, at 112-13, 230-31, 321 (1998) (discussing the arrest and two trials of Beckwith).

149. *Id.* at 230-31, 321; ADAM NOSSITER, *OF LONG MEMORY: MISSISSIPPI AND THE MURDER OF MEDGAR EVERS 105-09, 132-34* (Da Capo Press 2002) (1994) (describing the two mistrials of Beckwith in 1964).

150. NOSSITER, *supra* note 149, at 108-109 (describing Ross Barnett's appearance at Beckwith's trial).

151. *Id.* at 249-257 (describing Beckwith's third trial).

152. *Id.* at 260.

153. *Id.* at 259-63 (discussing gradual changes in how the case against Beckwith was perceived, and speculating that the film, *The Ghosts of Mississippi*, may have helped change views about the case). For a quite different example of how the law might be used to reverse past cases

explained, he was motivated to reopen the Beckwith case in the 1990s to “set things right” in the legal record, and to address “the lack of closure, the lack of justice [that] was still there.”<sup>154</sup>

In rejecting Beckwith’s contemporary appeals, the Mississippi Supreme Court affirmed a similar viewpoint and paid tribute to the power of the present to shape the decisions of history.<sup>155</sup> “Today’s ruling,” the Court stated,

represents the final act of this sovereign State’s attempt to deal with a maelstrom born out of human conflict as old as time . . . . Final resolution of this conflict resulted from voices, both present and past, who showed the courage and will, from 1964 to 1994, to merely state the truth in open court. Their voices cannot be ignored. We affirm the finding of the [1994] jury that Byron De La Beckwith, VI murdered Medgar Evers on the night of June 12, 1963.<sup>156</sup>

### *C. Law as an Aspirational Enterprise*

As numerous scholars have argued, our legal rules, traditions, institutions, and practices cannot be readily divorced from a normative vision of what we hope to achieve and become as both a society and political order.<sup>157</sup> In order to make our legal structure coherent and functional, our past must be read, our present must be structured, and our future must be planned for in ways that help to achieve these ideals.<sup>158</sup>

This “aspirational” element of legalism can be found in a wide

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and public perceptions, see Associated Press, *State Asked to Pardon “Witches,”* REPUBLICAN AM., Oct. 21, 2006, available at <http://www.rep-am.com/story.php?id=14262>, which discusses citizens’ efforts to obtain state pardons from the Connecticut Board of Pardons and Paroles for individuals executed as witches in the 17th century.

154. *Mississippi Justice*, UNIV. MISS. LAW CTR. NEWS, Fall 1999, [http://www.olemiss.edu/depts/law\\_misc/feturMsA.htm](http://www.olemiss.edu/depts/law_misc/feturMsA.htm); see BOBBY DELAUGHTER, NEVER TOO LATE: A PROSECUTOR’S STORY OF JUSTICE IN THE MEDGAR EVERS CASE 25, 292-95 (2001) (discussing his reasons for prosecuting the Beckwith case, including his motivation to reopen and cleanse the “old wound” left by Beckwith’s unsuccessful prior prosecution).

155. *De La Beckwith v. Mississippi*, 707 So. 2d 547, 604 (Miss. 1997).

156. *Id.*

157. See, e.g., SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 10 (1984) (laying out an “aspirational” theory of constitutionalism); Mark A. Graber, *Our (Im)Perfect Constitution*, 51 REV. POL. 86, 86 (1989) (identifying “perfect constitutionalism” with the proposition that “the Constitution requires that our society conform to the best principles of human governance”); Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 261-64 (1993) (discussing the “aspirational Constitution” by comparing it with a more conservative, retrospective “adjudicated Constitution”).

158. See RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 8, 14, 72 (1996) (discussing aspirationalism in the context of the Constitution’s Third Amendment).

array of institutions and practices. The U.S. Constitution's Preamble, for example, promises the political gifts of "a more perfect Union" and "Justice" not only to the present generation but to the future "posterity."<sup>159</sup> Case law recurrently features arguments that laws must be interpreted with an eye towards improving the moral conditions of the nation now and into the future. As noted previously, *Trop v. Dulles*<sup>160</sup> is famously centered on an understanding of the "evolving standards of decency that mark the progress of a maturing society."<sup>161</sup>

