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The Popular Constitutional Canon

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THE POPULAR CONSTITUTIONAL CANON

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ABSTRACT

Popular constitutionalism scholarship has often left out the American people. Sure, ordinary citizens make cameo appearances—often through the actions of elected officials and elite movement leaders. However, focusing on high politics among elite actors—even if those actors are not judges—simply is not enough. If popular constitutional views do, indeed, matter, then we can expect constitutional partisans to try to manipulate the processes through which these views emerge. Some constitutional scholars have made a start, reflecting on the importance of the constitutional canon. However, these scholars focus mostly on the *legal* canon and often ignore its *popular* analog. At the same time, other scholars have worked to bring the American people back into constitutional theory by studying the constitutional views of ordinary Americans and explaining the ways in which key social movements shape constitutional doctrine. These scholars, however, have largely ignored the pathways of constitutional socialization—the ways in which citizens learn about the Constitution. An important part of this neglected project is tending to the set of stock stories transmitted by key institutions to ordinary citizens—in other words, tending to the popular constitutional canon. In this Article, I turn to one site of constitutional socialization—American public schools. This visit to our Nation's classrooms highlights the various ways in which the lessons that we are teaching our schoolchildren undermine popular sovereignty, through mythologizing the Supreme Court, promoting "Founder worship," and downplaying the constitutional achievements of successive generations. In the end, if public opinion matters to constitutional doctrine and reform, as many scholars argue, then these sites of constitutional socialization are worth studying.

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INTRODUCTION

Popular constitutionalism began as a call to action. Richard Parker extolled the virtues of majority rule and popular constitutional values.[1] Mark Tushnet sought to abolish judicial review.[2] Jeremy Waldron defended legislative supremacy.[3] And Larry Kramer, in his pioneering work, *The People Themselves*, drew on constitutional history to call for an end to judicial supremacy and a return to the American tradition of popular constitutionalism—one that combined popular assertions of constitutional meaning with a commitment to realizing those popular views within our constitutional system, whether through elections and ordinary politics, or blunt curbs on judicial power like court-packing and jurisdiction-stripping.[4]

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[1] RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 3–5 (1994).

[2] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[3] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1351–53 (2006).

[4] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 5, 7–8 (2004) [hereinafter KRAMER, THE PEOPLE THEMSELVES]; Larry Kramer, *Generating Constitutional Meaning*, 94 CALIF. L. REV. 1439 (2006) [hereinafter Kramer, *Generating Constitutional Meaning*]; Larry Kramer, *Response*, 81 CHI.-KENT L. REV. 1173 (2006); Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697 (2006); Larry D. Kramer, *Undercover Anti-Populism*, 73 FORDHAM L. REV. 1343 (2005); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

While critics have long attacked popular constitutionalism as lacking a clear definition or a concrete (or, at minimum, realistic) reform agenda,[5] Kramer did offer a sweeping constitutional vision:

> [T]o control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means. It means publicly reprimanding politicians who insist that "as Americans" we should submissively yield to whatever the Supreme Court decides. It means refusing to be deflected by arguments that constitutional law is too complex or difficult for ordinary citizens. . . . Above all, it means insisting that the Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse. The Supreme Court is not the highest authority in the land on constitutional law. We are.[6]

Kramer's vision demanded a citizenry prepared to assume constitutional responsibility.[7] However, Kramer and his popular constitutionalist compatriots have spent precious little time studying the institutions and other forces that shape the constitutional views of the average citizen.[8]

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[5] *See* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1595 (2005); Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 676; Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 463 (2009). For terrific explorations of the universe of popular constitutionalism research, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 3–18 (2007); and David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–64 (2010).

[6] KRAMER, THE PEOPLE THEMSELVES, *supra* note 4, at 247–48.

[7] *Id.*

[8] *See, e.g.*, JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION]; DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001); MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986); Jack M. Balkin, *The Distribution of Political Faith*, 71 MD. L. REV. 1144 (2012) [hereinafter Balkin, *Distribution of Political Faith*]; Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623 (2009); Jamin B. Raskin, *The Marshall-Brennan Constitutional Literacy Project: American Legal Education's Ambitious Experiment in Democratic Constitutionalism*, 90 DENV. U. L. REV. 833 (2013); Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193 (2011).

At the same time, a different strand of popular constitutionalism—more descriptive than normative—sought to understand the relationship between public opinion and constitutional doctrine.[9] This scholarship grew out of the legal academy's decades-long obsession with the countermajoritarian difficulty.[10] While popular constitutionalist scholars like Kramer offer normative theories that attack judicial authority,[11] another set of scholars has decided to play a different game. Rather than churning out grand theories designed to legitimize or attack judicial review,[12] this new generation aims to prove that the countermajoritarian difficulty is no difficulty at all.[13] While not all of these scholars self-identify as popular constitutionalists, their scholarship establishes that constitutional doctrine, far from imposing the views of an out-of-touch legal elite on the general public, tends to track public opinion—particularly in the areas where the public cares most.[14] These scholars have devoted most of their time to working out the large-scale processes that produce this result—and to great avail; the proposition that constitutional doctrine tracks public opinion in high-salience cases is now the conventional wisdom among constitutional scholars.[15]

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[9] *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 16–18 (2009).

[10] *See, e.g.*, *id.* at 5–7.

[11] *See* KRAMER, THE PEOPLE THEMSELVES, *supra* note 4, at 7–8.

[12] *See, e.g.*, J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 22 (2012).

[13] *See, e.g.*, FRIEDMAN, *supra* note 9, at 14–15.

[14] *See id.* at 374–75; JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 3–5 (2006); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1738, 1750–51 (2007) [hereinafter Ackerman, *Living Constitution*]; Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1049–51 (2001); Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089, 1103 (2013); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598–600 (2003); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 497–501 (1997); Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 271–72 (2000); Michael J. Klarman, *What's So Great about Constitutionalism?*, 93 NW. U. L. REV. 145, 145–46 (1998); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, at 25–29 (Jack M. Balkin & Reva B. Siegel eds., 2009); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1946–47 (2003); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1027–29 (2004); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–76 (2007); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7–9 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1324–29 (2006); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 860–61 (2009).

[15] *See, e.g.*, Andrew B. Coan, *Well, Should They?: A Response to* If People Would Be

Much like Kramer's normative theory, these descriptive accounts rely on the American people.[16] However, for these descriptive scholars, public opinion often serves as an invisible hand of sorts, guiding constitutional doctrine most of the time and only becoming a blunt force when doctrine strays too far from consensus constitutional views.[17] Even so, as with Kramer's account, this descriptive scholarship tends to focus on constitutional history—particularly the elite conflicts that have spurred constitutional change.[18]

In short, popular constitutionalism—both normative and descriptive—often leaves out the American people. Sure, ordinary citizens make cameo appearances, often through the actions of elected officials and elite movement leaders. However, for those interested in promoting popular sovereignty, focusing on high politics among elite actors—even if those actors are not judges—simply is not enough. Popular constitutionalism must not ignore the American people and the institutions that shape popular constitutional views.

This oversight is troubling because if popular constitutional views do, indeed, matter, then we can expect constitutional partisans to attempt to manipulate the processes through which these views emerge.[19] And, in our age of heightened polarization,[20] when large-scale change at the national level through our cumbersome legislative process is all but impossible, constitutional partisans may seek change within smaller-scale institutions that have an outsized influence. It is up to the next generation of popular constitutionalists to pay attention to these microlevel processes and shift the field's focus from the realm of nonjudicial elites to the constitutional experiences of ordinary citizens and the processes shaping their constitutional views.[21]

Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213, 238 (2007) (arguing that popular constitutionalism "has taken constitutional theory by storm"). *But see* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares about Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010) (contending that elite opinion is more important to Supreme Court decision-making than public opinion); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757–58 (2011) (complicating the relationship between public opinion and Supreme Court decision-making).

[16] *See* FRIEDMAN, *supra* note 9, at 367–68.

[17] *See, e.g.*, *id.* at 383 ("Over time, sometimes a long period, public opinion jells, and the Court comes into line with the considered views of the American public."). The *Lochner* era, and the New Deal settlement, is the paradigm example. *Id.* at 4.

[18] *See, e.g.*, *id.* at 12–13.

[19] This was especially true during the Obama years, when the Tea Party, a movement committed to constitutional education, was on the rise. *See* Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 839, 859–60 (2011); Schmidt, *supra* note 8, at 194–95, 215–17.

[20] *See, e.g.*, NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2d ed. 2016).

[21] Popular constitutionalism scholarship should build on Michael Kammen's groundbreaking work decades ago on the Constitution in American culture. *See* KAMMEN, *supra* note 8. Here is how Kammen describes his project:

Of course, some constitutional scholars have made a start, reflecting on the importance of the constitutional canon and some of its pathologies.[22] Yet, even these scholars tend to focus on the *legal* canon and ignore its *popular* analog. Consequently, their treatment of the legal canon itself is often theoretical and normative—leaving important descriptive work to others.[23]

At the same time, some scholars have worked to bring the American people back into constitutional theory by studying the constitutional views of ordinary Americans[24] and explaining the ways in which key social movements shape constitutional doctrine.[25] However, even these scholars have largely ignored the pathways of what I call constitutional socialization—the ways in which citizens learn about the Constitution. An important part of this neglected project is tending to the set of stock stories transmitted by key institutions (like our public schools and national shrines) to ordinary citizens—in other words, tending to what I refer to as the popular constitutional canon. If public opinion matters to constitutional doctrine—as many scholars argue—then these sites of constitutional socialization are worth studying. This is especially true in a constitutional tradition like ours which is rooted in popular sovereignty with a Founding story premised on constitutional reform driven by public "reflection and choice."[26]

> Although a vast literature exists in the traditional field of constitutional history—including works on the Supreme Court, biographies of justices, so-called biographies of the Constitution, and pertinent aspects of American legal history—no one has attempted to describe the place of the Constitution in the public consciousness and symbolic life of the American people[,] . . . by which I mean the perceptions and misperceptions, uses and abuses, knowledge and ignorance of ordinary Americans.

Id. at xi.

[22] *See, e.g.*, 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014) [hereinafter ACKERMAN, CIVIL RIGHTS]; AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012) [hereinafter AMAR, UNWRITTEN CONSTITUTION]; J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998) [hereinafter Balkin & Levinson, *Canons of Constitutional Law*]; Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Jill Elaine Hasday, *Women's Exclusion from the Constitutional Canon*, 2013 U. ILL. L. REV. 1715; Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998); Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187 (2000).

[23] Looking ahead, future scholars should build on this literature and work to understand the constitutional stories that we enshrine in our casebooks, teach in our law school classrooms, and impart to young lawyers in the legal profession. These lessons, and the constitutional norms that they instill, are the foundation of our legal culture.

[24] *See, e.g.*, PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008); Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 358–60 (2011).

[25] *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 8.

[26] THE FEDERALIST NO. 1, at 9 (Alexander Hamilton) (Robert A. Ferguson ed., 2006).

In Part I, I define what I mean by the constitutional canon and offer a preliminary account of constitutional socialization. To that end, I draw on legal scholarship on the constitutional canon and the existing literature on political socialization[27] and social norms.[28] In Parts II, III, and IV, I explore the possible normative payoff of tending to the constitutional canon. In Part II, I consider its role in the legal profession, engaging extensively with Bruce Ackerman's works. His reflections on the constitutional canon are the most comprehensive in recent literature and begin to bridge the legal and the popular. For Ackerman, the constitutional canon plays a central role in his larger project—one designed to valorize popular sovereignty while also preserving the past achievements of the American people.[29] For Ackerman, the stories that lawyers tell each other (and the rest of us) about our legal tradition matter.[30]

In Parts III and IV, I turn to the popular constitutional canon and one site of constitutional socialization: American public schools. These Parts draw on my previous work on how America's leading textbooks have taught the American constitutional tradition over time.[31] While this work was largely descriptive, my treatment here attempts to synthesize some of the lessons that arise from those previous descriptive accounts. Public schools—and America's leading high-school textbooks—are a core way in which we define and transmit the popular constitutional canon to the American people.[32] This visit to our Nation's classrooms highlights the various ways in which the lessons that we are teaching our schoolchildren undermine popular sovereignty, including mythologizing the Supreme Court, promoting "Founder worship," and downplaying the constitutional achievements of successive generations.[33] For those who are committed to promoting popular sovereignty, these lessons should be unnerving. Finally, in Part V, I suggest avenues for future research.

