

Law and Representation: Observations from an American Constitutionalist

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American legal scholars have often found it hard to resist the belief that their constitutionalism occupies a privileged place in comparative work. Its origin in the Age of Revolution, as well as its long disciplinary development, provide deep historical, doctrinal, social, and cultural resources. While there have been difficult moments – for example, *Dred Scott* or *Lochner* – this faith in an exceptional, American constitutional experience was difficult to shake – until recently.

Today, many are not so confident. For them, hope has given way to anger. A constitutionalism of originalism that fails to address the necessary conditions of a democratic political system has alienated many scholars, lawyers, and citizens. The Supreme Court not only chose the President in 2000, it has given free rein to money in politics, and refused to act on political gerrymanders. Critics want a less powerful Court; they want less American constitutionalism and more international human rights.

Constitutional reform is necessarily on the political agenda, but we would be mistaken to think that American constitutionalism was ever about particular rules and institutions. That would be like thinking that Judaism is about the mitzvot. Sometimes, the argument is more important than that which we are arguing about. Members of the same community can argue without becoming enemies; they can disagree even while affirming their bonds to each other. American constitutionalism has been constitutive of this community. It has been a way of being political. Our constitutional practices and beliefs constructed the meaning of citizenship for the individual and the community. To investigate constitutionalism is to study a formation of the imagination.

American constitutionalism was particularly important for comparative work not because of the power of the American state, but because of the answer it provided to the general puzzle of all constitutional orders. The puzzle is how to achieve a unity of the rule of law and the rule of the people. Democracy and law do not necessarily or easily align. American constitutionalism as a political culture sustained the belief that the popular sovereign is the source of law: through law, we rule ourselves. The crisis in our nation today is related in no small part to the failure of this belief. We are living in the end times of American constitutionalism. In this paper, I offer a sketch of where we are, what we have lost, and what the stakes are.

Political Pathology: Our Degraded Constitutional State

Once it was possible to imagine that politics stops at the courthouse door. No longer. Control of the Supreme Court is now the greatest prize in American politics. The Court has become just another site for political contestation between deeply polarized factions. This competition assumes that the proper measure of the Court's work is the same standard used to assess other political institutions. Always the question is "which side are you on?"

A polarized political moment is one in which politics coopts everything, including the constitution. Absent any measure of constitutionalism independent of our divisive politics, we are tangled again in the counter-majoritarian difficulty. It is vividly on display when a President, substantially down in the polls, pushes forward a Supreme Court nominee days before an

election in which his party may also lose its majority in the Senate. Justices confirmed on narrow, party-line votes are not well situated to speak of a legal order independent of politics. Who in this sorry political display is tending to the values of a constitutional order that unites and defines the nation? Are there such values anymore? That we debate gun control as an issue of great constitutional magnitude is a sign of the degraded state of our constitutionalism.^[1]

American constitutionalism is suffering from a profound legitimacy crisis that encompasses both appointments and decisions. Control of the Court looks like victory in a board game: a lucky throw of the dice rewards the player. In this case, the throw of the dice is the arbitrariness of death for members of the Court. Personal tragedy is simultaneously one party's good fortune. Many citizens feel as if they are caught in a game that has little relationship to their own moral and political ideals.

Citizens no longer understand their own constitutional order. They do not see it as democratic; they have no theory of legitimacy by which to explain it to themselves. It is a game with no clear rules, as Senator McConnell invents different rules that have only one thing in common: he wins. Members of the Court give citizens little help. Rather, than standing for universal values, they often vote against rights claims, relying upon the original meaning of the constitutional text. They fail to offer any explanation of why contemporary citizens should be bound by those meanings, even if those meanings were accessible. When judges try to give reasons, they offer little more than expressions of distrust. The judges fear themselves; they fear that without the "objectivity" of history, they will vote their personal values. A coin toss is objective – more objective than history – but it is not politically legitimate. Like their fellow citizens, the judges have lost faith in constitutionalism. They think that apart from *facts*, there is only partisan politics. They fall victim to their own beliefs, when they look for answers where there are none to be found – in original meanings.

Facts cannot ground politics. Facts, as John Dewey said, don't carry their meanings on their faces. Politics is a normative and interpretive exercise, but then so is history. The unity of a political community is the unity of a shared imaginary. Citizenship must mean something, and that meaning must be equally accessible to all citizens. Today, we would be hard pressed to describe that core meaning for which the nation stands and belief in which holds our community together. Our culture wars have divided us. The culture war has become a civil war. We are "at war" when our political institutions, including courts, can no longer resolve our differences.

