

FUNDAMENTAL LAW, FUNDAMENTAL RIGHTS, AND CONSTITUTIONAL TIME

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ABSTRACT

This Article lays the groundwork for a novel theory giving citizens pride of place in constitutional interpretation—as voters and jurors, deliberators and disobedients, and more. My account adopts different answers to two basic questions that divide it from other prevailing theories: first, that citizens, rather than judges, shoulder primary *responsibility* for interpreting principles of fundamental law; and second, that *fidelity* to their Constitution requires, above all, keeping faith with their fellow citizens across constitutional time. This approach conceives of the Citizens’ Constitution as an enduring social contract. In setting the stage for this account, I advance several related claims that carry independent weight as theoretical contributions. First, the Citizens’ Constitution as Fundamental Law is a distinct and vitally important domain of constitutional principles, which are accessible and justifiable to citizens’ common reason, and which ground their pervasive disagreements. Second, propositions of fundamental law can be understood in another register—as propositions about *constitutional time*, relating the constitutional present to its past and future. Third, these propositions about constitutional time are moral arguments of a certain kind: arguments about constitutional justice, about what we share as citizens and participants in an enduring enterprise and what makes the Constitution worthy of our allegiance. Finally, together these claims point the way to a recognitional account of fundamental rights that deepens their connection to constitutional justice, even as it generates a measure of commonality across pitched value disagreements.

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I. INTRODUCTION: THE CITIZENS' CONSTITUTION

We need new heroes.

This slogan may ring true not just for American constitutionalism, but also for many liberal-democratic regimes currently buffeted by destructive tidal forces. It holds especially true, however—and it is within this narrow enterprise that I advance the claim—for liberal constitutional theory, which has become unmoored. American political liberals seem completely at a loss for how to think and talk about their Constitution.¹

The primary cause is a tectonic shift on the Court that has caught liberals flat-footed.² From the New Deal through the Civil Rights Revolution, liberals controlled the Court, and then they made peace with the gradually shifting sequence of three swing Justices.³ But this *détente* came crashing down with the

1. I say this less as a frustrated liberal and more in my capacity as a constitutional theorist.

2. Others have made this same observation. For an astute and prescient example, see Cass Sunstein, *Earl Warren Is Dead*, THE NEW REPUBLIC (May 12, 1996), <https://newrepublic.com/article/62143/earl-warren-dead> [<https://perma.cc/E8DU-4YK2>] (reviewing RONALD DWORKIN, FREEDOM'S LAW (1996)). But Sunstein's theoretical commitments favor minimalism over heroism. See CASS SUNSTEIN, CONSTITUTIONAL PERSONAE (2013) (preferring the archetype of the "minimalist" over that of the "hero"); *infra* notes 80, 209.

3. This liberal dominance was largely due to Justice Owen Roberts's "switch in time" in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and President Roosevelt's subsequent transformative appointments. See 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); BARRY FRIEDMAN, THE WILL OF THE PEOPLE 206-13 (2009); JEFF SHESHOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2011). Justice Kennedy reigned as the median Justice during the Roberts Court until his retirement; Justice O'Connor during the Rehnquist Court; and, to a lesser extent, Justice Powell during the Burger Court. See Andrew A. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005). But see Benjamin E. Lauderdale & Tom S. Clark, *The Supreme Court's Many Median Justices*, 106 AM. POL.

saga of Scalia, Garland, McConnell, Trump, Gorsuch, Kennedy, Kavanaugh, Ginsburg, and Barrett—leaving six committed constitutional conservatives in place.⁴ And the liberal response has swung as well, in its own occasionally incoherent way: from sober-minded commissions and structural reform proposals pining for a “balanced” Court,⁵ to skeptical legal realist charges that originalism is just conservative policy in a tri-corner hat,⁶ to earnest invocations of the founders in their wisdom.⁷ This is all baffling. There are real interpretive disagreements here, at bottom. But such a mishmash of opportunistic arguments will not help to clarify them.

This flat-footedness is partly attributable to constitutional theories that have lingered on the shelf long past their expiration date. Particularly, liberal constitutional theory has suffered from ill-fitting answers to two basic questions. I’ll call the first the *responsibility* question: Whose responsibility is the Constitution, its paradigmatic interpreter? The second question is one of *fidelity*:

SCI. REV. 847 (2012) (complicating this notion).

4. Justice Antonin Scalia died in his sleep in the early morning of February 13, 2016. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [<https://perma.cc/AP7N-D5JQ>]. Before President Obama nominated Judge Merrick Garland as his successor, Senate Majority Leader Mitch McConnell announced that the Senate would not conduct hearings or a vote for the confirmation, because the winner of the 2016 election should be able to fill Scalia’s seat. *The Latest: McConnell Tells Garland He Won’t Be Considered*, AP NEWS (Mar. 16, 2016), <https://apnews.com/article/2d97d3c84cc445dc9e09a8406d901765> [<https://perma.cc/C59E-TMCM>]. After winning the next election, President Trump successfully nominated Justice Neil Gorsuch to fill the vacancy, and after Justice Kennedy also announced his retirement, Justice Kavanaugh was also nominated and confirmed—after much heated controversy. See Mythili Sampathkumar, *Brett Kavanaugh Confirmed to Supreme Court Amid Widespread Outcry Over Sexual Assault Allegations*, INDEPENDENT (Oct. 7, 2018), <https://www.independent.co.uk/news/world/americas/us-politics/brett-kavanaugh-confirmed-supreme-court-justice-senate-donald-trump-christine-blasey-ford-a8572201.html> [<https://perma.cc/4TMF-UPJ8>]. Then just months before the 2020 election, Justice Ruth Bader Ginsburg succumbed to cancer, and President Trump nominated and confirmed Justice Amy Coney Barrett, over the outrage of many liberals. See Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [<https://perma.cc/J2SW-ZHV6>].

5. See THE WHITE HOUSE, Presidential Commission on the Supreme Court of the United States, <https://www.whitehouse.gov/pescotus/> [<https://perma.cc/4EFQ-B5XK>]; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L. J. 1 (2019).

6. See, e.g., ERIC J. SEGALL, ORIGINALISM AS FAITH (2018).

7. See, e.g., House Speaker Nancy Pelosi (@TeamPelosi), TWITTER (Nov. 1, 2019, 11:44 AM), <https://twitter.com/TeamPelosi/status/1190308686759104512> [<https://perma.cc/7WFV-2WQT>] (“When Benjamin Franklin came out of Independence Hall on September 17, 1787 after our Constitution was adopted, people asked him: What do we have—a monarchy or a republic? He said: ‘A republic, if you can keep it.’”).

How should those paradigmatic interpreters keep faith with the Constitution?⁸ Over the decades, most liberal theories have held the responsibility answer constant—without hesitation, judges—while supplying sophisticated answers to the fidelity question. John Hart Ely tells judges to preserve faith in the democratic process, tempering their interpretations with distrust for its defects—and enhancing their power to police the process.⁹ Bruce Ackerman’s theory of constitutional moments proliferates the number of founding eras commanding our fidelity to include Reconstruction and the New Deal, calling on judges to synthesize the commitments from these eras.¹⁰ Ronald Dworkin instructs Judge Hercules to keep faith with the best moral account of fundamental rights.¹¹ But theories that take the approach of vesting interpretive responsibility in judges while finessing the fidelity question will only work insofar as the judges cooperate and do what the theory tells them to do. These accounts are the best on offer, but they have nothing to say about the current set of circumstances.

The more recent turn to popular constitutionalism has seen the writing on the wall and reached for the responsibility question, as with Mark Tushnet’s call to “take the Constitution away from the courts,”¹² Louis Michael Seidman’s invocation of “constitutional disobedience,”¹³ and Michael Klarman’s exploration of “anti-fidelity.”¹⁴ At their best these theories spin a variation on a theme from

8. One obvious theoretical candidate not discussed here is originalism, which places responsibility in judges and requires fidelity to original constitutional meaning. It has many (probably too many) varieties, and my view of fundamental law is compatible with most of them, so long as they recognize the role of background principles and abstract textual markers that invite further disagreement. Although self-avowed liberals have carried out many of originalism’s most ambitious recent theoretical advances—see Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017) and JACK M. BALKIN, *LIVING ORIGINALISM* (2011)—most liberals disavow the view, and I set it to one side. To be clear, the proper opponent of my view is not originalism, but a different claim that some originalists such as Justice Scalia have held: that all there is to our Constitution is ordinary law. I discuss this further in chapter 4 of my dissertation. David Bragg McNamee, *The Citizens’ Constitution as Fundamental Law* (2020) (Ph.D. dissertation, Princeton University) (on file with the Mudd Library), <http://arks.princeton.edu/ark:/88435/dsp019g54xm61n>.

9. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

10. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

11. See RONALD DWORKIN, *LAW’S EMPIRE* (1986); RONALD DWORKIN, *JUSTICE IN ROBES* (2006).

12. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURT* (1999). Tushnet’s account in particular runs the risk of collapsing into bare politics. He argues that for progressives, judicial review “cannot be defended except by seeing how it operates”—and that they “are losing more . . . than they are getting” in terms of affirmative action and campaign finance reform when gender equality and gay rights enjoy majoritarian support. *Id.* at 172. For more recent articulation, see MARK TUSHNET, *TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW* 109-10 (2020).

13. LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

14. Michael J. Klarman, *Antifidelity*, 70 SO. CAL. L. REV. 381, 381 (1997) (“A more basic issue

James Bradley Thayer, that the Court should only exercise judicial review in rare cases of clear error.¹⁵ But even then the salience of the view depends on a negative and totalizing judgment casting the Court as a usurper or bogeyman. This view lacks nuance, overlooks the possibility that courts may play a beneficial (if limited) role in popular constitutionalism, and leaves the most important question wide open: what *should* our constitutional democracy look like? At their worst these forms of popular constitutionalism collapse into ordinary politics, becoming untethered from what is morally significant about a constitutional democracy. They fail to see the Constitution as a generative democratic resource, abandoning the fidelity question altogether.

The most attractive of these accounts is Larry Kramer's *The People Themselves*. His *locus classicus* of popular constitutionalism closes with a stirring demand to respect the judgment of ordinary citizens, pitted against "today's aristocrats," the lawyer-priests who derive their own power from the temple of judicial supremacy.¹⁶ This framing places the responsibility question front and center: it is up *to us* to reclaim our constitutional authority. And then Kramer moves to fidelity, discussing (in contrast with the judicial aristocrats) "those with a greater faith in the capacity of their fellow citizens to govern responsibly."¹⁷ Like Kramer, I believe that faith to be well-founded. But ultimately Kramer's claim is about power: there are more of us, who share that democratic sensibility, than there are of them—and so we the people have the power to stake our claim to the Constitution. Will we let that claim lie fallow and defer to the judicial aristocracy, or will we take on responsibility for our Constitution? Kramer's case is powerful, but it misses the mark. His populist plea against judicial aristocracy maintains faith *in* citizens,¹⁸ but we need more than that. What we need instead

has elicited relatively little interest: Does the Constitution deserve our fidelity at all? The answer to that more fundamental question seems clear, if counterintuitive: Of course not. Why would one think, presumptively, that Framers who lived two hundred years ago, inhabited a radically different world, and possessed radically different ideas would have anything useful to say about how we should govern ourselves today?" Cf. MICHAEL J. KLARMAN, *THE FRAMERS' COUP* (2017); Frank I. Michelman, *Michael Klarman's Framers' Coup (And the News from Antifidelity)*, 33 *CONST. COMMENT.* 109 (2018) (reviewing Klarman and drawing an esoteric connection between the texts).

15. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129 (1893). A recent contribution in this tradition that also advances interesting policy prescriptions is Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 *CALIF. L. REV.* 1703 (2021) (proposing a supermajority requirement for judicial review and jurisdiction stripping). The clearest and one of the longest-running opponents of judicial review is Jeremy Waldron. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006). But his ultimate preference for legislative supremacy, see JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (2001), does not sit well with the separation of powers.

16. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 246-48 (2005).

17. *Id.* at 247.

18. This base-level faith—more precisely, faith in citizens' capacity to govern themselves—is

is a theory for how to keep faith *with* them, in the present, past, and future. If our aim is a theory that can justify rule according to constitutional principles as more than the raw exercise of power, then we need an account of the Constitution as a social contract that endures through time.

The way forward, I suggest, is to revisit both the responsibility and the fidelity questions in the same sweep. The Constitution belongs to its citizens; it is their responsibility to interpret and apply its principles in their roles as voters, jurors, disobedients, and more.¹⁹ And in doing so their charge is to keep faith, not just with the past, but with their fellow citizens as participants in that enduring project across constitutional time, relating its present, past, and future.²⁰ This is

necessary for a theory of constitutional democracy, but a fully adequate account needs more. Not everyone shares this faith. *See, e.g.*, JASON BRENNAN, *AGAINST DEMOCRACY* (2016). Against this line of skepticism, I note that my account of fundamental law as principles accessible to citizens' common reason yields an epistemic domain that is particularly open to ordinary citizens' competence.

19. I mean to analogize citizens' role responsibilities to the sort of ethical considerations that weigh on conscientious officials who swear an oath to uphold the Constitution in their respective capacities. *Cf.* SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 103-05 (rev. ed. 2011) (discussing a constitutional oath of citizenship). Note that naturalized citizens do swear such an oath. I mean to deploy the concept of "citizenship" broadly, to include all members of the political community. This more capacious definition will include, in principle, all adults with the capacity to participate in political life. The Fourteenth Amendment guarantees national and state citizenship through birth and nationalization. U.S. CONST. amend. XIV, § 1. Some interpretive responsibilities, such as voting and jury service, are a function of state law, while other role responsibilities, such as deliberative discussion or civil disobedience, emanate from that more capacious and moral idea of membership in the political community.

20. Constitutional time is a somewhat familiar concept that has been deployed variously in the literature. Most of these discussions cluster around Skowronek's influential discussion of "political time." STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME* (2008) (articulating a cyclical theory of presidential regimes and "the politics presidents make," where constitutional and political time ebb and flow along with and according to these cyclical regimes); *see, e.g.*, BRUCE ACKERMAN, *WE THE PEOPLE* (in its various volumes spanning 1993, 1998, 2014, and TK) (applying some of Skowronek's insights to develop a theory of "constitutional moments" when transformational movements engage in higher law-making and entrench those alterations through winning decisive elections); KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007) (employing Skowronek's notion of "reconstructive" presidencies to explain the rise of judicial supremacy as regime-reinforcing). Jack Balkin's recent work has explored the concept of constitutional time, but he deploys it in an externalized and almost mechanistic account of periodic cycles: those of regimes, polarization, and the important idea of "constitutional rot." *See* JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2019). My account is more internal and interpretive—even, as I discuss later, a constructive notion. *See also* Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 101 (2006) (articulating their own account of "partisan entrenchment" to explain constitutional change through the mechanism of presidential regimes and the appointment process); JACK M. BALKIN & SANFORD LEVINSON, *DEMOCRACY AND DYSFUNCTION*

the idea of fundamental law. But it presents a puzzle about the nature of constitutional authority and the temporal aspect of our constitutional project. To further develop these ideas, we now turn to a concrete instance of that puzzle.

II. WHEN DID THE CONSTITUTION REQUIRE MARRIAGE EQUALITY? A PUZZLE AND SOME PROPOSITIONS

On March 26, 2013, two lawyers engaged in a pointed exchange during oral argument at the Supreme Court.²¹ Both men had ascended to prominence in the early 1980s with the rise of a new legal conservatism, and they retained their good standing in the conservative legal movement.²² Antonin Scalia, sitting at the bench with the other Justices, was an architect of the “New Originalism,”²³ a celebrated legal pugilist and public face of conservative constitutional thought. At the bar was Ted Olson, who had led President Reagan’s Office of Legal Counsel. Olson had argued dozens of Supreme Court cases advancing conservative causes in private practice and as Solicitor General for George W. Bush—from representing Bush during the 2000 Florida recount to assaulting campaign finance regulations in *Citizens United v. FEC*.²⁴

What might have been most surprising about the day’s argument was that

(2019) (featuring an epistolary exchange laying out the authors’ views, including Balkin’s temporal notion of “constitutional rot”). Balkin has also explored linkages between the concept of time in constitutional argument, the uses of history, and constitutional memory in Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENTARY 345 (2020) and Jack M. Balkin, *Constitutional Memories* (draft Jun. 1, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4106635. See also Gerald Postema, *Time in Law’s Domain*, 31 RATIO JURIS 160 (2018) (discussing time as an essential and under-theorized feature of law generally); ELIZABETH COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* (2018).

21. *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

22. Antonin Scalia and Ted Olson both served as Assistant Attorney General for different administrations, heading the Office of Legal Counsel. Scalia served during the Ford Administration; Olson served in the same position from 1981 to 1984 under Reagan. During that time Scalia was appointed to the D.C. Circuit Court, then later elevated to the Supreme Court in 1986. Both men participated in the opening convening of the Federalist Society at Yale Law School in 1982—Scalia as a faculty advisor for the group at the University of Chicago Law School, Olson as the head of the Reagan OLC. See Michael Kruse, *The Weekend at Yale That Changed American Politics*, POLITICO MAG. (Sept. 2018), <https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608> [<https://perma.cc/66DE-QRPV>]. See STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008), for a useful discussion of the conservative legal movement.

23. For a classic statement, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Amy Gutmann, ed. 1997). Scalia’s key contribution was the emphasis on the original public meaning of the constitutional text as ratified, as opposed to the original intentions of the framers who wrote it.

24. Theodore B. Olson, *Biography*, GIBSON DUNN, <https://www.gibsondunn.com/lawyer/olson-theodore-b/> [<https://perma.cc/2WBK-476B>].

these brothers-in-arms found themselves on opposing sides of a significant constitutional disagreement. Olson had come to challenge the constitutionality of California's Proposition 8, which had narrowly passed in 2008 to bar same-sex marriage within the state.²⁵ But, there is something even more striking about Scalia's question. Namely, there is no satisfactory answer Olson can give (save for conceding the point, which is no answer at all) without resorting to a deeper question of constitutional theory: How does the content of our fundamental law change over time?

Scalia begins with the premise that the Court's role is to "decide[] what the law is. That's what we decide, right? We don't prescribe law for the future. We—we decide what the law is. I'm curious . . . *when did it become unconstitutional* to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted?"²⁶ The implication, it seems, is that Olson cannot answer the question because he is making it all up as he goes along. Reasonable people disagree about gay rights and marriage equality, and the hard, fixed law of the Constitution, rooted in historical facts, does not resolve this disagreement. To pretend otherwise and ask the Court to strike down this democratic initiative is to ask the Justices to exceed the bounds of their judicial duty.

Olson offers the lawyerly rejoinder that it was no more obvious when the Constitution came to prohibit state bans on interracial marriage²⁷—which persisted until 1967, more than a decade after *Brown v. Board of Education*.²⁸ But Scalia will have none of it. The case of interracial marriage is "an easy . . . one," unlike the marriage ban before the Court that day. A race-based ban was, as a matter of plain text and original public meaning, unconstitutional "[a]t the time that the Equal Protection Clause was adopted. . . . But don't give me a question to my question. When do you think [banning same-sex marriage] became unconstitutional? Has it always been unconstitutional?"²⁹ Olson gamely tries again: such a ban became unconstitutional "when we as a culture determined that sexual orientation is a characteristic of individuals that they cannot control," the output of "an evolutionary cycle."³⁰ And one can almost see the steam billowing out of Scalia's ears: "Well, how am I supposed to know how to decide a case, then, . . . if you can't give me a date when the Constitution changes?"³¹ The easy (but mistaken) answer to Scalia's challenge is, of course, that such a ban was *never* unconstitutional. How can evolving social attitudes retroactively alter the legal-historical fact of what the Fourteenth Amendment said at the time of its

25. Perhaps as a symbol of bipartisan solidarity, Olson's co-counsel was David Boies, who had sat on the other side of the courtroom representing Vice President Gore in 2000.

26. Oral Argument, *Perry v. Hollingsworth*, 570 U.S. 693 (2013) (No. 12-144) <https://www.oyez.org/cases/2012/12-144> [<https://perma.cc/VB2M-KNBY>] (emphasis added).

27. *Id.*; *Loving v. Virginia*, 388 U.S. 1 (1967).

28. 347 U.S. 483 (1954).

29. Oral Argument, *supra* note 26.

30. *Id.*

31. *Id.*

enactment?³²

This Article seeks to answer Scalia's question by developing an account of the relationship between the Citizens' Constitution as fundamental law and the idea of *constitutional time*. I advance four interwoven propositions.

First is an idea I have already introduced, the Citizens' Constitution as fundamental law.³³ Basic principles of fundamental law are accessible to citizens' common reason. They are artifacts of our social world, but they are also steeped in political morality. They constitute the fundamental value commitments and aims of the constitutional order, underlying the Constitution's more specific requirements, and constitutional interpreters may properly rely on these principles in applying those constitutional requirements to certain controversies. And since citizens disagree with one another about the contours of our social world and the content of political morality, citizens will also disagree about these principles and how they apply. But because these principles are *basic* in this way, and because they appeal to our common reason as citizens, these principles serve an important purpose. They ground and channel citizens' deeply contested disagreements, ensuring that these pervasive disagreements are generative—that they sustain and repair the constitutional order as an enduring project of self-government, that the parties to these disagreements aim to view this common enterprise, as Ronald

32. Jack Balkin's imagined response—in what is truly grand-slam-level snark—to Scalia's question ("OLSON: Well, according to your dissent in *Lawrence v. Texas*, the Court decided that issue in 2003.") is a bit too on the nose—the answer is likely sometime *after* June 2003. See Jack Balkin, *Supreme Court Arguments We'd Like To See*, BALKINIZATION (Mar. 26, 2013), <https://balkin.blogspot.com/2013/03/supreme-court-arguments-wed-like-to-see.html> [<https://perma.cc/DG8K-6VC6>]. An even deeper irony is that, in the intervening years between Scalia's 2013 question and *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Circuit Court cases that would lead to that full recognition of marriage equality answered Scalia's question with his dissent in the DOMA case, *United States v. Windsor*, 570 U.S. 744 (2013), which came just several months after *Perry*.