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[27] *See, e.g.*, ROBERT S. ERIKSON & KENT L. TEDIN, AMERICAN PUBLIC OPINION (8th ed. 2011); DONALD GREEN, BRADLEY PALMQUIST & ERIC SCHICKLER, PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS (2002). Of course, political socialization and constitutionalism may differ in important ways. Nevertheless, if the importance of early learning holds true in politics—a topic that touches each citizen's life in important ways throughout her life cycle—it is reasonable to believe that the same may be true of constitutional socialization, an area more removed from one's daily routine.

[28] *See, e.g.*, Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

[29] ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 7–35, 121, 224, 311–40.

[30] *See id.* at 314; *see also* Ackerman, *Living Constitution*, *supra* note 14, at 1809.

[31] *See* Tom Donnelly, *A Popular Approach to Popular Constitutionalism: The First Amendment, Civic Education, and Constitutional Change*, 28 QUINNIPIAC L. REV. 321 (2010) [hereinafter Donnelly, *A Popular Approach*]; Tom Donnelly, *Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism*, 58 CLEV. ST. L. REV. 115 (2010) [hereinafter Donnelly, *Forgotten Founders*]; Tom Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948 (2009) [hereinafter Donnelly, *Stories We Tell*].

[32] Donnelly, *A Popular Approach*, *supra* note 31, at 335–36.

[33] *See generally* Donnelly, *Forgotten Founders*, *supra* note 31; Donnelly, *Stories We Tell*, *supra* note 31.

I. THE CONSTITUTIONAL CANON, CONSTITUTIONAL NORMS, AND THE PROCESS OF CONSTITUTIONAL SOCIALIZATION

Lawyers occupy important positions of power—in our communities, in our state and local governments, in Congress, in our Executive branch, and in our courts. Legal culture often filters down to ordinary citizens, most notably through the stories that we tell about our Constitution and its history. Scholars often refer to these core constitutional norms, lessons, and narratives as our Nation's constitutional canon.[34]

A. Defining the Constitutional Canon

The constitutional canon is the set of cases, e.g., *Brown v. Board of Education*;[35] Supreme Court dissents, e.g., Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*;[36] statutes, e.g., the Voting Rights Act of 1965; speeches, e.g., the Gettysburg Address; documents, e.g., the Declaration of Independence; narratives, e.g., the battle over President Franklin D. Roosevelt's "court-packing" plan; and constitutional provisions, e.g., "equal protection of the laws," that have earned a privileged place in the American constitutional tradition.[37] To date, legal scholars have mostly studied the constitutional canon as it relates to the legal profession itself.[38]

In their classic account, Jack Balkin and Sanford Levinson argue that "there is no better way to understand a discipline—its underlying assumptions, its current concerns and anxieties—than to study what its members think is canonical . . . ."[39] For Balkin and Levinson, such studies help unearth "the secrets of a culture and its characteristic modes of thought."[40] Within the legal community, the process of canonization is often driven by questions like (1) which texts should "appear in contemporary constitutional law casebooks"; (2) which texts should "American law students study and discuss, which should educated citizens know about, and which should inform the work of legal academics"; and (3) which texts should "form part of the 'canon' of American legal materials?"[41]

Mark Tushnet defines the constitutional canon as the "set of themes that organize the way in which people think about [constitutional law]."[42] Richard Primus describes it as "a set of greatly authoritative texts that above all others shape the

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[34] *See, e.g.*, Tushnet, *supra* note 22, at 187–91.

[35] 347 U.S. 483 (1954).

[36] 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

[37] U.S. CONST. amend. XIV. *See* ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 121; AMAR, UNWRITTEN CONSTITUTION, *supra* note 22, at 245–47; Balkin & Levinson, *Canons of Constitutional Law*, *supra* note 22, at 987; Greene, *supra* note 22, at 380–81, 475; Hasday, *supra* note 22, at 1716–17; Primus, *supra* note 22, at 243–46; Tushnet, *supra* note 22, at 187.

[38] *See, e.g.*, Greene, *supra* note 22, at 380–82; Primus, *supra* note 22, at 243–52.

[39] Balkin & Levinson, *Canons of Constitutional Law*, *supra* note 22, at 968.

[40] *Id.*

[41] *Id.* at 967–68.

[42] Tushnet, *supra* note 22, at 187.

nature and development of constitutional law."[43] Jamal Greene sees it covering "the set of decisions whose correctness participants in constitutional argument must always assume."[44] In other words, a case like *Brown* is canonical because "all legitimate constitutional decisions must be consistent with *Brown*'s rightness, and all credible theories of constitutional interpretation must accommodate the decision."[45]

The constitutional canon also includes anti-canonical examples.[46] Greene describes this "anti-canon" as a collection of cases that "embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute."[47] For Greene, these cases emerge not simply because of notable defects in their legal reasoning (although each contains some), but instead from "the attitude the constitutional interpretive community takes toward the ethical propositions that the decision has come to represent, and the susceptibility of the decision to *use* as an antiprecedent."[48] Primus adds that these cases are "the most reviled ones" in the field—cases like *Dred Scott v. Sandford*[49] and *Plessy v. Ferguson*.[50] A key feature of the anti-canon is that the interpretive community often canonizes the key dissent in the anti-canonical case, with courts often treating these dissents "as if they were legally authoritative precedents."[51]

At the same time, for Balkin and Levinson, there is no single constitutional canon; instead, the question of canonicity turns on context and depends "on the audience for whom and the purposes for which the canon is constructed."[52] When it comes to the constitutional canon, this means that certain norms, texts, cases, and narratives "can be canonical because they are important for educating law students, because they ensure a necessary cultural literacy for citizens in a democracy, or because they serve as benchmarks for testing academic theories."[53]

Building on Balkin and Levinson's insight, the constitutional canon has many different components and functions—both legal and popular.[54] The canon includes the body of materials at the heart of legal education, including the collection of cases, academic theories, and slivers of constitutional text that law professors seek to transmit to the next generation of lawyers.[55] This has been the main focus of constitutional

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[43] Primus, *supra* note 22, at 243.

[44] Greene, *supra* note 22, at 381.

[45] *Id.*

[46] *See id.*

[47] *Id.* at 380.

[48] *Id.* at 381.

[49] 60 U.S. 393 (1857).

[50] Primus, *supra* note 22, at 245.

[51] *Id.* at 246. Justice Harlan's dissent in *Plessy* is an example. *See* Plessy v. Ferguson, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

[52] Balkin & Levinson, *Canons of Constitutional Law*, *supra* note 22, at 970.

[53] *Id.*

[54] *See* Balkin & Levinson, *Canons of Constitutional Law*, *supra* note 22, at 970, 976, 980–81; *see also* Greene, *supra* note 22, at 383; Tushnet, *supra* note 22, at 194.

[55] *See* Balkin & Levinson, *Canons of Constitutional Law*, *supra* note 22, at 970, 973–74, 977.

scholars to date—with these accounts focusing mostly on leading casebooks, Supreme Court confirmation hearings, and Supreme Court citations.[56] However, the constitutional canon also includes *popular* components—for instance, the parts of our constitutional tradition at the core of American citizenship, including the set of constitutional stories that our public schools impart to our schoolchildren, the roster of shrines that the National Park Service preserves for large groups of visitors, and the snippets of constitutional knowledge that our government transmits to new immigrants seeking naturalization.[57] These sites merit attention from constitutional scholars as well.

B. Social Norms, Constitutional Socialization, and the Influence of the Constitutional Canon

The constitutional canon is a means of transmitting constitutional norms, texts, cases, and narratives to both lawyers and ordinary citizens.[58] The literature on political socialization and social norms offers several insights into how this process of constitutional socialization might work.[59]

The socialization literature suggests a standard political life cycle for most citizens—one that might be adapted for the purposes of building a model of constitutional socialization.[60] Early in life, people are quite receptive to new lessons—whether from parents,[61] teachers,[62] friends,[63] the mass media,[64] or historic events[65]—with our most impressionable years occurring between the ages of seventeen and twenty-six.[66]

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[56] *See, e.g.*, Greene, *supra* note 22, at 383.

[57] *See* Balkin & Levinson, *Canons of Constitutional Law*, *supra* note 22, at 970, 976–78, 987; Primus, *supra* note 22, at 243.

[58] *See* Donnelly, *Stories We Tell*, *supra* note 31, at 951.

[59] *See infra* notes 61–62 and accompanying text.

[60] *See infra* notes 61–62 and accompanying text.

[61] *See* ERIKSON & TEDIN, *supra* note 27, at 129; GREEN, PALMQUIST & SCHICKLER, *supra* note 27, at 4; Amy Linimon & Mark R. Joslyn, *Trickle Up Political Socialization: The Impact of Kids Voting USA on Voter Turnout in Kansas*, 2 STATE POL. & POL'Y Q. 24, 26 (2002).

[62] *See* ERIKSON & TEDIN, *supra* note 27, at 135; Lee H. Ehman, *The American School in the Political Socialization Process*, 50 REV. EDUC. RES. 99, 101–03 (1980); William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANN. REV. POL. SCI. 217, 232 (2001); Josh Pasek et al., *Schools as Incubators of Democratic Participation: Building Long-Term Political Efficacy with Civic Education*, 12 APPLIED DEVELOPMENTAL SCI. 26, 26–27 (2008); Judith Torney-Purta, *The School's Role in Developing Civic Engagement: A Study of Adolescents in Twenty-Eight Countries*, 6 APPLIED DEVELOPMENTAL SCI. 203, 203 (2002); Joel Westheimer & Joseph Kahne, *What Kind of Citizen? The Politics of Educating for Democracy*, 41 AM. EDUC. RES. J. 237, 263 (2004).

[63] *See* ERIKSON & TEDIN, *supra* note 27, at 134; GREEN, PALMQUIST & SCHICKLER, *supra* note 27, at 3–4.

[64] *See* Jason Barabas & Jennifer Jerit, *Estimating the Causal Effects of Media Coverage on Policy-Specific Knowledge*, 53 AM. J. POL. SCI. 73, 74 (2009); Linimon & Joslyn, *supra* note 61, at 27.

[65] *See* ERIKSON & TEDIN, *supra* note 27, at 147.

[66] *See id.* at 157.

However, by our late twenties, our views harden.[67] And moving forward, we live out the rest of our lives with a relatively fixed worldview, reading new events through the prism of our previously formed (often partisan) views.[68] While our opinions on the issues of the day may change and our trust in government may fluctuate, broader values like ideology and party identification remain fairly stable.[69] And those values, as well as the elite messengers associated with our chosen ideology and party, often greatly influence our views on specific issues.[70]

To be clear, adulthood is not a period of complete stasis, as cataclysmic events—e.g., the Great Depression; shifts in the orthodoxy of our chosen political party, e.g., a new embrace of civil rights laws; trends in wider societal opinion, e.g., growing support for marriage equality; and big changes in our personal lives, e.g., a move, a new job, or a new love interest—may alter our views in ways both large and small.[71] Over time, the Supreme Court decides new cases,[72] presidents deliver new Inaugural and State of the Union Addresses,[73] political candidates embrace new constitutional rhetoric on the campaign trail,[74] and the American people (and legal elites) embrace novel constitutional claims.[75] While the public's opinions may change on the issues of the day—like immigration or health care—and its trust in government may fluctuate, broader values like ideology, party identification, and even racial attitudes tend to harden over time.[76] In short, the overall process of socialization never really ends—it simply slows down. These patterns of socialization affect both lawyers and ordinary citizens.[77]

One key method of political, and, speculatively, constitutional, socialization is the cultivation of social norms.[78] Cass Sunstein defines social norms as "social attitudes of approval and disapproval, specifying what ought to be done and what

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[67] *Id.*

[68] *Id.* at 146.

[69] *See id.* at 155.

[70] *See* GREEN, PALMQUIST & SCHICKLER, *supra* note 27, at 4; Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POL. 1, 3 (2009).