Regardless of the outcome of the November election, it is unimaginable that the losing side will accept the outcome and unite under the leadership of the winner. Electoral victory can be no more than success in a single battle; the war itself will continue. Indeed, this war has already turned violent in American cities. I would count among its casualties the tens of thousands of needless Covid-19 deaths. Only a new political arrangement – a divorce – can manage a peaceful future. If we have become two different nations – that of the red and the blue – we need a peace treaty, not a constitution.

This is a bleak vision, but we must come to terms with where we are – a situation that is not going to change with electoral victory or defeat. There has been a dramatic change in America over the course of my life. We have lost our faith. The civil religion that animated the nation for two centuries is dying. The Court's special role had been to sustain that faith. It cannot play that role, if it too has lost faith. The rise of originalism is best seen as a declaration of that lost faith. The originalist is like the minister who no longer believes in God, but still holds up his

Bible. He fears that if he puts it down, there will be only chaos. But fear is not faith and it is quite unlikely that his children will be persuaded by his fear. We are not passing on a belief in the nation as the source of political identity to the next generation.

American constitutionalism rested on a faith in an intergenerational collective subject: the popular sovereign. Constitutionalism cannot survive when the appeal to law is only an extension of ordinary politics by other means. We once understood constitutionalism to control politics; now, it is the other way around. This is why the confirmation hearing has become a political spectacle in recent years. Once a ritual performance of the continuity of American faith in and through its constitutionalism, it has become the site for the explosive destruction of that tradition by the forces of ordinary politics.

This failure of faith in the popular sovereign is not merely analogous to the earlier phenomenon of the death of god; it is that same death extending its reach to the remaining god of the 20th century – the god of the nation.^[2] Absent that belief, politics can collapse into entertainment, and entertainment into pornography. We should not be surprised to see the rise of QAnon with its focus on a sex trade in children. This is not the first time that the deconstruction of a political culture has turned to the pornographic. The arrival of the pornographic is a sign of revolutionary collapse.

We cannot simply declare this all to be a mistake; there is no legal/technical fix for this situation. A legal theorist has no power to overcome our political divisions or stop the movement of history. What I can do, however, is try to remind us of the political imaginary within which American constitutionalism played a vital democratic role.

American Exceptionalism

The field of jurisprudence is often thought to fall within two master categories: natural law or positivism. These categories have framed much of the public debate over American constitutionalism, although often in the form of critique. Natural law appears as an accusation against those who would interpret the constitution to include moral and political values that are not mentioned in the text or were not widely shared at the time of ratification of the text.^[3] Positivism is used as a critique of those who would limit the constitution to the directions it was understood to set forth at the time of its drafting.^[4] American constitutionalism posed a problem for this dichotomy, for it fell neither on one side nor on the other. More accurately, American constitutionalism overflowed these jurisprudential categories because it is a cultural phenomenon, not merely a legal practice.

HLA Hart, the leading positivist of the 20th century, described law as a combination of primary and secondary rules, with the latter specifying sources and institutions for creating law or adjudicating legal claims. No doubt, American legal practice can be described in this way, but the description fails to capture the openness of our constitutionalism to endless moral contestation. It does not explain why political disputes become constitutional disputes, and what is at stake in the claim on the constitution. Nowhere does it register the importance of the relationship of democracy to law, but American constitutionalism exists just at that intersection.

Ronald Dworkin was the leading modern scholar opposing positivism. He defended a constitutional practice that would draw on moral principles in the resolution of a case. Law, he argued, was moving toward an ideal point of convergence with morality. Yet there is scarcely

any mention in his work of democracy. Law is an elite project – a Herculean project – of moral theorizing. American judges, however, have always affirmed that they are bound by a democratic project. They do not stand outside of the practice, as if they have access to some other source of truth – legal or otherwise. Their warrant is democratic, not moral; it is particular, not universal.

Like Hart's theory, Dworkin's is not wrong but incomplete. Our constitution is imagined as always already embodying our deepest moral positions. That is not our good luck, as a positivist might suggest, but rather our identity. American constitutionalism is characterized by this easy movement between the moral and the legal. Tellingly, even some abolitionists claimed that the constitution rightly understood prohibited slavery, all textual indications to the contrary.^[5] An explanation of this phenomenon requires an interpretation of our political practices and beliefs, not only an explanation of judicial reasoning.

All sides in our political debates claim the constitution's support. Consider our conflicts over the death penalty, voting rights, religious liberty, and environmental protection. This constitutionalizing of conflict is most immediately evident in our abortion politics. Neither side can accept the idea that the constitution does not already embrace their position, for neither side can imagine citizenship apart from the values they embrace. Neither could be part of such a state. One side sees equality and dignity of women at issue; the other sees the protection of innocent life.^[6]

Our constitutionalism is the social fact of our ideal self-conception, but that is not a fact at all. Identity is neither a fact of social practice nor a set of moral norms. It is an interpretive endeavor that is constantly reconstituting itself through the construction and circulation of narratives. To understand American constitutionalism, we must pay attention to the narratives and not just to the rules or the norms.

