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Constitutions as Constraints

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CONSTITUTIONS AS CONSTRAINTS

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Constitutional constraints are undertheorized and overrated. Constitutions are routinely advertised as vehicles for constraining political decisions. Constitutions work when governing officials make decisions on the basis of constitutional rules rather than personal preferences. Officials protect religious liberty rather than advance what their faith teaches is the one true religion. Constitutional constraints are undertheorized because conventional accounts of constitutions as constraining mechanisms fail to explore the strategies available to unsympathetic constitutional decisionmakers bent on frustrating constitutional provisions inconsistent with what they believe to be desirable political arrangements, fundamental rights, vital interests, and cherished policies. President Trump's lawyers claimed that executive orders which Trump had described as a "Muslim ban" were designed to promote national security and not to discriminate against adherents of Islam. Constitutional constraints are overrated because even discounting disobedience, such strategies as invalidation, denial, neglect, off-the-wall interpretation, circumcision, circumvention, and capture frequently enable unsympathetic constitutional decisionmakers to frustrate constitutional provisions while maintaining nominal allegiance to the rule of law. Police officers frequently claim that evidence was "in plain sight" to frustrate implementation of the Fourth Amendment.

Strong constitutional constraints work only when unsympathetic constitutional decisionmakers respect the rule of law and are compelled to interpret constitutional provisions as inconsistent with what they believe are desirable political arrangements, fundamental rights, vital interests, or cherished policies. Constitutional provisions constrain unsympathetic constitutional decisionmakers who have some respect for the rule of law only when they cannot invalidate, deny, neglect, interpret away, circumcise, capture, or circumvent the text. Constitutional reformers can preempt these

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strategies for frustrating constitutional constraints only by quite specific language that eschews appeals to broad values and is likely to be inflexible in response to political, social, and technological changes. One consequence of this narrowing is that constitutional constraints are poor vehicles for widescale social reform. Constitutional transformation requires empowering the faithful, not constraining the unsympathetic.

INTRODUCTION

Constitutional constraints promise much and deliver little. The First Amendment to the Constitution of the United States pledges religious freedom. Trump administration lawyers frustrated this commitment by presenting as a national security measure what Trump had described as a "Muslim ban."[1] Police officers, prosecutors, and judges frustrate constitutional commitments to due process when prosecutors offer perjured police testimony and judges credit such statements.[2] If the point of constitutions is to compel political actors to make decisions they would otherwise believe are inconsistent with their interests, morally wrong, or inefficient, constitutions are almost certain to fail and fail spectacularly.

Constitutional provisions designed to constrain enemies or unsympathetic constitutional decisionmakers are far more popular in constitutional theory than effective in constitutional practice. Much constitutional theory celebrates constitutions as constraining mechanisms.

1. Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018).

2. *See infra* note 129 and accompanying text; *see also* Mark A. Graber, *Almost Legal: Disobedience and Partial Nullification in American Constitutional Politics and Law*, *in* NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 146, 157–58 (Sanford Levinson ed., 2016).

Much constitutional practice indicates that constitutional constraints on the unsympathetic work only in narrowly defined circumstances. Strong constitutional constraints work only when unsympathetic constitutional decisionmakers respect the rule of law and are compelled to interpret constitutional provisions as inconsistent with what they believe are desirable political arrangements, fundamental rights, vital interests, or cherished policies. Constitutional framers often suspect that the unsympathetic lack this necessary respect for the rule of law. People who believe God has commanded them to spread the one true religion by any means possible are unlikely to be guided when in power by constitutional provisions guaranteeing the freedom of religion. Constitutional provisions constrain unsympathetic constitutional decisionmakers who have some respect for the rule of law only when they cannot invalidate, deny, neglect, circumcise, capture, or circumvent the text. A "cruel and unusual punishment" clause drafted by an opponent of capital punishment is unlikely to constrain proponents of capital punishment who believe executing murderers is neither cruel nor unusual. Constitutional reformers can preempt these strategies for frustrating constitutional constraints only by using quite specific language that eschews appeals to broad values and is likely to be inflexible in response to political, social, and technological changes. Constitutional reformers may be able to induce their rivals to maintain equal state representation in the upper house of Congress, but they are unlikely to compel their political enemies to take the steps necessary to achieve such broad social reforms as making former slaves fully equal citizens.

Constitutional constraints allegedly operate legally and politically. Constitutions constrain legally when, correctly interpreted, they forbid unsympathetic constitutional decisionmakers from taking certain actions. The Eighth Amendment legally constrains proponents of capital punishment if the "cruel and unusual punishments" clause, properly interpreted, forbids state executions. Constitutions constrain politically when they cause unsympathetic constitutional decisionmakers to refrain from taking certain actions. The Eighth Amendment politically constrains proponents of capital punishment when they interpret "cruel and unusual punishment" as forbidding state executions and act on their commitment to respecting the rule of law. The existence of a legal constraint depends on what a constitutional provision means. The existence of a political constraint depends on how a constitutional provision works.

Political actors concerned with the constitutional politics of constitutional change pay attention to how constitutional reforms work rather than only to what new constitutional provisions or precedents mean. The numerous examples discussed below detail how constitutional constraints, whether embodied in a constitutional amendment or precedent, in the hands

of unsympathetic constitutional decisionmakers often do not work as their constitutional sponsors or some of their successors hoped. Whether any or all of these decisions were correct as a matter of constitutional law is orthogonal to their constitutional politics. The lesson constitutional reformers should draw from such constitutional decisions as *People ex rel. Fyfe v. Barnett*[3] is not that judges went on a rampage when declaring that the Nineteenth Amendment did not grant women a right to sit on juries in Illinois,[4] but that if the proponents of the Nineteenth Amendment had wanted women to sit on juries, they needed to create a different record when framing the Nineteenth Amendment, use different language when drafting the Nineteenth Amendment, or, better yet, employ one of the alternative strategies for making their constitutional vision the official constitutional law of land.[5]

The persons responsible for the Constitution of the United States, the Fourteenth Amendment, and all other constitutional amendments were concerned with making the Constitution work. They wanted to prevent trade wars between the states, end the persecution of loyal citizens of all races in the post-bellum South, or enable women to cast ballots. They were not proposing "sham" constitutional provisions aimed primarily at convincing a naïve population or gullible outsiders that the United States was constitutionally committed to a set of desired political arrangements, fundamental rights, vital interests, and cherished policies.[6] Americans in the future may justly charge many Reconstruction Republicans with seeking to implement only a "kinder, gentler"[7] white supremacy, but little doubt exists that Thaddeus Stevens and his political allies were trying to make significant changes in the balance of power in both Southern states and the national government.

Constitutional reformers committed to significant regime change face largely insurmountable difficulties when seeking to constrain politically unsympathetic constitutional decisionmakers. Powerholders have eight techniques for frustrated constitutional provisions they detest (or just find annoying): disobedience, invalidation, denial, neglect, off-the-wall interpretation, circumcision, capture, and circumvention. Constitutional

3. 150 N.E. 290 (Ill. 1925).

4. *Id.* at 291.

5. For a discussion of constitutional strategies aimed at constructing and constituting constitutional politics rather than constraining constitutional politics, see MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM 219–27 (2013) [hereinafter GRABER, A NEW INTRODUCTION]. In future work, I hope to explore how constitutions also create politics by empowering the faithful to implement their constitutional vision.

6. For an excellent discussion of sham constitutions and sham constitutional provisions, see David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863 (2013).

7. Jack Nelson, *Bush Promises New Caring Policies to Build on the President's Record*, L.A. TIMES, Aug. 19, 1988, at 4.

reformers can do little to prevent disobedience, invalidation, denial, neglect, and off-the-wall interpretation. Denial, neglect, and off-the-wall interpretation raise particular problems. The unsympathetic may deny the factual foundations of constitutional violations. They may assert that the vast majority of white Southerners in early 1866 were loyal to the Union or that structural racism is not a problem in contemporary police forces. Significant constitutional reform almost always requires government to exercise certain powers as well as to refrain from acting in constitutionally forbidden ways. The unsympathetic must be made to implement a civil rights program or a police consent decree and not merely compelled to refrain from acting on their adverse constitutional commitments. Any provision can be interpreted away if political actors are creative and constitutional authorities cynical. If only the one true religion is really a religion, then the Religion Clauses provide no protection against an inquisition. Second, constitutional reformers committed to significant constitutional reform must draft provisions whose language includes "gross concepts"[8] or "essentially contested concepts"[9] such as "equality," "cruel," or "free exercise of religion." The meaning of those concepts depends on contested value choices, contested fact judgments, and contested interpretive methods. Recourse to gross or essentially contested concepts is necessary for ensuring that constitutional provisions remain responsive to changing social, political, and technological conditions. Constitutional provisions that use such language, however, are vulnerable to off-the wall interpretation, circumcision, circumvention, and capture in the hands of unsympathetic constitutional decisionmakers whose values, fact judgments, and interpretive methods differ from the original constitutional reformers. These largely intractable problems with constraining unsympathetic constitutional decisionmakers explain why constitutional reformers seeking fundamental regime change prefer empowering the faithful or constructing constitutional politics to constraining the unsympathetic when seeking to make their constitutional vision the official law of the land.

This analysis of the problems with constitutions as constraining mechanisms proceeds in four parts. Part I outlines the common view that constitutions are constraining mechanisms. Part II details the eight different strategies unsympathetic constitutional interpreters have for frustrating constitutional constraints. Part III examines the limited conditions under which constitutional constrains may constrain unsympathetic constitutional decisionmakers. Part IV, using the Fourteenth Amendment as an example,

8. *See* Ian Shapiro, *Gross Concepts in Political Argument*, 17 POL. THEORY 51, 51 (1989).

9. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1956).

suggests that constitutional thinkers ought to consider alternatives to constraint when considering how constitutions work.

I. CONSTRAINING OTHERS' CONSTITUTIONALITY

Distinguished scholars insist that constitutionalism is "by definition limited government" committed to constraining powerholders.[10] "[C]onstitutionalism," Frederick Schauer maintains, "impos[es] second-order constraints on the first-order policy decisions made by reasonable, well-meaning officials."[11] Giovanni Sartori regards a constitution as "a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a 'limited government.'"[12] Contemporary critics of the populist movements that are gaining power throughout the world highlight constitutional commitments to constraint and limited government. Gábor Halmai asserts that Hungarian "populism rejects the basic principles of constitutional democracy, understood as limited government, governed by the rule of law, and protecting fundamental rights."[13] Samuel Issacharoff charges that "[p]opulism puts . . . at risk" the democratic commitment to "institutional limitations with recognized boundaries."[14]

Proponents of constitutionalism as limited government insist on a principle aptly described as "no pain, no claim."[15] Constitutional government is not confined to the true, the good, and the beautiful, or constrained only from enacting recognized violations of human rights. A constitution or theory of constitutional interpretation must at times compel all government officials to act in ways they believe inconsistent with desirable political arrangements, fundamental rights, vital interests, and cherished policies. Laurence Tribe expresses the potential conflict between constitutional rules and other norms when he writes, "[i]f the Constitution is law, and if we are trying to interpret that law, then the claim that a particular government practice . . . is efficacious, is consistent with democratic theory, and is in some popular or

10. *See* CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 22–23 (1940); *see also* ANDRÁS SAJÓ & RENÁTA UITZ, THE CONSTITUTION OF FREEDOM: AN INTRODUCTION TO LEGAL CONSTITUTIONALISM 13 (2017).

11. Frederick Schauer, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881, 1883 (2013).

12. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 855 (1962).

13. Gábor Halmai, *A Coup Against Constitutional Democracy*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 243, 253 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

14. Samuel Isaacharoff, *Populism Versus Democratic Governance*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 13, at 455, 458.

15. *See* James E. Fleming, *The Natural Rights-Based Justification for Judicial Review*, 69 FORDHAM L. REV. 2119, 2129 (2001); Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 7 (1993).

moral sense 'legitimate' just doesn't cut much ice."[16] "[S]econd-order side constraints . . . on even official acts that are sound as a matter of first-order policy," Schauer asserts, "are central to understanding the very idea of constitutionalism."[17]

Constitutional constraints are better conceptualized as on a continuum with respect to other norms than as inevitably opposed to desirable political arrangements, fundamental rights, vital interests, and cherished policies. At one end of the continuum are faux constitutional constraints that constitutional drafters expect to be implemented by persons who agree with their constitutional and political vision. At the other end of the continuum are strong constitutional constraints that constitutional drafters hope will bind future constitutional decisionmakers who detest the political arrangements, rights, interests, and policies the new constitutional provisions are designed to secure. The weaker constitutional constraints that occupy the middle of this continuum are constitutional compromises that all parties to the constitutional bargain consider a reasonably attainable alternative to better constitutional provisions that they conclude are not politically feasible. The conditions under which and likelihood that a constitutional constraint will work depend on where that constraint falls on this continuum.

Faux constraints are disguised empowerments. Such constitutional provisions authorize the faithful to constrain the unsympathetic. They are other-binding. Faux constitutional constraints work by yoking the rule of law to other norms. They will work as long as the faithful retain power. Sympathetic constitutional decisionmakers can be trusted to interpret constitutional provisions faithfully because the provisions advance decisionmakers' notions of desirable political arrangements, fundamental rights, vital interests, and cherished policies when compelling others to maintain such constitutional commitments. Consider the Contracts Clause in light of Charles Beard's controversial claim that public and private creditors were the moving force behind the Constitution of 1789.[18] The Contracts Clause is phrased as a constraint on state power. The text declares: "No State shall . . . pass . . . any Law impairing the Obligation of Contracts . . . ."[19] Nevertheless, Beard's framers had no reason for thinking that state officials who had consistently defaulted on their obligations under the Articles of Confederation would become more legally virtuous under the Constitution of

16. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1302 (1995); *see* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 916 (1995).

17. Frederick Schauer, *The Annoying Constitution: Implications for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. 1689, 1689 (2017).

18. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 50–51 (Dover 2004) (1935).

19. U.S. CONST. art. I, § 10.

the United States. The Contracts Clause and related constitutional constraints on state power would work under the new constitution, Beard's framers thought, because they would be implemented by federal justices expected to regard state debtor relief laws and defalcations as violating fundamental rights, bad policy, and hostile to their personal fortunes.[20]

Weak constitutional constraints occur when all factions in a constitutional reform movement understand they will achieve more of their disparate goals by acting in concert than any faction could achieve by acting separately. They are mutually binding. Some mutually binding rules are products of constitutional log rolls. Crucial northern representatives at the Constitutional Convention traded protections for slavery for protections for commerce. Other mutually binding rules occur when general agreement exists on a second-best alternative. James Madison in *Federalist 10* assumed that factions who did not have the political power to establish their religion would agree that no religious establishment should exist.[21] Framers are particularly likely to establish weak constitutional constraints on matters where, as Justice Louis Brandeis observed, "it is more important that the applicable rule of law be settled than that it be settled right."[22] Everybody drives on the right side of the road because we are all safer if our driving behavior is coordinated than if each person decides for themselves whether to drive on the left or right side of the road.

Weak constitutional constraints work by yoking the rule of law to second-best constitutionalism.[23] They will work whenever constitutional decisionmakers believe past constitutional bargains should be maintained. Constitutional decisionmakers remain constrained by constitutional provisions inconsistent with their notions of desirable political arrangements, fundamental rights, vital interests, and cherished policies when they believe following the law is the best or at least a reasonable way of approximating those ends under existing political conditions. Justice Joseph Story thought returning fugitive slaves a fair price for maintaining a strong commercial union.[24] Justice Hugo Black in *Everson v. Board of Education*[25] maintained that not persecuting others for their religious beliefs is a fair price for not being persecuted for your religious beliefs.[26] The scholarship on constitutions as coordinating devices emphasizes how mutually binding or weak

20. *See* BEARD, *supra* note 18, at 176–83.

21. THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

22. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

23. *See* Adrian Vermeule, *Hume's Second Best Constitutionalism*, 70 U. CHI. L. REV. 421, 421–22 (2003).

24. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842).

25. 330 U.S. 1 (1947).