[71] *See* ERIKSON & TEDIN, *supra* note 27, at 147, 156; GREEN, PALMQUIST & SCHICKLER, *supra* note 27, at 4–6, 87; Bafumi & Shapiro, *supra* note 70, at 3.

[72] Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1216 (2010).

[73] Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837 (2009).

[74] ANDREW E. BUSCH, THE CONSTITUTION ON THE CAMPAIGN TRAIL: THE SURPRISING POLITICAL CAREER OF AMERICA'S FOUNDING DOCUMENT 4–8 (2007).

[75] JACK M. BALKIN, LIVING ORIGINALISM 294 (2011) [hereinafter BALKIN, LIVING ORIGINALISM]; Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, 198–99 (2013); Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 46–47 (2013).

[76] *See, e.g.*, ERIKSON & TEDIN, *supra* note 27, at 155.

[77] *See* Ackerman, *Living Constitution*, *supra* note 14, at 1809; Lessig, *supra* note 28, at 956.

[78] Sunstein, *supra* note 28, at 910.

ought not to be done."[79] For Sunstein, social norms are "enforced through social sanctions"—in other words, by attaching costs or benefits to a given choice.[80] They shape the choices that people make each day—whether at the office, at home, or on the bus. They help us determine how to value certain choices over others, shape the reputational costs and benefits of a given choice, and influence how a given choice might affect our own conception of ourselves.[81] In short, they help us "assign 'social meaning' to human behavior."[82]

Lawrence Lessig defines social meaning as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context."[83] These meanings are shaped by "a particular society or group or community within which social meanings occur," and they "empower or constrain individuals."[84] Even as these social meanings shape many of our most important choices, we have little control over them.[85] Instead, they are often shaped by the larger community—whether that is one's profession, constitutional culture, society, faith community, or political party—or, at times, by government policy (e.g., laws, court rulings, public education policy, etc.).[86]

In the context of the constitutional canon, legal scholars should tend to the processes through which the "orthodox gets made—by whom, and with what techniques"—whether that is the legal profession shaping the lessons taught to future lawyers in law schools or the government shaping the lessons that are taught to schoolchildren in public schools.[87] As in other contexts, our individual choices as lawyers and citizens within our constitutional culture is often "a function of . . . governing norms, meanings, and roles"—"an unruly amalgam of . . . aspirations, tastes, physical states, responses to existing roles and norms, values, judgments, emotions, drives, beliefs, whims."[88] These norms and meanings can be "intensely *role-specific*," with "people's conception of appropriate action and even of their 'interest' . . . very much a function of the particular social role in which they find themselves."[89] These roles may be defined by the norms of a given profession or community.[90]

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[79] *Id.* at 914.

[80] *Id.* at 915.

[81] *Id.* at 910. *See also* TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF FALSIFICATION 26–35 (1995) (distinguishing between "intrinsic utility, reputational utility, and expressive utility").

[82] Sunstein, *supra* note 28, at 925.

[83] Lessig, *supra* note 28, at 951.

[84] *Id.* at 952, 955.

[85] Sunstein, *supra* note 28, at 911.

[86] *Id.* at 913–14 (providing examples of social norms).

[87] Lessig, *supra* note 28, at 948.

[88] Sunstein, *supra* note 28, at 913, 967.

[89] *Id.* at 911–12, 921.

[90] *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006) (exploring how different audiences and legal communities influence judicial behavior); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988) [hereinafter LEVINSON,

Take a lawyer, for instance. Her choices as a member of the legal profession—even as a lawyer acting in a non-legal context—are shaped by the professional norms of legal culture—norms that may be imparted to her through her training in law school, through the process of ongoing professional socialization in her capacity as a lawyer in practice, and through any large-scale changes in the law or in professional practice (whether through court decisions in her area of expertise, influential academic works, new statutes or professional regulations, new ethical rules, etc.). These norms will influence the choices that she makes as a lawyer in practice, whether it is the advice that she gives to a client or the arguments that she makes in a court filing. However, they may also affect the choices that she makes outside of her official scope of practice, for instance, as an elected official or as a candidate running for office. Her professional culture inculcates certain personal traits appropriate to her profession, whether that be argumentativeness and competitiveness on the one hand, or disinterestedness and civic-republican virtue on the other hand.[91] In each case, the norms of her profession (or of her preferred norm community within that profession) informs what it means to be a well-trained and well-socialized lawyer within her legal community and shapes the choices that she makes.[92]

Certain constitutional norms and conventions may be especially important in the context of the U.S. Constitution—an old document filled with vague language with many gaps subject to interpretation and construction.[93] While the Constitution distributes power to different actors and institutions, constitutional conventions, shaped

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CONSTITUTIONAL FAITH] (explaining how different legal communities make different claims on the Constitution); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008) (describing how the progressive and conservative legal communities created their own distinct legal universes, with their own professional networks, legal organizations, and ways of creating professional incentives and disincentives).

[91] For historical treatment of these visions of the legal profession, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, *in* THE CONSTITUTION AND AMERICAN LIFE (David Thelen ed., 1988); and Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003).

[92] For an extended account of how this might influence judicial behavior, see BAUM, *supra* note 90.

[93] *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010) (noting that many significant parts of the Constitution's text are "general, abstract, and vague"). For additional accounts of the interpretation-construction divide, see BALKIN, LIVING ORGINIALISM, *supra* note 75; KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409 (2009); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2018); and Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

by constitutional practice over time, often influence how and when formal powers may be exercised.[94] As Keith Whittington explains, these conventions may "resolve apparent indeterminacies in constitutional meaning, settling potential disputes and allowing governance to proceed," or they may "narrow the apparent discretion in the exercise of political power that might otherwise fall to government officials, elaborating supplemental rules that limit political options."[95] These conventions are "backed by threats of ostracism, censure, reprisal, and the breakdown of cooperation . . . ."[96]

Whittington gives the classic example of the two-term President, derived from President George Washington's example and subsequent practice, but these conventions may go to other key choices within our constitutional culture among lawyers and non-lawyers alike.[97] They may guide a Senator determining whether to reach a compromise with her opponents on a key issue or to start a fight; a reform community determining whether to push for conventional political action, litigation, or a constitutional amendment; or an individual citizen determining whether to support a new constitutional amendment or leave the constitutional text as it is, whether in deference to the Founders's wisdom, in anticipation of a new constitutional construction by the courts, or as a result of substantive support for the existing Constitution.[98] These conventions may also influence whether an individual citizen, reform community, or elected official may support efforts to check the Supreme Court after one or more adverse constitutional rulings through blunt court-curbing measures like jurisdiction-stripping and court-packing, for example. These questions of political practice, interpretive authority, and constitutional reform are often shaped by the norms, meanings, and conventions advanced within our constitutional community.[99]

Importantly, these norms, meanings, and conventions are often transmitted through education—whether through public schools, law schools, or professional development.[100] For the purposes of this Article, I refer to this process as "constitutional socialization." In one of Lessig's key insights, he explains that the power of social meanings often "rest[s] upon a certain uncontested, or taken-for-granted, background of thought or expectation . . . that though constructed, their force depends upon them not seeming constructed."[101] Their power rests precisely when they "become uncontested and invisible, . . . appear[ing] natural, or necessary."[102]

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[94] *See* Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1854–55.

[95] *Id.* at 1858.

[96] *Id.* at 1863.

[97] *Id.* at 1855.

[98] *Id.*

[99] *Id.*

[100] *See* Lessig, *supra* note 28, at 976.

[101] *Id.* at 951.

[102] *Id.* at 960.

Consider constitutional education in our schools.[103] For Lessig, our public schools are the one "institution most clearly . . . dedicated to the construction of certain types of people, through subtle and important coercion, dependent upon the invisibility of this very same coercion."[104] School lessons are transmitted in the classroom by textbooks and teachers, who enforce the "right" answer to a given question or the "right" behavior in a given situation.[105] However, "this coercion is only effective to the extent that it is understood or seen as something other than coercion."[106] For Lessig, these key features "are the components of a machine that constructs a certain world for the children it touches and constructs citizens out of these children."[107]

We can see this process at work in how American history is taught to students in public school classrooms. While history is a contested field, the version transmitted in our schools through curricula, textbooks, lesson plans, and classroom instruction often takes the form of uncontested orthodoxy. This version is necessarily selective,

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[103] *See* K. Royal & Darra L. Hofman, *Impaneled and Ineffective: The Role of Law Schools and Constitutional Literacy Programs in Effective Jury Reform*, 90 DENV. L. REV. 959, 969 (2013).

[104] Lessig, *supra* note 28, at 976. *See also* J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 85–88 (1998) [hereinafter BALKIN, CULTURAL SOFTWARE] (describing the role that "institutionalized" storytelling plays in entrenching cultural values); STEPHEN M. CALIENDO, TEACHERS MATTER: THE TROUBLE WITH LEAVING POLITICAL EDUCATION TO THE COACHES 18–19 (2000) (explaining the long-term effects of constitutional education in our public schools on the constitutional perception of ordinary citizens); Alice Garrett, *Teaching High School History Inside and Outside the Historical Canon*, *in* LEARNING HISTORY IN AMERICA: SCHOOLS, CULTURES, AND POLITICS 71, 72 (Lloyd Kramer et al. eds., 1994) (explaining that Americans may not learn much about American history or America's constitutional system after graduating from high school); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 157 (1995) (arguing that the American people have long expected high schools to play a key role in advancing "cultural literacy" and cultural attachment).

[105] ROBERT L. TSAI, ELOQUENCE & REASON: CREATING A FIRST AMENDMENT CULTURE 6 (2008); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 672–74, 680–81 (2013) [hereinafter Balkin, *New Originalism*]; Gewirtzman, *supra* note 8, at 656 ("These [cultural] scripts are often transmitted and reinforced through . . . archetypal narratives."). These canonical accounts are designed to, at the very least, "preserve cultural content and cultural identity." BALKIN, CULTURAL SOFTWARE, *supra* note 104, at 90. At the same time, they often succeed in promoting "an emotional attachment to the polity"—one which tends to "encourage[ ] citizens to behave toward their country and its citizens as they do toward their families: proud, protective, and willing to make sacrifices." Sherry, *supra* note 104, at 162. Recent studies confirm that, "[w]hile many Americans remain ill-informed about the Constitution's specific content, they have an emotional bond with the document that sustains its legitimacy and lasting integrity." Gewirtzman, *supra* note 8, at 680.

[106] Lessig, *supra* note 28, at 974. Steven Teles discusses this in the context of the legal community. *See* TELES, *supra* note 90, at 16 ("A regime is most likely to endure when it can make its ideas seem natural, appropriate, and commonsensical, consigning its opponents to the extremes. . . . A regime that has achieved hegemony makes its principles seem like 'good professional practice,' 'standard operating procedure,' 'the public interest,' or 'conventional wisdom.'").

[107] Lessig, *supra* note 28, at 975.

but it is largely taken for granted as orthodox historical truth by most students and parents, even as movement activists often battle over which versions of history are taught to our children.[108] By telling these stories and ignoring others, we collectively remember or forget.[109]

Lessig explains this process well:

> [T]he invented tradition begins with a certain kind of learning through inculcation. The learning proceeds from an authority—a government, or a university, or a church—that purports to report the facts of the past, learned as uncontested. It succeeds to the extent that this pattern of learning and inculcation succeeds at freezing certain ideas about traditions into a taken-for-granted pattern of thought or action.[110]

In the process, history transmits our tradition to future citizens, including schoolchildren, through stories "told so often that [they] cannot be questioned as truth."[111] Public schools are an important site for this form of cultural transmission. However, we can see a similar process at work in law schools and within the legal profession as certain forms of argument, practice, and meaning (including constitutional meaning) are transmitted as professional orthodoxy to each generation of lawyers.[112]

II. THE ROLE OF THE CONSTITUTIONAL CANON IN THE LEGAL PROFESSION

Bruce Ackerman's extended treatment of the constitutional canon—the most comprehensive account in recent literature—suggests the power of tending to it closely in the context of the legal profession and its constitutional mission.[113] In his famous account of "constitutional moments," Ackerman is primarily interested in telling a story of constitutional development where the American people take center stage.[114] Nevertheless, he reserves an important role for the legal profession in this larger story.[115] While the American people, including movement leaders and key

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[108] *See* JONATHAN ZIMMERMAN, WHOSE AMERICA?: CULTURE WARS IN THE PUBLIC SCHOOLS (2002).