Aspirational accounts of law tend to be prescriptive as well as descriptive.<sup>162</sup> We should try to fashion the most just and attractive legal system, and, so the argument frequently goes, we also have a long history of striving toward this end.<sup>163</sup> Seen in this light, the necessity of reconsidering and sometimes reworking our legal past becomes clearer. While many of our longstanding institutions and traditions reflect our efforts to become a normatively better nation, they are often imperfect.<sup>164</sup> Aspirational thinkers are, therefore, keenly interested in how we might marshal and preserve our traditions, but they are also committed to recasting the past, and when necessary, to forgetting and forsaking elements of our history if this will advance our efforts to improve ourselves and achieve a morally superior future.<sup>165</sup>

While there are many variants of this aspirational account, Ronald Dworkin's writings on what he calls legal "naturalism" are especially instructive.<sup>166</sup> According to Dworkin, the great task of a legal interpreter

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159. U.S. CONST. pmb1.

160. 356 U.S. 86 (1958).

161. *Id.* at 101; *see also* Bruce Peabody, *Recovering the Political Constitution: Nonjudicial Interpretation, Judicial Supremacy, and the Separation of Powers* 25-30 (Aug. 2000) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with author) (discussing elements of constitutional interpretation by nonjudicial officials that have an aspirational character).

162. *See, e.g.*, Ronald Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 165 (1982) (outlining an approach to legal interpretation in which judges must interpret law with an eye on arriving at both the best fit with existing legal materials and the most morally justifiable opinion).

163. *See id.*

164. *See, e.g.*, Gerald J. Postema, *Integrity: Justice in Workclothes*, in *DWORKIN AND HIS CRITICS: WITH REPLIES BY DWORKIN* 285, 296 (Justine Burley ed., 2004) (discussing how Dworkin suggests that an interpreter deal with past social and legal "mistakes").

165. RONALD DWORKIN, *LAW'S EMPIRE* 93 (1986) ("The law of a community is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort"); CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 67-93 (2001) (distinguishing between "preservative" and "transformative" constitutions and identifying the latter as attempting "not to preserve an idealized past but to point the way toward an ideal future"); TUSHNET, *supra* note 56, at 17-30 (discussing argument about the conditions under which political officials should ignore the courts and legal precedent on constitutional matters).

166. DWORKIN, *supra* note 15, at 288-90 (discussing "naturalism" in legal theory).

entails showing “the facts of history in the best light he [or she] can.”<sup>167</sup> Judges should compare “two pictures of the judicial past to see which offers a more attractive picture from the standpoint of political morality” and they should then select that interpretation which comes “as close to the correct ideals of a just legal system as possible.”<sup>168</sup> For Dworkin, and other “aspirationalists,” the core of legal analysis entails integrating and adjusting the past on terms favorable to our present and future goals.<sup>169</sup>

#### *D. Law as a Formal System*

Law is a formal enterprise in the sense that it is more rule-bound and structured than, say, the decision making processes typically found in families or groups of friends.<sup>170</sup> One effect of this formality is that legal judgments about past events follow a distinctive (and often delayed) timeline relative to other social and political processes.<sup>171</sup> The proverbial “court of public opinion,” for example, is famously more immediate and impetuous than the courts of our legal system.

The lag inherent in “legal time” creates disjunctures with other forms of decision making.<sup>172</sup> Given law’s binding and authoritative character, when legal decisions are handed down, they can have the effect of dramatically reordering and even transforming our expectations

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167. Dworkin, *supra* note 162, at 169. While Dworkin emphasizes judges as legal interpreters, he recognizes that other figures, including citizens, may participate in reading law as well. *Id.*

168. *Id.* at 168, 172.

169. DWORKIN, *supra* note 15, at 25-26, 36, 44-45, 67-68, 71-80, 82-90, 96-97 (arguing that the law consists of inherited legal rules, but also moral principles and ideals of which the rules are but an imperfect expression). Some readers may object to this characterization of Dworkin’s philosophy, noting that some of his writing emphasizes the degree to which we (and legal interpreters) are bound by the past. For example, Dworkin offers the famous “chain novel” analogy to suggest that a proper legal interpreter must make sense of and reconcile past legal decisions just as a “chain novel” author must take stock of what has already been written when inheriting his or her manuscript. DWORKIN, *supra* note 165, at 228-38 (setting out the “chain novel” example). But even while constrained by the past, later chain novel authors (and judges) can exert tremendous power over what was written before them. *Id.* Consider, for example, the transformative power possessed by an author who is sent a nearly completed *Romeo and Juliet*, but who decides to turn the play into a comedy or traditional romance by having the two protagonists live happily together, rather than meeting an unfortunate demise. *See also* Lindquist & Cross, *supra* note 14, at 1173 (arguing that increasing the volume of pertinent precedent may actually free judges to pursue their ideological preferences as opposed to being bound down by legal rules).