26. *See id.* at 9–14.

constitutional constraints provide self-interested reasons for maintaining the rule of law. Russell Hardin insists, "[c]onstitutionalism works when and only when it serves to coordinate a population on some matters, such as order, commerce, and national defense, that are more important than the issues on which they might differ."[27]

Strong constitutional constraints disaggregate the rule of law from all other norms. They are self-binding. They work only when the rule of law trumps all other values. The Constitution of the United States works when elected officials committed to the rule of law refuse to support sectarian religions, even when they believe such support improves their chances for reelection or salvation. More commonly, constitutions work when judges committed to the rule of law ignore their policy preferences when making legal decisions. This constraining function of constitutional law is a staple of judicial rhetoric. "I like my privacy as well as the next one," Justice Black declared in *Griswold v. Connecticut*,[28] "but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[29] Justice Anthony Kennedy, when voting to strike down a state ban on flag burning, stated, "sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[30] Chief Justice John Roberts was incensed when a judicial majority struck down state laws banning same sex marriage, even as he acknowledged that persons might have a fundamental right to marry a person of their gender. "Although the policy arguments for extending marriage to same-sex couples may be compelling," his dissent in *Obergefell v. Hodges*[31] stated, "the legal arguments for requiring such an extension are not."[32]

Members of the legislative and executive branches of government play important secondary roles in a system of judicial supremacy, even if they cannot be trusted to implement constitutional commands without judicial prodding. In regimes in which courts determine what constitutional provisions mean, constitutions work when elected officials obey judicial decisions, even when those decrees trench on what members of Congress and the President believe to be desirable political arrangements, fundamental rights, vital interests, and cherished policies. Dwight Eisenhower informed the nation during the Little Rock crisis: "Our personal opinions about [*Brown v. Board of Education*] have no bearing on the matter of enforcement; the

27. RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 1 (1999).
28. 381 U.S. 479 (1965).
29. *Id.* at 510 (Black, J., dissenting).
30. Texas v. Johnson, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring).
31. 576 U.S. 641 (2015).
32. *Id.* at 686–87 (Roberts, C.J., dissenting).

responsibility and authority of the Supreme Court to interpret the Constitution are very clear."[33]

The story of Odysseus strapped to the masthead is the classic example of constitutionalism as strong constraint.[34] Odysseus in the present wants to steer the ship towards the sirens. He believes that to be his best alternative and would, if able, reject any past bargain that limited his power to implement his present understanding of the best alternative. Odysseus is nevertheless unable to realize his present wishes because he made a commitment in the past to steering the ship on the straight and narrow. He implements this commitment by tying himself to the masthead and plugging his crew's ears so they cannot hear his present orders. In this way, Odysseus's past self binds his present self, much like a people's decisions to adopt and amend a constitution in 1789 and 1868, respectively, bind that people in 1799 and 1878. Peter drunk, in the common parlance, binds Peter sober.[35]

The Odysseus story nevertheless does not capture important features of strong constitutional constraints. Decisionmakers in constitutional democracies are constrained by their present commitments to the rule of law rather than by impersonal forces put in place in the past. Justice Black was physically able to strike down the ban on contraceptives before the court in *Griswold*.[36] Unlike Odysseus, his present self made the decisive choice to remain bound to a decision Justice Black believed had been made in the past. Constitutions bind political enemies in the present and future, but they also bind the future selves of present political friends and allies. Peter sober binds Mary sober as well as Peter drunk. Odysseus's second-in-command, placed in charge of the ship after an accident, is expected to steer the ship away from the sirens even if she has always believed the sirens pose no threat and have information that will enable the ship to reach Ithaca.

Strong constitutional constraints require unsympathetic constitutional decisionmakers to be committed to the rule of law and compelled by the relevant constitutional text to act inconsistently with their other values, interests, and policy preferences. Constitutional reformers cannot constrain unsympathetic government officials who refuse to obey the law. Presidents who believe God has commanded them to spread the one true religion are not constrained by the Establishment Clause. Constitutional provisions must be drafted with a precision that compels unsympathetic constitutional

33. Dwight D. Eisenhower, Radio and Television Address to the American People on the Situation in Little Rock (Sept. 24, 1957), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 689, 690 (1957).

34. *See* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 92–96 (2000).

35. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 129–30 (2001).

36. *See* Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

decisionmakers committed to the rule of law to reach the same interpretive conclusions as sympathetic government officials. "Life, Liberty and the pursuit of Happiness" is inspiring, but that capacious language will not compel pro-life advocates, pro-choice advocates, Second Amendment devotees, champions of gun control, and the like to reach constitutional decisions inconsistent with what they believe are fundamental rights.[37]

Political movements bent on achieving substantial constitutional reforms through constitutional constraints must rely on strong constitutional constraints. Justice Felix Frankfurter recognized that the rule of law was the only motivation that might induce Southern elites to respect the judicial decision in *Brown v. Board of Education*.[38] "Law alone," he wrote in *Cooper v. Aaron*,[39] "saves a society from being rent by internecine strife or ruled by mere brute power however disguised."[40] Justice Frankfurter knew that appeals to white interests were futile. White Southerners would not implement *Brown* in good faith because they thought *Brown* consistent with what they believed were desirable political arrangements, fundamental rights, vital interests, and cherished policies. Southern elites in 1954 thought racial equality an abomination. Moreover, they did not think desegregated schools were the consideration Southerners gave for more valued concessions, a second-best alternative on a matter in which no consensus existed on a best alternative, or a matter that was better settled than settled right. White supremacists in 1954—or, for that matter, in 1866—could be induced to support constitutional provisions and precedents mandating racial equality only if a combination of commitments to the rule of law and clear constitutional command would leave them in the same position as Martin Luther at the Diet of Worms where he allegedly said: "Here I stand; I can do no other."[41]

II. THE TECHNIQUES OF FRUSTRATION

Constitutional framers drafting an amendment that unsympathetic constitutional decisionmakers will be compelled to interpret consistently with the framers' original expectations must forestall eight techniques for frustrating constitutional reform. Unsympathetic constitutional decisionmakers circumcise constitutional amendments by narrowing their

37. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Mark A. Graber, *Presidents and the Declaration of Independence*, *in* THE CAMBRIDGE COMPANION TO THE DECLARATION OF INDEPENDENCE (Michael Zuckert & Mark A. Graber eds., forthcoming 2025).

38. 347 U.S. 483 (1954).

39. 358 U.S. 1 (1958).

40. *Id.* at 23 (quoting United States v. United Mine Workers of Am., 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring)).

41. *See* Roy Pascal, *Martin Luther and His Times*, 2 SCI. & SOC'Y 332, 332 (1938).

scope. They capture constitutional amendments by interpreting them in ways that are orthogonal or antagonistic to the concerns of their original sponsors. They circumvent constitutional amendments by employing constitutional "workarounds"[42] or engaging in "preservation-through-transformation"[43] in ways that help maintain the constitutional status quo. They invalidate constitutional amendments by placing procedural or substantive limits on the amendment power. Constitutional "enemies" neglect constitutional amendments by refraining from exercising new constitutional powers. They deny constitutional amendments by finding "facts" demonstrating no constitutional violation. They offer off-the-wall interpretations that remove the sting of constitutional amendments. They disobey constitutional amendments by openly flouting constitutional rules.

These techniques for frustrating constitutional constraints are rooted in an ostensive commitment to the rule of law. Persons frustrating constitutional constraints claim to be interpreting the Constitution. They do not maintain that a higher law trumps constitutional fidelity. The constitutional reformers responsible for a particular constitutional text, unsympathetic constitutional decisionmakers often argue, did not draft language that successfully entrenched into constitutional law what those reformers now claim was their original ambition. The Equal Protection Clause does not prohibit states from passing race-neutral measures that promote white supremacy.[44] Unsympathetic constitutional decisionmakers bent on frustrating constitutional provisions wield the rule of law in various ways when claiming an amendment is unconstitutional or that no constitutional violation exists. White supremacists who oppose Black suffrage claimed that the Fifteenth Amendment was not a valid constitutional enactment under Article V.[45] Proponents of the death penalty insist, against contrary evidence, that plaintiffs have failed to prove unconstitutional race discrimination in the capital sentencing process.[46]

Constitutional provisions that entrench such essentially contested conceptions as "equality" and "human dignity," or, for that matter, "freedom of speech" and "the free exercise of religion," are highly vulnerable to frustration. In constitutional democracies, and even in many dictatorships, all factions claim to be committed to equality, human dignity, the freedom of

42. *See* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503 (2009).

43. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178 (1996).

44. *See* Williams v. Mississippi, 170 U.S. 213, 225 (1898).

45. *See* Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169, 169–70 (1910); *see also* William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 224 (1919) (claiming that the Eighteenth and Nineteenth Amendments were unconstitutional).

46. *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

speech, and the free exercise of religion. Controversies are over the application of principles rather than over the principles themselves. Political actors debate whether differences between men and women justify differential treatment or whether the freedom of speech encompasses speech that might instigate a slave rebellion, and not whether the government is committed to equality or freedom of speech. The answer to these questions depends on contested value choices, fact judgements, and interpretive methods that are rarely specified in the constitution. Unsympathetic constitutional decisionmakers, when determining whether differential treatment of men and women is consistent with constitutional commitment to equality, will, unsurprisingly, base decisions on what they believe to be the appropriate values, facts, and interpretive methods and not on the unenumerated values, facts, and interpretive methods presupposed by the persons responsible for equality provisions in the Constitution.

A. The Strategies

Circumcision. Unsympathetic constitutional decisionmakers are not constrained by constitutional amendments they can circumcise. Circumcision occurs when constitutional authorities sharply narrow the potential scope of constitutional amendment so as to permit regulations constitutional reformers hoped to forbid or protect behaviors constitutional reformers hoped to prohibit. Constitutional reformers who think a free exercise clause requires government to give exemptions to general laws are frustrated by unsympathetic constitutional decisionmakers who interpret that provision as forbidding only laws targeting religious behavior. If the Establishment Clause was intended to prevent government from establishing any religion, then Justice Story was engaged in circumcision when he interpreted that provision as merely prohibiting government from establishing a particular Protestant sect.[47]

Governing officials opposed to female participation in public life engaged in circumcision when limiting the influence of the Nineteenth Amendment. Many proponents of enfranchising women believed the suffrage amendment would substantially improve women's civic participation. By forbidding gender discrimination in voting laws, the Nineteenth Amendment seemingly entitled women voters to any right or privilege that voters enjoyed under state constitutional law. This beneficence was potentially quite broad. Many state constitutions or state laws declared all voters eligible for state offices. When Americans ratified women's suffrage, Illinois was one of many states that declared all voters eligible to

47. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 701 (Carolina Academic Press 1987) (1833).

serve on juries.[48] The Supreme Court of Illinois, in *People ex rel. Fyfe v. Barnett*, nevertheless interpreted the gender-neutral references to "voters" in the state constitution as implicitly limiting jury service to male voters.[49] The justices circumcised the Nineteenth Amendment by narrowly defining the purpose of that text rather than relying on the plain meaning of language in the federal and state constitutions. While the Nineteenth Amendment "had the effect of nullifying every expression in the Constitution and laws of the state denying or abridging the right of suffrage to women on account of their sex," Illinois Supreme Court Justice Oscar E. Heard declared, "it did not purport to have any effect whatever on the subject of liability or eligibility of citizens for jury service."[50] Other states and state courts employed similar techniques when denying that constitutional provisions forbidding gender discrimination in voting laws vested women with any other right or privilege given to voters by state law.[51]

The Supreme Court of Colorado at the turn of the twentieth century played a different variation on circumcision. The state judges in *In re Morgan*[52] (1899) declared unconstitutional a state law mandating an eight-hour day for persons working in mines. Shortly thereafter, Coloradoans ratified a constitutional amendment aimed at overturning that decision. The text declared:

> The general assembly shall provide by law . . . for a period of employment not to exceed eight (8) hours within any twenty-four (24) hours . . . for persons employed in underground mines . . . or other branch of industry or labor that the general assembly may consider injurious or dangerous to health, life or limb.[53]

When the Colorado legislature repassed the eight-hour day for miners, the state supreme court in *Burcher v. People*[54] acknowledged that the measure was now constitutional.[55] That statement, however, was dicta. The actual issue before the judges in *Burcher* was whether the state legislature was authorized to restrict the hours that women and children could work. The act under constitutional attack was entitled, "An act to prescribe and regulate the hours of employment for women and children in mills . . . and any other

48. *See* People *ex rel.* Fyfe v. Barnett, 150 N.E. 290, 290 (Ill. 1925).

49. *Id.* at 292.

50. *Id.* at 291.

51. For a nice study on the cabining of the Nineteenth Amendment, see GRETCHEN RITTER, THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER 33–131 (2006).

52. 58 P. 1071 (Colo. 1899).

53. COLO. CONST. art. 5, § 25a.

54. 93 P. 14 (Colo. 1907).

55. *Id.* at 17.

occupation which may be deemed unhealthful or dangerous."[56] The Colorado Supreme Court declared this measure unconstitutional in an opinion that sharply distinguished the power to regulate work in mines from the power to regulate work done by women and children. The recently passed constitutional amendment, the judges concluded, contained "not a word about regulating employment where labor as such is injurious or unhealthful, but only where the occupation or branch of industry is of that character."[57] The Colorado judges engaged in circumcision by interpreting that state constitutional amendment authorizing state regulation of unhealthy and dangerous occupations as carving out an exception to preexisting regime commitments to the freedom of contract rather than establishing a new regime commitment to the broad exercise of police powers. Judge John Campbell declared:

> [U]nder our [state] Constitution the right of contracting for one's labor is reserved and guaranteed to every citizen. It is subject to no restraint, except where the public safety, health, peace, morals, or general welfare demands it, and then only where the legislative department of the state government, in the exercise of its police power, selects a proper subject for its exercise and prescribes reasonable and appropriate regulations.[58]

Circumcision is a particularly effective frustration strategy when constitutional provisions must be interpreted flexibly in order to respond effectively to political, social, and technological changes. The constitutional law of criminal investigation is particularly vulnerable to the narrow constructions that characterize circumcision. Contemporary governments are able to gain substantial information about individuals suspected of crime without physically trespassing on their property or physically compelling testimony. Police on public streets can detect with thermal imaging facts about the interior of private homes.[59] They can learn what persons are doing in an enclosed backyard through aerial photography.[60] Investigators can discover where an individual is at almost every minute of the day by gaining access to GPS or cell phone information.[61] They can determine whether suspects are telling the truth by examining brain scans.[62] Government

56. *Id.* at 15.

57. *Id.* at 16.

58. *Id.* at 17.

59. *See* Kyllo v. United States, 533 U.S. 27, 27 (2001).

60. California v. Ciraolo, 476 U.S. 207, 207 (1986).

61. *See* Carpenter v. United States, 138 S. Ct. 2206, 2208–09 (2018); United States v. Jones, 565 U.S. 400, 400 (2012).

62. *See* Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351, 354 (2012); Amanda C. Pustilnik, *Neurotechnologies at the Intersection of Criminal Procedure and Constitutional Law*, *in* THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 109 (John Parry &

officials who have access to these technologies are likely to be unconstrained by rules of constitutional criminal procedure that they interpret as prohibiting only the particular behaviors targeted in 1791 by the persons responsible for the Fourth and Fifth Amendments.[63] Reform movements that cannot prevent circumcision cannot implement in any meaningful way constitutional constraints on criminal investigations.

Reva Siegel details how circumcision works when she describes "preservation-through-transformation,"[64] how proponents of discrimination maintain hierarchies by adjusting the means of subordination to fit the legal status quo. She observes, "[m]odernization of a status regime occurs when a legal system enforces social stratification by means that change over time."[65] A regime in which men are allowed to beat their wives is replaced by a regime in which spouses may not sue each other for torts.[66] Unsympathetic constitutional decisionmakers practice preservation though transformation by interpreting every legal reform as only prohibiting past practices. They claim *Brown* requires desegregation but not integration.[67] They insist laws directed at pregnant women are not sex discrimination.[68]

American constitutional development highlights the centrality of preservation-through-transformation as a circumcision strategy designed to frustrate constitutional amendments and precedents designed to achieve greater racial and gender equality. White supremacists first enslaved persons of color. After the Thirteenth Amendment abolished slavery, they retained racial hierarchies by first explicitly discriminating against persons of color and then insisting on a separation that was legally equal but discriminatory in practice.[69] Racial hierarchies survived the demise of separate but equal by the substitution of constitutional rules that did not permit racial motivations to be examined and permitted substantial racial disparities whenever the possibility existed that some race-neutral factor might explain those

Song Richardson eds., 2013); *see also* David Gray, *A Right to Go Dark (?)*, 72 SMU L. REV. 621, 651–55 (2019).

63. For excellent discussions of some problems raised in this paragraph, see DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE (2017); David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62 (2013).

64. Siegel, *supra* note 43, at 2178.

65. *Id.*

66. *Id.* at 2180.

67. *See* Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

68. *See* Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

69. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–29 (1997).

disparities.[70] The foundations for gender hierarchies shift from religion,[71] to biological differences between men and women,[72] to a series of social practices that disadvantage women in professional and political settings.[73] These circumcision strategies force proponents of racial and gender equality to play the constitutional equivalent of whack-a-mole. As soon as they demolish through constitutional amendment or interpretation one set of barriers to racial or gender equality, proponents of racial and gender hierarchies construct new obstacles that unsympathetic constitutional decisionmakers claim are not covered by the previous egalitarian constitutional reforms.