[109] Lessig, *supra* note 28, at 979.

[110] *Id.*

[111] *Id.* at 978.

[112] *See generally* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999) (describing how the legal profession adopted a contested reading of Reconstruction history as official legal history).

[113] *See* ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 3.

[114] *See id.* at 1, 3, 44–47; 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 38 (1991) [hereinafter ACKERMAN, FOUNDATIONS].

[115] ACKERMAN, FOUNDATIONS, *supra* note 114, at 38.

elected officials, drive constitutional change, it falls primarily to the legal profession, as the "keeper of the nation's constitutional memory," to preserve these achievements over time—in part by tending to the constitutional canon.[116]

Ackerman's discussion of the constitutional canon is directed mostly, though not exclusively, towards legal elites.[117] While he acknowledges the canon's importance to both the legal profession and the wider public,[118] he spends a good deal of time discussing the canon's *legal* components—the constitutional stories that lawyers tell each other and the rest of us.[119] For Ackerman, the "constitutional canon" is "the body of texts that law-trained professionals should place at the very center of their constitutional understanding."[120] The canon is "necessarily selective," with a chance for either constitutional "insight or blindness."[121] It "package[s]" the "achievements of the past . . . into easily readable form[s] for the very busy men and women"—lawyers—"who are charged with sustaining our constitutional tradition."[122] For instance, the Nation's Founding and its immediate aftermath are largely defined by the Constitution's text itself, records of the debates at the Constitutional Convention, *The Federalist*, and the great decisions of the Marshall Court, perhaps with a gloss by Gordon Wood in his magisterial work, *The Creation of the American Republic*.[123]

More generally, the canon includes the original Constitution, its twenty-seven amendments, and certain "superprecedents."[124] A complete and well-thought-out canon is important to our constitutional system. Without one, Ackerman argues, "constitutional law will fail to provide Americans the guidance they need as they confront the challenges of the future,"[125] as the actions, sources, and principles that we choose to canonize "serve as precedents for future generations as they confront the constitutional crises of the coming decades."[126] Rather than fixating on the Constitution's text and the Supreme Court's glosses on it, the legal profession should "redefine the canon to permit a deeper understanding of what Americans did, and did not, accomplish over *all* of our history."[127]

Importantly, Ackerman highlights three deficiencies in the constitutional canon as it exists today. First, it mythologizes the Supreme Court;[128] second, it worships

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[116] ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 121.

[117] *See* ACKERMAN, FOUNDATIONS, *supra* note 114, at 38; *see also* ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 7.

[118] *See* Ackerman, *Living Constitution*, *supra* note 14, at 1809.

[119] ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 7.

[120] *Id.*

[121] *Id.* at 9.

[122] *Id.* at 7.

[123] *See id.*

[124] *Id.* at 33.

[125] *Id.*

[126] *Id.* at 121.

[127] *Id.* at 35.

[128] *Id.* at 32–36.

our distant predecessors—particularly our Founding Fathers and the Reconstruction Republicans;[129] and third, it downplays the constitutional achievements of the twentieth century.[130] In the end, Ackerman laments that these three strands combine to teach a rather troubling lesson: "*Popular sovereignty is dead in America . . . .*"[131]

Take, for example, the Civil Rights Revolution. In Ackerman's view, the legal profession has advanced a constitutional narrative that celebrates the Reconstruction Amendments and the Warren Court, but gives short shrift to political leaders like Lyndon B. Johnson and Everett Dirksen.[132] While the Warren Court's "precedent-shattering reinterpretations of the Reconstruction Amendments" take center stage, key political leaders and, ultimately, the American people emerge as mere "bit players."[133] In the process, the Civil Rights Revolution is reduced to a story of "common-law development"—"a long conversation between judges, and only judges, over the meaning of equality,"[134] with the legal profession marveling at the Warren Court's doctrinal gymnastics as the Chief Justice and his colleagues gave new life to ancient texts handed down by legal giants.[135]

For Ackerman, this narrative—one that canonizes key Article V amendments, as well as certain landmark cases—is driven by unjustified formalism.[136] The Founding and Reconstruction yielded important pieces of constitutional text.[137] The New Deal and the Civil Rights Revolution did not.[138] However, if the legal profession's narrative is right, then "We the People have made no big decisions for almost a century."[139] Furthermore, the current canon, and its focus on common-law constitutionalism, gives later judges flexibility to "displac[e]" key constitutional principles like *Brown*'s core insights "with other doctrines they [find] more compelling."[140] The danger here is that if constitutional law is mere common-law development, untethered from the principles endorsed by the American people over time, then later generations of judges have the flexibility to erase some of our most significant constitutional achievements, as in the case of the Voting Rights Act in *Shelby County v. Holder*.[141] Importantly, Ackerman offers a compelling counter-narrative.

Rather than viewing the twentieth century as a period of constitutional stasis or decline, he sees it as one of great constitutional creativity, with political leaders like

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[129] *Id.* at 340.
[130] *Id.* at 9–10, 33–34.
[131] *Id.* at 17.
[132] *Id.* at 6.
[133] *Id.* at 12.
[134] *Id.* at 317.
[135] *Id.* at 16.
[136] *Id.* at 311.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 317.
[141] 570 U.S. 529 (2013).

Franklin D. Roosevelt and Lyndon B. Johnson securing even broader support for their "radical reforms" than the likes of George Washington and Abraham Lincoln and, in the process, carving out a new constitutional role for the federal government in combatting economic injustice and rooting out racial discrimination.[142] For Ackerman, the legal canon must move beyond "ancestor worship" and judicial supremacy to valorize the American people's "primary" twentieth-century spokespeople, such as Presidents Franklin D. Roosevelt and Lyndon B. Johnson; canonize their handiwork, such as the Social Security Act and the Civil Rights Act of 1964; and treat those newly canonical texts as legitimate sources of constitutional meaning, akin to the written Constitution and transformative Supreme Court decisions.[143] Above all, this revised canon should make it clear that popular sovereignty remains alive and well in America.

In the end, the stories that lawyers choose to tell about our constitutional tradition matter. Most obviously, they are of great practical importance to the legal profession itself, shaping the lessons that students learn in law school, the arguments that lawyers make in court, and the legal sources that judges treat as binding, or, at least, persuasive, in individual cases.[144] Given this, the legal canon helps define the official meaning of the Constitution, or rather, constitutional doctrine. However, the legal canon also influences the wider public.[145]

Of course, part of this influence is simply a function of the canon's effect on lawyer-leaders in the community. If lawyers serve disproportionately as political leaders at the local, state, and national levels, then the constitutional stories that they tell each other—in law school, in court, in law offices, at legal conferences, and in legal publications—are of great practical importance to the wider community.[146] They influence these lawyers' actions in office and their conception of what is constitutionally possible and consistent with the American ethos.[147] However, the legal canon also exerts a more direct influence on ordinary Americans, filtering down into the stories that comprise the popular constitutional canon—for instance, those that citizens hear at our national shrines and learn in our public schools.[148] In this sense, our constitutional past, and how *lawyers* choose to preserve it, helps to define our constitutional future.[149]

In the end, while Ackerman and his fellow constitutional scholars are right that lawyers must tend to the legal canon, we must not lose sight of the forces shaping its popular analog. Even as a defective legal canon risks erasing some of our key

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[142] ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 311.

[143] *See supra* notes 125–27 and accompanying text.

[144] ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 121.

[145] *See id.*

[146] *See* Tushnet, *supra* note 22, at 194.

[147] *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 93–122 (1982).

[148] Lessig, *supra* note 28, at 975–76.

[149] *See* ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 1, 19, 33; Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3143 (2014).

constitutional achievements from legal doctrine, a defective popular constitutional canon may harm us in a variety of other ways, many of which mirror the deficiencies that Ackerman identifies in the legal canon. It may advance a form of "Founder worship" that stifles constitutional creativity, for instance, when it comes to making new rights-based arguments or supporting potential institutional reforms.[150] It may mythologize the Supreme Court's role as privileged constitutional interpreter, therefore transforming the Constitution into a mere lawyer's document and dampening the constitutional confidence of ordinary Americans.[151] It may radicalize one side of a public debate, transforming one's own cause into the mythical Founders' cause and one's opponents into enemies of the Constitution, undermining civic- republican virtue and sowing civil discord in the process.[152] Finally, it may shape public opinion (and popular constitutional views), which, in turn, may shape constitutional doctrine.[153]

III. THE POPULAR CONSTITUTIONAL CANON AND ITS ROLE IN CONSTITUTIONAL SOCIALIZATION

Constitutional socialization is the process through which ordinary Americans learn about our constitutional tradition and develop their own constitutional views and instincts.[154] Throughout our lives, this process is often driven by forms of constitutional storytelling,[155] including the stories told by elites (such as presidential inaugural addresses,[156] Supreme Court opinions,[157] and candidate stump speeches[158]) and those told by ordinary Americans (such as parents at the dinner table, friends out at a bar, and editorials in the local newspaper). Importantly, these stories also

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[150] *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 17 (2006) [hereinafter LEVINSON, UNDEMOCRATIC CONSTITUTION].

[151] *See* KRAMER, THE PEOPLE THEMSELVES, *supra* note 4, at 247–48.

[152] *See* Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. 1807, 1808–10 (2011); Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. 300, 303–04 (2011). For example, if one believes that the Founding generation was committed to a libertarian vision of government, she may conclude that the New Deal was not a political mistake, but was actually an "un-American" move away from the Founders' Constitution.

[153] *See* FRIEDMAN, *supra* note 9, at 374; ROSEN, *supra* note 14.

[154] For a helpful overview of scholarship on political socialization, see ERIKSON & TEDIN, *supra* note 27.

[155] *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 8, at 2–6; Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4 (1983); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 21 (2003); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1032 (2002).

[156] *See* Purdy, *supra* note 73, at 1837.

[157] *See* Primus, *supra* note 72, at 1216.

[158] *See* BUSCH, *supra* note 74.

include the canonical narratives told by key institutions and public officials tasked with transmitting historical truth to ordinary citizens, such as teachers in our public schools, park rangers at our national shrines, and government officials crafting our Nation's naturalization test—in other words, the very stories that comprise the popular constitutional canon.[159]

The popular constitutional canon refers to the set of stock stories that key institutions like our public schools transmit to ordinary citizens.[160] These stories are intended to codify our shared constitutional understandings, a dynamic process that draws on both academic consensus *and* institutional (often political) decision-making.[161] Regardless of the institutional details, the end product is a set of constitutional stories that receives the imprimatur of a respected, seemingly non-partisan institution and, therefore, may have an outsized influence on the constitutional views of ordinary citizens—empowering them to question the constitutional status quo, to make new rights-based claims, and to seek key institutional reforms.[162]

Of course, the popular constitutional canon is not the only game in town. Constitutional partisans, including social movements, political parties, legal elites, opinion leaders, and even judges, consistently make claims on the Constitution, thereby shaping the constitutional views of ordinary citizens.[163] Sometimes these claims draw on uncontroversial premises about the Founders or a given constitutional principle by linking support for a given policy initiative (e.g., a new anti-discrimination law) to a key principle (e.g., equal protection).[164] Other times, these claims seek to use cultural memory to advance novel positions, such as using the image of the Founders as tax-hating, limited-government crusaders to argue against the constitutionality of the Affordable Care Act's individual mandate.[165] In both cases, constitutional partisans seek to shape the views of ordinary citizens.

The main difference between the stories told by such partisans and those that comprise the popular constitutional canon is their source. In one case, it is identifiably partisan, and in the other case, it is not. Therefore, while the former may only convert fellow partisans, the latter's influence may sweep more broadly.[166] To be clear, scholars should be interested in both aspects of our constitutional culture. Nevertheless, the popular constitutional canon is worth far more study than it has received so far.

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[159] For a classic (but decades-old) treatment of some of these sources by a cultural historian, see KAMMEN, *supra* note 8.