33. Elsewhere I have examined the example of "Black Lives Matter" as a claim of fundamental law that invokes the Citizens' Constitution. See David McNamee, "*Black Lives Matter*" as a Claim of Fundamental Law, 14 U. MASS. L. REV. 2 (2019). In contrast to the rival principle of colorblindness (which insists that we recognize that "*all lives matter*," and that any other contention perpetuates invidious discrimination), the claim that "Black Lives Matter" acknowledges the difference in the lived experience of Black citizens and the historical legacy of their continuing subordination by the institutions of White Supremacy. It demands that any serious effort to interpret what equality requires or what police conduct is reasonable *must* include a clear-eyed recognition of that difference and that legacy. But, following the example of Frederick Douglass's emancipatory protestantism, I show how this claim of fundamental law empowers citizens to keep faith with their Constitution, even when they experience alienation from these institutions. And that is because the *Citizens' Constitution*, properly understood, forbids practices such as White Supremacy and structural discrimination. This idea of emancipatory protestantism enables a kind of radical self-inclusion and promotes what I call the "constitutional bases of respect," even in the face of on-the-ground injustice, which I discuss further here.

Dworkin puts it, in its “best light.”³⁴ At the very least, the invocation of principles of fundamental law serves to ensure that the participants to these interpretive disagreements are arguing about the same thing: a shared scheme of constitutional principles. Beyond that minimal aspiration, the repeated application of these principles to new circumstances sustains a grander hope—that these principles might justify our political order as coherent and at its best, one that is worthy of our allegiance.

Second, claims of fundamental law, at least in part, can be understood as arguments about constitutional time, defined in a certain way. This idea, as I will explain, is not merely a matter of some empirically discernable historical record, like the sort of constitutional time stamp that Scalia was seeking. Events in constitutional time must, of course, be answerable to those sorts of historical facts—but the sweep of constitutional time is more than the sum of their parts. Neither should we understand constitutional time as the aggregate of individual time slices, from “time immemorial” to 1789 and into (one hopes) the distant future, which we can imagine viewing from some external Archimedean perspective or verifying by stuffing a bunch of constitutional scholars in a time machine and visiting each one in sequence.³⁵ Rather, the concept of constitutional time as I use it is a relational, presentist, and argumentative phenomenon. Claims about constitutional time consist of interpretive arguments, offered by participants in a given moment, relating the constitutional present to its past and future.

Third, so defined, arguments about constitutional time are essentially *moral* arguments, of a kind.³⁶ These aim to justify our constitutional order to its citizens.

34. DWORKIN, *LAW’S EMPIRE*, *supra* note 11, at 398.

35. See Arthur Ripstein, *Introduction: Anti-Archimedeanism*, in RONALD DWORKIN 5-18 (Arthur Ripstein ed., 2007), for discussion of this notion as an organizing theme of Ronald Dworkin’s body of thought. Archimedes is said to have claimed that, with a lever and proper place to stand, he could move the world. Dworkin’s web of related philosophical projects suggests that, with respect to the domain of value, there can be no such Archimedean standpoint outside of that domain from which we can assess various arguments. For such assessments to be coherent, they must be understood as interpretive claims made from within the domain of value (including law, ethics, political and personal morality), embedded within a shared interpretive practice. See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011); Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 *PHIL. & PUB. AFF.* 87 (1996). With respect to an Archimedean perspective on constitutional time, I am imagining a sum of time slices that resembles modern physicists’ notion of a four-dimensional “block universe” that emerges from Einstein’s theories of relativity. For an interesting discussion of the various philosophical controversies about the nature of time, see Ned Markosian, *Time*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Jan. 24, 2014), <https://plato.stanford.edu/entries/time/> [<https://perma.cc/L6FB-PMA3>]. Whatever happens to be the best way to understand the nature of time itself, my claim is that *constitutional* time, as an argumentative phenomenon that manifests in the shared practice of constitutional interpretation, is best understood as a presentist notion that is, at least in part, constituted by moral arguments of a kind. As such, my account rejects this sort of Archimedean standpoint from which we might evaluate claims of constitutional time.

36. It is, of course, a common feature of various strands of thought opposed to legal positivism

They sustain and are anchored in the constitutional bases of respect. They ground pervasive disagreements about constitutional justice. They give rise to the domain of what I have called “citizens’ common reason”—which we can understand as a constellation of competing and complementary narratives that partly cohere and partly diverge across the span of constitutional time. These concepts warrant further explanation, and the notion of constitutional time offers useful explanatory resources at our disposal.

This account provides an answer to Scalia’s question, one that tackles the problem of disagreement head-on. Discrimination against marriage equality did not become unconstitutional when some judge in black robes intoned some Delphic proclamation. It happened when (or, better, *because*) constitutional citizens, deliberating together, came to understand that their fundamental law required that equal recognition. Such an “event,” if we want to call it that, can occur—indeed, as we will see, *must* occur—even as interpretive disagreement persists. The key is to observe this disagreement *over the arc of constitutional time*—from our present commitments into the shared traditions of the past, with an eye to the future and an imagined retrospective of the “right side of history” (whatever that turns out to be). That, as we will see, is precisely what Justice Kennedy is doing over the two-decade span of gay rights cases that lead to the recognition of marriage equality.

Fourth and finally, my account also points to a richer conception of fundamental rights. This account properly identifies their recognitional stakes in disagreements about rights, placing that concern front and center. It locates important conceptual space between hardbound particularized traditionalism and unmoored theoretical inquiry—where custom and history operate as interpretive objects and sources of animating abstraction.

that law and morality are essentially connected in some way. A recent turn in several prominent antipositivist accounts suggests that law, in general, is a kind of subset of morality. *See, e.g.*, RONALD DWORKIN, JUSTICE FOR HEDGEHOGS *supra* note 35, at 5, 407 (arguing that law is a “branch” of morality—namely, the set of rights and duties that are judicially enforceable); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1290 (2014) (defending the view that “legal obligations are a certain subset of moral obligations,” insofar as “[l]egal institutions—legislatures, courts, administrative agencies—take actions that change our moral obligations . . . by changing the morally relevant facts and circumstances, for example by changing people’s expectations, providing new options, or bestowing the blessing of the people’s representatives on particular schemes . . . [and, as a result,] the law is the moral impact of the relevant actions of legal institutions”). The claim I defend here is much narrower than these: it is simply that arguments about constitutional time (and it follows, at least some claims of fundamental law) are essentially moral arguments because they sound in a certain moral register: one that resonates with what I have called the constitutional bases of respect and which aims to constructively ground disagreements of political morality. There is similarly nothing in this claim that requires the legal positivist to hop off the train—positive law may certainly give rise to arguments that sound in a particular moral register.

III. FUNDAMENTAL LAW AND FUNDAMENTAL RIGHTS

In this section I develop the idea of fundamental law by sketching its history and characteristics. One idea that emerges from that survey—the notion of constitutional justice—then sets the stage for an important feature of aspect of fundamental rights claims: their recognitional stakes and concomitant effect on citizens’ constitutional bases of respect. Two important objections to the account then come into view.

A. Fundamental Law: History and Features

The founding generation’s notion of fundamental law traces to the seventeenth-century legal theory of the English Whigs.³⁷ Historian J.G.A. Pocock calls fundamental law “that most important and elusive of seventeenth-century concepts.”³⁸ Shannon Stimson observes that the concept bore substantial disagreement during its height, proving to be murky even then. Even though political players of all stripes regularly invoked the notion of fundamental law—from Lord Coke in his jurisdictional battles with James I to the radical Leveller critics of the common law— “there was never any single ‘idea’ of fundamental law, or even general agreement as to which laws or customs were the fundamental ones and which were not.”³⁹

But perhaps all that disagreement is precisely the point. Indeed, viewing fundamental law as an argumentative resource is vital to understanding it as a concept. Legal historian Larry Kramer helpfully describes this notion of fundamental law as a “*framework for argument*, in which historical accuracy was less important than analogical persuasiveness in maintaining over time an established balance between liberty and power despite new or changed circumstances.”⁴⁰ A wide range of deliberative resources informed these

37. See JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 76 (1995); see also JOHN PHILLIP REID, IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION 35 (1981); SHANNON STIMSON, THE AMERICAN REVOLUTION IN LAW (1991). For discussion of similar trends in constitutional development by the English Whigs, see J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW, 30-56 (1987) and JOHN W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY (1955).

38. POCOCK, *supra* note 37, at 48.

39. STIMSON, *supra* note 37, at 15. Both Lord Coke and the radical Leveller reformers subscribed to the view that fundamental law was “enshrined in the common law and in those common law institutions such as trial by jury that were believed to have roots in a remote Saxon and legally pure English past.” *Id.* Leveller critics of the contemporary common law subscribed to Coke’s characterization that fundamental law was “the absolute perfection of reason,” but, as Stimson observes, “[t]he question at issue was, whose reason? Leveller law reformers explicitly challenged Coke’s claim that only the professionally trained and artificial reason of judges could unlock the meaning of law.” *Id.* at 18 (discussing Leveller John Lilburne’s treason trial).

40. KRAMER, *supra* note 16, at 13 (emphasis added).

arguments, but the core of the “fundamental law” was a

constitution [that] consisted of English liberty . . . derived from “custom immemorial,” a bounded and very real canon whose roots were said to be lost in the distant Saxon past. Subsequent enactments, later developed practices, learned treatises, and arguments drawn from natural law were all useful in helping to illuminate, translate, and make sense of these ancient principles. Constitutional polemicists employed these diverse sources to articulate and apply the enduring precepts of fundamental law.⁴¹

Of course, such a “framework for argument” would generate considerable disagreement about what exactly the principles of fundamental law require. But Kramer is careful to caution that “there was consensus about a great deal of fundamental law,”⁴² stemming from the conflicts of the seventeenth century and their resolution.⁴³ “Constitutional disputes might arise respecting the precise meaning or application of these principles”—such as the trial by jury or the liberty of the press—“in particular contexts, but there was general agreement as to their existence and even as to their application in a fairly broad range of circumstances.”⁴⁴

Historian Suzanna Sherry thus describes the fundamental law of the ancient constitution as “*custom mediated by reason*.”⁴⁵ She cites Lord Bollingbroke’s memorable depiction of fundamental law as “that Assemblage of Laws, Institutions and Customs, derived from certain fix’d Principles of Reason, directed to certain fix’d Objects of publick Good, that compose the general System, according to which the Community hath agreed to be govern’d.”⁴⁶ Sherry explains how the fundamental law of a constitution interacts with (and even can invalidate!) ordinary positive law—but is importantly distinct from it:

Like natural law and laws or traditions that had existed since time immemorial, [the constitution] could be used to invalidate positive law, but again like natural law and those long-established laws and traditions, a constitution was not itself seen as positive, enacted law but rather as a declaration of first principles.⁴⁷

Fundamental law, in other words, interacts with ordinary law—but it is importantly distinct from it, a set of basic principles that underlie (and can

41. *Id.*

42. *Id.* at 14.