At the end of the 19th century, Oliver Wendell Holmes – a veteran of the Civil War – provided a firmer point from which to reconsider the terms of our constitutionalism.^[7] Despite the “cynical acid” he claimed to cast upon the law, Holmes wrote: “I venerate the law, and especially our system of law, as one of the vastest products of the human mind. . . . It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men.”^[8] This suggests three points relevant to American constitutionalism. Notably, these points are wholly lost in our current infatuation with originalism.

The first sounds in Social Darwinism: survival (existence) signals success over competing beliefs and practices. A practice that survives is likely getting something right. It is adopting to circumstances; it brings order to disorder. Holmes thought this about the development of legal rules: they embody the learning process of a society. This was a virtue of the common law; it was also a judicially acknowledged virtue of 20th century constitutionalism. Think of *Brown's* reflection on the evolving place of education in politics, economics, and society:

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.^[9]

Similarly, consider the evolution of attitudes toward the right of gay couples to marry, specifically acknowledged in *Obergefell*:

[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.^[10]

Originalism fits poorly with this idea growth, for it rejects a place for learning.

Holmes' second point links the content of legal norms to the ideals of a broader political and social culture. The American constitutional order, he says, is a living practice within an actual community. The law should be "venerated" because it expresses that which is best about us: the "vastest product" of the human mind. Holmes is borrowing directly from Lincoln's famous lyceum speech, in which he spoke of a "reverence for the constitution and the laws."^[11] Holmes, like Lincoln, cannot speak of American citizenship without speaking of our law: it is our particular excellence. Lincoln lacked words for this excellence other than "reason." Holmes has broader reach: the vastness of human mind. Holmes is gesturing toward the classical concept of "nous." It is that which brings order to chaos. At the end of his talk, Holmes comes back to this theme when he speaks of finding "an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."^[12] Originalism ignores this ground of excellence, replacing it with contingent historical facts.

The third point goes directly to the inadequacy of a binary choice between positivism and natural law. The respect due the legal order rests simultaneously on the particularity of existence – it is as part of *our* lives – and on essence – nous. The vastness of the human mind that the law realizes is not particularly American, but its role in our lives is. Holmes is linking the is and the ought, being and the good. American constitutionalism should be venerated because it is one iteration of the universal. If we give up that idea, then there is no particular ground for veneration of the law. Originalism give up this idea.

This final point places our constitutionalism in the tradition of Protestant providentialism. When the constitution displaces the Bible, the human mind displaces the mind of God. Providentially, we are becoming what we should be and therefore must be. Holmes's comment about Hegel should not be misread as a dismissal of Hegel's fundamental idea. The American legal system is objective reason developing itself through history. This is the source of the belief that American constitutionalism always already secures a citizen's highest values. To believe otherwise would be like believing God's moral order left out a value of transcendent significance. Those who could not attach themselves to this belief – for example, idiosyncratic religious sects – have always been outsiders to the constitutional project. They are the Quakers, who are tolerated, or the Seventh Day Adventists who were jailed. Political interest groups have turned to constitutional litigation not only because they think it easier to win in the courts than at the polls, but also because they believe in this convergence of political mission, moral values, and the rule of law.

Holmes' greatness often seems to come down to a single sentence that captures complex ideas. Here, he gives expression to the basic tenet of America's civil religion. This conjunction of history and morality – the lingering presence of providentialism -- reigned for some 200 years in American culture. Americans thought that their nation was a site of unique importance to all

men, because here history came to an end in the conjunction of reason, civilization, markets, and Christianity. The name for this convergence was “the rule of law.”

At the time that Holmes wrote, Americans had become missionaries to the world, bringing forward this conjoined vision of law, markets, and faith. It was easy for scholars – as well as ordinary citizens -- to assume, by the last half of the 20th century, that constitutionally everyone wanted to be American – an idea that seemed vindicated by the end of the Cold War. Markets, elections, rights, and constitutionalism all seemed of a piece. This did not mean that all nations should adopt the American constitutional text, but they should all adopt our basic practices of a written constitution, judicial review, legal enforcement of individual rights, and free markets.

Domestically, this set of beliefs worked as long as most people accepted a Protestant inflected morality; it continued to work, as that same common morality became the liberalism of John Rawls. It began to fail when the community came to hear multiple, conflicting moral voices. It failed spectacularly before the onslaught of new forms of communication, which undermined the very idea of a common public opinion. In the ages of American law, we can think of the 19th century as the period of growth of this American ideology; the 20th century as the period of its reign; and the 21st century as that of its collapse.