Capture. Unsympathetic constitutional decisionmakers are not constrained by constitutional amendments they can capture. Capture occurs when constitutional decisionmakers apply enumerated constitutional principles in ways that are orthogonal or antagonistic to the goals of their constitutional framers. Jack Balkin coined the phrase "ideological drift" to describe how the "normative or political valence" of legal ideas originally identified with one political movement evolve as they become objects of political struggle.[74] The significance of color-blindness shifted when conservatives opposed to affirmative action began aggressively employing language originally designed to undermine racial segregation.[75] Proponents of the men's rights movement, who march under the banner, "End all Discrimination and Sexism Against Men & Boys. For Equal Rights and Liberty of All People,"[76] are prepared if they gain power to interpret the Equal Protection Clause and state equal rights amendments in ways that subvert the

70. *See id.* at 1131–35; *see also* Washington v. Davis, 426 U.S. 229 (1976); Whren v. United States, 517 U.S. 806 (1996).

71. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.").

72. *See* Muller v. Oregon, 208 U.S. 412, 421 (1908) ("That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious.").

73. *See* Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 719 (7th Cir. 1986) ("[M]ost women take considerable time out of the labor force in order to take care of their children. As a result they tend to invest less in their 'human capital' (earning capacity); and since part of any wage is a return on human capital, they tend therefore to be found in jobs that pay less.").

74. J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993).

75. *Id.* at 872–73.

76. *Men's Rights Movement*, FACEBOOK, https://www.facebook.com/pg/themensrightsmovement/about/?ref=page_internal (last visited Apr. 8, 2024).

egalitarian vision that animated feminists to demand heightened scrutiny for gender discriminations.[77]

The Supreme Court's recent religion cases illustrate capture at work. During the 1980s and early 1990s, the more conservative Justices on that tribunal consistently rejected free exercise claims, claiming either that the challenged legislation met a compelling interest standard or that the Free Exercise Clause permitted the government to pass neutral laws that burdened religious believers.[78] The more liberal Justices frequently dissented from these rulings, demanding a far more consistent and stricter version of the compelling interest standard.[79] In 1993, Congress mandated that consistent and stricter compelling interest standard by passing the Religious Freedom Restoration Act.[80] That law was declared unconstitutional as applied to the states in *City of Boerne v. Flores*,[81] but was sustained as applied to federal legislation.[82] In *Burwell v. Hobby Lobby Stores, Inc.*,[83] conservatives captured that compelling interest test. Much to the distress of the more liberal Justices on the court,[84] Justice Samuel Alito converted a standard previously employed to protect politically powerless sects into a vehicle that allowed closed corporations owned by conservative Christians to opt out of federal mandates requiring employers to include contraceptive care in the health benefits they provided their employees.[85]

Participants in American constitutional politics have complained about capture for more than two hundred years. Federalists during the first decade of the nineteenth century accused National Republicans of capture during the debates over the Embargo Acts. Thomas Jefferson invoked the Commerce Clause when justifying those prohibitions on international trade. New Englanders responded by insisting that the Commerce Clause was framed to facilitate interstate and international commerce inconsistent with federal embargoes.[86] Justice Stephen Breyer's twenty-first century dissent in

77. *See, e.g.*, *The Facts About Men and Boys*, A VOICE FOR MEN, https://www.avoiceformen.com/the-facts-about-men-and-boys/ (last visited Apr. 8, 2024).

78. *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990); United States v. Lee, 455 U.S. 252 (1982); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Goldman v. Weinberger, 475 U.S. 503 (1986).

79. *Smith*, 494 U.S. at 907–08 (Blackmun, J., dissenting); *Lyng*, 485 U.S. at 476–77 (Brennan, J., dissenting); *Goldman*, 475 U.S. at 522 (Brennan, J., dissenting).

80. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

81. 521 U.S. 507 (1997).

82. Gonzales v. O Centro Espirata Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

83. 573 U.S. 682 (2014).

84. *Id.* at 747, 767 (Ginsburg, J., dissenting).

85. *Id.* at 690–91 (majority opinion).

86. *See* Josiah Quincy, *Speech on Foreign Relations*, *in* 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT 148 (Howard Gillman, Mark A. Graber & Keith E. Whittington eds., 2d ed. 2016).

McCutcheon v. Federal Election Commission[87] accused Roberts Court conservatives of capture. Responding to the majority's claim that the First Amendment protected a right to contribute to an unlimited number of candidates, Breyer maintained that the First Amendment was framed to facilitate a popular control of government that was best fostered by legislative restrictions on campaign finance.[88]

Circumvention. Unsympathetic constitutional decisionmakers are not constrained by constitutional provisions they can circumvent. Circumvention occurs when constitutional authorities substitute a permissible means for achieving desired ends for a means barred by the Constitution. During the debate over Texas statehood, Democrats in 1845 circumvented the requirement that two-thirds of the Senate agree on treaties with foreign countries by declaring that simple majorities in both houses of Congress could admit a foreign country to statehood.[89] Pro-life advocates before *Dobbs v. Jackson Women's Health Organization*[90] circumvented Supreme Court decisions declaring that women have a constitutional right to abortion[91] by passing laws that make access to abortion practically impossible for many women. Rather than ban abortion, which was unconstitutional under judicial precedent, they sought to reduce drastically or eliminate entirely abortion providers.[92]

Antislavery advocates before the Civil War proposed numerous evasive maneuvers that, if adopted by constitutional decisionmakers, would have almost completely circumvented the constitutional rendition process for fugitive slaves. Abolitionists claimed that Congress had no power to pass laws regulating the rendition process, insisted that the federal government could not compel states to assist the rendition process, and demanded that alleged fugitives be given jury trials in the state of capture.[93] None of these strategies denied or expressly narrowed the constitutional obligation to return a captured, identified fugitive slave.[94] Rather, abolitionists sought to make capturing and identifying fugitive slaves nearly impossible.

87. 572 U.S. 185 (2014).

88. *Id.* at 235–40 (Breyer, J., dissenting).

89. *See* Mark A. Graber, *Settling the West: The Louisiana Purchase, the Annexation of Texas, and* Bush v. Gore, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSIONISM 83 (Sanford Levinson & Bartholomew Sparrow eds. 2006). Congress engaged in similar circumvention when passing the North America Free Trade Agreement. *See* Tushnet, *supra* note 42, at 1502–03.

90. 597 U.S. 215 (2022).

91. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

92. *See* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When 'Protecting Health' Obstructs Choice*, 125 YALE L.J. 1428, 1430 (2016).

93. *See generally* THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861 (1974).

94. *See* U.S. CONST. art. IV, § 2.

Circumvention differs from circumcision, at least from the perspective of those attempting to frustrate a constitutional provision. Unsympathetic constitutional decisionmakers engage in circumcision when they narrow the scope of the constitutional provision they find objectionable. They maintain that past paths to their constitutional end remain open. Justice Samuel Miller in *Bradwell v. Illinois*,[95] when rejecting claims that otherwise qualified women had a constitutional right to be attorneys, insisted that the Fourteenth Amendment did not affect state power to determine who could practice law.[96] Unsympathetic constitutional decisionmakers engage in circumvention when, finding one constitutional route to their ends blocked by a constitutional change, they find an alternative constitutional path. Justice Joseph Bradley's concurring opinion in *Bradwell* acknowledged that the Fourteenth Amendment withdrew from states the power to determine who could practice law, but he insisted that women, because of their essential nature, were not qualified to be lawyers.[97] Of course, from the perspective of the constitutional reform movement, the line between circumcision and circumvention is fuzzy, if not non-existent. Myra Bradwell and her attorneys insisted that the Fourteenth Amendment did not permit states to make gender a qualification for practicing a profession.[98] Justice Bradley, in their view, merely made a different circumcision than Justice Miller into the Fourteenth Amendment.

Mark Tushnet details various circumvention strategies when discussing the "constitutional workarounds" governing officials use to "accomplish a goal blocked by parts of the Constitution's text."[99] What the Constitution takes away with one hand, he observes, the text often gives back with another. Governing officials bent on frustration achieve "results inconsistent with one constitutional provision by taking advantage of the opportunities provided by other constitutional provisions."[100] One example Tushnet gives is the National Popular Vote Interstate Compact. Proponents of this agreement propose to circumvent the Electoral College by convincing a sufficient number of states to pass laws requiring that their presidential electors cast their votes for the candidate who received the most popular votes.[101] The Compact Clause of Article I, Section 10, in their view, enables Americans to escape the strictures of the provisions in Article II, Section 1 empowering the

95. 83 U.S. 130 (1872).
96. *Id.* at 139.
97. *Id.* at 140–41 (Bradley, J., concurring in the judgement).
98. *Id*. at 133–37 (argument of Matthew Hale Carpenter).
99. Tushnet, *supra* note 42, at 1504.
100. *Id.* at 1506.
101. *See id.* at 1500–01.

Electoral College to decide presidential elections.[102] Similarly, the constitutional requirement that treaties be approved by a two-thirds majority in the Senate, Tushnet observes, is circumvented whenever governing officials convert treaty provisions into ordinary legislation and then use the majoritarian path the Constitution lays out for enacting statutes.[103]

Invalidation. Unsympathetic constitutional decisionmakers are not constrained by constitutional amendments they can invalidate.[104] Invalidation occurs when constitutional decisionmakers rule that a constitutional provision has not been properly ratified or cannot be ratified consistently with the rules for constitutional amendment. A constitutional amendment may be invalid on procedural grounds. Americans in the 1980s and afterwards debated whether Congress had the power to extend the deadline for ratifying the Equal Rights Amendment.[105] Americans in the 1990s debated whether state legislatures could ratify the "purported Twenty-Seventh Amendment" two hundred years after that amendment passed both houses of Congress.[106] A constitutional amendment may be invalid on substantive grounds. The plaintiffs in *Leser v. Garnett*[107] maintained that the alleged Nineteenth Amendment was not part of the fundamental law of the United States, even though it was ratified consistently with the procedures laid out in Article V, because a constitutional amendment enfranchising women was inconsistent with fundamental constitutional commitments to state sovereignty.[108]

The possibility of "unconstitutional constitutional amendments" has gained substantial scholarly and judicial traction in the last half-century. Proponents of "unconstitutional constitutional amendments" claim that constitutional amendment clauses sanction only constitutional amendments that modify constitutional arrangements, not those that alter the fundamental character of the constitution.[109] Yaniv Roznai insists that the "constitutional amendment power" is not a "primary constituent power," and, for this reason,

102. *See id.*

103. *See id.* at 1502–03.

104. For an excellent survey of unconstitutional constitutional amendments, see YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017).

105. *See* Mason Kalfus, Comment, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437, 443–44 (1999); Idaho v. Freeman, 529 F. Supp. 1107, 1153 (D. Idaho 1981) (declaring unconstitutional a congressional extension of the time for ratifying the Equal Rights Amendment); THOMAS H. NEALE, CONG. RSCH. SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES (2019).

106. *See* Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT 101 (1994).

107. 258 U.S. 130 (1922).

108. *Id.* at 136.

109. *See* WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 506 (2007); GRABER, A NEW INTRODUCTION, *supra* note 5, at 148–50.

cannot be used to "destroy the constitution or replace it with a new one."[110] Constitutional amendments may improve or adjust democratic processes, but they cannot convert a constitutional democracy into some other form of government. Americans, in this view, may constitutionally ratify amendments limiting gerrymandering but not amendments prohibiting political dissent. An increasing number of constitutional courts are invalidating constitutional amendments on substantive grounds. The Supreme Court of India, which maintains that "the power to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity,"[111] has struck down several constitutional amendments, including a constitutional amendment prohibiting the judiciary from declaring constitutional amendments unconstitutional.[112]

Invalidation is a powerful form of frustration. If successful, this strategy permits unsympathetic constitutional decisionmakers to engage in the full range of behaviors permitted before the constitutional change. White Southern males who successfully invalidated the Fifteenth and Nineteenth Amendments would have prevented all persons of color and women from voting. In contrast, circumcision, capture, and circumvention leave at least a residue of the constitutional reform. Women voted in Ohio, even if after *People ex rel. Fyfe v. Barnett* they could not serve on juries.[113] A few voters of color in the Jim Crow South managed to find their way to the polls, even if circumcision, circumvention, and brutal violence often made their number miniscule.[114]

Neglect. Unsympathetic constitutional decisionmakers are not constrained by constitutional provisions they can neglect. Neglect occurs when constitution decisionmakers frustrate constitutional reforms by failing to exercise constitutional powers. They refuse to intervene when vital constitutional interests are threatened. National constitutional decisionmakers opposed to the commerce power do not pass laws or make constitutional rules that prevent trade wars between the states. They fail to establish or dismantle the support systems necessary for persons to identify and vindicate constitutional rights. Democrats who fought against ratification of the Fifteenth Amendment, when returned to power, immediately repealed

110. ROZNAI, *supra* note 104, at 227.

111. Yaniv Roznai, *Unconstitutional Constitutional Change by Courts*, 51 NEW. ENG. L. REV. 557, 562 (2017) (quoting Kesavananda Bharati v. State of Kerala, 1973 (4) SCC 225 (India)).

112. Minerva Mills Ltd. v. India, AIR 1980 SC 1789 (India); *see* Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 690–93 (2013).

113. *See* People *ex rel.* Fyfe v. Barnett, 150 N.E. 290, 291 (Ill. 1925).

114. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 54–55, 236–37 (2004).

laws that empowered federal officials to prevent state officials from discriminating against voters of color.[115] They do not interfere when private violence or coercion prevents persons from challenging unconstitutional or illegal practices. Government officials in the Deep South frustrated the post-Civil War amendments by doing little or nothing to prevent persons of color who asserted legal claims from being viciously beaten or murdered by vigilantes committed to white supremacy.[116]

Neglect provides particular challenges for constitutional reformers. Compelling unsympathetic constitutional decisionmakers to take various actions is even more difficult than compelling them not to do something. Alexander Hamilton captured the fundamental problem when in *Federalist 23* he declared that most national "powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them."[117] Hamilton believed vesting discretion in sympathetic constitutional decisionmakers was necessary for them to respond to changing conditions in ways that achieved constitutional ends. The same discretion, however, enables unsympathetic constitutional decisionmakers to thwart constitutional ends. The framers' decision to give Congress discretion to decide when declaring war is in the national interest empowers a pacifist majority in Congress to frustrate the letter of Article I, Section 8, paragraph 11 ("The Congress shall have Power . . . [t]o declare War") by refraining from declaring war under any circumstance, even where members recognize the national interest, if not national survival, requires military hostilities. This problem of discretion does not depend on whether powers given are discretionary. Democrats would have made the same claims that voting rights laws were too expensive, ineffective, and inconsistent with state sovereignty had Section 2 of the Fifteenth Amendment declared, "the Congress shall enforce this article by appropriate legislation" rather than, "[t]he Congress shall have power to enforce this article by appropriate legislation."

The history of bankruptcy illustrates one means unsympathetic constitutional decisionmakers have for frustrating constitutional reform by neglect. The persons responsible for Article I, Section 8, paragraph 4, which empowers Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," intended the bankruptcy power to be exercised, even as they gave Congress discretion over what federal

115. *See* COMMITTEE ON PRIVILEGES AND ELECTIONS REPORT, S. REP. NO. 113 (1893); Act of Feb. 8, 1984, ch. 25, 28 Stat. 36 (1894).

116. *See* KLARMAN, *supra* note 114.

117. THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

bankruptcy laws would best accomplish national goals. National bankruptcy laws, *Federalist* 42 maintains, "will prevent so many frauds where the parties or their property may lie or be removed into different States."[118] Jeffersonians and Jacksonians who opposed the decision in 1787 to empower Congress to pass federal bankruptcy laws frustrated this framing ambition by refusing to exercise the bankruptcy power.[119] The end result, at least from a Federalist perspective, was all the evils the Bankruptcy Clause was intended to forestall.[120] Framing goals would not have advanced substantially had the Bankruptcy Clause been phrased as a congressional obligation rather than a legal permission. The national bankruptcy law Jeffersonians or Jacksonians might have passed (and unsympathetic constitutional decisionmakers might have sustained) would either have provided little actual bankruptcy relief or declared as a national rule that state law governs bankruptcy.

Neglect takes a different form when unsympathetic constitutional decisionmakers fail to establish or maintain the infrastructure necessary to vindicate constitutional rights. Access to justice is a prerequisite for constitutional supremacy and the rule of law.[121] Constitutional constraints on government officials work in practice only when persons are able to identify and pursue claims of constitutional wrong. The capacity to identify and pursue claims of constitutional wrong, much social science scholarship demonstrates, requires a support system that provides persons whose rights have been violated with the opportunities and means necessary to pursue remedies.[122] One basic element of a support system in most constitutional democracies is a lawyer who can inform persons of the rights they have and has the skill to advocate for those rights in litigation.[123] Government officials who neglect to establish adequate legal services frustrate fundamental constitutional norms. Deborah Rhode observes how the maldistribution of legal services in the United States creates conditions where "[i]n most jurisdictions, it is safer to be rich and guilty than poor and innocent."[124] "Denying an adequate defense to those who cannot afford it," she observes "compromises our most fundamental constitutional commitments,"[125] and

118. THE FEDERALIST NO. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961).

119. *See generally* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935); EMILY ZACKIN & CHLOE N. THURSTON, THE POLITICAL DEVELOPMENT OF AMERICAN DEBT RELIEF (forthcoming June 2024).