170. *See, e.g.*, PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 76-77; 213-19 (1998) (contrasting the formalism and distinctive sense of time in law with the characteristics of “everyday life”).

171. *See id.*

172. *See id.*

and views about prior events, even those long past.<sup>173</sup> As the example of De La Beckwith attests, new evidence, along with new assessments of a case's meaning, importance, and prospects, can revivify legal proceedings and judgments previously deemed settled.<sup>174</sup> Political communities of the present revisit and alter past legal decisions, with the effect of not only purging erroneous legal statements but transforming the identity of past acts and actors.<sup>175</sup>

## V. CONCLUSION

This Article is founded on a presumption that, perhaps contrary to initial expectations, it is intellectually productive to think of the present as having an impact on the past—in ways that go beyond mere (re)interpretation. Assuming that this general argument about chronological disorder and the law has some traction, what are the stakes involved?

One answer to this query is that the approach laid out in this piece can assist us in grappling with, and profitably rethinking, trenchant

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173. *See id.* Present day legal and political orders can also transform and condition the terms under which we gain access to and construct the past. One of the more dramatic examples of this occurred when President George W. Bush used an executive order to alter the terms under which presidential records were made available to the public. Among other effects, Bush's order allowed former Presidents, their heirs, and other designated representatives to block access to prior presidential records. *See* Mark J. Rozell, *Executive Privilege in an Era of Polarized Politics*, in *EXECUTING THE CONSTITUTION: PUTTING THE PRESIDENT BACK INTO THE CONSTITUTION* 96-98 (Christopher S. Kelley ed., 2001) (discussing Executive order 13,223 and its effects on the Presidential Records Act); Todd J. Gillman, *SMU Pressed to Fight Bush's Secrecy: Historians Ask School to Reject Presidential Library Unless Bush Voids Privacy Order*, DALLAS MORNING NEWS, Feb. 5, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/020507/dnnatbushsecrecy.1f9a953.html>.

174. Other examples also demonstrate how decisions made in the present can modify the legal status of decisions made in the past. *See* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 497, 499, 504-08, 541-42 (1992) (discussing the revival and eventual ratification of the Twenty-Seventh Amendment over a two hundred year period). *See generally* Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 *CONST. COMMENT.* 101, 101-08 (1994); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 *YALE L.J.* 677, 678-79 (1993).

175. *See* BOOTH, *supra* note 142, at 142 (discussing the 1997 trial of Maurice Papon “a full fifty-three years after the events it was concerned with,” and describing the trial as one that “annihilated that distance and with it the ‘regularization’ that the passage of time seemed to have won for Papon”); French, *supra* note 7, at 700-701 (discussing court reversals and trials as examples of “time reversal”). In some contexts, this transformation is quite literal and concrete. *See, e.g.*, STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 25 (2005) (describing how after the changing of an IRS reporting rule “seven million American children suddenly disappeared” because they were no longer listed on tax forms).

debates in both the academy and public affairs. Stated somewhat differently, we can gain distinctive analytic leverage on a number of important, enduring legal problems by appreciating the extent to which they turn on our ability to reconcile and assess today's hold on the past.<sup>176</sup>

One of the central controversies in American constitutionalism, for example, involves the search for an appropriate methodology of constitutional interpretation.<sup>177</sup> An enormous portion of this scholarly terrain has been overrun by battles about the supposed superiority or defect of one interpretive modality relative to others.<sup>178</sup> This sometimes tired discussion can be usefully reconfigured and perhaps advanced by setting it against the analytic framework of this Article.