[160] *See supra* notes 155–57 and accompanying text.

[161] *See supra* notes 155–57 and accompanying text.

[162] *See* Lessig, *supra* note 28, at 951.

[163] *See* LEVINSON, CONSTITUTIONAL FAITH, *supra* note 90.

[164] *See* ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 311.

[165] *See, e.g.*, Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010); Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli?: Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 U.C.L.A. L. REV. 66, 129–32 (2013).

[166] *See* Lessig, *supra* note 28, at 951.

Importantly, recent constitutional scholarship suggests a link between public opinion and constitutional doctrine, especially for high-salience issues.[167] The subtleties of these findings—and there are many—are beyond the scope of this Article, as are various strands of criticism.[168] However, the weight of the evidence suggests that popular constitutional views matter.[169] And if that is correct, then scholars should spend more time studying the processes shaping them.

Scholars offer several explanations for why Supreme Court decisions have tended to track public opinion over time.[170] First, in some areas of constitutional law, popular constitutional views shape doctrine directly.[171] For instance, in Eighth Amendment cases, courts often turn to either public opinion or legislative enactments to discern the "evolving standards of decency" in American society.[172]

Second, put simply, our system is designed that way.[173] New elections bring new presidents and new senators. Over time, justices leave the bench, either voluntarily or involuntarily. They are then replaced with new justices who are appointed by presidents and confirmed by senators who are elected by the American people. These newly confirmed justices are, therefore, likely to reflect the views of the winning electoral coalition and, in the process, align constitutional doctrine with broader public opinion.[174]

Third, certain Justices jealously guard the Court's overall public legitimacy.[175] Therefore, over time, the Court hews fairly closely to mass opinion and often defers to the democratically elected branches on high-salience cases in order to maintain its overall institutional reputation, sometimes at the expense of their own policy preferences.[176]

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[167] *See, e.g.*, Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 276–81 (2010).

[168] *Compare* Baum & Devins, *supra* note 15, *with* Driver, *supra* note 15.

[169] *See* Epstein & Martin, *supra* note 167, at 277–81.

[170] *See infra* notes 171–80 and accompanying text.

[171] Trop v. Dulles, 356 U.S. 86, 101 (1958). *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards*," 57 U.C.L.A. L. REV. 365, 365, 401 (2009).

[172] Lain, *supra* note 171, at 365, 401.

[173] *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 ST. AM. POL. DEV. 35 (1993); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

[174] FRIEDMAN, *supra* note 9, at 374; Balkin & Levinson, *Canons of Constitutional Law*, *supra* note 22; Baum & Devins, *supra* note 15, at 1522–25; Epstein & Martin, *supra* note 167, at 270. Of course, this process is often complicated by a variety of factors. The President may guess wrong about a Justice's actions once the Justice takes her seat on the Court, or may not care much about a Justice's constitutional vision (as opposed to her electoral payoff for the President). Despite these complications, the combination of elections and new appointments tend to make constitutional doctrine track large-scale changes in public opinion over time.

[175] *See* FRIEDMAN, *supra* note 9, at 383.

[176] *See id.* at 375; Baum & Devins, *supra* note 15, at 1525–28. Many see Chief Justice John Roberts's vote to uphold the Affordable Care Act in this light. *See* Jeffery Rosen, *Big Chief*,

On this view, the public sets parameters for what the Court can do on high-salience issues.[177] If the Court stays within those parameters, it has a considerable amount of freedom to act.[178] If it strays beyond them, it loses public legitimacy and becomes vulnerable to large-scale criticism and, in extreme cases, reprisals.[179] As a result, certain Justices are disinclined to decide cases involving high-salience issues in ways that diverge sharply from public opinion or to act in ways that contradict the public's expectations for the Court.[180]

Fourth, the Justices themselves are members of the American public. Public opinion shapes the world in which the justices live, which in turn can shape their constitutional views.[181] In other words, the justices are influenced by the same societal changes and processes of constitutional socialization that affect everyone else. Although elite opinions, like those of the Justices, are often more firmly felt and therefore more difficult to dislodge than those of ordinary Americans, elite opinions can change too. Sweeping societal changes on high-salience constitutional issues, whether it be race in the 1950s and 1960s, gender equality in the 1970s, or gay rights in the 1990s and 2000s, can influence certain Justices.[182] Indeed, some Justices have even acknowledged as much.[183]

While these explanations do not settle the debate over the relationship between public opinion and constitutional doctrine, they do suggest the importance of tending to the processes of constitutional socialization. Before turning to Part IV, it is worth pausing for a moment to consider why heightened polarization increases the importance of such a scholarly agenda.

We live in a polarized age.[184] With polarization increasing, we can expect popular constitutionalism to resemble a series of battles between committed, entrenched

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NEW REPUBLIC (July 13, 2012), https://newrepublic.com/article/104898/john-roberts-supreme-court-aca [https://perma.cc/7894-P2MT].

[177] *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 17–18 (1996).

[178] *See* FRIEDMAN, *supra* note 9, at 4.

[179] *See id.*

[180] *See id.*

[181] *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 88 (2013); FRIEDMAN, *supra* note 9, at 371 (quoting Justice O'Connor on the relationship between public opinion and judicial decision-making); Baum & Devins, *supra* note 15, at 1521; Epstein & Martin, *supra* note 167, at 263–64, 277–79; William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986).

[182] *See* Baum & Devins, *supra* note 15, at 1521.

[183] *See* FRIEDMAN, *supra* note 9, at 371 (quoting Justice O'Connor); Rehnquist, *supra* note 181, at 768 ("Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.").

[184] *See* MCCARTY ET AL., *supra* note 20, at 3; Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 DRAKE L. REV. 989, 992–93 (2013).

factions of "constitutional Protestants."[185] In turn, these factions will attempt to expand their influence, channeling the hydraulic force of polarization to influence the constitutional views of our leading political parties and, in the process, ordinary citizens connected with those parties.[186] From the perspective of the constitutional Protestant, polarization makes it easier for each faction to "proselytize" and "grow the faith" quickly.[187] Once one of the leading political parties has a "conversion experience," their partisans will similarly adopt the new constitutional dogma.[188] Constitutional factions, driven by constitutional passion, have several mechanisms for spreading their constitutional views, including converting party leaders on the merits, threatening them with bruising primary battles driven by grassroots activism, or some combination of such tactics.[189] Once key party leaders convert to the new constitutional faith, their partisans, many of which are members of the general public, are likely to follow suit.[190]

However, polarization also limits the eventual reach of a new constitutional movement.[191] Polarization makes it difficult to build a movement that transcends party lines—both among members of the public and among elected officials.[192] At the institutional level, partisan polarization makes bipartisan actions in our elected branches, including actions to promote a new constitutional vision, more difficult.[193] This places a ceiling on most constitutional evangelizing, making a broadly popular constitutional faith less likely.[194] Therefore, we may see increased criticisms of government actions and Supreme Court decisions, but fewer bipartisan actions in Congress and fewer genuine threats to judicial supremacy.[195]

Finally, polarization may have one additional effect on popular constitutional activism. Since bipartisan action on visible issues at the national level is more difficult, constitutional factions will look elsewhere to exercise their influence.[196] Of course, some will remain interested in constitutional litigation.[197] However, constitutional scholars must also examine (and monitor) key sites of potential influence at the state and local level. With gridlock in Washington, D.C., constitutional factions

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[185] *See* LEVINSON, CONSTITUTIONAL FAITH, *supra* note 90, at 17–18, 29.

[186] *See, e.g.*, Schmidt, *supra* note 8, at 198–99 (discussing LEVINSON, CONSTITUTIONAL FAITH, *supra* note 90).

[187] *See id.*

[188] *Id.* at 198.

[189] *Id.* at 227–36.

[190] *See id.* at 239.

[191] *See* Hasen, *supra* note 184, at 1013–19 (discussing the obstacles faced by the Tea Party in enacting its constitutional vision).

[192] *Id.* at 1014–18.

[193] *Id.* at 1016–18.

[194] *See id.*

[195] *See id.*

[196] Schmidt, *supra* note 8, at 217–18.

[197] *Id.* at 237 (discussing the Tea Party's efforts to strike down Obamacare through the courts).

may target subnational institutions with outsized national influence.[198] State and local institutions that shape constitutional education, especially those with an outsized national influence, may become prime targets.[199] This is precisely why it is so important for legal scholars to tend to the process of constitutional socialization and to the content of the popular constitutional canon.[200]

IV. TENDING TO THE POPULAR CONSTITUTIONAL CANON, A CASE STUDY: THE CONSTITUTIONAL PATHOLOGIES OF CIVIC EDUCATION

The stories that we tell our schoolchildren are a core part of the popular constitutional canon. Public education, including some combination of American history and government courses, is one of the few sustained ways in which we transmit our canonical constitutional lessons to large groups of Americans.[201]

These lessons are often taught at an important time in a citizen's life—namely, when her public attitudes are still forming, and she is generally receptive to new lessons.[202] While earlier political science research was skeptical of the importance of civic education,[203] more recent research confirms what political partisans have long suspected: the lessons we teach to our schoolchildren matter.[204] Therefore, it

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[198] *See* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 49 (2010).

[199] Goldstein, *supra* note 19, at 839, 859–60; Schmidt, *supra* note 8, at 217–18.

[200] Balkin, *New Originalism*, *supra* note 105, at 717.

[201] *See* Royal & Hofman, *supra* note 103, at 969.

[202] *See* ERIKSON & TEDIN, *supra* note 27, at 125, 135–37.

[203] RICHARD G. NIEMI & JANE JUNN, CIVIC EDUCATION: WHAT MAKES STUDENTS LEARN 13–20, 61–63 (1998); Thomas L. Dynneson & Richard E. Gross, *The Educational Perspective: Citizenship Education in American Society*, *in* SOCIAL SCIENCE PERSPECTIVES ON CITIZENSHIP EDUCATION 1, 10–11, 15–17 (Richard E. Gross & Thomas L. Dynneson eds., 1991); Galston, *supra* note 62, at 218–19, 231; Linimon & Joslyn, *supra* note 61, at 27.

[204] CARNEGIE CORP. OF N.Y. & CIRCLE: THE CENTER FOR INFORMATION & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, THE CIVIC MISSION OF SCHOOLS 14, 22–25 (2003); CHRIS CHAPMAN, MARY JO NOLIN & KAREN KLINE, NATIONAL CENTER FOR EDUCATION STATISTICS, STATISTICS IN BRIEF: STUDENT INTEREST IN NATIONAL NEWS AND ITS RELATION TO SCHOOL COURSES 4 (1997); ERIKSON & TEDIN, *supra* note 27, at 135; NIEMI & JUNN, *supra* note 203, at 70; Maryam Ahranjani et al., *Evaluating High School Students' Constitutional and Civic Literacy: A Case Study of the Washington, D.C. Chapter of the Marshall-Brennan Constitutional Literacy Project*, 90 DENV. U. L. REV. 917, 919–22 (2013); Richard A. Brody, *Civic Education and Political Attitudes: The "We the People . . ." Curriculum*, 10 GOOD SOC'Y 29, 30–34 (2001); Robert L. Dudley & Alan R. Gitelson, *Civic Education, Civic Engagement, and Youth Civic Development*, 36 PS: POL. SCI. & POL. 263, 265 (2003); Ehman, *supra* note 62, at 101–03; Lauren Feldman et al., *Identifying Best Practices in Civic Education: Lessons from the Student Voices Program*, 114 AM. J. EDUC. 75 (2007); Galston, *supra* note 62, at 223; Joseph E. Kahne & Susan E. Sporte, *Developing Citizens: The Impact of Civic Learning Opportunities on Students' Commitment to Civic Participation*, 45 AM. EDUC. RES. J. 738, 740 (2008); Joseph Kahne & Ellen Middaugh, *High Quality Civic Education: What Is It and*

is little wonder that generations of political and constitutional activists have battled over the lessons that we teach in our schools.[205]

Educators and activists have long seen our nation's textbooks as a key way in which we promote a "collective identity" by passing along "stories of important past events (e.g., describing the origins of the nation) and stories of important past leaders (e.g., describing the heroic Founding Fathers)" to future leaders and citizens.[206] For many, these books "now serve as the prayer-books of the United States's civil religion."[207]

Education scholar David Tyack contends that history textbooks "reveal what adults thought children should learn about the past and are probably the best index of what teachers tried to teach young Americans."[208] Activists, hence, have long understood that when it comes to public school textbooks, the stakes are high.[209] As Tyack explains, "People have wanted history texts to tell the official truth about the past. . . . Textbooks resemble stone monuments. Designed to commemorate and represent emblematic figures, events, and ideas—and thus to create common civic bonds—they have also aroused vigorous dissent."[210] As Frances FitzGerald adds, "Like time capsules, . . . [our textbooks] contain the truths selected for posterity."[211] This has led activists on both the left and the right to advocate for their own preferred versions of American history in our Nation's schools, often by trying to influence the textbook adoption processes in large states like California and Texas.[212]

In this Part, I draw on my own previous scholarship on American civic education to suggest the normative payoff of tending to the popular constitutional canon.[213]

Who Gets It?, 72 SOC. EDUC. 34, 34 (2008); Laura McNabb, *Civic Outreach Programs: Common Models, Shared Challenges, and Strategic Recommendations*, 90 DENV. U. L. REV. 871, 880, 888 (2013); Pasek et al., *supra* note 62; Dawinder S. Sidhu, *Civic Education as an Instrument of Social Mobility*, 90 DENV. U. L. REV. 977, 983 (2013); Torney-Purta, *supra* note 62.