43. These include the English Civil War, the Stuart restoration, the Glorious Revolution, and so on.

44. KRAMER, *supra* note 16, at 14.

45. Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1130 (1987) (emphasis added).

46. *Id.*

47. *Id.* at 1146.

invalidate) those laws. Notice the basic and systematic character of Bollingbroke's definition. What matters is that a complex pattern of law and custom spins out, over time, guided by "principles of reason"—and it is to this emergent weave that the political community consent, in a limited sense,⁴⁸ to be governed. On this analogy, the fundamental law of the Constitution is the pattern itself, not the individual threads of laws and customs that compose it. The constitution may invalidate a law, but it is not the result of some positive enactment. Rather (as with plucking an errant thread that departs from a pattern) it is the emergent system that does the work.⁴⁹

The innovation of the American Constitution was, of course, to inscribe and *enact* fundamental law. As Sylvia Snowiss argues, written enactment underscores the democratic values of fundamental law, rendering the Citizens' Constitution even more accessible—not just to common law judges, but to anyone who can

48. In his law lectures, founding figure James Wilson provides a way for understanding how this figurative conception of consent operates, with how discussion of the evolution of common law principles. "This law is founded on long and general custom," which "necessarily carries with it intrinsic evidence of consent." This body of principles, Wilson says, "acquires strength in its progress," and notably, it does so on the basis of *argument*:

A customary law, with a modesty appropriate to conscious merit, asks for admittance only upon trial, and claims not to be considered as a part of the political family, till she can establish a character, founded on long and intimate acquaintance. The same means, by which the character of one law is known and approved, are employed to try and discriminate the character of every other. In favor of every one that is recommended, it can be said, not only, that it has lived unexceptionably by itself, but also that it has lived in peace and harmony with all the others. In this manner, a system of approved and concurring laws is gradually, though slowly, collected and formed.

To the citizen, these enduring legal principles entreat as follows: "I never intruded upon you: I was invited upon trial: this trial has been had: you have long known me: you have long approved me: shall I now obtain an establishment in your family?" See 1 THE COLLECTED WORKS OF JAMES WILSON 567-69 (Kermit Hall & Mark Hall eds., 2007). This is, of course, nothing like the sort of consent we would expect of an actual agreement between persons—but that fact alone does not negate its normative value. We can see a similar notion at play in the modern inheritors of the social contract tradition in which fundamental law thinking was steeped. See JOHN RAWLS, POLITICAL LIBERALISM 222 (1993).

49. And indeed, fundamental law is what *constitutes* that system of institutions. Gough quotes a memorable passage from an anonymous Leveller pamphleteer in 1643: "Fundamental Laws . . . are not (or at least need not be) any written agreement like meare-stones [boundary markers] between King and people, the King himself being a part (not party) in those laws, and the Commonwealth not being like a corporation created by charter, but creating itself." As a matter of first principles, fundamental laws cannot be "things of capitulation between king and people as if they were foreigners and strangers one to another" but rather "*things of constitution*, creating such a relation, and giving such an existence and being . . . to king and subject, as head and members." As a result, the fundamental law that gives rise to a constitutional system "is a law held forth with more evidence and written in the very heart of the Republic, far firmler than can be by pen and paper." GOUGH, *supra* note 37, at 100-02.

read the text and reason about its principles together.⁵⁰ But if unwritten principles of fundamental law *preceded* the ratification of a positive Constitution, then the question is this: did these principles of fundamental law survive ratification, or were they displaced by it? Sherry ultimately concludes that a substantial body of fundamental law persisted after the founding, that the textual enactments “coexist with and complement other sources of fundamental law.”⁵¹ For example, during the convention debates, James Wilson argued against Article I, Section 9’s prohibition against *ex post facto* laws, because such retroactive lawmaking violates the first principles of legislation.⁵² One way to think about this claim is that it attaches to Article I’s vesting of “legislative power,” properly understood. But a parallel and complementary understanding is that principles of fundamental law—such as “*ex post facto* laws are no law at all”—predated and would survive written constitutional enactment.

Principles of fundamental law do not come from without; despite the importance of reason in their discernment and elaboration, they are not simply emanations of natural law. Instead, any claim of fundamental law must take root in positive sources of some kind or other—what we might think of as the set of constitutional materials, broadly understood. These include, as we have already observed, certain abstract and evocative provisions of the constitutional text, such as “cruel and unusual” or “due process.” They also include claims about “ancient” customs from “time immemorial”—once again, pitched at a high level of abstraction, so that their application can endure. A prohibition against *ex post facto* legislation can trace its roots to both sources. But, crucially, the *force* of principles of fundamental law is not strictly reducible to these positive authorities. Such force is not authoritative, but rather *deliberative*, mediated by the ongoing reasoned application of these principles—the ideal that Habermas would later call “the unforced force of the better argument.”⁵³ The point cuts deeper, in somewhat surprising ways. Because it is this deliberative application of principles of fundamental law—their ability to justify our constitutional order and its exercise as fair and reasonable—that generate their “oomph,” we can observe some odd causal directionalities. For principles of fundamental law that trace a line to ancient custom, it is the *rightness* of a principle or practice, its eminent reasonableness, that renders it timeless; not the other way around.⁵⁴ What makes

50. SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 26 (1990). See also Gordon Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999).

51. Sherry, *supra* note 45, at 1160. See generally *id.* at 1156-70.

52. WILSON, *supra* note 48, at 153-54. At the Pennsylvania ratification convention, Wilson was also among the first of the Federalists to take this same line of argument against a Bill of Rights: not only was the enumeration of such rights unnecessary, but it was also pernicious, in that it might undermine other implicit principles in the text.

53. JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 305-06 (Thomas McCarty ed., Rehg trans., 1996).

54. Cf. Thomas Grey, *Origins of Unwritten Law*, 30 STAN. L. REV. 843, 852-53: (“The

certain abstract textual provisions vital principles of fundamental law is that they evoke the sort of moral concepts that should inform our deliberations and channel our disagreements. This is what I mean when I say that principles of fundamental law appeal to citizens' common reason.

The most obvious and basic contrast is between fundamental law and its categorical opposite and complement, ordinary law. Fundamental law is, in a sense, both *deeper than* and *prior to* ordinary law, which seeks to provide action-guidance for the parties it binds. Ordinary law does so through specific and predictable settlement by authoritative institutions such as courts. By contrast, the domain of fundamental law contains far more controversy—a function of citizens' capacity to apprehend (and disagree about) its meaning.

In 1675, Quaker leader William Penn described the “fundamental laws”—in addition to and distinct from the natural laws of universal reason—as:

those rights and privileges which I call English, and which are the proper birthright of Englishmen, and may be reduced to these three:

First. An ownership, and undisturbed possession: that what they have is rightly theirs, and nobody else's.

2ndly. A voting of every law that is made, whereby that ownership or propriety may be maintained.

3rdly. An influence upon, and a real share in, that judicatory power that must apply every such law; which is the ancient, necessary, and laudable use of juries.⁵⁵

These laws are “either fundamental and so immutable,” or are instead “mere superficial and temporary, and consequently alterable . . . as are suited to present occurrences and emergencies of states.” As examples of such ordinary laws, Penn offers “those statutes that relate to victuals, clothes, times and places of trade, etc.”⁵⁶ Distinguishing such “mere” ordinary laws is not to denigrate or trivialize them. (The times and places of trade are quite important!) In the debate over constitutional ratification and the need for a Bill of Rights, Antifederalist author Federal Farmer draws a similar tripartite distinction. First are natural rights, “which even the people cannot deprive individuals.”⁵⁷ Then there are ordinary laws, which can be issued and altered by the legislature. By contrast:

Constitutional or fundamental [rights] . . . cannot be altered or abolished by the ordinary laws; but the people, by express acts, may alter or abolish them—These, such as the trial by jury, the benefits of the writ of habeas

authority of the fundamental laws rested partly on this imagined immemorial antiquity, but also partly on their asserted reasonableness. As had their medieval predecessors, 17th-century lawyers blended custom and reason into a single system of fundamental law. The two sources were not seen as in conflict—the old was the reasonable and the reasonable was the old.”)

55. GOUGH, *supra* note 37, at 154.

56. *Id.* at 153.

57. *Letter from Federal Farmer No. 6* (Dec. 25, 1787), in HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 261 (1981).

corpus, &c. individuals claim under the solemn compacts of the people, as constitutions, or at least under laws so strengthened by long usage as not to be repealable by the ordinary legislature.⁵⁸

Importantly, what renders these principles and provisions of fundamental law *unalterable* is not that they are encased behind unbreakable glass, briefly to be squinted at by citizens shuffling through a line under the superintending gaze of their curators, judges in black robes. Instead, principles of fundamental law are unalterable because of their ready accessibility and justificatory appeal to citizens' common reason. It is their "long usage," rather than their disuse, that makes these principles endure—and what determines that length is not mere historical fact, but (as we will see) moral arguments of a kind.

This deliberative conception of unalterability in principles of fundamental law suggests that they are unalterable in virtue of their commonality, accessibility, and justifiability—all of which are properties that are dynamic rather than static. We can distill this deliberative and dynamic conception into three features that may serve as a complete statement of my account of fundamental law and its distinctiveness.

Feature (F1): Principles of fundamental law operate *as law* despite persistent disagreement over application and a lack of settlement. They aim at objective coherence through ongoing interpretive argument.

This feature is perhaps the most salient distinction between fundamental law and ordinary law. Fundamental law is law in the sense that its principles continue to operate *as law* in spite of disagreement over their particular application. We cannot say the same for rules of ordinary law.

Consider the difference between the Fourth Amendment's general guarantee against "unreasonable . . . seizures" and a binding judgment from a court that a police officer is liable for using excessive force against a suspect. The latter is an instance of ordinary law, a determination that gives rise to a stable array of rights and remedies—but only if the relevant officials and parties agree on its application (that the court has proper jurisdiction, etc.). By contrast, we can imagine robust disagreement over whether the particular use of force was "unreasonable," both within the jury's deliberations and in response to the verdict. There is no question, however, that the general principle of "reasonableness" continues to apply and operate even then, *as law*, constraining and guiding those deliberations. The persisting disagreement is about the best interpretation and proper application of that principle, which is shared at a high level of abstraction.⁵⁹

58. *Id.*

59. Compare with Dworkin's discussion of the concept/conception distinction in, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977).