Take the case of the ceaseless debate between originalists<sup>179</sup> and those espousing some variant of the idea of a "living constitution."<sup>180</sup> Much of the criticism of both approaches to construing constitutional issues can be traced to their respective shortcomings in providing a means of bridging the past with the concerns of the present. Thus, as Professor Farber contends,

What is wrong with originalism is that it seeks to block judges from even considering . . . later developments, which on their face seem so clearly relevant to [assessing constitutional questions, such as] the legitimacy of federal gun control efforts. But try as they may, it seems unlikely that judges can avoid being influenced by these realities.<sup>181</sup>

In this view, without some account of how to integrate present day concerns and developments, originalism threatens to be irrelevant or disingenuous as a theory of constitutional interpretation.<sup>182</sup> The notion of a "living constitution," a traditional counterpoint to originalism, seems to offer the promise of some systematic explanation of how the

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176. See Harrison, *supra* note 16, at 1601 ("Much constitutional theorizing . . . is about the relationship between the present and the past.").

177. See HUHNS, *supra* note 101, at 13-16 (setting out five different kinds of argument generally accepted by the legal community, each with its own "structure" and supporting evidence); SCALIA, *supra* note 106, at 37-41, 62-73, 103-09, 112-13, 137-40 (discussing various approaches to and controversies involving constitutional interpretation); SUNSTEIN, *supra* note 165, at 50-59, 68-72, 79-84, 87-89 (outlining different bases for constitutional interpretation).

178. SUNSTEIN, *supra* note 165, at 50-59, 68-72, 78-84, 87-89.

179. *Id.* at 87-89, 117 (describing "originalism").

180. Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, <http://www.slate.com/id/2125226> ("We are all living constitutionalists now.").

181. Farber, *supra* note 65, at 192.

182. See *id.* at 192-93.

norms and expectations of a developing society should influence our inherited, supreme law. But as Chief Justice Rehnquist has noted, “the phrase ‘living Constitution’ has about it a teasing imprecision that makes it a coat of many colors.”<sup>183</sup> While nobody wants to espouse support for a “dead” Constitution,<sup>184</sup> the particular character of the living and evolutionary variant—and how it supplies the purported defects of originalism—is a subject that has yet to generate much consensus or analytic precision.<sup>185</sup> More systematically mapping the different ways in which we meaningfully regard the current constitutional order as influencing past legal structures and traditions would provide at least a prompt for pressing proponents of both “originalism” and the “living constitution” to elaborate and defend these accounts.<sup>186</sup>

Beyond helping to shift the existing lines of discussion about interpretive methodology, more extensive inquiry into the circumstances in which present day legal structures and decisions disrupt traditional chronology may assist us in understanding and reconciling tensions between judicial independence and democratic rule. In recent years, controversial decisions from the bench,<sup>187</sup> the activism of the Rehnquist Court,<sup>188</sup> and partisan division over the judicial confirmation process<sup>189</sup> have stoked high profile criticism of the U.S. judiciary.<sup>190</sup> While perhaps not initially obvious, many of these attacks are ultimately fueled by anxieties about how extensively, and under what conditions, we allow the present to claim and control the legacies of the past.

Part of conservatives’ objection to “activist” courts, for example, is

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183. William H. Rehnquist, *The Notion of a Living Constitution*, in *JUDGES ON JUDGING*, *supra* note 101, at 141.

184. See Balkin, *supra* note 180; Levinson, *supra* note 27, at 13 (“It is hard to find anyone who is truly willing to reject [the notion of a living constitution], given that the alternative seems to be a *dead* Constitution.”).

185. Levinson, *supra* note 27, at 13-14.

186. This does not presume that such a task is straightforward or without controversy; there is considerable debate amongst legal historians and other scholars about the standards for “mapping” the past and how we ought to regard, construct, and understand the relationship between the present and the past.

187. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (upholding marriage rights for same-sex couples); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (reversing, on procedural grounds, a Circuit Court decision finding the Pledge of Allegiance violated First Amendment guarantees of religious freedom).

188. See Peabody, *supra* note 107, at 270 (2006) (discussing the Rehnquist Court’s activism).

189. Emery G. Lee, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 on the Senate’s Role in the Judiciary Confirmation Process*, 30 OHIO N.U. L. REV. 235, 237 (2004) (discussing recent partisan strategies in the judicial confirmation process).