120. WARREN, *supra* note 119, at 52–56.

121. *See* Mark A. Graber, *Access to Justice in the Theory of Constitutional Democracy*, RIVISTA DI DIRITTI COMPARATI (SPECIAL ISSUE), 2019, at 90, 93.

122. *See generally* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING (1990).

123. *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004).

124. *Id.* at 122.

125. *Id.* at 142.

leaves "individuals who are unjustly accused or denied their constitutional rights . . . without effective remedies."[126] Access to unbiased fora for resolving claims of constitutional and legal wrong is an equally vital part of the infrastructure necessary for maintaining the rule of law. Sarah Staszak documents how the Roberts Court has frustrated many liberal employment and anti-discrimination laws by creating standing rules that make litigating certain employment claims nearly impossible and interpreting other federal laws as requiring employees to submit to binding arbitration before biased arbiters.[127]

Unsympathetic constitutional decisionmakers frustrate constitutional reforms by failing to respond when private parties, through violence and other means, prevent constitutionally injured parties from asserting rights. Consider the travails of Joseph DeLaine, the person who brought the South Carolina lawsuit against segregated schools that was a companion case in *Brown v. Board of Education*:

> Before it was over, they fired him from the little school-house at the church he had taught devotedly for ten years. And they fired his wife and two of his sisters and a niece. And they threatened him with bodily harm. And they sued him on trumped-up charges and convicted him in a kangaroo court and left him with a judgment that denied him credit from any bank. And they burned his house to the ground while the fire department stood around watching the flames consume the night. And they stoned the church at which he pastored. And fired shotguns at him out of the dark.[128]

DeLaine was incredibly brave, an American hero. Most persons in the absence of government protection under these circumstances would refrain from attempting to exercise constitutional or legal rights, even if guaranteed that they or their heirs would eventually obtain a unanimous Supreme Court decision in their favor.

Denial. Unsympathetic constitutional decisionmakers are not constrained by constitutional provisions when they can deny that a constitutional violation, as defined by constitutional reformers, has taken place. Denial occurs when constitutional decisionmakers allege facts that, if correct, justify the behavior under constitutional attack. Police perjury is a too common instance of denial. Police officers often frustrate constitutional rights by falsely claiming to have followed the constitutional rules for searching a suspect, obtaining a warrant, or eliciting a confession. This

126. *Id.* at 123.

127. SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015).

128. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 3 (1975).

evasive maneuver is successful whenever courts believe or purport to believe such perjured testimony. Stephen Gard observes, "[t]he Fourth Amendment 'is no barrier at all if it can be evaded by a policeman concocting a story that he feeds a magistrate.'"[129] Justice Lewis Powell in *McCleskey v. Kemp*[130] employed a denial strategy when insisting, despite data to the contrary, that the evidence did not actually demonstrate that Georgia juries were statistically more likely to sentence to death persons convicting of murdering white persons than persons convicted of murdering persons of color.[131]

Denial takes at least three forms. First, constitutional decisionmakers falsely claim their behavior was consistent with constitutional norms. Police perjury is one example of this practice. Conservatives accuse liberals of denial when the latter claim that state university officials are not using racial quotas in their admissions process.[132] Liberals charge conservatives with denial when the latter claim racism in police forces is limited to a few bad eggs.[133] Second, constitutional decisionmakers invent facts that justify legislation that, on the actual facts, would be unconstitutional. Pro-choice advocates charge pro-life legislators with fabricating sham health benefits when passing laws whose actual purpose is to shut down abortion clinics.[134] The petitioners in *Trump v. Hawaii*[135] accused the Trump administration of disguising an unconstitutional anti-Muslim travel ban as a constitutional anti-terrorist measure.[136] Third, constitutional decisionmakers justify neglect by claiming the circumstances on the ground do not warrant legislative intervention or particular forms of legislative intervention. Opponents of federal lynching laws routinely exaggerated local commitments to the rule of law and minimized the number of lynchings taking place in the South. Claudine Ferrell documents how the Democrats who defeated the Dyer Bill

129. Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 SUFFOLK U. L. REV. 445, 446 (2008) (quoting Baldwin v. Placer County, 418 F.3d 966, 970 (9th Cir. 2005)).

130. 481 U.S. 279 (1987).

131. *Id.* at 312 ("At most, the Baldus study indicates a discrepancy that appears to correlate with race.").

132. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 381–86 (2003) (Rehnquist, C.J., dissenting).

133. *See, e.g.*, Utah v. Strieff, 579 U.S. 232, 253–54 (2016) (Sotomayor, J., dissenting).

134. *See, e.g.*, June Med. Servs. LLC v. Russo, 140 S. Ct. 2103 (2020); Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).

135. 138 S. Ct. 2392 (2018).

136. *See id.* at 2433–437 (Sotomayor, J., dissenting). The Supreme Court's decision in *Korematsu v. United States*, 323 U.S. 214 (1944), was influenced by statements made by Lieutenant General John L. DeWitt about the threat Japanese Americans presented to the West Coast, which government attorneys kept on the case record even when they knew many of those assertions were false. *See* WILLIAM M. WIECEK, THE BIRTH OF MODERN CONSTITUTIONALISM: THE UNITED STATES SUPREME COURT, 1941-1953, at 353–54 (2006). For an important discussion of the crucial role claims of denial played in both *Korematsu* and *Trump*, see Mark R. Killenbeck, *Sober Second Thought?* Korematsu *Reconsidered*, 74 ARK. L. REV. 151, 226, 233 (2021).

in the 1920s "claimed unyielding opposition to lynching, unflagging friendship for the Negro, and an unbending determination to protect black rights."[137] Justice Ruth Bader Ginsburg charged Chief Justice John Roberts's opinion in *Shelby County v. Holder*[138] with ignoring the congressional factfinding underlying the 2006 extension of the Voting Rights Act when declaring unconstitutional the preclearance formula used in that measure.[139]

Denial plays a central role in many famous cases in the canon and anti-canon of American constitutional law.[140] Anti-canonical cases deny what is now considered obvious. The majority in *Lochner v. New York*[141] denied that baking was a particularly unhealthy trade.[142] Justice Henry Billings Brown's opinion in *Plessy v. Ferguson*[143] denied that segregation laws were motivated by race prejudice. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority," he infamously asserted.[144] "If this be so," Brown continued, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[145] Canonical cases reject longstanding uses of denial that previously frustrated constitutional reforms. The Supreme Court in *Brown v. Board of Education* refused to be persuaded by Southern claims that both white and Black citizens supported school segregation as being in the best interest of both races.[146] Charles Black's celebrated defense of *Brown* observed:

> [I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of

137. Claudine L. Ferrell, Nightmare and Dream: Antilynching in Congress, 1917-1922, at 331–38 (1983) (Ph.D. dissertation, Rice University), https://repository.rice.edu/server/api/core/bitstreams/d9f34548-2b36-43e1-814a-569646c62a65/content.

138. 570 U.S. 529 (2013).

139. *Id.* at 565–80 (Ginsburg, J., dissenting).

140. *See* Killenbeck, *supra* note 136, at 228–30 (noting that attitudes towards such Supreme Court decisions as *Korematsu v. United States*, *Trump v. Hawaii*, *Brown v. Board of Education*, *Roe v. Wade*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and *Grutter v. Bollinger* may depend on whether one believes a party to the case was engaged in denial).

141. 198 U.S. 45 (1905).

142. *Id.* at 59 ("We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual . . . .").

143. 163 U.S. 537 (1896).

144. *Id.* at 551.

145. *Id.*

146. For such claims, see KLUGER, *supra* note 128, at 545–46, 574, 672.

> laughter. . . . Northern people may be misled by the entirely sincere protestations of many southerners that segregation is "better" for the Negroes, is not intended to hurt them. But I think a little probing would demonstrate that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future.[147]

Whether *Brown* would be as worthy of celebration in the absence of denial, if persons of all races actually thought segregation was and was intended to be equal, is a difficult question.[148]

Off-the-Wall Interpretation. Unsympathetic constitutional decisionmakers are not constrained by constitutional provisions that are susceptible to off-the-wall interpretations. Off-the-wall interpretations occur when persons reach conclusions that constitutional provisions do not have their obvious meaning by relying on unconventional methods of constitutional interpretation or by applying conventional methods of constitutional interpretation in ways considered unreasonable by the legal community. Jack Balkin describes an off-the-wall interpretation as "inconsistent with the key assumptions of the legal culture and . . . not the sort of argument one would expect a well-trained lawyer to make. Lawyers who make such an argument are either poor lawyers, ideologues pushing a political agenda, or deliberately trying to be provocative."[149] Some off-the-wall constitutional arguments take the Constitution too literally when reaching legally daft conclusions. John Hart Ely made the tongue-in-cheek suggestion that doctors who perform cesarean sections deliver children who are ineligible to become President of the United States because one criteria for the office is being a "natural born citizen."[150] Jordan Steiker, Sandy Levinson, and Jack Balkin point out that when the Constitution is taken too literally, no one living at present is eligible to become President of the United States because the Constitution requires the President to be a citizen of the United States "at the time of the Adoption of this Constitution."[151]

Radical abolitionist claims that the Constitution prohibited slavery throughout the United States provide examples of an "off-the-wall" constitutional arguments. Alvan Stewart developed a simple syllogism for

147. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

148. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (claiming that Justices foreclosed from knowing actual segregation practices would find *Brown* a difficult case).

149. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 180 (2011).

150. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 13 (1980).

151. *See* Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237, 238 (1995).

proving that slavery as practiced in the United States was unconstitutional: "Slaves were persons; persons were entitled to due process; due process required judicial proceedings as a prerequisite to deprivation of liberty; slaves had had no such proceeding; ergo, they had been deprived of their liberty without due process of law."[152] Frederick Douglass supplemented the due process argument for universal freedom with arguments rooted in "the right of trial by jury, the privilege of the writ of habeas corpus," the constitutional guarantee of "a republican form of government," and the constitutional ban on "the passing of a bill of attainder."[153] Lysander Spooner thought the constitutional commitment to birthright citizenship entailed that all persons born in the United States after the Constitution was ratified, which included almost every person held in bondage, was a free citizen of the United States.[154]

These arguments were as clever as they were ineffectual. No prominent jurist before the Civil War claimed that radical abolitionists were even making professionally competent arguments. Jack Balkin and Sandy Levinson point out that the "views of abolitionists like Lysander Spooner and Frederick Douglass, who insisted that the Constitution was actually hostile to slavery, were widely regarded as unsound examples of special pleading, or, in today's parlance, as 'off the wall.'"[155] Robert Cover, who was quite sympathetic to more moderate antislavery constitutional arguments, speaks of Stewart, Douglass, Spooner, and related thinkers as "constitutional utopians," who were "relatively unimportant antislavery thinkers" engaged in "legal madness."[156] Cover describes Spooner's work as "the haphazard ingenuity of rule and phrase manipulation" that "ignore[s] the 'method' of the judge in any real sense."[157]

Political actors willing to engage in off-the-wall interpretation are as immune to constitutional reform as persons who adhere to a higher law, engage in neglect, or commit to various forms of denial. Stewart, Douglass, Spooner, and other abolitionists who championed the radically antislavery Constitution would not have been moved by a more explicit amendment

152. JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 47 (1951).

153. Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Antislavery? (Mar. 26, 1860), *in* FREDERICK DOUGLAS: SELECTED SPEECHES AND WRITINGS 380, 388 (Philip S. Foner ed., 1999).

154. LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 131–32 (Boston, Bela Marsh 1860).

155. Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 78 (2007) (footnote omitted).

156. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 154–55 (1975).

157. *Id.* at 157.

declaring "Congress has no power to interfere with slavery in an existing state." Stewart could have claimed the amendment referred only to persons enslaved after a jury trial. Douglass could have contended that the amendment implied that the President of the United States or the federal judiciary was constitutionally authorized to emancipate enslaved persons. Spooner could have insisted the amendment referred only to those persons who were enslaved when the Constitution was ratified. No doubt radical abolitionists could think of cleverer off-the-wall constitutional arguments to neuter the above amendment and any other amendment slaveholders could devise to provide firmer foundations for the "peculiar institution." Radical abolitionists were hardly unique in their capacity to develop off-the-wall arguments to defeat any plain constitutional text. Jared Goldstein's history of right-wing fringe groups in the United States demonstrates that proponents of white Christian supremacy have had little difficulty developing off-the-wall constitutional arguments that explain why, despite the plain language of the First and Fourteenth Amendments, the Constitution is committed to white, Christian rule.[158]

Off-the-wall interpretations gain power when repeated. A lie remains a lie no matter how often, but an off-the-wall interpretation has the power to become a precedent that becomes intertwined with the law. American constitutional history demonstrates how yesterday's off-the-wall constitutional argument becomes today's conventional wisdom. Arguments for same-sex marriage that a unanimous Supreme Court of Minnesota casually dismissed during the 1970s[159] became the law of the land in *Obergefell v. Hodges*.[160] The notion that Congress could not require people to buy health insurance was largely derided by law professors[161] before becoming the law of the land in *National Federation of Independent Business v. Sebelius*.[162]

Combination Shots. Unsympathetic constitutional decision-makers typically employ multiprong strategies when frustrating constitutional provisions. Former Confederates in the wake of the Civil War sought to frustrate the Thirteenth Amendment by defining slavery narrowly, denying racial problems existed in the post-war South, neglecting to implement constitutional bans on human bondage, and by claiming those constitutional

158. JARED GOLDSTEIN, REAL AMERICANS: NATIONAL IDENTITY, VIOLENCE, AND THE CONSTITUTION 29–106 (2022).

159. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

160. 576 U.S. 644 (2015).

161. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), http://www.theatlantic.com/national/archive/2012/06/fromoffthewalltoonthewallhowthemandatech/258040/.

162. 567 U.S. 519 (2012).

bans were invalid.[163] These strategies were mutually reinforcing. Claims that no racial problems existed in former Confederate states buttressed claims that African-Americans did not find Black Codes to be a form of re-enslavement.[164]

Combination shorts are effective because the strategies for frustrating constitutional reforms are not airtight or exclusive. Circumcision bleeds into circumvention. Using standing rules to prevent persons from raising claims of constitutional wrong might be classified as circumvention, neglect, or both. Some unsympathetic constitutional decisionmakers might behave in ways that have elements of circumcision, capture, circumvention, neglect, denial, and off-the-wall interpretation. Consider the Supreme Court's decision in *Wainwright v. Sykes*,[165] holding that persons who fail to make a constitutional claim at trial will normally be considered to have waived that claim in habeas corpus proceedings.

- Circumcision. *Sykes* holds that constitutional criminal procedure rights must be asserted at trial.[166]
- Capture. Proponents of the due process revolution intended to expand the rights of poor persons and persons of color. By not tinkering with the substance of those rights, but limiting them to trial, *Sykes* makes the main beneficiaries of the due process revolution persons who can afford expert criminal trial lawyers.
- Circumvention. Instead of cutting back on Warren Court decisions expanding the rights of persons suspected of crime, *Sykes* imposes federalism limitations on the opportunity to assert those rights.
- Neglect. States frustrate the exercise of constitutional rights by not supplying most defendants in criminal law cases with the resources necessary to identify and assert all possible constitutional violations.
- Denial. *Sykes* assumes that counsel typically has strategic reasons for bypassing constitutional claims at trial.[167]
- Off-the-wall interpretation. The right to an effective counsel may depend in some cases on an ineffective counsel acknowledging their incompetence.

Similar accounts could be given of other efforts to frustrate constitutional reform movements. The challenge constitutional reformers

163. *See* MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR 51–91 (2023) [hereinafter GRABER, PUNISH TREASON].

164. *Id.* at 65–68.

165. 433 U.S. 72 (1977).

166. *See id.* at 86.

167. *See id.* at 76.

bent on constraining future unsympathetic constitutional decisionmakers face, therefore, is finding language that can defeat all these frustration strategies when employed singularly or in combination.