This set of beliefs that constitutes American exceptionalism has been both a strength and weakness of American politics. Its strengths have been those of a civil religion linking national identity to law. This is the belief that American power rests on commitment to its constitutionalism. This is not law as a social contract ending the state of nature, but law as a robust source of meaning. It is law as an end in itself. On the other hand, this exceptionalism is a form of nationalism and it shares the vulnerabilities of nationalist movements. It can be turned toward racism, intolerance, isolationism, and xenophobia. It supports a sacrificial ethos, but that can lead to an easy recourse to violence against alleged enemies within and without.

This civic religion has been present in the great moments of American political rhetoric. Consider the greatest of them all: the Gettysburg address. We are a sacrificial nation dedicated to a proposition that links the historical fact of citizenship to the universal norm of equality. Dedication to a proposition is a poetic way of speaking of commitment to the rule of law. The nation means something apart from its geography and its population: it stands for a legal order that we have given to ourselves as free citizens, and must sustain on the field of battle, if we are to remain free and equal. The law is our own in multiple senses: it is of, by, and for the people. But our law also stands for a possibility that extends beyond our own borders. The war is “testing whether [our] nation, or any nation so conceived and so dedicated, can long endure.” Americans, beginning with the writers of *The Federalist Papers*, have thought of their constitutionalism as an “experiment” of interest to all mankind, because on this experiment rides the possibility of a unity of the rule of law and the rule of the people.^[13]

Absent this set of beliefs, of what exactly would we speak when called upon to perform the nation’s meaning: GDP or ethnic nationalism? The closest thing we have in today’s political rhetoric is the politics of health care, which is the exact opposite of a rhetoric of sacrifice. The former puts individual well-being first; the latter puts the existence of the state first. The health care demand reduces law to a means to individual ends; the sacrificial demand subordinates all individual ends to a transcendent national value. The degraded sense of Trump’s political rhetoric reflects directly the loss of belief in our civil religion. Trump may point to his funding of the military, but he never uses the language of “sacrifice.”

A sacrificial, civic religion embracing a thick constitutionalism offered the ideology of American power in the 20th century. It made America an “exceptional” nation in both senses of the word: an indispensable nation and one not subject to the same rules as everyone else. Even today, as our law and politics are moving toward collapse, many Americans continue to be members of this church. On this point, our popular culture lags behind our political culture. At the movies, we are still more West Wing than we are The Apprentice. I suspect, however, that on social media, it is the other way around.

How to respond to this loss of faith is an open question – or maybe even an open wound -- among American constitutional theorists today. Students no longer believe that there is even a space for constitutional study that is independent of ordinary politics. Professors are assessed by their colleagues on the right-left scale of politics. Schools seek a diversity of political views among their constitutional law faculty, as if they too believe that constitutional law is only ordinary politics carried on by other means.

Politics or the Political?

Legal scholars have long analyzed the effects of power on law; they have been skeptical of claims of law’s objectivity. The politics penetrating the academy today, however, has a cruder feel to it. This is not Gramsci on ideology or Foucault on disciplinary power, but ordinary party politics. The question is, “Which side are you on?” A Court constituted by “party members” can, at best be representative in the same way that other political institutions are representative: it follows the election returns. This is a very thin reed of support, for no one is elected for life. If all that constitutional law does is arbitrarily entrench a political faction, it is an illegitimate institution without even theoretical support.

Constitutionalism does make a representative claim, but not one that can be found in the direction of ordinary politics. This claim begins with the distinction between politics and the political. The former refers to the electoral competition between parties. The latter refers to the shared beliefs and practices that provide the background against which politics occurs. The political is that which is defended against enemies; it is that for which citizens sacrifice themselves, and perhaps more importantly, sacrifice their children. It is that which remains when ordinary politics breaks down. The politics of the exception is the political. We rightly fear that the instruments of the exception will be used to advance politics, rather than to defend the political. When that happens, we are in the midst of coup.

Constitutionalism was always about the political, not politics. Justices did not refer to party platforms; they did not take directions from party leaders; they did not identify with a political party. Indeed, many Justices believed they should not even vote in elections. Rather than belonging to a party, each belonged to the Court as a continuous body. They wore the same robes to remind us that they were all the same; they were to be without personal subjectivity.^[14] They spoke easily of past decisions as something “We” have done and for which they held themselves accountable. This is the meaning of *stare decisis*, not as a formal rule but as an important element in the narrative of law. If past decisions are seen only as the product of temporary coalitions among the Justices, politics has displaced the political.