While ordinary law consists in binding directives and a settled scheme of rights and duties, the currency of fundamental law is nothing more than interpretive argumentation. In their operation, principles of fundamental law reduce to the reasoned arguments that interpretive participants bring to bear on the case at hand. Their force depends entirely on who has the better of the argument—and, more importantly, *why*. Individual citizens, situated within the context of a particular role, are responsible for making this determination and justifying with interpretive arguments that their fellow interpreters can accept. Fundamental law holds out the promise that these conversations could (and do!) continue indefinitely in principle, even as we resolve cases and controversies at hand. It is through the ongoing dialogue that fundamental law promotes the values of constitutional democracy—grounding our disagreements, illuminating responsibility for constitutional injustices, securing the constitutional bases of respect.

Interpretive arguments that deploy principles of fundamental law aim at coherence in the following way: they aim to offer the best and most thoroughgoing account of common constitutional materials—textual commitments, their interlocking structures, their animating history, as well as landmark enactments and decisions. I say that this aspirational coherence is *objective* in three respects. First, the common constitutional materials that operate as grist for the interpretive mill—text, structure, history, landmarks—are all shared. Their existence is an inter-subjective phenomenon, a matter of social fact. Of course, whichever is the best and most coherent interpretation of these materials remains controversial—but the materials themselves are not.

The manner in which this disagreement proceeds points us to the second respect in which principles of fundamental law aim at objective coherence. Where these disagreements persist, they engage with controversial questions of political morality. This includes the moral and interpretive judgments that undergird clashing claims that previous decisions were *mistaken*—that coherence would be better served by plucking them from the weave altogether. The key point is that these disagreements proceed *as though* there is a right answer to the question at hand: whatever emerges from interpretive deliberation supported by the best set of interpretive arguments.⁶⁰

60. This need not rest on any mysterious philosophical notion, be it metaphysical or metaethical. See DWORKIN, *JUSTICE IN ROBES*, *supra* note 11, at 260 (“Whether a proposition claims objective truth depends on its content. It claims objective truth if it claims that its truth is independent of anyone’s belief or preference: that manufacturers would be liable, on the present state of the law, even if lawyers didn’t think so. That is all the claim of objectivity means. Whether that claim is successful depends on the legal arguments we can offer for it, that is, on our reasons for thinking that manufacturers would still be liable even if lawyers didn’t think so. If we think that our reasons for thinking that are good reasons, then we must also think that the proposition that the manufacturers are liable is objectively true.”). See also Dworkin, *Objectivity and Truth*, *supra* note 35, (suggesting that we understand metaethical arguments as themselves a kind of substantive moral claim, and that this is how people use them in everyday life). I have discussed the democratic character of this approach to interpretive objectivity in David McNamee & Stephen Macedo, *A Democratic*

These disagreements are driven by individual and independent judgments. But this does not mean that individual interpreters are at liberty to decide these questions any way they like. And here we see the third respect in which these disagreements aim at something objective. Participants who take up the enterprise of interpreting fundamental law encounter genuine interpretive responsibilities, ones that emerge from the practice they share with their fellow participants.

To see how, recall the interpretive question of whether a particular arrest used excessive force—whether it was an “unreasonable . . . seizure.” An interpreter who takes up this question (whether it is a judge, juror, or whomever) cannot decide the question in *any* manner she chooses—not, at any rate, if she is genuinely engaged in interpreting and applying fundamental law. The reason is that, *as a claim of fundamental law*, an interpretive proposition will prevail only to the extent that the interpreter engages with the applicable standard (and, in the final analysis, applies it rightly). Here, the operative question is both eminently clear and undoubtedly moral: what use of force would have been reasonable under the circumstances? And any conclusion on this score must be borne out by interpretive arguments, directed at others, grounded in shared values and common materials. Of course, there will be disagreement about which interpretive arguments (if any) best succeed at generating a coherent account of those values and materials. But that unsurprising fact of disagreement supplies no reason to doubt the important presupposition that there is *some* such answer to interpretive questions.⁶¹ As we saw before, these disagreements are predicated on a shared assumption that *there is some* right answer to this question, and this democratic premise—that we should continue to argue over this lodestar’s location and how to orient our politics towards it—underwrites important constitutional values.

Claims of fundamental law and the principles that mediate them subsist on competing interpretive arguments and the common reason that negotiate those disagreements. Indeed, the force of fundamental law (outside the verdicts, judgments, and other binding dispositions that claims of fundamental law may give rise to), as a set of basic principles, exists exclusively in the reasoned interpretive arguments applying those principles. Responsible participants must be prepared to offer those reasons to one another. But ultimately, from the standpoint of individual interpretive responsibility, the content of fundamental law *just is* the precipitate of that set of reasons, which must tip the balance of the argument one way or another.

Each interpretive argument that deploys a principle of fundamental law “alters” it in a sense—in applying that principle to novel circumstances, we excavate and repurpose its legal and moral substance. But this same interpretive

Interpretation of the Right-Answer Thesis, PHIL. & L. (Am. Phil. Ass’n), Fall 2015, at 11.

61. Indeed, following Dworkin’s case for moral realism, we can say that such skepticism cannot stand if it is “external”—resting on some Archimedean point *outside* our constitutional practices. It must instead operate internally to these practices, and global internal skepticism about the *mere possibility* of right answers to *any* interpretive questions does not seem plausible. *See* discussion and sources cited, *supra* note 35.

exercise also underscores the principle's *unalterability* in another and more enduring sense. Interpretive deliberation generates connectivity and continuity among these principles over time. The principles remain vital through interpretive argumentation and application to the circumstances—even as those circumstances change, the principles remain all the same.

Feature (F2): Principles of fundamental law are accessible to citizens' common reason, in light of particular circumstances.

Perhaps the most vital feature of principles of fundamental law is this one—their accessibility to citizens' common reason is what makes them *fundamental* to a system of self-government. In his law lectures, founding figure James Wilson insisted that “the great principles of society and government should not only be known and recognized, but also that they should . . . make a practical impression, deep and habitual, upon the publick [sic] mind.”⁶² One way to understand this feature is that the importance of the principles *explains* their accessibility. In other words, abiding by certain basic principles is necessary to justify our political institutions—and, *as a result*, these basic principles should be accessible to citizens' common reason, if only at a high level of abstraction.

But it is also significant that Wilson stresses the “practical impression” of these principles on the public mind—it is because citizens *take part* in that “great public character” when they occupy certain roles. This is especially true for jurors applying the principles of fundamental law to particular cases. In so doing, citizen-jurors supply the *content* of those abstract principles in concrete circumstances. And as a result, principles of fundamental law must be accessible to citizens' common reason—because their application is the product of citizens' reasoning together. It is in this sense that, as Wilson notes, for the sovereign citizen, constitutional meaning is “clay in the hands of the potter.”⁶³ Even the old idea of fundamental law as “custom” is not merely some antiquarian notion. Rather, it is custom as *common reason*—a deliberative framework for interpretive argument, one that develops over time through the process of citizens reasoning together.

A key example of this feature of principles of fundamental law is the way in which the law of negligence folds the normative question of “reasonableness” into the legal duties we owe one another—and the way in which the jury, as a paradigmatic instance of citizens reasoning together about the law and its application, determines whether a defendant has breached such a duty and caused damage to a plaintiff. In a series of lectures given at several American law schools in 1903, the English jurist Sir Frederick Pollock writes that “the test of what a reasonable man's conduct would be in the circumstances governs our modern law of negligence,” and this standard of reasonableness “enables the law to keep in close touch with the moral and practical sense of mankind in the affairs

62. WILSON, *supra* note 48, at 713-14.

63. *Id.* at 712.

of life.”⁶⁴ Importantly, this standard evolves over the centuries, because the law’s “conclusions in detail were not dogmas, but flexible applications of living and still expanding principles: The knowledge and resources of a reasonable man are far greater in the twentieth than in the sixteenth or the eighteenth century, and accordingly so much the more is required of him.” And, as a result:

A defendant must clear himself by showing, not that he acted to the best of his own judgment, or with a degree of prudence that would have been sufficient in the Middle Ages, but that his action was such as is to be expected here and now from a man competent so far as any special competence was required in the business he was about, and otherwise not below the general standard of a capable citizen's information, intelligence, and caution.⁶⁵

Negligence, at its core, is a paradigmatic instance of this second feature of fundamental law in action. Its governing standard of reasonableness is accessible to citizens’ common reason, and the particularized content of that standard emerges from a holistic judgment, distilled through the reasoned arguments citizen-jurors offer one another in their deliberations. And though negligence is noteworthy in this regard, it is hardly unique—we can imagine a number of scenarios where a conscientious citizen engaging in interpretive deliberation involving questions of fundamental law, as a voter, juror, or otherwise.

Feature (F3): Principles of fundamental law are justifiable to citizens’ common reason, in that they track constitutional justice over constitutional time.

This brings us to another important delineation: how to distinguish the normative force of fundamental law from other moral sources—especially, for citizens as actors operating within institutions, what justice requires of them.

Begin with a brief note on actors’ all-things-considered moral obligations. One consensus view among philosophers of political obligation is that a claim to legal authority will give rise to a *pro tanto*, defeasible obligation⁶⁶ that can be overridden by, for example, considerations of justice. Put more simply: legal authority creates reasons for *action*. The account of fundamental law that I advance here generates a different sort of duty: a *deliberative* responsibility, the

64. FREDERICK POLLOCK, *EXPANSION OF THE COMMON LAW* 108 (1904). Cf. DWORKIN, *LAW’S EMPIRE*, *supra* note 11, at 413.

65. POLLOCK, *supra* note 64, at 124.

66. See, e.g., Stephen Perry, *Political Authority and Political Obligation*, in 2 *OXFORD STUDIES IN PHILOSOPHY OF LAW* (Leslie Green & Brian Leiter eds., 2013), at 22 (“If the state’s legitimate power to issue obligation imposing directives has in all cases been exercised correctly, then every directive it has issued not only purports to impose an obligation but does in fact impose an obligation, from which it follows that we have, at the very least, a *pro tanto* obligation to obey each and every such directive; in that sense, we have a general obligation to obey the law”).

obligation to engage in interpretive argument. This duty is also defeasible and can similarly be overridden by justice. Other moral considerations might matter as well; for example, it is not obvious how valuable it would be for a theocrat or a Marxist to engage in sustained interpretive argument about how to understand the fundamental law of the American Constitution in its best light. Still, I would think that some principles of fundamental law, such as the idea that no one should be the judge in her own case, would nonetheless appeal even to these sorts of illiberal perspectives. The presence of such a *pro tanto* obligation to engage in interpretive argument is a significant contribution to citizens' moral calculus.