B. Disobedience, Frustration, and the Rule of Law

Disobedience is the eighth strategy for frustrating a constitutional reform. Unsympathetic constitutional decisionmakers are not constrained by constitutional amendments and reforms they can disobey. Unlike the first seven techniques for frustrating constitutional provisions, disobedients do not claim to be bound by the rule of law. They are lawbreakers—not, at least superficially, legal actors. Disobedience occurs when government officials refuse to be bound by constitutional rules they think inconsistent with their notion of desirable political arrangements, fundamental rights, valued interests, and cherished policies. Some political actors call for open disobedience. Abolitionists with the support of sympathetic free state officials publicly defied the Fugitive Slave Clause and federal laws passed under that provision. Charles Sumner called for the citizens of Massachusetts to "prevent any SLAVE-HUNTER from ever setting foot in this Commonwealth."[168] Others disobey in secret. Dissenting judges routinely accuse the judges in the majority of constitutional bad faith. Chief Justice John Roberts concluded his dissent in *Obergefell v. Hodges* by claiming that "the many Americans . . . who favor expanding same-sex marriage . . . [should] not celebrate the Constitution. It had nothing to do with it."[169] Justice Kennedy's majority opinion may have invoked constitutional provisions, but that was a sham. No persons interpreting the Constitution in good faith, Roberts maintained, could conclude that the Fourteenth Amendment or any other provision protected the right to same-sex couples to be married.

What constitutes disobedience is contestable. From the perspective of the Roberts dissent, the *Obergefell* majority engaged in disobedience because same-sex marriage has no foundation in the Constitution. From the perspective of the *Obergefell* majority, Roberts was the disobedient. Justice Kennedy's opinion insisted that the right to same-sex marriage is a straightforward application of past precedents interpreting the Equal Protection and Due Process Clauses of the Constitution.[170] The Chief Justice engaged in unconstitutional circumcision, or capture, by insisting that *Loving v. Virginia*[171] further entrenched constitutional commitments to marriage as

168. Charles Sumner, Our Immediate Antislavery Duties (Nov. 6, 1850), *in* 3 CHARLES SUMNER: HIS COMPLETE WORKS 136 (George Frisbie Hoar ed., 1900).

169. Obergefell v. Hodges, 576 U.S. 644, 713 (2015) (Roberts, C.J., dissenting).

170. *Id.* at 670–74 (majority opinion).

171. 388 U.S. 1 (1967).

limited to one man and one woman[172] when *Loving*, interpreted in good faith, demonstrated how constitutional understandings of marriage change over time.[173] Other alleged disobedients similarly claim constitutional justification for their decisions and actions. Sumner called for resistance to slave-hunters because he regarded the Fugitive Slave Act of 1850 as unconstitutional and maintained that slavery had no lawful existence under the Massachusetts and federal constitutions.[174] Police perjurers claim to be respecting the constitutional rules governing search and seizures. They often insist their conduct is justified because the judicial rules constraining their investigations have no foundation in the Constitution.[175]

The problems with identifying disobedience extend to identifying when unsympathetic constitutional decisionmakers are employing the other seven strategies for frustrating constitutional reforms. Constitutional decisionmakers in the United States vehemently deny that they are illegitimately engaged in circumcision, capture, circumvention, invalidation, neglect, denial, or off-the-wall interpretation. They insist their dispute is over what past reformers actually accomplished. Proponents of the labor amendment in Colorado may have wanted to empower the state legislature to regulate the hours and wages of all employees, the Supreme Court of Colorado in *Burcher* reasoned, but the constitutional amendment state citizens ratified was limited to dangerous occupations.[176] Proponents of men's rights, when claiming rights not to pay alimony or support for unwanted children, will be quick to point out after ratification of the Equal Rights Amendment that the text declares, "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,"[177] not "equality of rights, as 'equality of rights' is understood by late twentieth-century feminists, shall not be denied or abridged . . . ."[178] As time passes, unsympathetic constitutional decisionmakers claim that they are the legitimate heirs to the legacy left by past constitutional reformers. Chief Justice Roberts maintained he, and not the present leadership of the NAACP Legal Defense Fund ("LDF"), remained faithful to the colorblind principles Roberts claimed animated Thurgood Marshall and other past

172. *Obergefell*, 576 U.S. at 699–700 (Roberts, C.J., dissenting).

173. *Id.* at 663–65 (majority opinion).

174. Sumner, *supra* note 168, at 127–29, 140–41.

175. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 321–29 (2d ed. 2008).

176. People v. Burcher, 93 P. 14, 16–17 (Colo. 1907).

177. H.R.J. Res. 208, 92d Cong. (1972).

178. *See supra* notes 76–77 and accompanying text.

leaders of the LDF and were constitutionalized in *Brown v. Board of Education*.[179]

Unsympathetic constitutional decisionmakers in the United States employ broadly accepted principles of constitutional interpretation when engaging in what constitutional reformers maintain are illegitimate efforts to frustrate constitutional constraints. The basic constitutional principles underlying circumcision and capture have distinguished champions on the bench and the academy. Circumcision relies heavily on the originalism championed by such jurists as Antonin Scalia and Clarence Thomas, which focuses on the specific practices constitutional reformers intended to prohibit or permit.[180] Proponents limit broad constitutional language to the specific practices constitutional framers sought to prohibit or protect. The Illinois Supreme Court in *People ex rel. Fyfe v. Barnett* emphasized that the persons responsible for the Nineteenth Amendment sought to grant women the right to vote, not the right to serve on juries.[181] Capture relies heavily on aspirationalism as championed by such jurists as Ronald Dworkin. Proponents interpret constitutional language as binding constitutional decisionmakers to implement the general principles codified by the text but not the specific unenumerated ways the framers might have implemented those principles.[182] Justice Alito in *Burwell* applied the compelling interest test mandated by the Religious Freedom Restoration Act without pausing to discuss whether the liberals in Congress or on the federal bench who championed that standard thought that religious employers had a right not to provide contraception benefits to their employees.[183] The common claim that the Constitution of the United States is a charter of negative liberties[184] provides constitutional justification for neglect. Invalidation also has distinguished champions in the academy and on foreign benches.[185] Off-the-wall interpretations may be guilty of taking the constitutional text too seriously as, for example, when radical abolitionists claimed that the absence

179. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) ("The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer . . . .").

180. *See* Morse v. Frederick, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring); United States v. Virginia, 518 U.S. 515, 568–69 (1996) (Scalia, J., dissenting).

181. People *ex rel.* Fyfe v. Barnett, 150 N.E. 290, 291 (Ill. 1925).

182. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1978); *see* JACK M. BALKIN, LIVING ORIGINALISM 6–7 (2011).

183. Burwell v. Hobby Lobby, 573 U.S. 682, 690–91 (2014).

184. *See* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989).

185. *See supra* notes 104–114.

of the word "slavery" in the Constitution entailed that slavery had no constitutional existence.[186]

The extreme infrequency of pure disobedience in the history of the United States highlights how prominent Americans do not claim to act outside of the Constitution or frustrate constitutional norms. William Lloyd Garrison was the rare political activist who burned the Constitution.[187] Within a few years, prominent abolitionists discovered that, in fact, the Constitution did not sanction slavery.[188] Who knew? Proponents of nullification and secession throughout the history of the United States claimed that their actions were sanctioned by the Constitution. Jefferson, when declaring in the Kentucky Resolution that the Constitution was a compact that entitled states to determine whether federal laws were constitutional, claimed both constitutional justification for nullification in general and for specifically nullifying the Alien and Sedition Act.[189] The secession resolutions issued by Confederate states seceding from the Union claimed they were acting consistently with constitutional norms. The "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union" declared that the Constitution of the United States was committed to three "great principles."[190] These were "the right of a State to govern itself"; "the right of a people to abolish a Government when it becomes destructive of the ends for which it is instituted"; and "the law of compact," under which "the failure of one of the contracting parties to perform a material part of the agreement, entirely releases the obligation of the other."[191]

That unsympathetic constitutional decisionmakers are ostensibly committed to the rule of law and the Constitution of the United States provides constitutional reformers with an opportunity and a challenge. Constitutional constraints are not chimeras that exist in theoretical zoos but

186. *See supra* notes 152–158.

187. *See* HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 444–45 (1998)*; see also id.* at 313 (quoting Garrison declaring the Constitution to be "a covenant with death, and with hell"). John Brown is another rare instance of a pure disobedient in American history.

188. *See, e.g.*, SPOONER, *supra* note 154; Frederick Douglass, The American Constitution and the Slave (Mar. 26, 1860), *in* THE SPEECHES OF FREDERICK DOUGLAS 151 (John R. McKivigan et al. eds., 2018).

189. *See* Thomas Jefferson, The Kentucky Resolutions (Oct. 1798), *in* THE PORTABLE THOMAS JEFFERSON 281 (Merrill D. Peterson ed., 1975).

190. Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union, *in* JOURNAL OF THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA HELD IN 1860-61, at 326 (Evans & Cogswell 1861) [hereinafter Declaration of the Immediate Causes].

191. *Id.* at 326–28. For other Southern resolutions on secession, see 5 MARK A. GRABER & HOWARD GILLMAN, THE COMPLETE AMERICAN CONSTITUTIONALISM, PART I: THE CONSTITUTION OF THE CONFEDERATE STATES 62–77 (2018).

do not survive in the political wilds. Unsympathetic constitutional decisionmakers who actually are committed to the rule of law make favorable decisions when compelled to do so by legal language. The Colorado Supreme Court in *Burcher* abandoned opposition to state laws regulating the hours of miners after state voters passed a constitutional amendment explicitly vesting the state legislature with that power.[192] A broad consensus exists that the Electoral College has severe democratic deficiencies but is constitutionally mandated.[193] The challenge is devising the legal language that compels unsympathetic constitutional decisionmakers to implement constitutional reforms they detest. Constitutional reformers cannot rest content with legal language that they interpret or is best interpreted as entrenching their constitutional vision. They must devise language that constitutional "enemies" in power will interpret as entrenching the reformers' constitutional vision.

III. THE CONDITIONS OF CONSTRAINT

Constitutional reformers have a limited capacity to prevent political opponents from frustrating constitutional constraints. Constitutional reformers cannot constrain pure disobedients who have no respect for the rule of law. They can do little to forestall rival constitutional decisionmakers in power from invalidating, neglecting, or denying constitutional provisions, or engaging in off-the-wall interpretation. If a pacifist Congress and President refuse to exercise war powers in any circumstance or a racist Supreme Court declares the Thirteenth Amendment unconstitutional, the only recourse more militant political actors and antislavery advocates have is to use the next series of elections as a means for obtaining constitutional decisionmakers more sympathetic to their causes.

Constitutional reformers are better positioned to avert to some degree circumcision, circumvention, and capture. They do so by avoiding gross or essentially contested concepts, drafting language that is relatively immune to different value choices, fact judgments, and interpretive methods. Successful constitutional constraints clearly state the legal consequences of well-defined facts. "No person convicted of a crime shall be executed or put to death" is

192. Burcher v. People, 93 P. 14, 17 (Colo. 1907).

193. *See, e.g.*, ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE (2020); EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE (2020); GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (3d ed. 2019); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 81–97 (2006).

an example. Such a provision is much harder to interpret away than a "cruel and unusual punishment clause."[194]

Successful constraints come with a price. Constitutional provisions that clearly state the legal consequences of well-defined facts are limited and inflexible. "No person convicted of a crime shall be executed" will constrain proponents of capital punishment committed to the rule of law to some degree. That provision is fairly immune to differences between retributionists, utilitarians, and proponents of rehabilitation, between those who believe and do not believe the death penalty has deterrent value, and between originalists, textualists, and aspirationalists. Jack the Ripper cannot be executed for murder under this provision, even if the sentencer believes murder should be punished by death, executing Jack the Ripper will have a powerful deterrent effect, and the constitution ought to be interpreted consistently with the principle "an eye for an eye." "No person convicted of a crime shall be executed" is, however, limited to capital punishment. The text does not constrain in any way unsympathetic constitutional decisionmakers from imposing other punishments that members of the constitutional reform movement think cruel or barbaric.[195]

The conditions of constraint place political movements seeking substantial constitutional reform in a dilemma. Constitutional provisions that clearly state the legal consequences of well-defined facts are vulnerable to circumvention. Unsympathetic constitutional decisionmakers will find other means for achieving their goals. If the constitution declares, "no person convicted of a crime shall be executed," proponents of capital punishment may sentence murderers to a life in solitary confinement that induces most to commit suicide.[196] Constitutional provisions that prevent circumvention by employing essentially contested concepts are vulnerable to circumcision and capture. If the constitution declares, "no person convicted of a crime shall suffer a cruel and unusual punishment," sympathetic constitutional decisionmakers will declare solitary confinement unconstitutional, but unsympathetic constitutional decisionmakers in power will claim that capital punishment is not unconstitutionally cruel (circumcision), while declaring unconstitutionally cruel, perhaps, the punishment constitutional reformers think most appropriate for murderers (capture).

A. Plain Legal Texts and Essentially Contested Concepts

Constitutional reformers must adopt the perspective of an unsympathetic constitutional decisionmaker when drafting constitutional

194. *See infra* Section III.A.

195. *See infra* Section III.B.

196. *See* Davis v. Ayala, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring).

language. Their goal must be to compel unsympathetic constitutional decisionmakers committed to the rule of law to make decisions inconsistent with what those decisionmakers believe to be desirable political arrangements, fundamental rights, valued interests, and cherished policies. Techniques exist that enable constitutional reformers to achieve their ends in some instances. Nevertheless, constitutional reformers attempting to constrain unsympathetic constitutional decisionmakers must recognize that the language they draft will be interpreted from perspectives quite different from the perspectives that inspired the constitutional amendment. With rare exceptions, constitutional reformers should strive for plain legal texts eschewing language that incorporates essentially contested concepts.

Plain legal texts matter.[197] No one contends that Californians have a constitutional right to more representatives in the Senate than Wyoming, even though such a policy is clearly in the interest of Californians and arguably a lot fairer than the constitutional mandate for state equality in the upper house of Congress.[198] Commentators who believe that all citizens should have a right to become President if elected call for constitutional amendments or a new Constitution because the plain words of Article II restrict the presidency to citizens of the United States over thirty-five years of age.[199] Putting aside questions raised by candidates born on February 29,[200] the meaning of "thirty-five years of age" does not depend on any contested value choice, contested fact judgment, or contested method of interpreting the Constitution. The text announces clearly defined legal consequences (a person cannot be President), of well-defined facts (if the person is less than thirty-five years old). Every constitutional amendment that explicitly overturned a previous Supreme Court ruling has been successfully implemented. No Supreme Court Justice maintained that *Pollock v. Farmers' Loan and Trust Co.*[201] remained good law after Americans ratified the Sixteenth Amendment, even though opponents of the income tax claimed the measure was "communistic in its purposes and tendencies."[202] Again the text announces clearly defined legal consequences, "[t]he Congress shall have power to lay and collect taxes . . . without apportionment among the several

197. *See* Mark A. Graber, *Constitutional Law and American Politics*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 300 (Keith E. Whittington, R. Daniel Kelemen & Gregary A. Caldeira eds., 2010); Sanford Levinson, *What Are We to Do About Dysfunction? Reflections on Structural Constitutional Change and the Irrelevance of Clever Lawyering*, 94 B.U. L. REV. 1127, 1136–37 (2014).

198. *See* FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION (1999).

199. *See* JOHN SEERY, TOO YOUNG TO RUN?: A PROPOSAL FOR AN AGE AMENDMENT TO THE U.S. CONSTITUTION (2011); LEVINSON, *supra* note 193, at 141–57.

200. *See* ARTHUR GILBERT & W.S. SULLIVAN, THE PIRATES OF PENZANCE (1879).

201. 157 U.S. 429 (1895).

202. *Id.* at 532 (argument of Joseph H. Choate).

States," of well-defined facts, "taxes on incomes, from whatever source derived."[203]

More broadly phrased constitutional provisions constrain when an essentially contested concept has consensual applications to well-defined fact situations. Unsympathetic constitutional decisionmakers have historically respected paradigmatic instances of rights violations. Following the rule of *Bushell's Case*,[204] trial judges in criminal cases do not reverse acquittals they believe to be mistaken or imprison jurors who have clearly failed to follow judicial instructions. Following another series of eighteenth-century precedents,[205] judges in ordinary criminal investigations do not issue general warrants that fail to specify the places to be searched and the items to be discovered, even when they believe a general warrant might lead to evidence of criminal wrongdoing. These examples highlight how the meaning of most essentially contested constitutional concepts is partly constituted by clearly established legal consequences of well-defined facts. A consensus exists that constitutional commitments to the freedom of religion entails that persons cannot be punished for their religious beliefs, for being a reform Jew, praying in Latin, or worshipping the Greek gods.[206] American constitutionalists have respected these paradigmatic instances of religious freedom. Disputes over the meaning of religious freedom are over what general principles best explain these paradigms—whether, for example, coercion is a necessary element for a violation of religious freedom[207]—and over what practices are analogous to these paradigmatic instances of religious freedom—whether, for example, excluding parents who send their children to religious schools from certain benefits is analogous to punishing those parents for their religious beliefs.[208]

The American constitutional experience with slavery illustrates the power of well-drafted constitutional provisions and paradigmatic constitutional examples to constrain unsympathetic constitutional decisionmakers. Antebellum slaveowners respected clear law and consensual legal understandings. Many Southerners believed slave states had a vital interest in a renewed international slave trade. None denied the clearly

203. U.S. CONST. amend. XVI.

204. (1670) 124 Eng. Rep. 1006.