[205] Perhaps the greatest evidence of the overall importance of civic education is the persistent war over its content throughout American history, and especially from the twentieth century onward. *See* FRANCES FITZGERALD, AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY 47 (1979); ROBERT LERNER ET AL., MOLDING THE GOOD CITIZEN: THE POLITICS OF HIGH SCHOOL HISTORY TEXTS 1 (1995); DAVID TYACK, SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY 41 (2003).

[206] Lloyd Kramer & Donald Reid, *Introduction: Historical Knowledge, Education, and Public Culture*, *in* LEARNING HISTORY IN AMERICA: SCHOOLS, CULTURES, AND POLITICS 1, 4–5 (Lloyd Kramer et al. eds., 1994).

[207] LERNER ET AL., *supra* note 205, at 1.

[208] TYACK, *supra* note 205, at 40.

[209] *Id.* at 40–41.

[210] *Id.* at 40. *See generally* FITZGERALD, *supra* note 205 (providing a colorful account of the American textbook wars from the early republic through the 1970s).

[211] FITZGERALD, *supra* note 205, at 47.

[212] TYACK, *supra* note 205, at 59.

[213] For an explanation of my methodological choices, including why I selected the specific textbooks used in this Article and why I chose textbook analysis in the first place, see Donnelly, *Stories We Tell*, *supra* note 31, at 1000–01.

This research uses content from our leading American history textbooks, ranging from those used in the early twentieth to twenty-first centuries, to draw conclusions about the consensus lessons transmitted to American high-school students over time.[214] This visit to our Nation's classrooms highlights the various ways in which the lessons that we are teaching our schoolchildren undermine popular sovereignty, including mythologizing the Supreme Court, promoting "Founder worship," and downplaying the constitutional achievements of successive generations. Interestingly, these pathologies mirror those that Ackerman perceives in the legal canon.[215]

A. Mythologizing the Supreme Court

Ordinary citizens reserve a special place for the Supreme Court as a privileged constitutional interpreter.[216] Over time, this image has been reinforced by the lessons taught in our leading high-school textbooks.[217] These lessons mythologize the Supreme Court and delegitimize popular challenges to its authority.

In our leading textbooks, the Supreme Court emerges largely as the Court of *Marbury v. Madison*[218] and *Brown v. Board of Education*.[219] From *Marbury*, students are taught that judicial review is an unproblematic feature of our constitutional system, and that the Court itself has long served as the legitimate "guardian of our Constitution."[220] From *Brown*, students learn that the Court is the courageous protector of our most cherished rights and an important engine of social change.[221] Taken together, these lessons—products of by far the most detailed Court-based narratives included in our leading textbooks—buttress the Court's constitutional and moral authority.[222]

Importantly, our leading textbooks also use certain key episodes in American history to delegitimize popular challenges to the Supreme Court's authority.[223] While these textbooks largely ignore examples that serve more appealing normative goals (like the Reconstruction Congress's fight to protect its policies in the South),

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[214] *Id.*

[215] *See supra* notes 125–27 and accompanying text.

[216] *See* Donnelly, *Stories We Tell*, *supra* note 31, at 982–84.

[217] *Id.*

[218] 5 U.S. (1 Cranch) 137 (1803).

[219] *See* Donnelly, *Stories We Tell*, *supra* note 31, at 978.

[220] DANIEL J. BOORSTIN & BROOKS MATHER KELLEY, A HISTORY OF THE UNITED STATES 191 (2005). *See also* Donnelly, *Stories We Tell*, *supra* note 31, at 982–84 (describing our textbooks' treatment of *Marbury*).

[221] *See* Donnelly, *Stories We Tell*, *supra* note 31, at 981–82.

[222] *See id.* at 977–79. As my previous research shows, there were six cases cited in all eleven of the twenty-first century textbooks that I studied: *Marbury*, *Brown*, *Dred Scott*, *McCulloch v. Maryland*, *Plessy v. Ferguson*, and *Worcester v. Georgia*. *Id.* at 918. Interestingly, earlier textbooks excluded *Plessy*. *Id.* at 981. However, after *Brown*, *Plessy* became an essential part of the constitutional stories told in our schools (as an anti-canonical case). *Id.*

[223] *See id.* at 984–99.

our textbooks often link anti-Court resistance to the actions of self-serving politicians and leaders on the wrong side of history.[224]

For instance, our leading textbooks include the story of *Worcester v. Georgia*[225] and the battle over President Andrew Jackson's "Indian removal" policy.[226] This narrative offers the image of a heroic John Marshall standing up to a stubborn and racist Andrew Jackson.[227] Our textbooks teach similar lessons through other canonical episodes like Franklin D. Roosevelt's "court-packing" plan, which demonstrates that even our greatest leaders sometimes ignore important constitutional principles,[228] and Southern defiance after *Brown*, which links anti-Court challenges to the actions of bitter-end racists.[229] Taken together, these examples suggest to our students that public challenges to the Court's authority are often tinged with troubling motives. Interestingly, earlier textbooks provide subtler accounts of some key episodes of popular constitutional activism, often providing additional political and substantive context for certain challenges to the Supreme Court's authority.

Early accounts of *Marbury* frame the case as a standoff between key figures with competing constitutional visions.[230] Chief Justice Marshall emerges as a key leader within the Federalist Party—one with (as a 1940s textbook explains) "stronger views upon the necessity of having a national government with strength enough to govern than Alexander Hamilton" and one who "detested his cousin and fellow-Virginian, Thomas Jefferson."[231] Early textbooks also use *Marbury* as a means of questioning the origins of judicial review—for instance, with one 1960s textbook describing Chief Justice Marshall and the *Marbury* Court as "assum[ing]" power as "guardian of the Constitution"—a power that was not explicitly mentioned in the Constitution's text.[232] Another early textbook highlights one key normative criticism of judicial review, explaining that following Chief Justice Marshall's embrace of judicial review in *Marbury*, "the opinion of a single justice can determine what is law for one hundred and fifty million people when the court, as it has frequently done in important cases, hands down a five-to-four decision."[233] This textbook adds that "[i]n no other self-governing country in the world is such power given to so small a group of men."[234] These subtler accounts of *Marbury* are replaced by more celebratory accounts in later decades.[235]

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[224] *See id.* at 997–99.

[225] 31 U.S. (6 Pet.) 515 (1832).

[226] Donnelly, *Stories We Tell*, *supra* note 31, at 988–89.

[227] *Id.* at 989.

[228] *Id.* at 992–93.

[229] *Id.* at 997–99.

[230] *Id.* at 983–84.

[231] EUGENE C. BARKER & HENRY STEELE COMMAGER, OUR NATION 285 (1949).

[232] HENRY W. BRAGDON & SAMUEL P. MCCUTCHEN, HISTORY OF A FREE PEOPLE 196 (1967).

[233] DAVID SAVILLE MUZZEY, A HISTORY OF OUR COUNTRY: A TEXTBOOK FOR HIGH-SCHOOL STUDENTS 166 (1943).

[234] *Id.* at 167.

[235] Donnelly, *Stories We Tell*, *supra* note 31, at 984.

Furthermore, while recent textbooks gesture toward Jefferson's frustration with the Federalist judiciary and tell the unfortunate story of John Adams's "midnight appointments," students learn little about the constitutional battle between Jefferson and the Federalist judiciary over the meaning of the Constitution.[236] Far from emphasizing Jefferson's aggressive assault on the judiciary by impeaching judges and removing an entire layer of the federal judiciary, twenty-first century textbooks portray a helpless Jefferson.[237] For instance, one textbook explains, "Though Jefferson ended many Federalist programs, he had little power over the courts. . . . Jefferson often felt frustrated by Federalist control of the courts. Yet because judges received their appointments for life, the president could do little."[238] Tell that to the circuit judges who lost their jobs after the Jeffersonian Congress repealed Adams's Judiciary Act![239]

Earlier textbooks provide additional details about Jefferson's attack on the Federalist judiciary, including the repeal of the Judiciary Act and the push to impeach Federalist judges, most notably, Justice Samuel Chase.[240] Rather than rejecting these efforts as mere acts of political self-interest, some of these earlier textbooks offer supportive reasons for Jefferson's assault, describing federal judges as "beyond the control of the people"[241] since they were "not controlled by popular vote,"[242] criticizing them as "political[ly] bias[ed],"[243] and adding that Chief Justice Marshall's constitutional vision was "harmful" to President Jefferson.[244] Later in the twentieth century, this additional texture disappears from our leading textbooks.[245]

We see a similar shift in our leading textbooks' treatment of Franklin D. Roosevelt's "court-packing" plan. In our twenty-first century textbooks, his attempt to "pack the court" emerges as a serious constitutional mistake, an attack on judicial independence, and a blight on his presidential legacy.[246] For instance, one textbook describes Roosevelt as trying "to 'pack' the Court with judges supportive of the New Deal," thus "inject[ing] politics into the judiciary" and threatening to "undermine the constitutional principle of separation of powers."[247]

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[236] *Id.* at 982–84, 986–88.

[237] *See, e.g.*, JESUS GARCIA ET AL., CREATING AMERICA: A HISTORY OF THE UNITED STATES 316 (2007).

[238] *Id.*

[239] *See* BRAGDON & MCCUTCHEN, *supra* note 232, at 195–96.

[240] *Id.*; LEON H. CANFIELD & HOWARD B. WILDER, THE MAKING OF MODERN AMERICA 164 (1962); MUZZEY, *supra* note 233, at 214, 215.

[241] BRAGDON & MCCUTCHEN, *supra* note 232, at 195.

[242] CANFIELD & WILDER, *supra* note 240, at 160.

[243] HENRY F. GRAFF & JOHN A. KROUT, A HISTORY OF THE UNITED STATES: THE ADVENTURE OF THE AMERICAN PEOPLE 147 (1968).

[244] FRANK FREIDEL & HENRY N. DREWRY, AMERICA: A MODERN HISTORY OF THE UNITED STATES 152 (1970).

[245] *See* Donnelly, *Stories We Tell*, *supra* note 31, at 984.

[246] *Id.* at 992–93.

[247] ANDREW CAYTON ET AL., AMERICA: PATHWAYS TO THE PRESENT 551 (2005).