The content of principles of fundamental law will predictably depart from what justice requires (although, of course, there will be considerable disagreement about how extensive that departure is) in three respects. First, as we have seen, fundamental law must be rooted in the constitutional materials, broadly understood. To the extent that those materials depart from what principles of justice require of background institutions,⁶⁷ there will be some daylight between those principles of justice and principles of fundamental law, applied to American constitutionalism.

Second, however, fundamental law is orientational—in that its principles aim to orient these materials towards *constitutional justice*. This is a more particularized conception of justice than abstract justice, full stop—in that it grips the set of particular constitutional materials and propels them towards a more perfect realization of justice. Constitutional justice requires more than the mere *accessibility* of principles of fundamental law, in terms of citizens' common reason. These claims must also be *justifiable* to citizens, in a certain way. To aim at constitutional justice is to engage with extant and colorable claims of fundamental law (like “Black Lives Matter”)⁶⁸ so that they justify the constitutional order, across constitutional time, in ways that promote citizens' constitutional bases of respect. These include the core civic interests that all citizens will share in virtue of that common status—in particular, the institutional foundations of individual citizens' self-worth, as well as their deliberative interests in participating in an enduring project.⁶⁹

Third, and relatedly, fundamental law—as oriented towards constitutional justice—can ply this gap between the possibility of justice and the existence of unjust background institutions because constitutional justice and its focus on institutional meaning (and not just institutional forms) is *temporal*, in a way that we will explore more fully in the next Part.

B. Fundamental Rights: Respect, Recognition, and Animating Abstraction

This Article is, in part, a precis for a larger theory of fundamental law that vests in citizens the principal responsibility for interpreting their Constitution.

67. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

68. See McNamee, *supra* note 33.

69. See *id.* at 47. I discuss these ideas further in the next section on the recognitional interests underlying fundamental rights claims.

The previous section laid the historical basis for the idea of fundamental law, analyzed the concept, and motivated its normative appeal. I have also suggested that this claim about responsibility complements another theoretical move addressing the question of constitutional fidelity in a fresh and novel way: as keeping faith with fellow citizen interpreters, across pitched disagreements in the present and across constitutional time. But before we get to that idea, I want to take up a different concept—the idea of fundamental rights. Once we have in place the notion of the Citizens’ Constitution as fundamental law, fundamental rights take on a different cast: not the objects of beneficent protection by the courts, but a set of urgent claims that pierce through politics as a matter of constitutional justice.

In that light, I want to confront another emergent trend in liberal constitutional theory: what I will call fundamental rights skepticism. This is not skepticism about the content or soundness of any particular right claim,⁷⁰ which is part and parcel of ongoing interpretive argument.⁷¹ Instead it presents a more general and far-reaching skepticism about *any* set of fundamental rights that demarcate a certain set of claims as especially pressing, which require resolution outside of and even protection from the realm of ordinary politics. The classic menu of liberal theories we scanned in the introduction, for example, all have their own formulations for which rights are fundamental—for Dworkin, they are the rights that best fit and justify our constitutional materials as a matter of political morality; for Ackerman, they emerge from the proper interpretive synthesis of the Founding, Reconstruction, and the New Deal; for Ely, they are the rights that best protect the political process—but each view (along with many more) endorses a category of rights that warrant special protection by the courts. But a recent turn in the literature has suggested a different course: “Rejecting Rights,” as political theorist Sonu Bedi aptly titles his monograph. On Bedi’s account, a “court ought only to look at the legislative purpose behind a particular law rather than the alleged right it violates,” and when “we turn our normative attention to reasons, realizing that the polity has no good reason to regulate activity this way [criminalizing sodomy], rights turn out to be unnecessary.”⁷² Libertarians such as Randy Barnett have made similar arguments in favor of a

70. See Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953 (2018); Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223 (2020); see also J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L. J. 375, 379-82 (1990) (analyzing and comparing left critiques of the First Amendment to legal realist critique of formal freedom of contract based on inequalities of bargaining power and the porousness of the distinction between public and private domains).

71. See Dworkin, *Objectivity and Truth*, *supra* note 35, at 129-38 (arguing that “internal skepticism” of various kinds ultimately rests on some kind of substantive interpretive argument); see also DWORKIN, *LAW’S EMPIRE*, *supra* note 11, at 78-84; DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 35.

72. SONU BEDI, *REJECTING RIGHTS* 5-6 (2009).

“presumption of liberty,” in lieu of a special judicially-maintained set of enumerated and unenumerated rights.⁷³

In particular, I will engage with a recent argument from Jamal Greene.⁷⁴ Greene’s core contention is that any theory—and more importantly, any practice—of fundamental rights protection proves to be unworkable and inimical to deliberation about important questions of political morality. Fundamental rights are unworkable because they invariably lead to an explosion of claims elbowing for protective status within the special category whose analytical boundaries will not hold.⁷⁵ And even for the important claims, the judicialized strictures of text and doctrine bleed fundamental rights dry of their moral energy, distorting the claims themselves and the deliberation they might otherwise drive. Greene writes that the inevitable need for judicially-imposed limits will “track a judge’s capacity to isolate and discipline a right rather than tracking the reasonableness of the state’s actual behavior. This is how we get rock-ribbed rights to guns and data scraping and corporate election spending, but no rights to food and shelter and education.”⁷⁶ Atop this enervation is yet another heavy deliberative cost: rights talk fuels extreme rhetoric, transforming the courtroom from a forum of principle into “a legal *Guernica* cluttered with slippery slopes, law school hypotheticals, and assorted horrors on parade,”⁷⁷ precluding pragmatic compromise that might balance the interests at stake. This “frame requires us to formulate constitutional politics as a battle between those who are of constitutional concern and those who are not. It coarsens us, and by leaving us farther apart at the end of a dispute than we were at the beginning, it diminishes us.”⁷⁸

Giving up on fundamental rights opens up a different approach consonant with Bedi’s and Barnett’s proposals: focusing judicial review on the reasons for government action, rather than artificial categorization and the pathologies that fundamental rights talk brings with it. There is much to commend Greene’s account—to at least some extent, by dialing down the absolute character of rights claims, he attempts to divert the Court from deciding the major political questions of the day in favor of a broader political conversation among the citizenry. And he admirably seeks to bridge deep disagreements about basic constitutional principles, echoing Jeremy Waldron’s doubts that the institution of judicial

73. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2005).

74. JAMAL GREENE, *HOW RIGHTS WENT WRONG: HOW OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021). *See also* Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018).

75. GREENE, *supra* note 74, at 249 (“Absolute rights cannot be, as rights are, ubiquitous, so courts artificially limit what counts”).

76. *Id.*

77. *Id.* at 31.

78. *Id.* at 34; *see* MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991).

review promotes that discussion.⁷⁹

Ultimately Greene's view fails, however, because of its deflationary approach to rights. Because he believes that rights-talk as practiced simply heightens conflict and raises the stakes in controversies, his goal is to boil grand questions about abstract rights down to particularized, fact-bound disputes—the sort of contextualized and circumstantial resolutions that minimalist judges are well-suited to provide.⁸⁰ This logic is clearest when Greene insists that there are rights on all sides in most disputes. For liberals, this insight is welcome when a more blinkered approach obscures meritorious rights claims, and the appropriate course of action is instead a more expansive conversation about the contours of socio-economic rights or the pervasiveness of racial discrimination in our institutions.⁸¹ But I fear that, more often, Greene's chosen approach is to shrink down rights talk to fit the interests against which they are to be properly balanced—as in the case of the West German woman's asserted right to feed the pigeons in the public square.

The answer to [whether such a right is fundamental] is clearly yes If pigeon feeding was an important part of what made this woman's life meaningful, then she had a right to feed the pigeons. That's what a right is.

But just because the woman had a right to feed pigeons didn't mean she should win her case. In this rights dispute, as in any other, the judges had to ask whether the government had good reasons for acting as it did.⁸²

With countervailing reasons (ranging from public health to transportation to preventing property damage) washing over the right in question—even though being “an important part of what makes” a person's “life meaningful” is just “what a right is”—the content of what makes a right fundamental and the import of that claim become remarkably thin. Implicit in this discussion may be a key question that Greene more or less spells out: what is lost, really, if we alter our relationship rights so that individual kooks and bird ladies no longer have veto

79. See Waldron, *The Core of the Case Against Judicial Review*, *supra* note 15; JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

80. Cf. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (arguing for a minimalist approach to judicial decision making to promote democratic deliberation).

81. GREENE, *supra* note 74, at 94-99 (criticizing the Court's decision in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), to reject a fundamental right to education); GREENE, *supra* note 74, at 106-07 (criticizing *McCleskey v. Kemp*, 481 U.S. 279 (1987), for its refusal to acknowledge a disparate impact theory under the Equal Protection Clause in a challenge to the constitutionality death penalty because, as Justice Brennan memorably wrote in dissent, it would invite “too much justice” (quoting *id.* at 339 (Brennan, J., dissenting))).

82. GREENE, *supra* note 74, at 92.

power over our broader politics? That was the problem in *Lochner v. New York*⁸³—the rush to theory and fundamental rights talk settled the question, closing down the conversation when instead it should have served as an opening deliberative bid. Deflating our conception of rights, on this account, can only be healthy.

This view is mistaken. The answer instead must be that, at a concrete level of particularity, there is no *fundamental* right to feed the pigeons, and that at a higher level of abstraction, such a law does not burden her basic liberty to determine important questions about her life and what makes it valuable.⁸⁴ But there are other rights that *are* fundamental—where such an infringement violates basic interests that we share in common as citizens, as members of a free community of equals—in light of our custom and our law, mediated by our common reason. The problem with Greene’s (and Bedi’s, and Barnett’s) account of rights is that they lose sight of what is most important about fundamental right claims—what separates those kinds of arguments from other considerations in politics. What makes rights fundamental are the stakes of collective recognition and individual self-respect. Greene misunderstands why fundamental rights are important, and for the remainder of this Section I will attempt to explain those recognitional stakes and illustrate them as a vital part of our constitutional tradition.

But first I want to note an important corollary: not only does Greene misunderstand why fundamental rights matter, but he also misdiagnoses what might be wrong with them in the current state of American constitutional law. The problem is not so much with rights in and of themselves. Instead, the problem is with judicial supremacy—with courts getting the rights wrong and protecting the wrong rights. But, to state the obvious, the answer here is not to abandon fundamental rights altogether, or to deflate the content of fundamental rights so much as to render them indistinguishable from other considerations in ordinary politics. Instead, the answer is to get fundamental rights *right*, including through mechanisms of constitutional politics outside of courts. Indeed, the entire paradigm of an unworkable rights explosion presupposes that courts must perform the fussy doctrinal work of sorting and categorizing rights properly. But the Citizens’ Constitution as fundamental law offers an entirely different paradigm. With citizens as the prime movers in constitutional interpretation, fundamental rights need not be so pathological. Outside the context of litigation, fundamental rights need not be so divisive.⁸⁵ And their articulation is no longer the technical craft of judicial opinions written by and for legal elites, but rather a matter of broad public debate, driven by social movements and the politics of persuasion.