205. *See* Wilkes v. Wood (1763) 98 Eng. Rep. 489 (Common Pleas); Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB).

206. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878); Thomas Jefferson, Notes on the State of Virginia (Feb. 27, 1787), *in* THE PORTABLE THOMAS JEFFERSON, *supra* note 189, at 23, 210 ("The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.").

207. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).

208. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

expressed congressional power under Article I, Section 9 to regulate that human commerce after 1808.[209] Southern jurists on federal courts interpreted that congressional power broadly.[210] Abolitionists aside, northerners and Southerners alike accepted the federal consensus, the principle that no branch of the federal government could interfere with the status of slavery in an existing state.[211] Prominent slaveholders and Democrats agreed that the paradigmatic example of a state law sanctioned by the federal consensus was an edict forbidding permanent state residents from owning slaves. However desirable as a matter of right and policy, Southern elites acknowledged that a South Carolinian could not take his slaves to New York and establish a plantation in Westchester County.[212] Constitutional disputes were over whether state laws and state judicial decisions forbidding slaveholders from travelling with their slaves to any state in the Union were analogous to the paradigmatic instances when states could constitutionally ban slavery.[213]

Essentially contested or gross concepts do not constrain beyond their paradigmatic instances. A constitutional declaration that "all persons are created equal and endowed by their creator with certain inalienable rights, among them life, liberty and the pursuit of happiness" is highly susceptible to being interpreted differently by persons with different understandings of the values underlying the Declaration of Independence, different understandings of the relevant constitutional facts, and different theories of constitutional interpretation. Alexander Tsesis has documented how almost every political movement that gained some traction in American constitutional politics, including the antebellum movement for Southern secession,[214] regarded the Declaration of Independence as a foundational document.[215] An amendment larded with such gross or essentially contested concepts as appear in Jefferson's handiwork might be desirable as a means for stating general American ideals or empowering the faithful. Nevertheless, a constitutional amendment entrenching the second paragraph of the Declaration of Independence is a poor means for constraining political

209. For a discussion of efforts to reopen the international slave trade, see RONALD T. TAKAKI, A PRO-SLAVERY CRUSADE: THE AGITATION TO REOPEN THE AFRICAN SLAVE TRADE (1971).

210. *See* Charge to Grand Jury, 30 F. Cas. 1026 (C.C.D. Ga. 1859) (No. 18,269a) (Wayne, J.); United States v. Haun, 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15,329) (Campbell, J.).

211. *See* 2 ANNALS OF CONG. 1474 (1790) (congressional resolution declaring the national legislature has "no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States"); MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 116 (2006) [hereinafter GRABER, *DRED SCOTT*].

212. For the debate over the rights of slaveholders residing and travelling in free states, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

213. *See* Lemmon v. People, 20 N.Y. 562 (1860).

214. *See* Declaration of the Immediate Causes, *supra* note 190, at 325–26.

215. ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE (2012).

opponents who can argue, in perfectly good faith, that their conception of desirable political arrangements, fundamental rights, vital interests, and cherished policies is more consistent with the Declaration of Independence than those of the original constitutional reformers.

Essentially contested or gross concepts constitutionalize rather than resolve societal debates. In liberal societies, broad agreement exists that government should not violate the freedom of speech, religious freedoms, privacy rights, and related liberties. Broad agreement exists as well that government should have power to promote commercial development and protect the populace from external and internal threats.[216] Constitutional declarations that merely announce commitments to those consensual liberties and powers do not compel liberal citizens to abandon any of what they believe to be desirable political arrangements, fundamental rights, vital interests, or cherished policies. The text of the First Amendment might constrain Torquemada and other members of the Spanish Inquisition, who thought state ends best served by torturing religious heretics. Neither the Free Exercise nor the Establishment Clause, however, expressly resolves contemporary disputes between liberal citizens over whether religious freedom consists primarily of freedom from religious coercion.[217] Article I, Section 8 does not explicitly state whether persons who refuse to purchase health insurance are engaged in interstate commerce. By not specifying the legal consequences of well-defined facts, the First Amendment, Commerce Clause and other provisions containing essentially contested concepts license government officials interpreting and implementing the Constitution to rely on their value choices and fact judgments, which may or may not be the value choices and fact judgments that inspired the constitutional text. If, as Douglas Rae maintains, more than one hundred versions of equality exist,[218] mandating that constitutional decisionmakers treat people equally is unlikely to be constraining.

Constitutional reformers who do not specify the legal consequences of well-defined facts empower unsympathetic constitutional decisionmakers to engage in some combination of circumcision, capture, and denial by substituting contrary value choices and fact judgments for the reformers' value choices and fact judgments. Unsympathetic constitutional decisionmakers interpret broad constitutional provisions in light of the political arrangements, rights, interests, and policies they think best. White supremacists insist segregation is consistent with the constitutional commitment to equality. Gun rights advocates maintain the Second

216. For one account of consensual liberal goods, see ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 13–18 (1985).

217. For one example of this dispute, see Van Orden v. Perry, 545 U.S. 677 (2005).

218. DOUGLAS RAE, EQUALITIES 133–34 (1981).

Amendment protects weapons in common use. Proponents of legal abortion claim the Due Process Clause prohibits restrictions on abortion that do not have significant health benefits. Constitutional decisionmakers then find the facts necessary to reach their desired conclusion. These segregated schools are equal. This weapon is in common use. These restrictions on abortion do not have significant health benefits. Readers who think the segregation, gun, or abortion examples demonstrate commitments to original constitutional ends need only substitute converse propositions. They will be frustrated by unsympathetic constitutional interpreters who reach different conclusions on history and present facts. The framers knew segregation is inherently unequal. The Second Amendment limits only federal regulation of state militias. The Constitution does not protect abortion rights. This segregation is unequal. This weapon is not in common use. This regulation of abortion rights has significant health benefits. The point is that even if we assume the persons responsible for the Second Amendment and Due Process Clause had intentions with respect to contemporary problems, the essentially contested concepts they drafted have little capacity to constrain contemporary constitutional decisionmakers. By constitutionalizing only the concept of racial equality, the right to bear arms, and fundamental rights, framers leave unsympathetic constitutional decisionmakers free to frustrate constitutional reforms by acting on their particular conceptions of racial equality, the right to bear arms, and fundamental rights.

Settled principles of constitutional interpretation will not prevent unsympathetic constitutional decisionmakers from interpreting constitutional provisions in light of their value choices and fact judgments rather than those of the persons responsible for the constitutional text. Constitutional reformers should not naively assume the constitutional provisions they draft and ratify will in the future be interpreted consistently with either what they think is the best method of constitutional interpretation or what foreseeable unsympathetic constitutional decisionmakers are presently claiming is the best method of constitutional interpretation. Constitutional decisionmakers in the United States are notoriously fickle in their interpretive methodologies. Pamela Karlan and Daniel Ortiz warn constitutional reformers that "[t]he range of permissible constitutional arguments now extends so far that a few workable ones are always available in a pinch."[219] Jeffrey Segal and Harold Spaeth point out that in high stakes cases, commitments to originalism, purposivism, and other methods of constitutional interpretation have little explanatory value. "Simply put," they state, "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did

219. Pamela S. Karlan & Daniel R. Ortiz, *Constitutional Farce*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 180, 180 (William N. Eskridge, Jr., & Sanford Levinson eds., 1998).

because he was extremely liberal."[220] Constitutional decisionmakers who make reference to the framers, the evidence suggests, do so more to buttress their contested value choices than to discover what values actually motivated the drafting and ratification of a constitutional provision. Both the majority and dissenting opinions in *District of Columbia v. Heller*[221] elaborated at great length the original meaning of the right to bear arms, but the actual judicial votes suggest that judicial decision making turned on whether each justice believed individuals had a right to bear arms independent of militia service and not on what values the framers sought to entrench in the late eighteenth century when they framed and ratified the Second Amendment. Justice Antonin Scalia in *Printz v. United States*[222] abandoned previous commitments to textualism[223] for a combination of doctrinalism and structuralism when finding that Congress had no power to compel state officers to implement federal gun control laws.[224] The liberals in dissent who had scorned originalism and textualism in other contexts[225] were only too happy to rely on what they perceived as a clear framing commitment to vesting the federal government with the power to require state officials to enforce federal law.[226] If a constitutional provision is written in ways that permit constitutional decisionmakers to decide on the basis of contested value choices and fact judgments, then *Heller*, *Printz*, history, and social science research concur that constitutional decisionmakers will decide on that basis rather than on their preexisting dispositions towards one method of constitutional interpretation.[227]

The problems with "cruel and unusual punishment" as a constraint on proponents of capital punishment illustrate the challenges constitutional

220. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002).

221. 554 U.S. 570 (2008).

222. 521 U.S. 898 (1997).

223. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

224. *Printz*, 521 U.S. at 905 ("Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."). For more detailed demonstrations that conservatives abandon originalism and textualism when doing so enables them to make conservative value choices, see ERIC J. SEGALL, ORIGINALISM AS FAITH (2018); Mark A. Graber, *Justice Thomas and the Perils of Amateur History*, *in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 70 (Earl Maltz ed., 2003).

225. *See* Georgia v. Randolph, 547 U.S. 103, 123 (2006) (Stevens, J., concurring) ("This case illustrates why even the most dedicated adherent to an approach to constitutional interpretation that places primary reliance on the search for original understanding would recognize the relevance of changes in our society."); *Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 161 (1990).

226. *Printz*, 521 U.S. at 941–47 (Stevens, J., dissenting); *id.* at 971–75 (Souter, J., dissenting).

227. *See* SEGAL & SPAETH, *supra* note 220, at 115–77.

reformers confront when they abandon explicit language in favor of essentially contested concepts. Constitutional reformers opposed to capital punishment who use themselves as the referent when drafting and ratifying a ban on "cruel and unusual punishment" may think they have constitutionally prohibited capital punishment because they believe executing any convicted criminal is inherently cruel and serves no deterrent or other social purpose. Besides, prohibiting capital punishment is what they as constitutional framers intended to be the consequence of their constitutional amendment. Unsympathetic proponents of capital punishment are unlikely to experience this constraint. They will interpret "cruel and unusual" in light of their understanding that executing some convicted criminals is not inherently cruel and that the death penalty either deters murder or has other social benefits. When pointed to the evidence that the persons responsible for the amendment sought to ban capital punishment, unsympathetic constitutional decisionmakers cite Ronald Dworkin for the proposition that the constitutional amendment drafted by abolitionists requires decisionmakers to be guided only by the phrase "cruel and unusual," and not by what the framers regarded as cruel and unusual.[228]

The probable fate of broadly phrased constitutional amendments on abortion highlights related problems with using general language to constrain unsympathetic constitutional decisionmakers. Pro-choice advocates have various strategies for frustrating a pro-life amendment declaring, "All persons have a right to life from conception." Citing work by Judith Jarvis Thomson[229] and Eileen McDonagh,[230] pro-choice constitutional decisionmakers might engage in circumvention, concluding that a woman's right to an abortion does not depend on whether the fetus has a constitutional right to life. Proponents of abortion rights might engage in capture, interpreting the pro-life amendment as giving pregnant women the right to terminate a pregnancy whenever, as is the case until very late in pregnancy, abortion is safer than childbirth. Pro-life advocates can as successfully frustrate a pro-choice amendment that declares, "All persons have a right to privacy." Some pro-life constitutional decisionmakers may combine a purposive approach to constitutional interpretation with a contested value judgment. The alleged pro-choice amendment protects the right to privacy, not what the framers thought were privacy rights. If abortion is not actually a privacy right,[231] then the constitutional right to privacy does not encompass the right to terminate a pregnancy. Other unsympathetic constitutional

228. *See* RONALD DWORKIN, LAW'S EMPIRE 71 (1986).

229. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971).

230. EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT (1996).

231. *See* Roe v. Wade, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting).

decisionmakers might combine originalism with a contested historical judgment. Citing feminist scholarship insisting that abortion is an equality right,[232] they might claim that abortion was not universally regarded as a privacy right when the privacy amendment was ratified. Pro-choice amendments that explicitly include a "right to choose" are (almost) as vulnerable to manipulation. What constitutes voluntary action depends on contested value choices and fact judgements. If, as pro-life advocates claim, women are routinely coerced into having unwanted abortions,[233] then the right to choose may entail substantial pro-life counseling before terminating a pregnancy if not a ban on abortion altogether.

Unsympathetic constitutional decisionmakers are unlikely to be significantly constrained by constitutional bans on "cruel and unusual punishments" or by constitutional declarations that "all persons have a right to life" because such texts use language appropriate for what Sandy Levinson calls the "Constitution of Conversation."[234] This constitution, he points out, consists of "those parts of the document that . . . present myriad challenges of 'meaning' and 'interpretation'" because they "can be described as 'essentially contested concepts,' such as 'Equal Protection of the Laws' or 'Free Exercise of Religion.'"[235] Constitutional authorities of all persuasions in the contemporary United States agree that persons are equal, have the right to practice their religion, should not be subject to cruel punishments, and have a right to life. No agreement exists on the proper application of consensual constitutional commitments. Americans dispute whether constitutional equality should be concerned with banning particularly offensive classifications or preventing subordination,[236] whether a reasonable observer will interpret a public monument that consists of a large cross as an endorsement of religion,[237] and whether the consensus in 1791 that the death penalty was not cruel settles the constitutionality of capital punishment.[238] These ongoing controversies explain why constitutional provisions that incorporate essentially contested concepts are extraordinary vulnerable to differences in value choices, fact judgments, and interpretive methodologies.

232. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1984-1985).

233. *See* DAVID C. REARDON, ABORTED WOMEN: SILENT NO MORE (1987); Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1195–96 (1991).

234. SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 19 (2012) (emphasis omitted).

235. Sanford Levinson, "*Who Counts?" "Sez Who?"*, 58 ST. LOUIS U. L.J. 937, 984 (2014) (quoting LEVINSON, *supra* note 234, at 27).

236. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

237. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

238. *See, e.g.*, Glossip v. Gross, 576 U.S. 863 (2015).

Amendments that declare rights to life, equality, religious freedom, and humane punishments influence how constitutional decisionmakers justify their positions but not the positions they justify.

Constitutional reformers must strive for amendments that become part of the "Constitution of Settlement."[239] Levinson's Constitution of Settlement consists of those provisions that "appear impervious to 'interpretation' precisely because they are close to 'self-evident' in their meaning."[240] He asks, "[w]hat part of 'two senators,' 'two years,' 'four years,' 'six years,' 'January 20,' 'two-thirds,' or 'three-quarters' do we not understand or, more to the point, put into intellectual play?"[241] We debate the wisdom of clauses in the Constitution of Settlement, but not their meaning,[242] because the language is largely immune to differences in value choices, fact judgments, and interpretative methodologies. Everyone agrees the Constitution permits the President to veto legislation and vests Supreme Court justices with life tenure, even as some commentators dispute the merits of these practices.[243] "States may ban abortion under any circumstance" is a provision that uses language appropriate for the Constitution of Settlement. "All persons have a right to life" is a provision destined for the Constitution of Conversation.

B. The Practice of Constraints

Constitutional reformers can constrain unsympathetic constitutional decisionmakers by adopting a version of the "if you cannot beat them, join them" strategy. Rather than rely on essentially contested or gross concepts, reformers can do a version of preemption that narrows the constitutional amendment to those applications the reformers think particularly pressing. We might call this practice "preemptive circumcision." Preemptive circumcision occurs when reformers substitute specific language for general phrases in order to immunize their amendment from being interpreted in light of different value choices, fact judgments, and interpretive methodologies. Rather than rely on essentially contested concepts that unsympathetic constitutional decisionmakers can circumcise or capture, reformers constitutionalize particular instances of that concept. They preempt adverse circumcision by doing the circumcision themselves in ways that ensure the constitution protects the particular rights or vests the particular powers they believe most important. They prohibit the death penalty instead of cruel and

239. LEVINSON, *supra* note 234, at 19 (emphasis omitted).

240. Sanford Levinson, *What Are We to Do About Dysfunction? Reflections on Structural Constitutional Change and the Irrelevance of Clever Lawyering*, 94 B.U. L. REV. 1127, 1137 (2014).

241. *Id.*

242. LEVINSON, *supra* note 234, at 23.

243. LEVINSON, *supra* note 193, at 7.

unusual punishment. They prefer "Quakers shall not be required to bear arms" to "Congress shall not abridge the free exercise of religion" because the interpretation of the former does not depend on contested conceptions of religious freedom. They forestall debates over whether Congress has the power under the Interstate Commerce Clause to compel people to buy health insurance by ratifying a constitutional amendment that declares "the Congress shall not have the power to compel any person to purchase any good or service," knowing no dispute in their society exists over whether health insurance is a good or a service.