190. See Peabody, *supra* note 107, at 324-326 (summarizing the results of a study examining efforts to limit the Supreme Court’s subject matter jurisdiction from 1981-2003).

their concern that judges are reconfiguring and appropriating the nation's history in pursuit of individual policy preferences and partisan agendas.<sup>191</sup> Thus, in introducing *The Congressional Accountability for Judicial Activism Act*<sup>192</sup> (a measure that would have allowed Congress to reverse constitutional judgments of the Supreme Court), Congressman Ron Lewis decried how the judiciary had taken “upon itself the singular ability to legislate.”<sup>193</sup> The actions of the courts, he warned, “usurp the will of the governed . . . by allowing . . . a select few . . . to conclusively rule on issues that are radically reshaping the societal traditions of our great Nation.”<sup>194</sup>

As suggested, by infusing legal research with more systematic analyses of different sequences of time and causality, scholars will arguably gain new purchase on these and other recurring problems facing our polity. Moreover, the analytic framework provided by this piece offers an abstraction that is less politically freighted and potentially more revealing than some traditional sources of political inquiry. For example, asking judicial nominees to address how they envision the relationship between present and past may be less threatening—and, as a consequence, more intellectually profitable—than directly probing their views about particular cases, lines of doctrine, or even interpretive methodologies.

In its broadest terms, this Article urges scholars, especially in the legal academy, to reconsider their largely settled and unexamined views about how time is structured, and how the sequence of time affects our description and assessment of legal phenomena.<sup>195</sup> In advocating for this approach, I call, in effect, for more cross-fertilization between traditional scholarship on law and the subfield of American politics known as

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191. See Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 187-88 (2007).

192. H.R. 3073, 104th Cong. (2005).

193. Press Release, House of Representative Ron Lewis, Accountability for Judicial Activism Act Introduced in House (Mar. 9, 2004), available at [http://www.house.gov/list/press/ky02\\_lewis/SCOTUS.html](http://www.house.gov/list/press/ky02_lewis/SCOTUS.html).

194. *Id.* Interestingly, and somewhat paradoxically, Lewis indicated that the Court's failings could be attributed, in part, to how far it had become “disconnected from the values of everyday Americans.” *Id.* One reading of this statement is that Lewis endorsed justices who would explicitly take stock of the current climate in addressing precedent and other inherited legal structures.

<sup>195</sup> Some of these issues may start to be addressed in the emerging scholarship looking at the intersection of law and neuroscience. See, e.g., Adam J. Kolber, *Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening*, 59 VAND. L. REV. 1561, 1566 (2006) (analyzing the “novel legal and ethical issues that could be presented by memory-dampening technology”). Among other implications, Professor Kolber's research suggests that what we regard as the past could be altered, perhaps permanently, by the use of drugs like propranolol. *Id.* at 1225-26.

“American political development” (APD).<sup>196</sup> Generally speaking, scholars in this latter tradition seek distinctive insights about our political order by situating it “in time”—that is, by taking seriously its historical and developmental character.<sup>197</sup>

For example, in their recent work, *The Search for American Political Development*,<sup>198</sup> Karen Orren and Stephen Skowronek urge us to turn our attention away from thinking of public affairs in terms of “who gets what, when, and how.”<sup>199</sup> Instead, they suggest, we should reflect more carefully on how political practitioners ask themselves variations of the deceptively simple question “what time is it?”<sup>200</sup> This query represents a search, among other things, for a sense of whose political stars are rising and setting, and what emergent political interests and concerns will be in ascendance on the next day.<sup>201</sup>

This is a fine question to ask as we try to plumb the depths of American political and legal life. But, as this Article suggests, the question assumes too much. Sometimes the clock of our political and legal life may be broken or even running backwards. In addition to asking “what time is it,” we need to ask an even more naïve and disarming query: “how do we tell time?”

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196. ORREN & SKOWRONEK, *supra* note 7, at 1-5, 35, 75 (discussing the origins of and resurgence of interest in “American political development”).

197. *Id.* at 1 (discussing the “theoretical precept” behind American political development: “because a polity in all its different parts is constructed historically, over time, the nature and prospects of any single part will be best understood within the long course of political formation”).

198. *Id.*

199. *Id.* at 195-96 (discussing how the emphasis of APD complements scholars’ examination of the question “who gets what?”).

200. *Id.*

201. *Id.* at 195 (arguing that asking “What time is it?” represents an essential “time question” for scholars and politicians that is “inextricably tied to political action; it affirms the value and efficacy of political engagements. The normative commitments implicit in the question are, first, to political conflict as a vital human activity and then to the potential that these conflicts have for bringing about durable changes in governing.”).