Greene wants to push the domain of constitutional justice away from

83. 198 U.S. 45 (1905). Greene discusses *Lochner* and its dominant influence over theoretical debates for the past hundred years in GREENE, *supra* note 74, at 40-86.

84. This discussion prefigures the problem of levels of abstraction, which I address later in this Section. See text accompanying *infra* notes 128-40.

85. See *infra* discussion accompanying notes 104-40, 197-205.

interpretation, which inherently engenders disagreement, into the realm of the “empirical,” towards fact-bound particularizations of the sort that is familiar to judicial inquiry:

Justice means that we must confront the government’s actual behavior, the legislature or executive’s actual motives, the actual evidence available, and the degree to which individuals are actually burdened by the government practices that restrict our liberty or favor one person’s rights over another’s. These questions are empirical, not interpretive, because justice isn’t abstract or literary or historical, but rather depends on the facts in the here and now. . . . Unsurprisingly, the rights judges declare us to have end up aligning with their own subjective sense of what is needed for a well-lived life. Rights stop being about justice and start being about the justices. We forget ourselves along the way.⁸⁶

This is a fair criticism of the familiar model where judges are the principal players responsible for interpreting the Constitution. But the Citizens’ Constitution as Fundamental Law answers this responsibility question differently, giving citizens pride of place. And its answer to the question of fidelity does not depend on some undertheorized notion of what is “empirical” as opposed to “interpretive.” Instead, it insists that we, the citizens, keep faith with one another as fellow participants in the project of constitutional interpretation. This endeavor is, contrary to Greene, unabashedly interpretive, scaling different heights of abstraction, drawing on history and even controversial judgments of political morality. It is difficult to see how an undertaking about constitutional justice could be otherwise. Greene cannot avoid the problem of disagreement by hiding behind question-begging characterizations about “actual” phenomena as opposed to “subjective” judgments, nor by emphasizing the kind of fact-intensive proportionality approach he wishes that American judges would adopt. Constitutional justice is not a matter of judicial fact-finding that settles disagreements about rights once and for all—judges can at most do that work once case (and one set of parties) at a time.⁸⁷ And why shouldn’t it be the jury’s role to decide these factual questions?⁸⁸ Instead constitutional justice is a matter for citizens to continue to argue about—how our fundamental law serves as an enduring social contract that rightfully claims our ongoing allegiance. This brings us to the feature that distinguishes certain rights as fundamental: their

86. GREENE, *supra* note 74, at 93-94. In the earlier article, Greene writes that “[w]ithin a mature rights culture, the typical cases that reach deep into the appellate courts and up to the Supreme Court do not arise from the wholesale denials of citizenship that preoccupied Dworkin but rather from workaday acts of governance from which individuals seek retail exemption.” *Id.* at 32. One of my fears is that this assessment may hold less true and that the judiciary is a large part of the problem.

87. See SUNSTEIN, *supra* note 80; see generally William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008).

88. Cf. GREENE, *supra* note 74, at 12-16, 24-29 (noting the prominence of the jury in interpreting and applying the Bill of Rights).

recognitional stakes.

For the remainder of the Section, I want to develop this important implication of my account of fundamental law—how it emphasizes the recognitional stakes of fundamental right claims and the way they promote citizens’ constitutional bases of respect. Elsewhere I have suggested that there are two components of citizens’ constitutional bases of respect.⁸⁹ First is the mutual recognition of fellow citizens’ equal status that occurs through their joint participation in a common enterprise: the deliberative process of ongoing interpretive argument about basic principles of fundamental law. By engaging in constitutional interpretation and directing their arguments to one another, citizens perform and create a basic foundation of respect for one another. We can see that marker of citizens’ equal status on display in the historical materials and examples in the previous Section. The second component of the constitutional bases of respect is a more substantive one: that the particular content of the principles animating our basic institutions—in Rawls’s term, our “constitutional essentials”⁹⁰—promotes citizens’ self-respect, reinforcing their free and equal status. The constitution as a social contract must affirm and substantively promote citizens’ self-respect. It is by securing that freedom and equality that inheres in citizenship, by orienting our constitutional principles towards justice, that the constitution as a social contract earns our endorsement.

This relationship between justice and self-respect requires further exploration. In constructing his theory of distributive justice, Rawls develops the idea of interpersonal comparison by looking at the distribution of “primary goods.” These are, for the most part, income and wealth, resources, opportunities—the sort of all-purpose means that any person would want in order to live well and advance their conception of a good life, regardless of what the particular content of that conception might be.⁹¹ This idea is important for Rawls because, in his theory, principles of justice must be chosen in the Original Position behind a “veil of ignorance” by parties who do not know either their position within society or the particular content of their conception of the good.⁹² But Rawls is careful to note that “perhaps the main” or “most important” primary good to a theory of distributive justice is “the social bases” of “self-respect”—the sense, reflected on the face of shared institutions, of one’s own worth, that one’s projects and plans have purpose and meaning, that from a social point of view there is value in carrying them out.⁹³ “This democracy in judging each others’ aims is the foundation of self-respect” in a just society, where “in public life citizens respect one another’s ends and adjudicate their political claims in ways that also support their self-esteem. It is precisely this background condition that is maintained by the principles of justice.”⁹⁴

89. See McNamee, *supra* note 33, at 47.

90. RAWLS, *supra* note 48, at 227.

91. See RAWLS, *supra* note 67, at 79-80.

92. See *id.* at 118-19.

93. *Id.* at 155, 386, 477-78.

94. *Id.* at 388.

Philosopher Tommie Shelby has helpfully clarified the Rawlsian picture of self-respect in two further ways. First, he disentangles a conflation in Rawls's thinking between self-esteem—the idea that “we regard our fundamental ends as valuable and consider ourselves competent to secure those ends”—and self-respect: “a matter of recognizing oneself as a rational agent and a moral equal and valuing oneself accordingly . . . [as] embodied and expressed in the way one conducts oneself.”⁹⁵ Whereas the former idea is fundamentally an attitude about one's projects and plans, the latter is an attitude about one's worth and equal status—or lack thereof—as a member of the political community, and it is particularly vulnerable to forms of oppression. Second, Shelby highlights how this distinct concept of self-respect is useful in unjust circumstances, allowing individuals to resist injustice “as a matter of living with a sense of moral pride *despite* unjust conditions” and even as they insist on their own equal status within the political community, properly understood.⁹⁶

One clear assertion of self-respect that lays bare the psychic damage of unjust oppression is King's response in his Letter from Birmingham Jail to white moderates imploring civil rights activists to delay direct action and instead, wait:

[W]hen you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalize and even kill your black brothers and sisters with impunity; when you see the vast majority of your twenty million Negro brothers smothering in an air-tight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky . . . then you will understand why we find it difficult to wait.⁹⁷

King's powerful words illustrate how oppressive institutions insidiously work to undermine citizens' self-respect through the expressive power of their very

95. TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 97-98 (2016).

96. *Id.* at 99-100; *see also id.* at 105-08, 197-200 (criticizing the moral paternalism of respectability politics and the expressive harm of work requirements on the grounds that they undermine citizens' self-esteem and self-respect); *id.* at 276 (suggesting that “noncompliance with societal expectations—refusing to delay childbearing, to marry, to accept low-paying and demeaning jobs, to respect the law, and to submit to other ‘mainstream’ norms can be a healthy expression of self-respect and a morally rooted opposition to the status quo, not mere nihilism or despair . . . draw[ing] our attention to the failure of reciprocity embedded in the social institutions and informal practices that constitute the structure of our society”).

97. Martin Luther King, Jr., *Letter from Birmingham City Jail*, in *CIVIL DISOBEDIENCE IN FOCUS* 68, 72-73 (Hugo Adam Bedau ed., 1991).

structure—imposing the burden of articulation on King, who tries and fails to find the words to name his and his daughter’s inferior status. Public injustices convey this indignity, from formal prohibitions of the right to contract and property in the Black Codes, to informal barriers to vote, to refusing lunch counter service.⁹⁸

Charles Beitz discusses this same phenomenon in the different context of John Stewart Mill’s plural voting proposal, to essentially dilute the votes of uneducated members of the populace. A significant cost here is “the effect on self-esteem likely to be produced when political inequalities reflect other natural or social distinctions that are the objects of invidious discrimination or are occasions of disrespect in society at large.” The degradation of “visible dilution of influence will appear as an insult, conveying *public approval* of pre-existing, demeaning social practices.”⁹⁹ Beitz draws a connection to broad exclusion of Black citizens from the franchise, in such a way that “those excluded ‘are not publicly recognized as persons at all’ and might be described as ‘socially dead.’”¹⁰⁰ The same is true, at least as a matter of degree, with racial vote dilution: “[t]hose singled out as less worthy are demeaned and insulted; they are encouraged to feel that patterns of disrespect that exist in society at large *enjoy official sanction*. It would be reasonable for anyone to object to”—in other words, a social contract would properly reject—such “procedural arrangements that had this effect.”¹⁰¹ Moreover, this objection does not stem merely from the subjective toll taken on citizens demeaned by public practices, but rather from “a more objective foundation”:

98. These emanations of citizenship correspond in a way with the “badges and incidents of slavery” by which courts under the Thirteenth Amendment have evaluated the extent of abolition. The reach of the Thirteenth Amendment’s prohibition must extend beyond the mere practice of chattelization and reach into Reconstructing the social institutions that constituted Slave Power in the antebellum era. See James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 436-42 (2018); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 362-63 (Random House, 2005); see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968) (“Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”).

99. CHARLES R. BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* 37 (1989) (emphasis added). For a social contract conception of political equality that rejects Mill’s aggregative consequentialism in favor of justifications that must appeal to those disadvantaged by a policy, see *id.* at 100-17.

100. *Id.* at 109 (first quoting John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 243 (1985); and then citing ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* (1982)).

101. *Id.* at 110. I leave to the side the technical philosophical specifications of Beitz’s contractualist account, under which fair terms of social cooperation are established according to principles that no participant motivated to reach agreement would reasonably reject. See *id.* at 100-17; cf. T.M. SCANLON, *WHAT WE OWE TO EACH ANOTHER* (rev. ed. 2000); RAWLS, *supra* note 67.

because it is a fixed point in a democratic culture that public institutions should not establish or reinforce the perception that some people's interests deserve less respect or concern than those of others simply in virtue of their membership in one rather than another social or ascriptive group. The political roles defined by democratic institutions should convey a communal acknowledgment of equal individual worth.¹⁰²

From these examples of constitutional injustice, we can also project the opposite effect of fundamental rights that would promote citizens' constitutional bases of respect. This is what Rawls and Shelby mean when they talk of a democratic basis for citizens judging one another's aims and worth, as written on the face of their institutions. And this discussion of recognition and respect points to a different way of thinking about rights, anchored in the inviolable nature of a certain equal status, which all rights-bearers share.¹⁰³

Following John Hart Ely's lead, Greene takes a walking tour through the Bill of Rights to illustrate his central thesis. For Ely, the core point is to illustrate the procedural nature of the lion's share of constitutional protections.¹⁰⁴ For Greene, the purpose is to show that these rights are not so similar to "'rights' as we understand them today—protective of politically powerless dissenters, enforced by courts against majorities, and presumptively absolute."¹⁰⁵ This is largely true as a historical matter. But if we survey not just the founding conception of those

102. BEITZ, *supra* note 99; *cf.* discussion accompanying *supra* notes 60-61 (related but different notion of objectivity).