Preemptive circumcision is a half-a-loaf strategy. Reformers sacrifice opportunities to realize a broad constitutional vision in return for better safeguarding particular rights or powers. Sympathetic constitutional decisionmakers are not fully empowered so that unsympathetic constitutional decisionmakers may be more effectively constrained. Murderers may be whipped, but they will not be executed. Quakers will not have to go into battle, even if they are expected to do community service on what they consider a divinely mandated day of rest. Congress may require employers to provide health insurance for their employees but may not forbid persons from bringing guns on school property.[244]

Whether preemptive circumcision can achieve this proverbial half a loaf is often doubtful. Preemptive circumcision is primarily a defense against circumcision, capture, and, to some degree, denial. Constitutional reforms remain vulnerable to circumvention tactics not covered or conceived when the constitutional amendment was drafted. Constitutional reformers have no good strategy for preempting or preventing invalidation, neglect, disobedience off-the-wall interpretation, and most instances of denial. Significant constitutional change increases the likelihood that unsympathetic constitutional decisionmakers will declare a constitutional amendment inconsistent with fundamental constitutional norms. Constitutional language cannot compel unsympathetic constitutional decisionmakers to exercise newly vested constitutional powers or exercise those constitutional powers in ways that achieve their original constitutional goals. Constitutional language that forbids governing authorities from sending Quakers to war does not compel government authorities to find that any person claiming to be a conscientious objector is a Quaker. There is little a constitutional reformer can do to forestall a future interpreter who insists that death by some future technology is not a form of execution because that was not the means of implementing the death penalty when an amendment barring executions was ratified. Political enemies committed to disobedience are not constrained by any strategy for avoiding frustration.

244. *See* United States v. Lopez, 514 U.S. 549 (1995).

Circumcision. Preemptive circumcision is an effective means for preventing adverse circumcision. Adverse circumcision occurs when unsympathetic constitutional decisionmakers interpret general constitutional language as not encompassing the particular government actions the reformers hoped to prohibit, permit, or mandate. Preemptive circumcision eschews the essentially contested concepts that made adverse circumcision possible. Constitutional reformers at the drafting stage make decisions about the proper application of their general values rather than use language that may leave such decisions to their political opponents. They set out the government actions they wish to prohibit, permit, or mandate in the detail necessary to immunize their language from differences in value choices, fact judgments, or interpretive methods. They forbid the death penalty rather than ban cruel punishments. They specify that "all persons have a right to carry a handgun for their self-defense." By setting out the legal consequences of well-defined fact situations, constitutional reformers prevent unsympathetic constitutional decisionmakers from frustrating their reform by maintaining that capital punishment is not cruel or that "bearing arms" refers to militia service.

Preemptive circumcision constrains unsympathetic constitutional decisionmakers by abandoning the broader constitutional reform project. Constitutional protections for or prohibitions on specific actions replace constitutional commitments to more general freedoms or powers. "Persons convicted of crimes shall not be executed" constraints unsympathetic constitutional decisionmakers committed to the rule of law who favor capital punishment but leaves them free to inflict any other punishment that the constitutional reformers think cruel, including punishments that may induce convicted criminals to commit suicide. This narrower language may even hinder broader constitutional ambitions. The decision to ban only capital punishment, unsympathetic constitutional decisionmakers may reasonably conclude, supports an inference that the framing generation did not believe other punishments should be constitutionally prohibited.

Capture. Preemptive circumcision prevents capture for the same reasons preemptive circumcision prevents adverse circumcision. Capture occurs when unsympathetic constitutional decisionmakers interpret general constitutional language as prohibiting what constitutional reformers hoped to protect or as protecting what constitutional reformers hoped to prohibit. Preemptive circumcision abandons the essentially contested concepts or general phrases that make capture possible. Reformers describe explicitly the practices to be constitutionally prohibited or protected in language that is not open to interpretation in light of different value choices, fact judgments, or interpretive methods. "No Quaker shall be compelled to bear arms" compels unsympathetic constitutional decisionmakers to refrain from drafting

Quakers but does not empower them to grant religious believers the exemptions they believe are entailed by constitutional protection for "the free exercise of religion." Persons with a different conception of religious freedom than proponents of the Quaker Amendment must rely on some previously ratified constitutional clause if they wish to grant religious believers immunities from laws requiring employers to provide their employees with contraception, though they might cite the ban on drafting Quakers as one piece of evidence that the constitution is committed to a broader principle of religious freedom.

Circumvention. Preventing circumvention is more difficult than preempting adverse circumcision. Constitutional reformers must anticipate and precisely describe all tactics unsympathetic constitutional decisionmakers might employ that undermine the constitutional amendment without violating the letter of the law. Unsympathetic constitutional decisionmakers who are compelled by a provision that "no state shall impose the death penalty" to refrain from executing murderers must also be compelled to refrain from inflicting punishments that induce suicide or otherwise shorten a convicted murderer's lifespan substantially. Drafting language that specifically forbids any practice that constitutional reformers believe substantially increases the likelihood that a prisoner will commit suicide, be murdered in prison, or succumb to a fatal illness caused by prison conditions is next to impossible. The interpretation of "the death penalty is prohibited as are all prison conditions likely to shorten a prisoner's life span" depends on contested fact judgments about prison conditions. Alternative provisions are likely to use synonyms for "cruel," which are highly vulnerable to circumcision and capture.

Constitutional reformers can limit circumvention. They can prohibit at the drafting stage some foreseeable circumvention tactics. The ban on the death penalty can include a ban on whipping and life in solitary confinement. Constitutional framers can declare "Quakers cannot be compelled to bear arms and cannot be barred from the legal or medical profession because of their failure to bear arms." Such exercises in circumvention prevention work because, like exercises in preemptive circumcision, they eschew essentially contested concepts or general phrases whose interpretation depends on contested value choices, fact judgments, and interpretive methods.

Circumvention prevention nevertheless has severe limitations. Prohibiting all known tactics for circumventing a constitutional right or power will make constitutional amendments unwieldy. Try listing all the prison conditions likely to shorten a prisoner's life span or every justification a state might claim sufficiently compelling to require a religious believer to obey a general law. Time opens new means for circumvention strategies unheard of when the constitution was adopted or amended. Unsympathetic

constitutional decisionmakers devise new tactics. Changing political, social, and technological conditions create opportunities for circumvention that were inconceivable when the constitutional amendment was ratified. The framers of the Fugitive Slave Clause did not foresee the Underground Railroad. The framers of the Fourth Amendment did not foresee contemporary surveillance technologies.

Invalidation. Constitutional reformers cannot prevent invalidation. Political movements that successfully ratify new constitutional provisions cannot immunize them in advance from unsympathetic constitutional decisionmakers who believe the Constitution imposes substantive and procedural limits on amendments. What matters when invalidation is contemplated is the proper interpretation of existing provisions governing constitutional amendments, not the precise meaning of the proposed constitutional amendment. No language aimed at prohibiting capital punishment can constrain an unsympathetic constitutional decisionmaker who believes that Article V does not permit amendments that fundamentally change the constitutional order and that limiting the punishments states may inflict on murderers fundamentally changes the constitutional order. Republicans in 1866 could not have drafted an equal protection clause immune to Democrats who claimed that states are free under Article V to rescind ratification at any time before the constitutional number of states has ratified.[245] Bootstrapping provides no more constraint. An unsympathetic constitutional decisionmaker who believes Article V does not permit amendments banning capital punishment but permits states to rescind ratification of a constitutional amendment will also reject as unconstitutional, on both procedural and substantive grounds, a constitutional amendment that first authorizes use of the amendment process to ratify an amendment that bans capital punishment, then forbids states from rescinding ratification of any amendment banning capital punishment, and then bans capital punishment.

Significant constitutional reform is particularly susceptible to invalidation. Unconstitutional constitutional amendments, proponents of invalidation claim, are inconsistent with the fundamental values or "basic structure" of a constitution.[246] Minor constitutional reforms do not meet this standard. Altering the date the President takes office does not change the status of the United States as a constitutional democracy, even if some dates

245. *See* JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 284–86 (1984) (discussing Democratic Party efforts to rescind ratification of the Fourteenth Amendment in New Jersey).

246. *See* ROZNAI, *supra* note 104, at 42–69.

may be more consistent with democratic theory than others.[247] More significant constitutional reforms from the perspective of unsympathetic constitution decisionmakers alter constitutional arrangements essential to the constitutional identity of a regime[248] in ways that justify invalidation. Proslavery advocates insisted that the Thirteenth Amendment unconstitutionally violated the longstanding constitutional commitments to property rights that they believed central to American constitutionalism.[249] Anti-prohibition advocates maintained that the Eighteenth Amendment unconstitutionally violated the longstanding constitutional commitments to state sovereignty that they believed central to American constitutionalism.[250] The more constitutional reformers champion their proposals as significantly reconstructing constitutional practice, these examples illustrate, the more they provide unsympathetic constitutional decisionmakers with the arguments the latter need when they gain power to engage in invalidation.

Significant constitutional change is just as vulnerable to invalidation on procedural grounds. Constitutional reformers test the procedural limits of constitutional reform only when they have pressing political reasons to seek significant constitutional change and must overcome substantial opposition to their proposed alterations to the fundamental law.[251] Significant white supremacist opposition forced Republicans to play "fast and loose" with Article V in order to ratify the Thirteenth and Fourteenth Amendments.[252] Proponents of gender equality responded to growing resistance to the Equal Rights Amendment by extending congressional deadlines for states to ratify that measure.[253] Amendments that are perceived as fixing minor glitches in the Constitution either do not meet the resistance that compels constitutional reformers to take controversial procedural routes or are not considered sufficiently vital to warrant a controversial ratification process. Constitutional reformers pushed the procedural envelope when attempting to

247. Sanford Levinson, *Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 84 IND. L.J. 1337, 1351–55 (2009).

248. For an outstanding mediation of constitutional identity, see GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY (2010).

249. *See* MICHAEL VORENBURG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 107–12 (2001).

250. *See* Marbury, *supra* note 45, at 228–29.

251. *See generally* David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013) (documenting how opponents of democracy in South America engage in questionable procedural maneuvers to change fundamentally the official constitutional law and constitution of the regime).

252. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 500–10 (1989).

253. *See* sources cited *supra* note 105.

ratify the amendments challenging racial hierarchies, but not when seeking to change the date the President of the United States takes office.[254]

The main constraint on invalidation in the United States is the broad consensus in that regime that declaring constitutional amendments unconstitutional is not a legitimate legal practice.[255] The Supreme Court maintains that Americans are free to ratify any constitutional amendment that does not abrogate the state equality in the Senate entrenched by Article V.[256] Contemporary constitutional law vests Congress with unreviewable authority over the processes by which constitutional amendments are ratified.[257] These rulings are widely accepted, even as a few American scholars promote the notion of unconstitutional constitutional amendments.[258] The white supremacist claim that the Fifteenth Amendment was unconstitutional[259] fell on deaf ears. The tortured history of that ban on race discrimination in voting laws highlights why constitutional reformers in the United States worry far more about circumcision, capture, circumvention, neglect, denial, and disobedience than invalidation.

Neglect. Constitutional reformers can do little to prevent constitutional decisionmakers from neglecting constitutional amendments for reasons noted previously.[260] Most constitutional powers are thought to be discretionary. Assuming no violation of another constitutional provision, constitutional powers can be exercised or not exercised however the relevant powerholders see fit in light of their beliefs about desirable political arrangements, fundamental rights, vital interests, and cherished policies. Article I, Section 8 does not compel a pacifist to vote to declare war or spend money on military forces. The Fourteenth Amendment for most of post-Civil War American history did not compel Congress to establish the support systems necessary for victims of unconstitutional discrimination to identify constitutional wrongs and have those wrongs remedied.

Constitutional reformers are unlikely to achieve much by converting discretionary powers into mandatory legislative duties other than changing the frustration strategy from neglect to circumcision, circumvention, capture,

254. For the very different procedural histories of constitutional amendments that promised substantial constitutional change and those that were perceived as fixing minor glitches, see DAVID E. KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-1995 (1996).

255. *See* Richard Albert, *How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments*, 77 MD. L. REV. 181, 182–84 (2017).

256. Leser v. Garnett, 258 U.S. 130, 136 (1922); *see* Schneiderman v. United States, 320 U.S. 118, 137–39 (1943).

257. *See* Baker v. Carr, 369 U.S. 186, 214–15 (1962); Coleman v. Miller, 307 U.S. 433, 456 (1939).

258. *See* sources cited *supra* note 109.

259. *See* Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1909).

260. See *supra* notes 115–128 and accompanying text.

or denial. Pacifists confronted with a provision requiring Congress to declare war whenever the United States faces a severe military threat will make the disputed fact judgment that the United States is not facing a severe military threat. White supremacists compelled to implement the Equal Protection Clause are likely to establish a support system for persons claiming unconstitutional discrimination that facilitates challenges to affirmative action programs but provides little benefit to persons whose major offense is driving while Black.

That constitutional reformers cannot forestall neglect potentially undermines all significant constitutional change. Constitutional provisions can be circumvented by private behavior as well as by government action. Lynch mobs substitute for state executions. Klan violence substitutes for bans on Black voting. Preventing private efforts to frustrate constitutional reforms requires government to exercise discretionary powers. Constitutions may ban drinking or require equal pay for equal work, but regulation is needed to implement those mandates. The prohibition amendment was unsuccessful because government officials did not effectively enforce bans on drinking.[261] Women's rights activists recognize that governments must restructure the workplace and childcare if women are in practice to have the same opportunities as men.[262] Unsympathetic constitutional decisionmakers who do not prosecute drinkers or fail to provide childcare enable speakeasies and private employers to frustrate constitutional bans on drinking and constitutional mandates for gender equality. A reproductive rights program restricted to constitutional constraints will not satisfy either the pro-life or pro-choice movements. Bans on abortion without enforcement are parchment barriers. Abortion rights without abortion clinics are paper guarantees.

Denial. Preemptive circumcision prevents some, but not all, denial. By applying clear legal rules to well-defined facts, preemptive circumcision prevents unsympathetic constitutional decisionmakers making disputed fact judgments when claiming a particular fact situation is not covered by the constitutional reform. "No criminal shall be sentenced to death" forestalls debate over whether capital punishment deters. "All persons have a right to carry a handgun for self-defense" forestalls debate over whether handguns were in common use when the Second Amendment was ratified or at present, as well as disputes over the extent to which banning persons from carrying handguns reduces crimes. Preemptive circumcision does not prevent unsympathetic constitutional decisionmakers from denying that that the

261. *See, e.g.*, ROBERT SMITH BADER, PROHIBITION IN KANSAS: A HISTORY 199 (1986) ("B]ootlegging became as commonplace as moonshining.").

262. *See, e.g.*, Amanda Pesonen, *Encouraging Work-Family Balance to Correct Gender Imbalance: A Comparison of the Family and Medical Leave Act and the Iceland Act on Maternity/Paternity and Parental Leave*, 37 HOUS. J. INT'L L. 157 (2015).

constitutionally relevant facts exist. Unsympathetic constitutional decisionmakers may claim that the weapon being regulated is not a handgun. "No religious pacifist shall be required to bear arms" leaves open whether any person claiming to be a conscientious objector is, in fact, a religious pacifist.

The Supreme Court's decisions interpreting the constitutional ban on coerced confessions illustrate how preemptive circumcision limits, but often does not eliminate, denial. Before *Miranda v. Arizona*,[263] the Supreme Court determined whether a confession made during a custodial interrogation was voluntary. "The question in each case," Justice Stewart claimed in *Reck v. Pate*,[264] "is whether a defendant's will was overborne at the time he confessed."[265] Voluntariness was a "mixed question of law and fact"[266] or, in philosophical terms, an essentially contested concept whose meaning depended on contested value choices and disputed fact judgments. Unsympathetic constitutional decisionmakers could frustrate the constitutional ban on coerced confessions by finding that the police interrogation met civilized standards or that the confession was "freely made." *Miranda* foreclosed this denial strategy by substituting well-defined police warnings for the essentially contested concept of voluntariness. Confessions made by persons in custody who had received *Miranda* warnings were constitutionally admissible during the prosecution's case-in-chief.[267] Confessions made by persons in custody before *Miranda* warnings were given were not admissible during the prosecution's case-in-chief.[268] Past denial strategies were foreclosed because whether the police interrogation was civilized or the confession freely made were no longer relevant for determining whether a custodial confession was coerced. The only relevant fact was whether the appropriate warnings had been given, and a general consensus existed on the content of those warnings.[269] *Miranda*, nevertheless, did not eliminate denial. Constitutional decisionmakers could frustrate constitutional reforms by falsely claiming *Miranda* warnings had been given before the confession was made.[270] Still, by requiring police

263. 348 U.S. 436 (1966).

264. 367 U.S. 433 (1961).

265. *Id.* at 440.

266. *See* Brantley v. McKaskle, 772 F.2d 187, 188 (5th Cir. 1984).