As with Jefferson's attack on the Federalist judiciary, earlier textbooks offer additional context for Roosevelt's court-packing plan. One earlier textbook explains that the New Deal Court had "invalidate[d] laws passed by a large majority of Congress."[248] Another presents a sympathetic account of Roosevelt's rationale for the plan: "Those who supported the change contended that the Court was already packed, and that this was merely an effort to unpack it, and that the Court should be in harmony with the purposes of the people as expressed through the political branches."[249] Yet another frames Roosevelt's plan as an alternative to other, more radical reform proposals—such as requiring "a unanimous, or at least a two-thirds, vote of the justices" before striking down a law, "allow[ing] Congress to override [Supreme Court] decisions by a two-thirds vote," "submit[ting] [Supreme Court decisions] to a popular referendum," or "forbid[ing] the court" from "annul[l]ing [federal] laws."[250] To be sure, these earlier accounts also include criticisms of Roosevelt's plan—however, they offer a subtler, richer account of this constitutional battle and its stakes.[251]

In the end, the lessons in our twenty-first century textbooks reinforce the Court's image as the final arbiter of constitutional meaning, much as Larry Kramer might expect and lament.[252] While leading textbooks from earlier decades include criticisms of judicial review and more nuanced accounts of certain public challenges to the Court's authority, those from more recent decades—especially after *Brown*—are more celebratory of judicial review and, in turn, the Court's current role within our constitutional system.[253] In the process, these stories help to promote a constitutional culture that is deferential to the Supreme Court and its constitutional commands.

B. Promoting "Founder Worship"

The American people love their "Founding Fathers," and the lessons taught in our classrooms reinforce this culture of "Founder worship."[254] This has been true since at least the early twentieth century, and it is a product, in part, of popular efforts to shape the Founding-era narratives taught to our schoolchildren.[255]

When revisionist historians like Charles Beard began attacking the Founders in the early twentieth century, the American people fought back.[256] Driven by a common

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[248] MUZZEY, *supra* note 233, at 852–53.

[249] BARKER & COMMAGER, *supra* note 231, at 935.

[250] MUZZEY, *supra* note 233, at 853.

[251] Donnelly, *Stories We Tell*, *supra* note 31, at 993.

[252] *See* Kramer, *Generating Constitutional Meaning*, *supra* note 4, at 1440.

[253] *See* Donnelly, *Stories We Tell*, *supra* note 31, at 999.

[254] *See* Donnelly, *Forgotten Founders*, *supra* note 31, at 132–34.

[255] *See id.*

[256] *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). For summaries of this revisionist scholarship, see DOUGLASS ADAIR, *The Tenth Federalist Revisited*, *in* FAME AND THE FOUNDING FATHERS 75, 80 (Trevor Colbourn ed., 1974); and Ackerman, *Living Constitution*, *supra* note 14, at 1795–98.

fear that historians like Beard might corrupt American students, patriotic groups, leading religious and ethnic organizations, and other angry Americans worked together to ensure that revisionist accounts of the Founding did not find their way into public school classrooms—even pushing for legislation that banned the Beardian account from school curricula.[257] Similar efforts lasted well into the 1930s and 40s,[258] and, following this flurry of popular activity, not even Charles and Mary Beard's own widely used history textbook taught the Beardian version of the Founding.[259] Our leading textbooks have celebrated the Founders and their Constitution ever since.

The consensus narrative has long praised the Founders for their collective and individual brilliance. The Founders emerge from our textbooks as "famous,"[260] "thoughtful,"[261] "energetic,"[262] "notable,"[263] "very distinguished,"[264] the "outstanding leaders in America,"[265] "an assembly of demigods,"[266] and "[f]ather[s] of the Constitution."[267] Individually, our textbooks celebrate certain Founders like Alexander Hamilton and James Madison as constitutional heroes, with Hamilton remembered as Washington's loyal lieutenant and a key author of *The Federalist*[268] and Madison described as the "Father of the Constitution."[269]

Finally, our textbooks present the original Constitution itself as a model charter[270] and tell a powerful story of constitutional continuity.[271] This story stresses the durability of the Founders's original scheme,[272] the enduring power of their Bill of

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[257] ZIMMERMAN, *supra* note 108, at 14, 36.

[258] *Id.* at 14.

[259] *Id.* at 14, 19.

[260] CANFIELD & WILDER, *supra* note 240, at 132–33.

[261] FREMONT P. WIRTH, THE DEVELOPMENT OF AMERICA 190 (1945).

[262] BOORSTIN & KELLEY, *supra* note 220, at 117.

[263] CANFIELD & WILDER, *supra* note 240, at 132–33.

[264] DAVID SAVILLE MUZZEY, A HISTORY OF OUR COUNTRY 173 (1942).

[265] FREMONT P. WIRTH, UNITED STATES HISTORY 104–05 (rev. ed. 1955).

[266] MUZZEY, *supra* note 264, at 173.

[267] WIRTH, *supra* note 265, at 104–05.

[268] *See, e.g.*, BOORSTIN & KELLEY, *supra* note 220, at 116 (presenting Hamilton as a "bold" and "brillian[t]" leader); CANFIELD & WILDER, *supra* note 240, at 149 (highlighting Hamilton's "talent" and "patriotism").

[269] *See, e.g.*, CAYTON ET AL., *supra* note 247, at 57 (2005) (presenting Madison as one of the best-informed men at the Constitutional Convention); GERALD A. DANZER ET AL., THE AMERICANS 141 (2007) (emphasizing Madison's "brilliant political leadership" at the Founding); WIRTH, *supra* note 265, at 104 (describing Madison as "a profound student of government and history").

[270] *See, e.g.*, CANFIELD & WILDER, *supra* note 240, at 138 ("World statesmen have been astonished that the men who framed this document could have finished such a tremendous task in only four months."); CAYTON ET AL., *supra* note 247, at 58 (explaining that the Constitution "continues to inspire people around the world"); MUZZEY, *supra* note 264, at 173, 178 (presenting the 1787 Constitution as a "[w]onderful [a]chievement").

[271] *See infra* notes 267–69 and accompanying text.

[272] *See, e.g.*, EDWARD L. AYERS ET AL., HOLT AMERICAN ANTHEM 156 (2007) ("[T]he

Rights,[273] and the small number of constitutional amendments ratified in the intervening years.[274] In short, our leading textbooks promote a belief in what Kurt Lash has called the "constitutional big bang"[275]—the notion that all real constitutional creativity happened at the Founding and that all successive generations have simply refined the Founders's near-perfect system.[276] Never mind that many of the key structural features of the original Constitution, like the Three-Fifths Clause, entrenched the slave power, or that the Founders's Bill of Rights required the Fourteenth Amendment—and a series of twentieth-century Supreme Court decisions—to give it real bite.[277]

In the end, a constitutional culture of "Founder worship" may stifle constitutional innovation.[278] If the American people view the Founders as geniuses, then they may see little need to alter the mechanics of their constitutional system or add new constitutional principles to their charter.[279] Over time, this may dampen popular sovereignty and reinforce the constitutional status quo.[280] Rather than channeling their widespread disaffection with American politics into a movement for constitutional reform, the American people may simply conclude that the problem is not the system itself or the Constitution's text, but rather the "bums" that currently hold office or the justices that currently sit on the Supreme Court.[281]

Of course, Ackerman expressed parallel fears about "ancestor worship" in the legal canon.[282] Unfortunately, the stories captured in our leading high-school textbooks are even worse in this regard than those told by the legal profession.

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basic structure of the federal government [today] remains exactly as the Framers envisioned it over 200 years ago."); WIRTH, *supra* note 265, at 106 (arguing that the 1787 Constitution "finally solved" the "difficult problem of obtaining a proper balance between the central government and the states").

[273] *See, e.g.*, AYERS ET AL., *supra* note 272, at 49 ("Most of the amendments that form the Bill of Rights listed things that *no* government, *state* or *federal*, could do." (emphasis added)); CANFIELD & WILDER, *supra* note 240, at 140 ("The Bill of Rights has become one of the foundation stones of our American way of life.").

[274] *See, e.g.*, CANFIELD & WILDER, *supra* note 240, at 143 ("The changes that have been made in the original work of the Constitutional delegates are remarkably few."); CAYTON ET AL., *supra* note 247, at 58 ("Perhaps the best proof of this flexibility is the fact that the Constitution has been amended just 27 times in the nation's history.").

[275] Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's* The Bill of Rights, 33 U. RICH. L. REV. 485, 487 (1999).

[276] *See supra* notes 269–70 and accompanying text.

[277] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 251–57, 351–52 (2005); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 160–62, 288–89 (1998) [hereinafter AMAR, BILL OF RIGHTS]; Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be about Structure After All*, 93 NW. U. L. REV. 977, 993 (1999).

[278] *See* LEVINSON, UNDEMOCRATIC CONSTITUTION, *supra* note 150, at 16–17.

[279] *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 8, at 11; Balkin, *New Originalism*, *supra* note 105, at 697.

[280] *See* KAMMEN, *supra* note 8, at 22; Gewirtzman, *supra* note 8, at 675–76.

[281] *See* Balkin, *Distribution of Political Faith*, *supra* note 8, at 1171–72.

[282] *See* ACKERMAN, CIVIL RIGHTS, *supra* note 22, at 16.

C. Downplaying the Achievements of Successive Generations

Ackerman laments that the legal canon celebrates both the Founders and the Reconstruction Republicans as genuine legal "giants," while treating key twentieth-century leaders like Franklin D. Roosevelt and Lyndon B. Johnson as mere "bit players."[283] The civic education canon is even worse. While the Founders receive reverential treatment in our leading textbooks, these same textbooks even downplay the constitutional achievements of the Reconstruction Republicans.[284]

To be sure, these accounts have improved dramatically in recent decades, transformed by waves of revisionist scholarship from leading historians like Eric Foner and legal scholars like Akhil Amar.[285] Through the middle of the twentieth century, the Dunning School's critical account of Reconstruction dominated our leading textbooks with stories of angry Radicals in Congress, corrupt Reconstruction governments in the South, pliable and ignorant newly freed slaves, and victimized and impoverished white Southerners.[286] More recent textbooks have shifted this narrative in important ways—most notably by taking seriously the abuses of African Americans in the Reconstruction South.[287] This shift leaves these accounts more sympathetic to the Reconstruction Republicans' substantive goals, even if their leaders still suffer in comparison to the likes of George Washington, James Madison, and Alexander Hamilton. In twenty-first century textbooks, Thaddeus Stevens, Charles Sumner, and their Republican colleagues remain bitter and eager for vengeance.[288] However, recent textbooks link these feelings to the values underlying them—namely, a sincere concern for the future of African Americans in the South.[289] Even so, Reconstruction—in many ways, America's "Second Founding"—retains, at best, a mixed constitutional legacy in recent textbooks.

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[283] *Id.* at 12, 16.

[284] *See* Donnelly, *Forgotten Founders*, *supra* note 31, at 184.

[285] *See id.* at 142–65.

[286] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at xix–xx (1988) (describing Dunning School scholarship and its account of Reconstruction); John Hope Franklin, *Mirror for Americans: A Century of Reconstruction History*, 85 AM. HIST. REV. 1, 3–4 (1980) (same).

[287] *See, e.g.*, GARY B. NASH, AMERICAN ODYSSEY: THE 20TH CENTURY AND BEYOND 188–89 (2004).

[288] *See, e.g.*, BOORSTIN & KELLEY, *supra* note 220, at 369 (presenting Reconstruction Republicans as "vindictive," arguing that they were "[h]ungry for power," and contending that the military occupation of the South was designed so that the former rebels would not "be allowed to forget" that the South was a "conquered province"); NASH, *supra* note 287, at 185–86 (teaching that Reconstruction Republicans crafted a program that was "designed to punish the former Confederate states" and challenging whether "the presence of federal troops was necessary to bring about political and social changes in the South").

[289] *See, e.g.*, NASH, *supra* note 287, at 186, 188–89 (explaining that Reconstruction "increased the rights and freedoms of African-Americans").

For instance, our leading textbooks still use President Lincoln's image to paint the Reconstruction Republicans in an unflattering light. In particular, they contrast President Lincoln's gentleness with the Reconstruction Republicans' "harsh[ness]," and, in turn, Lincoln's "lenient" vision for Reconstruction with the Radical Republicans' strict approach.[290] On this account, Lincoln showed "his greatness—and his forgiving spirit—by his plan for bringing Southerners back into the Union" as quickly as possible.[291] Instead of following Lincoln's lead and moving quickly to restore the Union, Reconstruction Republicans were "bitter against the Southern rebels"[292] and eager to "destroy the political power of former slaveholders."[293]

Of course, Lincoln was tragically assassinated before having to face the core challenge of Reconstruction—namely, determining how best to restore the Union and promote freedom and equality for the newly freed slaves when faced with unrepentant rebels and waves of white violence in the South.[294] While we will never know how Lincoln would have addressed this challenge, history suggests that a policy of leniency and gentleness would have fallen well short of realizing the "new birth of freedom" that Lincoln promised at Gettysburg.[295] In the end, although recent accounts of Reconstruction are a vast improvement over those of earlier decades, students still must reject this "But-for-Lincoln" narrative to embrace fully the Reconstruction Republicans.