Ever since *Marbury v. Madison*, the Court's role has been "to say what the law is." The narrative of the opinion always expands outward. The writer becomes the we of the majority, which becomes the we of the Court, which becomes We the People, who have given the law to ourselves. When the Court succeeds, citizens are to see through the opinion to their own political identity. Seeing the law, they are to see themselves, for the source of the law is the popular sovereign.^[15]

Only the Court's power to persuade citizens to see themselves in this way holds off the view that the Justices are picking winners and losers. They may be thought to pick based on their moral beliefs or based on their party affiliations. It does not matter, for in either case the link between the rule of law and the rule of the people is broken. Originalism cannot mend that break, for the dead hand of the past has no more democratic warrant than do five Justices on the Court.

The Court was not do politics, because it represented the national commitment to the political. Politics no more belonged in the Court than it did in the military. Both institutions defended the constitution as rule by the people. Both wielded the power of the state as an instrument capable of violence in its own defense. Both institutions were sites that particularly symbolized the existence of the nation. The Court speaks that which the military defends. Each models citizenship.^[16] The Justices in their robes and the officers in their uniforms sit side-by-side at the front of the audience in the yearly State of the Union Address.

America's robust constitutionalism, accordingly, expressed its deep commitment to the political. Politics is the work of factions, while the political is that of the popular sovereign. Factions absent the unity of the political are, in Hobbes's language, always in a state of war, regardless of whether they are actually fighting.^[17] Only calculation, not commitment, keeps factions from falling back into the state of nature. This is the distinction between a peace treaty and the constitution. The former is likely to fail when the constellation of forces upon which it was based shift. The latter lasts as long as the imagination of citizen identity lasts. A constitution can continue even in the face of military defeat: consider the exiled Jews. Conversely, a constitutionalism of the political can disappear even when our ordinary institutions continue to operate. As with any other faith, it can die by the sword or it can simply lose the energy to continue.

Representing the Popular Sovereign

Only the commitment to the political has made possible the intersection of the rule of law and rule by the people in American history. Absent that commitment, politics coopts the political, judges become partisans, and the unity of the nation dissolves. The narratives we use to understand our communities and ourselves carry the commitment to the political. Those narratives are organized around a single theme: the intersection of popular sovereignty and the rule of law. The actor in the drama of the political is always the popular sovereign; the field within which the popular sovereign shows itself is law, and in particular constitutional law.

We misunderstand the nature of popular sovereignty if we view it from within the framework of ordinary electoral politics and the selection of representatives. Popular sovereignty is not popular elections. A mob that wins an election is still a mob, until and unless it can sustain a claim to represent the intergenerational collective subject that is the popular sovereign. The popular sovereign reigns; it does not govern. An elected representative may claim to speak for

the popular sovereign, but many others – in and out of government -- can make that same claim. Nor can we get to the popular sovereign by relying on popular referenda in place of representatives. A majority vote is only a decision rule. A referendum gives us a snapshot of the distribution of opinions; it does not constitute an agent. For that reason, imagining government through instant referenda immediately leads to a temporal abyss: a past referendum has no democratic authority to govern contemporary citizens. Arguments become “practical,” as if we must choose between democratic legitimacy and practicality.

The popular sovereign is the nation imagined as the agent of its own history. In American texts, it is the We of the Declaration of Independence, as in “We hold these truths to be self-evident,” and the “We the People” of the opening words of the Constitution. It is the we that separated from Great Britain, and the we that has won the nation’s wars. It is the we that the Supreme Court offers us in its narratives of law. We did all of these things; they were not done for us or to us by others.

The sovereignty of the people is like the sovereignty of God: we know it only in and through its works. We do not first know God and then discover that the Bible is his word. We know God, when we read the text as his Word. We do not have some other way by which to check authorship – that is, to see if God really spoke the words of this text. The same is true of creation. We do not have some independent means of establishing the link between God and the world. There is no external position. Rather, we see God through his creation. Similarly, the burden of constitutionalism is to maintain the belief that we have access to the popular sovereign through law. Looking at the Constitution, we are to see the popular sovereign as its source. Citizens come to We the People through its work, which is law.

This formation of the political imaginary, which comes to identity through a reading of the works, has its most important antecedent in our religious traditions. It takes, however, only a moments reflection to see that the same imaginative paradigm is at work when we consider personal identity. We have no access to the self as an agent except through our works. To look back at my past as genuinely *mine* is not to find some other point of access to my identity by which to confirm that the acts were really my own. The idea of getting hold of the pure self, stripped of the things it has done or might do, is an empty idea. Similarly, there is not a self that thinks to which I have access apart from the content of my thoughts.^[18] Claims of identity are always the products of narratives, for there can be no agency apart from freedom, and no freedom apart from an account. Abandon all narratives and we are left, at best, with a world of cause and effect – that is, a world without agency.