267. *Miranda*, 348 U.S. at 478–79.

268. The Supreme Court frequently permits prosecutors to use confessions obtained without *Miranda* warnings in circumstances other than their case in chief. *See* 2 HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM: RIGHTS AND LIBERTIES 670 (2d ed. 2017).

269. *See Miranda*, 348 U.S. at 467–73.

270. *See* Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1315 (1998).

officers to commit perjury, prosecutors to present perjured testimony, and constitutional decisionmakers to believe or "believe" perjured testimony, *Miranda* probably curtailed to some degree denial as an effective strategy for frustrating the Fifth and Fourteenth Amendments.

Off-the-Wall Interpretation. Off-the-wall interpretations are immune to preemptive circumstances. A determined unsympathetic interpreter can always reach a desired conclusion, no matter how specific the constitutional language. Consider the following examples.

- If past precedent treats the United States as a democracy,[271] then members of the electoral college have a judicially enforceable obligation to vote for the presidential candidate who received the most popular votes.
- The requirement of state equality in the Senate interpreted consistently with "one-person, one-vote"[272] entails that the Senate should be apportioned in light of state population.
- The Equal Rights Amendment, if ratified, will prohibit discrimination on the basis of sex but not discrimination on the basis of gender.

Most readers will have their favorite examples of absurd constitutional interpretation, some of which, one suspects, have occurred.

Reconstruction provides particularly vivid examples of efforts to use off-the-wall interpretations to defeat fairly specific language. Southern Black Codes are a well-known example. Former Confederate states attempted to frustrate the constitutional ban on slavery by denying persons of color all rights of free persons.[273] Section Three of the Fourteenth Amendment provided a lesser known example. Several Confederates sought to evade disqualification by claiming that the words "shall have engaged in insurrection" had prospective application only, that no person who engaged in an insurrection before 1866 was disqualified from public office.[274] Judges shut that argument down quickly. Judge Emmons charged a grand jury in Tennessee: "The amendment . . . appl[ies] to offenses committed before, as well as after" ratification.[275]

Disobedience. Preemptive circumcision can expose, but not constrain, disobedience. Off-the-wall interpretation aside, precise constitutional

271. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 (1978) (noting that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments").

272. *See* Bd. of Estimate of City of N.Y. v. Morris, 489 U.S. 688, 692 (1989).

273. *See* THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965).

274. *See* Edwin H. Ewing, *The Fourteenth Amendment*, MEMPHIS DAILY APPEAL, Aug. 18, 1870, at 2.

275. *The United States Court: Fourteenth Amendment: Charge of Judge Emmons to the Grand Jury*, PUB. LEDGER, Dec. 2, 1870, at 3.

language prevents disobedients from masking their constitutional transgressions as creative constitutional interpretations. They must violate the explicit constitutional prohibition on conscripting Quakers rather than mask disobedience by claiming constitutional commitments to religious freedom do not give persons exemptions from general laws. Some constraint may be the tribute hypocrisy pays to virtue. Unsympathetic constitutional decisionmakers may refrain from executing murderers after citizens ratify a "no state shall impose capital punishment" clause if they believe maintaining a reputation for commitment to the rule of law is more important than frustrating this particular constitutional command. Pure disobedients who are willing to disregard constitutional commands openly are not so constrained. Unsympathetic constitutional decisionmakers who believe God has ordained that murderers be executed and that they must follow God's will when that will conflicts with the Constitution are not deterred by constitutional provisions prohibiting capital punishment.

IV. FROM CONSTRAINT AND BEYOND

The Citizenship, Privileges and Immunities, Equal Protection, and Due Process Clauses of the Fourteenth Amendment, conventional wisdom maintains, constrain constitutional politics. Justice Thurgood Marshall stated, "the Fourteenth Amendment . . . significantly constrains the range of permissible government choices."[276] "[T]he Fourteenth Amendment," Vicki Jackson agrees, "had as one of its manifest purposes to constrain state power."[277] Judicial opinions frequently assert that the Republicans who drafted and ratified the Fourteenth Amendment limited state prerogatives. Justice Orville Moody at the turn of the twentieth century declared, "[t]he [Fourteenth] Amendment withdrew from the states powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise."[278] Justice Anthony Kennedy at the turn of the twenty-first century asserted that Section One "imposed self-executing limits on the States."[279] More than one thousand law review essays use the phrase "the Fourteenth Amendment constraints/limits/restricts" or declare that some clause in the Fourteenth Amendment "constrains/limits/restricts."[280]

The Republicans who drafted the post-Civil War amendments, on this view, were constraining political enemies, not empowering political friends

276. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 471 (1985).

277. Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1269 (2001).

278. Twining v. New Jersey, 211 U.S. 78, 92 (1908).

279. City of Boerne v. Flores, 521 U.S. 507, 522 (1997).

280. I reached this conclusion through a Westlaw search using the relevant phrases.

or political allies.[281] The numerous compromises that took place when the Thirty-Ninth Congress debated the Fourteenth Amendment were over the extent to which the post-Civil War Constitution would constrain the future behavior of former Confederates, white supremacists, and Democrats.[282] No Republican faction agreed to constrain their future behavior in return for either increased powers or constraints on the future behavior of another Republican faction. The Second Founding in this respect was quite different from the First Founding. In sharp contrast to Reconstruction Republicans, Founding Federalists often bargained over constraints on their future behavior. One of their most notable arrangements was the bisectional deal in which Northern Federalists accepted constraints on their power to ban the international slave trade for twenty years in return for Southern Federalists agreeing to vest bare congressional majorities with the power to regulate navigation and making other commercial concessions.[283]

Mutually binding constraints among political friends in power work differently than constitutional constraints designed to bind political enemies in power. Constitutional provisions designed to constrain political friends or allies work by yoking commitments to the rule of law to commitments to desirable political arrangements, fundamental rights, vital interests, and cherished policies. The first framers thought constitutional authorities could be trusted to implement faithfully provisions in the Constitution of 1787 like the Contracts Clause because the persons making future constitutional decisions were likely to agree with the underlying policy. Constitutional authorities would implement other provisions faithfully because they would continue receiving valuable constitutional considerations for maintaining past constitutional bargains, acknowledged that the constitutional provision being implemented was a second-best alternative to a matter on which no consensual first-best alternative existed, or thought a particular matter best settled than settled correctly. Constitutional provisions designed to constrain political enemies in power cannot work in these ways. What such unsympathetic constitutional authorities think are desirable political arrangements, fundamental rights, vital interests, and cherished policies do not buttress any commitment they might have to the rule of law. The former Confederates, white supremacists, and Democrats who might be responsible for implementing various Fourteenth Amendments in the future favored

281. For the classic distinction between political friends and political enemies, see CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26–27 (George Schwab trans., expanded ed. 2007).

282. For the debates over the language in the post-Civil War Amendments, see VORENBERG, *supra* note 249; MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869 (1974); WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965).

283. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 277–91 (2016).

white supremacy, were not receiving valuable constitutional consideration for abandoning those practices, did not agree that any provision of the Fourteenth Amendment was a second-best alternative, and thought white supremacy and the slaveocracy bonus needed to be settled correctly rather than just be settled.

The Fourteenth Amendment as a constitutional constraint or limitation on political enemies would work only when unsympathetic constitutional decisionmakers committed to the rule of law implement constitutional commitments to free labor and racial equality even though they favor slavery and white supremacists. White supremacists in state governments who respect the rule of law must repeal popular Black Codes and faithfully implement hated congressional decrees mandating racial equality. Alternatively, white supremacists in the federal judiciary must strike down popular Black Codes and sustain hated congressional decrees mandating racial equality. These legal decisions must be obeyed by white supremacists in state governments.

To describe how the Fourteenth Amendment and related constitutional provisions would work in theory to constrain politics is to reject the common claim that the Fourteenth Amendment and similarly worded constitutional provisions do constrain politics. Constitutional constraints are not practical means for achieving significant constitutional reform. Persons drafting constitutional amendments can do little or nothing to prevent neglect, denial, invalidation, off-the-wall interpretation, and disobedience. Amendments that incorporate essentially contested concepts can be circumcised, captured, and circumvented by unsympathetic constitutional decisionmakers.[284] Preemptive circumscription limits adverse circumcision and capture at the cost of sharply narrowing the constitutional reform.[285] Constitutional reformers cannot anticipate in advance how amendments might be circumvented by unsympathetic government officials. They cannot prevent unsympathetic constitutional decisionmakers from neglecting the relevant constitutional powers in ways that enable private circumvention of the constitutional reform. They can rarely prevent unsympathetic constitutional makers from denying that a constitutional violation has taken place. Off-the-wall interpretation and disobedience frustrated even the most finely worded constitutional reforms.

The astute reader may notice my claim is that "constitutional constraints are not *practical* means for achieving significant constitutional reform," just as the clever reader has been contemplating constitutional amendments more immune to circumcision, capture, circumvention, neglect, denial, and off-the-

284. *See supra* Section III.A.

285. *See supra* Section III.B.

wall interpretation than those discussed in the above pages. One such amendment might be:

> Cruel and unusual punishments shall be not be inflicted. The death penalty is a cruel and unusual punishment that shall not be inflicted, but a punishment may be cruel and unusual even if not enumerated in the Constitution or thought cruel and unusual at the time this amendment was drafted. All punishments and all punitive activities must be designed to rehabilitate the offender and no constitutional punishment may have a significant likelihood of shortening the prisoner's lifespan. Such banned punishments include . . . .

The amendment is wordy, and many more words are needed. Still, most constitutions are far wordier than the Constitution of the United States.[286] A constitution the length of the Constitution of India,[287] which exceeds the word limits editors impose on most academic books, might more successfully constrain unsympathetic constitutional decisionmakers.

The magnum opus constitution suffers from two defects. This magnum opus manuscript might include an additional 15 to 150 pages, demonstrating that length cannot eliminate the vulnerability of constitutional reforms to circumcision, capture, and circumvention and does not reduce at all the vulnerability of constitutional reforms to invalidation, denial, neglect, off-the-wall interpretation, or disobedience. The more pragmatic problem that can be stated in less than a paragraph is that neither in the United States nor in any other constitutional democracy do constitutional reformers engage in preemptive circumscription or related strategies when seeking to change the constitutional status quo significantly. Constitutions routinely employ essentially contested concepts that in the hands of unsympathetic constitutional decisionmakers will be wielded in ways that frustrate constitutional reforms. The proper inference from this drafting practice is that such persons as James Madison and his political allies, Thaddeus Stevens and his political allies, and constitutional reformers more generally are doing something other than constraining their political opponents when attempting significant constitutional reform.

CONCLUSION

We might better understand how the post-Civil War Constitution, constitutional amendments, and constitutions more generally work by paying closer attention to the faithful, the persons who support constitutional change,

286. *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1653–58 (2014).

287. *Id.* at 1653 (noting that the Constitution of India has 146,385 words).

than to their unsympathetic opponents.[288] Constitutional reformers are likely to achieve more of their goals by taking various steps that empower their supporters rather than by trying to find words that will constrain their rivals. Constitutions work by creating a constitutional politics that authorizes the faithful to act on what they believe to be desirable political arrangements, fundamental rights, vital interests, and cherished policies. Constitutions work by configuring a constitutional politics that privileges the selection of officeholders and governing majorities who can be trusted to implement the constitutional vision championed by constitutional reformers. Constitutions work by constituting a constitutional politics that fashions a citizenry that supports the goals championed by constitutional reformers.

Constitutions that do not constrain the unsympathetic may authorize the faithful. Consider the Thirteenth Amendment. The constitutional ban on human bondage had only a limited impact on former slaveholders. Most former Confederate states responded to emancipation by passing a series of Black Codes that sharply restricted the civil rights enjoyed by nominally free African-Americans.[289] The Thirteenth Amendment had a more powerful impact on Republicans in Congress. Most moderate antislavery advocates before the Civil War insisted with Abraham Lincoln that Congress had no power to "interfere with the institution of slavery [or race relations] in the States where it exists."[290] The Thirteenth Amendment removed this inhibition. Almost immediately after ratification, a newly empowered Congress passed the Civil Rights Act of 1866[291] and the Second Freedmen's Bureau Bill.[292] These measures invalided the Black Codes, declared all persons born in the United States to be citizens of the United States, and provided former enslaved persons with much needed goods and services. The Thirteenth Amendment worked in 1866 by authorizing faithful proponents of free labor to constrain unsympathetic champions of slavery.

Constitutions that do not constrain the unsympathetic may work by configuring politics in ways that favor the faithful. Consider Section Two of the Fourteenth Amendment. Under that provision, states that limit male voting rights lose seats in the House of Representatives and votes in the Electoral College in proportion to the percentage of male citizens

288. The arguments in this paragraph and the next three were first explored in GRABER, A NEW INTRODUCTION, *supra* note 5, at 212–49. They were developed a bit in GRABER, PUNISH TREASON, *supra* note 163, at xxxi–xxxiii. They will be developed at greater length in MARK A. GRABER, MAKING THE THIRTEENTH AMENDMENT'S CONSTITUTION WORK (forthcoming).

289. *See* WILSON, *supra* note 273.

290. Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 263 (Roy P. Basler ed., 1953). For general consensus on what was known as the federal consensus, see GRABER, *DRED SCOTT*, *supra* note 211, at 116.

291. 14 Stat. 27 (1866).

292. 14 Stat. 173 (1866).

disenfranchised. Proponents of free labor and racial equality in the Republican Party expected Section Two to have powerful political consequences.[293] Republicans would control the national government should former Confederate states not enfranchise formerly enslaved males because the white South would lack the representatives necessary to form majorities in the House of Representatives and Electoral College. Representative Thaddeus Stevens of Pennsylvania observed, "if they should refuse to . . . alter their election laws it would reduce the representatives of the late slave States to about forty-five and render them powerless for evil."[294] Republicans would control the national government should former Confederate states enfranchise formerly enslaved males because the African-American vote would heavily skew Republican. Stevens noted, "[i]f they should grant the right of suffrage to persons of color, I think there would always be Union white men enough in the South, aided by the blacks, to divide the Representation, and thus continue the Republican ascendancy."[295] The post-Civil War Constitution would work by guaranteeing Republican majorities in the national government who could be trusted to implement the Thirteenth Amendment in ways that destroyed slavery and the slave system.

Finally, Constitutions that do not work by constraining the unsympathetic may work by constituting politics in ways that create the faithful. Consider again the post-Civil War amendments. Congress under the Freedmen's Bureau established schools that educated formerly enslaved persons.[296] Formerly enslaved persons empowered in former Confederate states passed measures funding public schools for all children.[297] Had those schools flourished, young Southerners might have been socialized in ways that privileged commitments to free labor and racial equality. "We must educate them," Representative Ignatius Donnelly of Minnesota declared when speaking of Black and white Southerners during the debate over congressional power to implement the Thirteenth Amendment. He continued: "When you destroy ignorance you destroy disloyalty; for what man with a free, broad scope of mind, and with a knowledge of all the facts, can fail to love this just benevolent, and most gentle Government?"[298] The post-Civil War Constitution would work by fashioning citizens who could be trusted to implement constitutional commitments to destroying the slave system and any status hierarchy established in the wake of slavery's destruction.

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293. *See* GRABER, PUNISH TREASON, *supra* note 163, at 144–47.

294. CONG. GLOBE, 39th Cong., 1st Sess. 74 (1866).

295. *Id.*

296. 14 Stat. 173, 176 (1866).

297. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 364–68 (1988).

298. CONG. GLOBE, 39th Cong., 1st Sess. 588 (1867).

American history demonstrates that efforts to create, configure, and constitute constitutional politics do not come with guarantees of success. Republican majorities in the late nineteenth century did not sustain their commitment to free labor and white supremacy.[299] Congress did not resort to Section Two after former Confederate states passed legislation that in practice disenfranchised most formerly enslaved men and their descendants.[300] Southern segregated education socialized white supremacists.[301] Still, as the events of the Second Reconstruction[302] demonstrated, the post-Civil War Amendments proved powerful tools in the hands of those committed to Reconstruction Republican constitutional aspirations.[303] If Americans are to experience a Third Reconstruction, constitutional reformers are best advised to interpret existing constitutional provisions as empowerments rather than as constraints, and to fashion new amendments that empower those committed to undermining existing status hierarchies rather than constitutional rules that require persons who favor the racial, gender, sexual, and religious status quo to be guided by law as understood by the reformers rather than in light of their hostile preferences.

299. The classic account is STANLEY P. HIRSHSON, FAREWELL TO THE BLOODY SHIRT: NORTHERN REPUBLICANS AND THE SOUTHERN NEGRO, 1877–1893 (1962).

300. *See* Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 434 (2015) ("Congress has never imposed Section 2's penalty on offending states.").

301. *See* Chas. H. Thompson, *Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School*, 4 J. NEGRO EDUC. 419 (1935).

302. *See* RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT (2004).

303. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY (1990).