In addition, none of the leaders of Reconstruction emerge from recent textbooks as genuine constitutional heroes.[296] Thaddeus Stevens receives the most extensive treatment, but even those accounts mix Stevens's noble motives[297] with his appetite for vengeance.[298] Charles Sumner is also mentioned in many textbooks, but he is remembered mostly for getting caned on the Senate floor and not for his many contributions to Reconstruction's constitutional legacy.[299] Most troubling of all,

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[290] DANZER ET AL., *supra* note 269, at 377.

[291] BOORSTIN & KELLEY, *supra* note 220, at 362.

[292] *Id.* at 361.

[293] DANZER ET AL., *supra* note 269, at 377.

[294] *See* ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 290–322 (2010); BROOKS D. SIMPSON, THE RECONSTRUCTION PRESIDENTS 8–64 (1998).

[295] *See* FONER, *supra* note 294, at 333–36; SIMPSON, *supra* note 294, at 63–64; *see also* ALLEN C. GUELZO, RECONSTRUCTION: A CONCISE HISTORY (2018); RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896 (2017).

[296] *See infra* notes 292–96 and accompanying text.

[297] *See, e.g.*, BOORSTIN & KELLEY, *supra* note 220, at 362 ("Very early in life Stevens took up the great cause of abolishing slavery."); DANZER ET AL., *supra* note 269, at 377 ("Stevens hated slavery . . . .").

[298] *See, e.g.*, AYERS ET AL., *supra* note 272, at 410 (leading a section with the heading, "*Why was Thaddeus Stevens so angry?*"); BOORSTIN & KELLEY, *supra* note 220, at 362, 367 (presenting Thaddeus Stevens as a "Radical avenger" and "one of the strangest men in American history").

[299] *See, e.g.*, CAYTON ET AL., *supra* note 247, at 140.

John Bingham, who Justice Hugo Black described as the "Madison" of Section One of the Fourteenth Amendment,[300] is ignored.[301]

Although these textbooks do celebrate the noble goals of the Reconstruction Republicans and the constitutional amendments that their generation ratified,[302] students still leave this pivotal era with only a vague sense of the broader constitutional revolution that Stevens, Sumner, Bingham, and their colleagues waged and of the important characters driving this key period of American constitutional history.[303] This is, of course, in sharp contrast with our leading textbooks' portrayal of the Founding.

By ignoring some of the original Constitution's most glaring defects and downplaying the constitutional achievements of successive generations, our leading textbooks promote the belief that somehow we still live under the constitutional regime that the Founders envisioned, rather than one that was transformed by the Civil War, Reconstruction, the New Deal, the Civil Rights Revolution, the Women's Rights Movement, and the LGBT Rights Movement, among many others. This pathology may dampen the current generation's enthusiasm for constitutional reform. Furthermore, this skewed emphasis may also drive originalism's traditional obsession with the Founding at the expense of other key periods of constitutional reform like Reconstruction.[304]

In the end, constitutional education should inspire constitutional faith—a faith in the current generation's ability to redeem the promise of our Constitution's deepest principles and improve on the framework inherited from previous generations.[305]

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[300] Adamson v. California, 332 U.S. 46, 74 (1947) (Black, J., dissenting). For a full biography of John Bingham, see GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT (2013).

[301] *See* MAGLIOCCA, *supra* note 300, at 10–11.

[302] *See, e.g.*, CAYTON ET AL., *supra* note 247, at 207 (arguing that the Fourteenth Amendment was "a turning point" whose "effects have echoed throughout American history").

[303] *See* Donnelly, *Forgotten Founders*, *supra* note 31, at 168–69.

[304] *See* AMAR, BILL OF RIGHTS, *supra* note 277, at 242 ("Advocates and scholars focus all their analytic and narrative attention on the Creation, not the Reconstruction."); Balkin, *New Originalism*, *supra* note 105, at 694 ("Even the framers of the Reconstruction Amendments—including John Bingham, Thaddeus Stevens, Lyman Trumbull, William P. Fessenden, Charles Sumner, and Jacob Howard—have remarkably little ethical authority given the importance of these amendments, and are known today mostly to specialists."); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 980 (2012) (arguing that "originalism in practice is not just a method of interpretation, but rather—and most persuasively—a normative claim on American identity" and "originalists' ethical compass infrequently points toward the Reconstruction era or the political work of the Fourteenth Amendment's drafters").

[305] *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 8, at 8–9; Gewirtzman, *supra* note 8, at 675–76; Melissa Hart, *Foreword: Public Constitutional Literacy: A Conversation*, 90 DENV. U. L. REV. 825, 826 (2013).

V. AVENUES FOR FUTURE RESEARCH

My research on civic education suggests various pathologies that may dampen the constitutional confidence of the American people. It also points toward four distinct avenues of future popular constitutionalism research.

First, it suggests the value of continuing to tend to civic education as a site of constitutional socialization. While my previous research has focused on the *content* of the civic-education canon, future research should turn toward the state and local administrative processes that shape this content—especially the state administrative regimes that exert an outsized influence on textbook content nationwide, such as those in California, Florida, Indiana, New York, North Carolina, and Texas.[306] This new research should consider all key features of these administrative processes: from the board members' campaigns for office, to the range of curricular suggestions provided by the public, to the final curricular decisions made by the various state agencies. Furthermore, it should focus on how these regimes attempt to strike a balance between the desire for public input and democratic accountability on the one hand, and the need for technical and academic expertise on the other.[307] Throughout, it should also pay attention to any attempts by individual citizens or larger groups of citizens to influence the constitutional lessons that we teach our public school students.[308]

Second, popular constitutionalists should also study other key institutions tasked with transmitting official historical truth to ordinary citizens. For example, they should tend to the narratives presented at various national shrines throughout the country like Independence Hall, the National Constitution Center, and Monticello.[309] These sites are well positioned to make a lasting impression on their visitors, offering a captive audience mostly new information transmitted by authoritative messengers who pitch themselves as credible and non-ideological.[310] Furthermore,

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[306] *See* TYACK, *supra* note 205, at 59.

[307] *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM AND A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 33–34, 95 (2012).

[308] For terrific accounts of the battles over American history textbooks, see FITZGERALD, *supra* note 205; TYACK, *supra* note 205, at 41; and ZIMMERMAN, *supra* note 108.

[309] *See, e.g.*, EDWARD TABOR LINENTHAL, SACRED GROUND: AMERICANS AND THEIR BATTLEFIELDS 87–125 (1991) (telling the story of the Gettysburg battlefield); TIMOTHY B. SMITH, ALTOGETHER FITTING AND PROPER: CIVIL WAR BATTLEFIELD PRESERVATION IN HISTORY, MEMORY, AND POLICY, 1861–2015 (2017); Erika Doss, *Commemorating Disaster and Disobedience: National Park Service Initiatives in the 21st Century*, 97 SOC. SCI. Q. 105, 108 (2016) (discussing the battle over Custer battlefield); Jadelyn J. Moniz Nakamura, *Up in Arms!: The Struggle to Preserve the Legacy of the National Park Service During Wartime*, 47 HAW. J. HIST. 179 (2013) (discussing Hawaii National Park's use during World War II); Mariah Zeisberg, *A New Framing? Constitutional Representation at Philadelphia's National Constitution Center*, 6 PERSP. POL. 553 (2008) (analyzing the constitutional stories at the National Constitution Center).

[310] *See* Page Putnam Miller, *Reflections on Historical Advocacy and the National Park Service*, 9 PUB. HIST. 105, 106 (1987) ("Adults in this country who rarely read history books

each site brings history to life—either because it is the actual site of an historic event, a venue associated with a famous person, or a museum with a collection of important artifacts.[311] Taken together, these elements maximize the likelihood that these sites will have a lasting effect on their visitors—either reshaping their views or reinforcing previous beliefs.[312] This research should study the processes through which these sites develop their content, the key stakeholders and interest groups that have input, and, finally, the content of the actual lessons that these sites teach average citizens. The National Park Service, in particular, is a promising research target along these lines, as it is a government agency tasked with maintaining hundreds of sites throughout the country and sharing these sites' stories with millions of visitors each year.[313]

Third, in addition to research focusing on our national shrines, popular constitutionalists should also examine other institutions serving a similar history-defining function for average citizens. Possible research targets include the constitutional lessons that recent immigrants must learn in order to pass the naturalization exam, the curriculum that we teach our most gifted children (including in Advanced Placement courses and the "We the People" program), the ceremonial speeches that our public leaders deliver on key holidays like Constitution Day and the Fourth of July, the degree requirements and related syllabi at American colleges and universities, and the ways in which legal elites translate the Supreme Court's handiwork into newspaper articles and other commentary pieces consumed by the general public. Throughout, popular constitutionalists should pay particular attention to the ways in which the legal canon filters down into the stories told to ordinary citizens.

Fourth, and finally, popular constitutionalists should seek to fill in the details of the larger process of constitutional socialization. Civic education is part of this

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or attend historical programs glean a significant amount of information about and insights into our nation's history from historic parks.").

311 *See* ORG. AM. HISTORIANS, IMPERILED PROMISE: THE STATE OF HISTORY IN THE NATIONAL PARK SERVICE 1, 5 (2011) ("Millions of Americans each year cultivate a deeper appreciation of the nation's past through encounters with historic buildings, landscapes, and narratives preserved by the NPS and its constituent agencies and programs.").

312 *See* Michael G. Schene, *The National Park Service and Historic Preservation: An Introduction*, 9 PUB. HIST. 6, 7 (1987) ("[T]he National Park Service has had as much influence in educating Americans about their history as any other institution.").

313 *See* Doss, *supra* note 309, at 109 ("The U.S. National Park Service is the major institutional body in America today charged with shaping understandings of national identity through its management of America's national parks, memorials, historic trails, historic sites, and more."). For examples of the existing historical literature on the National Park Services' History Program, see RONALD A. FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS (1984); BARRY MACKINTOSH, THE HISTORIC SITES SURVEY AND NATIONAL HISTORIC LANDMARKS PROGRAM: A HISTORY (1985); DENISE D. MERINGOLO, MUSEUMS, MONUMENTS, AND NATIONAL PARKS: TOWARD A NEW GENEAOLOGY OF PUBLIC HISTORY (2012); ORG. AM. HISTORIANS, *supra* note 311; Edwin C. Bearss, *The National Park Service and Its History Program: 1864–1986: An Overview*, 9 PUB. HIST. 10 (1987); Barry Mackintosh, *The National Park Service Moves into Historical Interpretation*, 9 PUB. HIST. 51 (1987); and Donald C. Swain, *The National Park Service and the New Deal, 1933–1940*, 41 PAC. HIST. REV. 312 (1972).

larger process—as are the various items mentioned above, but there are a number of other forces shaping the constitutional views of ordinary Americans. Moving forward, popular constitutionalists should work to identify these forces, study them, and chart the constitutional life cycle of the average citizen.

CONCLUSION

The stories that we tell about our constitutional past matter. They shape how lawyers learn about the Constitution and influence the sorts of arguments that they make in court and what judges accept as legally legitimate. In turn, through their elevated status as leaders in American society, lawyers often transmit the values of the legal canon to ordinary citizens, shaping their public actions and their private thoughts. Lawyers may promote these values through their participation as political, civic, and thought leaders. At times, the legal canon also finds its way into our public schools, shaping the views of an attentive audience—students. In the end, the American constitutional project, rooted in popular sovereignty, rests on the constitutional norms and narratives transmitted to lawyers and ordinary citizens alike. Constitutional scholars, and especially popular constitutionalists, should tend to the constitutional canon, both legal *and* popular.