The Justices on the Supreme Court are often criticized for writing poor history, but they are not really writing history at all; they deal in myths. Their function is to maintain belief, not to set forth facts. The investigations of professional historians, accordingly, do not bear on the substantive character of the popular sovereign. When we adopt originalism as the method for explaining the meaning of the constitutional text, we confuse an ordinary historical inquiry with an existential endeavor. The meaning of the constitution is whatever is required to maintain the belief in the popular sovereign as its author. There is no set of instructions – no established rules – to which the justices can turn to perform this task. They must persuade us by appealing to the rhetoric of the political.

The robustness of our constitutionalism rests on the belief that in and through law, we have access to the popular sovereign. This is the representative character of law. A failure in this

belief will leave us uncertain as to why we are bound by a 200-year-old document written by a group of wealthy white men, some of whom owned slaves. Where, we will ask, were the women, minorities, and Native Americans? What could these dead white men know of contemporary problems? The answer to this question is not that they were particularly wise. It is that they were the drafters, but not the authors of the constitutional text. We the people gave ourselves the law under which we live. We are the authors.

If we do ask these questions today, it is because we are no longer persuaded by the representative claim of law. That belief is failing, and that failure has unmoored us from our constitutional tradition. That tradition encompassed two distinct narrative forms, which I have characterized as project and system.^[19] Of a project we ask, who was its author and what was his intention? Of a system, we ask, what is its immanent principle of order? A watch is the product of a project; an organism is a system. Legislation is typically understood as a project; the common law, as a system.

Our earliest constitutionalism was a political theology of the project. Revolution was imagined as the direct presence of the popular sovereign. That presence signals an indeterminacy in which existing claims of authority fail and new investments in law can be made. In the American Revolution, British law fails when its capacity to represent the popular sovereign disappears. There is a sovereign withdrawal from that legal order. Revolutionary indeterminacy ends only with the sovereign creation of a new text – the constitution. Law represents the absent sovereign because the text is a relic of sovereign presence. It is that which the sovereign left behind as a reminder and a claim. It is the product of the popular sovereign's project. It is, accordingly, a representation of popular sovereignty and remains that as long as it can be read within this faith tradition.

Were we to stand in the presence of the sovereign author, the text would lose its claim upon us. We have no need of representation when we have the presence of the thing itself. I use this language deliberately: the popular sovereign is a political expression of Kant's noumenal world. We live in a phenomenal world of law, but we have faith that beyond law is the popular sovereign as the author of our order. Absent that faith in representation, law becomes a series of rules that we will judge according to our own interests and values.

Americans know this relationship of popular sovereign to legal text as an entirely familiar pattern of thought. A project creates order through the intentional act of a subject capable of abstract thought. Projects are efforts by an agent to instantiate ideas. American constitutionalism is the belief that the author is the popular sovereign and the idea is a theory of Republican government. Modern constitutionalism is inextricably linked to modern political theory through this idea of project. It is linked as well to the will of a political community imagined as the agent of its own creation. This constellation of beliefs is on display, for example, in *The Federalist Papers* and in *Marbury v. Madison*.^[20] Failure of either of these beliefs in reason and will reduces the political to politics: factions acting to advance partisan ideas.

The constitution as a project of popular sovereignty offers an idea of representation independent of ordinary electoral politics. Law represents us before any of us arrive; it will represent us well after we are gone. It represents us as an intergenerational, collective subject that has always already acted to produce a text. There is a tendency to see that text as the only positive act of which the popular sovereign is capable.^[21] That is, when the popular sovereign acts, it produces constitutional text. Thus, there can be no equally authoritative representation of the sovereign

that can compete with the supremacy of the text. This does not mean that we are bound to the texts meaning as it was intended. It means we are bound to whatever meanings sustain this belief in its origin.

Constitutionalism as a project of the popular sovereign expresses the Protestant roots of our national politics. Alongside of this narrative of civil faith, there has been a Catholic inflected narrative. In place of an authorial project in which the text is the remainder of an absent sovereign, this narrative locates the popular sovereign within the body of the state. This is the state as a political church animated by the sacred, just as the Catholic Church is the body of Christ. Sovereignty is the animate soul of this body. Our constitutionalism is the spirit of this living organism; it is realizing itself in and through the nation's history. American history, on this account, has been a process of self-realization as the nation has become what it always already is. It is realizing its own form, which does not precede it in the domain of theory – the project view. We can use the words of the Nicene Code to express this: the constitution is born, not made. Something that is born grows into its own immanent order; it realizes itself. To understand it, we must look to what it is becoming, not to what it has been.

Law as the project of popular sovereignty has been the dominant narrative of American constitutionalism. This alternative narrative of immanent order begins to appear in the Civil War – a moment when many thought the original, constitutional project had failed. American constitutionalism, like so much else in the 19th century, comes under the sway of a model of “system.” Evolution – the idea most associated with the 19th century – is an example of systemic order. So, however, are the investigations of the social sciences, which came to include law by the 1870s. That was the moment when the modern law school was invented at Harvard. Its first dean, Christopher Columbus Langdell promised to make the study of law a study of the immanent principles that have developed in and through the case law.^[22]

By the second half of the 19th century, books were appearing with titles like “The Unwritten Constitution.”^[23] The real constitution was no longer an authored text, but practices, including judicial practices, that displayed an immanent order. Order was to be discovered within the practice; it was not brought to the practice from outside. By the end of the century, jurists could speak of a convergence of Anglo-American common law and constitutional law.^[24] At the center of this immanent constitutionalism were contract and property working through unregulated markets. This constitutionalism of system made courts skeptical of legislative projects based on plans that had their source in theories. Legislative projects were appropriate as remedies for pathological conditions – for example, market failure – but beyond that, they were likely to confuse politics with the political. On this view, popular sovereignty was not prior to or apart from the institutions of law. Popular sovereignty was the public opinion that animated these institutions. This was the Hegelianism that stood behind Holmes's cryptic remark on law and the vastness of mind.

Our ordinary constitutional rhetoric is more project than system. Yet, the operation of judicial reasoning remains more system than project. On the systemic view, law is working itself pure through the actions of judges deciding one case at a time. This remains the belief behind the judicial inclination to reason from precedents. Freedom of speech, for example, develops as a legal doctrine through judges deciding individual cases – each one elaborating the meaning of the precedents and itself becoming a precedent for future cases. To learn what free speech is, we must study the cases in order to discern their immanent principle.^[25] We have a faith that there is

such an immanent principle that animates the cases. They are not simply a disorganized, eclectic collection of results based on contingent, judicial majorities.

By the end of the 19th century, Americans held a cluster of beliefs grounded in this idea of the systemic character of law as the elaboration of an immanent order. Law was not a matter of anyone's intention; it expressed the spirit of the nation as objective reason. One hundred years before Fukuyama, Americans believed they stood at the "end of history." Of course, it goes without saying that not all Americans believed this. Many were excluded from the possibility of identification with the popular sovereign. It also goes without saying that any particular claim of representation would and could be contested. Today, this idea of constitutionalism as a representation of the objective spirit of the American people is as anachronistic as the Christian imperialism it supported.

While neither narrative of the relationship of popular sovereignty and the rule of law is gone completely, both are under considerable strain. That strain is visible in the turn to originalism, which can support neither. It is visible in the disappearance of sacrifice from our political rhetoric. And, it is most visible, in the conflict that characterizes our political culture today. We no longer have a unifying narrative that makes a claim upon all of us.

In place of both of these ideas of the popular sovereign, we are left with an idea of popular sovereignty as electoral majorities. This, however, is not an idea of sovereignty that can support our constitutional practices. Its home is in politics, not the political. It has no answer to the question of the legitimacy of the judicial review – the counter-majoritarian difficulty. Worse, it has no answer to the question of the legitimacy of the constitution. It points to the death of the political as a thick form of community life.

If our faith in the popular sovereign is fading, then so is our ability to see the constitution as a representation of ourselves. That failure is an extension of the decline of religious faith that marked the 20th century, for American constitutionalism has been a political theological practice. Belief in the popular sovereign grounded a civil religion that was not a secular analogue to religion. It was, rather, a structure of belief in immanent meanings and transcendent claims no less forceful than those of the religious traditions it followed.

Conclusion: A Comparative Note on Constitutional Futures

American and European citizens come out of the same faith traditions of religion and nationalism. They are, however, differently situated with respect to this failure of faith in political theological practices. For Americans, that failure raises the question of what happens to our constitutionalism once popular sovereignty collapses into electoral politics. What sort of a claim does the Supreme Court make when it holds to an interpretation of the Constitution that conflicts with the values and interests of a majority? Laboring under an idea of democratic politics that extends no further than elections, we have no good answer to this question.

We are living through a moment when the implications of this failure of belief are particularly evident: the country is literally falling apart. We are dividing into multiple factions with no common commitments, no sympathy across party lines, and little respect across cultural or social differences. We worship different political gods or, more realistically, we worship no such gods at all. Our politics are those of end times, for the popular sovereign has already died. Religions

are living practices. When they die, there is no return. Imagine trying to recreate belief in the Greek gods

The unity of the country is at stake when we can no longer see ourselves as a single people represented in and through the law. If the nation does not split apart, it may be because we do not care very much about a politics stripped of its connection to the political. Perhaps we will settle for a “good enough” politics -- a peace treaty rather than a constitution. That settlement too is a consequence of a loss of faith: we no more want to fight political wars than we want to fight religious wars. We are busy elsewhere.

In the Europe Union, the question is whether a constitutional project can ground itself without a faith that supports an idea of law as a representation of the popular sovereign. Absent that representation, law becomes a means to the ends of ordinary politics. We ask who is winning and who is losing. We theorize law as a form of neo-liberalism – its purpose is facilitate markets. To this, we may tack on a doctrine of human rights, but does that represent anything more than a form of civility? Is it only a kind of aesthetic morality that stands in for the absence of the political? Who, we may rightly ask, is willing to sacrifice for this idea? A European law seen through that lens will be a weak force against the assertions of political identity made by nation-states that can still answer the question of representation, even if their answers do not refer to law.

The American constitutionalist cannot help but see here a struggle over the question of whether there is a European people to represent. A generation ago, many thought that a legal project of elites might bring an immanent people into active existence. That idea, I think, was already 100 years too late, for few believed anymore in a European people located at the intersection of Christianity, reason, and civilization. Reflecting on the American experience today, I wonder less about what law can create, than what it can sustain, once our constitutional practices have lost their capacity to represent.

^[1] See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

^[2] Tocqueville famously captured this belief in the early decades of the 19th century: “The people reign over the American political world as does God over the universe. They are the cause and the end of all things; everything comes out for them and everything is absorbed into them.” *Democracy in America* at 55 (2000).

^[3] See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 507 (Black, J. dissenting); John Hart Ely, *Democracy and Distrust*, chap. 3 (1980).

^[4] See e.g., *Obergefell v. Hodges*, 576 U.S. 644, ---- (2015) (“The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. . . . History and tradition guide and discipline this inquiry but do not set its outer boundaries.”)

^[5] See Lysander Spooner, *The Unconstitutionality of Slavery* (1845).

^[6] For this reason, the debate will not end easily with a decision that leaves the matter to the states. The pro-life position will continue to press for constitutional protection of the fetus as a person.

^[7] Oliver Wendell Holmes, “The Path of the Law,” 10 Harv. L.R. 457 (1897).

^[8] No doubt, his idea of “our system of law” included more than our constitutionalism, but the relevance of his point today is limited outside of constitutional law. Ours is an age of regulation, not of the common law. More to the point, the locus of common law reasoning has become constitutionalism.

^[9] *Brown v. Board of Education*, 347 U.S. 483, 492 (1953).

^[10] *Obergefell*, 576 U.S. at

- ^[11] Address before the Young Men’s Lyceum of Springfield, Illinois, January 27, 1838 in *Abraham Lincoln, His Speeches and Writings* 76-85 (R. Basler ed. 1946).
- ^[12] Holmes, *supra* note 7 at
- ^[13] See *Federalist One* (Hamilton): The contest over adoption of the Constitution is a test of the general question “whether societies of men are really capable or not of establishing good government from reflection and choice...”
- ^[14] The contemporary Justice as celebrity – e.g., “the notorious RBG” -- is no less an indicator of the failure of the political.
- ^[15] See Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (1997).
- ^[16] Justice Oliver Wendell Holmes interestingly stands at the convergence of both images: Justice and veteran.
- ^[17] Hobbes, *Leviathan*, chapter 13 (“war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary.”).
- ^[18] Some forms of mysticism may take a contrary view. I do not mean to express any view on such practices or claims.
- ^[19] See Paul W. Kahn, *Origins of Order: Project and System in the American Legal Imagination* (2019). Agamben, looking at the Christian tradition, draws a similar distinction between transcendence and immanence. Giorgio Agamben, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*, trans. Lorenzo Chiesa (2011).
- ^[20] See *supra* note 13 (on “reflection and choice”) and Kahn, *supra* note 15.
- ^[21] The negative acts of the popular sovereign are the destruction of law, which can take the form of revolution.
- ^[22] Christopher Columbus Langdell, *A Selection of Cases on the Law of Contracts*, 2nd ed. (1879)), viii (“Law considered as a science, consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees.”).
- ^[23] Christopher Tiedeman, *The Unwritten Constitution of the United States* (1890).
- ^[24] See Kahn, *Origin*, *supra* note 19, at 224.
- ^[25] See, e.g., Robert Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (2012).