103. Other authors have, of course, noted the connection between respect, recognition, and rights that threads throughout the Kantian tradition. See Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83, 85-89 (1995); see also DWORKIN, *supra* note 59, at 278 (explaining the core idea of equal concern and respect for persons); DWORKIN, *supra* note 2, at 22-26 (developing the related idea of moral membership within a political community); Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. L. STUD. 301 (2000) (unpacking Dworkin's metaphor of rights as trumps as consonant with these related ideas); HABERMAS, *supra* note 53, at 122-31, 251 (describing citizens as both authors and addressees of law whose mutual recognition leads to the co-originality of public and private autonomy, which in turn generates substantive protections for citizens' freedom and equality); COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT* (2007) (discussing fundamental democratic rights of democratic citizenship, protecting citizens' free and equal status); Corey Brettschneider & David McNamee, *Sovereign and State: A Democratic Theory of Sovereign Immunity*, 93 TEX. L. REV. 1229, 1235-39 (same); Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L. J. 1600 (2020) (explaining the centrality of recognition and respect for personhood in antidiscrimination law). My account is distinctive, first, in its emphasis on citizens' role in *interpreting* as well as bearing rights; and second, in the way it treats the history, custom, and tradition that inform fundamental rights claims as objects of interpretation.

104. See ELY, *supra* note 9, at 95-100; *cf.* AMAR, *supra* note 98 (adopting this general approach as the organizational structure of the entire book).

105. GREENE, *supra* note 74, at 13.

fundamental rights, but also the modern discourse that drives ongoing interpretive contestation about what they mean and what they require of us, then the recognitional stakes of fundamental rights remain central.

Just look to the First and Second Amendments. The initial guarantee in the Bill of Rights is against a law respecting the establishment of religion. As Justice O'Connor has famously articulated, the Establishment Clause protects citizens' interest in equal recognition:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . [G]overnment endorsement or disapproval of religion . . . sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.¹⁰⁶

This fundamental interest in equal recognition is not implicated, according to Justice O'Connor, by prominent invocations of "God" on our currency and in our courts. These instances of ceremonial deism, "because of their history and ubiquity . . . are not understood as conveying government approval of particular religious beliefs."¹⁰⁷ At the core of this right, then, is the right-holder's self-respect—as mediated by various institutional forms that may promote that self-respect on an equal basis or, alternatively, undermine it through disapproval. And, perhaps surprisingly, this core concept is shared even by more stringent approaches to the Establishment Clause. In his dissent in *Lee v. Weisman*, Justice Scalia admits that "our constitutional tradition . . . has . . . ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and . . . where the endorsement is sectarian."¹⁰⁸ And even Justice Scalia's stricter standard prohibiting "coercion of religious orthodoxy and of financial support by force of law and threat of penalty" continues to track the core interest of the right-holder's self-respect—the harm of such coercion is the violence by public institutions inflicted on the nonbelieving citizen's innermost convictions.¹⁰⁹ This is a narrower interpretation of the same shared concept, which illustrates the constitutional bases of respect.

We can conduct a similar analysis of the Free Exercise Clause. As Justice Kennedy wrote in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*:

106. *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring). Note, in ways similar to what Beitz, *supra* note 99 emphasizes, that this is an inquiry into both the "subjective and the objective components" of the intended meaning. *Lynch*, 465 U.S. at 690.

107. *Id.* at 693; *cf. id.* at 716 (Brennan, J., dissenting) (suggesting that such forms of "ceremonial deism" survive "Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content").

108. *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

109. *Id.* at 640 (emphasis removed); *see also* *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2264 (2020) (Thomas, J., concurring) (quoting *Weisman*, 505 U.S. at 640).

the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion.¹¹⁰

Again, at the heart of this right is a protection against official animosity and hostility visited upon a citizen's religious beliefs and practices. Such motivations cannot serve as legitimate governing purposes because they fatally compromise the equal respect and recognition that every citizen is owed from the institutions that govern in our name. The Court's continuing concern for "status-based discrimination" under the Free Exercise Clause only confirms this connection to the constitutional bases of respect.¹¹¹

The same overtones of recognition and respect resonate in the First Amendment's protection of the freedom of speech. Echoing the same core logic of the religion clauses, Justice Jackson sonorously wrote that the First Amendment forbids compelled speech because, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."¹¹² The prohibition against content-based restrictions publicly promotes citizens' self-respect because it places the ultimate responsibility for discerning the truth about these matters of fundamental importance in citizens themselves— through our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open."¹¹³ This concern for nondiscrimination and equal recognition of citizens is pronounced even in the minutiae of public forum doctrine:

There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.¹¹⁴

Ultimately, however, the most telling evidence for the recognitional stakes for the

110. 138 S. Ct. 1719, 1731 (2018) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)).

111. *Espinoza*, 140 S. Ct. at 2257.

112. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

113. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

114. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)).

freedom of speech and its connection to the constitutional bases of respect is not to be found in the pages of the U.S. Reports. Instead, as Stephen Shiffrin writes, it is the role that this liberty plays in how citizens understand themselves as both free and equal as individuals and part of a democratic polity:

American citizens not only feel a deep emotional attachment to the country, but also that an important source of that attachment is a sense of pride about the first amendment. . . . It plays an important role in the construction of an appealing story, a story about a nation that promotes an independent people, a nation that affords a place of refuge for peoples all over the globe, a nation that welcomes the iconoclast, a nation that respects, tolerates, and even sponsors dissent. So understood, it is a nation whose citizens can come to regard themselves as a part of something larger than themselves without losing a sense of freedom. . . . It encourages us to picture Walt Whitman's citizenry—vibrant, diverse, vital, stubborn, and independent. It encourages us to believe with Emerson that “America is the idea of emancipation.”¹¹⁵

In this way, the First Amendment integrates how we see ourselves as both free and equal individuals and as fellow participants in the joint project of democratic self-government. It thus anchors our mutual recognition for one another and partially grounds the institutional basis for our self-respect.

Perhaps surprisingly, we can also find recognition- and respect-based conceptual moorings for the Second Amendment's right to keep and bear arms. David Kopel observes the same conceptual interplay between individual liberty, responsible citizenship, and democratic self-government, drawing an express parallel between the animating logic of both Amendments:

The First Amendment is not only a means for self-government; it is the method by which mature self-governance is supposed to be learned. The Second Amendment is exactly the same. The affirmation of the importance of the militia puts national and community self-defense directly in the hands of the responsible citizenry. The Second Amendment citizen is courageous and vigilant in safeguarding God-given rights against infringement. The Second Amendment citizen is skilled and practiced in the use of arms to defend those rights when necessary. Rather than being submissively dependent solely on the government for personal and community security, the Second Amendment citizen takes responsibility for protecting herself and her community.¹¹⁶

The virtuous and simultaneous exercise of an individual's basic rights and the promotion of the common good through democratic citizenship locates the right

115. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 159 (1990) (quoting RALPH WALDO EMERSON, *EMERSON IN HIS JOURNALS* 428 (Joel Porte ed., 1984)).

116. David Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 457 (2014).

as an essential basis of our self-respect. Tanya K. Metaksa deepens this claim by expanding on the connection between the Second Amendment, the fundamental right to self-defense, and even more abstract rights such as safety.¹¹⁷

The Second Amendment simultaneously promotes individual liberty and responsibility, constituting the boundary between a space where each citizen can contribute to responsible and collective self-government and, on the other side of the fence, a private domain of safety that legitimate government can never undermine, but which we are responsible for defending ourselves.

These conceptual linkages are clear in Charlton Heston's moralized rhetoric about the Second Amendment. He begins with an express invocation of the culture wars—exhorting the reader to do what is right and take up the “purpose,” “power,” and “pride” that accompany the exercise of the right to keep and bear arms:

There is only one way to win a cultural war. Do the right thing. . . . I promised to try to reconnect you with that sense of purpose, that compass for what's right, that already lives in you. To unleash its power, you need only unbridle your pride and re-arm yourself with the raw courage of your convictions. . . . [I]f you want to touch the proud pulse of liberty that beat in our founding fathers in its purest form, you can do so through the majesty of the Second Amendment right to keep and bear arms.¹¹⁸

Framed as such, the right promises to be a source of dignity and self-respect, the “pur[e]” and “proud pulse of liberty” inherited from the founding generation.¹¹⁹ More than that, Heston deploys metonymy so that *the weapon itself* stands in for “the raw courage of [our] convictions,” with which we are to “re-arm” ourselves, releasing our pride from bridled restraint and regulation.¹²⁰ On this logic, the right and the object it protects become central to the citizens' core commitments and even how we conceive of ourselves as persons. Heston continues:

Because there, in that wooden stock and blued steel, is what gives the most common of common men the most uncommon of freedoms. When ordinary hands are free to own this extraordinary, symbolic tool standing for the full measure of human dignity and liberty, that's as good as it gets. It doesn't matter whether its purpose is to defend our shores or your front door; whether the gun is a rite of passage for a young man or a tool

117. Tanya K. Metaksa, *Self Defense: A Primary Civil Right*, in GUNS IN AMERICA: A READER (Jan E. Dizard et al. eds., 1999) at 194, 195.

118. Charlton Heston, *The Second Amendment, America's First Freedom*, in GUNS IN AMERICA: A READER (Jan E. Dizard et al. eds., 1999) at 199, 203; see also DAVID WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT* 188-89 (2003) (noting the slippage between figurative rhetoric of war and the very real exhortation to maintain a very real arsenal of firearms in anticipation of a conflict that, in the minds of his audience, could turn out to be very real as well).

119. Heston, *supra* note 118, at 203-204.

120. *Id.*

of survival for a young woman; whether it brings meat for the table or trophies for the shelf; without respect to age, or gender, or race, or class, the Second Amendment right to keep and bear arms connects us all—with all that is right—with that sacred document: the Bill of Rights.¹²¹

Here we see the egalitarian (and, perhaps, populist) logic of the recognitional stakes of fundamental rights, which appeal to all citizens in virtue of their shared status as democratic equals. And thus even the “common” and “ordinary” citizen becomes elevated in that status, in virtue of possessing the precious right (and gun) in question. The logic of equality presses even further¹²²—embracing the protected categories of the antidiscrimination regime and empowering women against sexual domination, juxtaposed against the patriarchal passage of a rifle from father to son. But what makes the right truly fundamental, promoting our mutual recognition and our self-respect, is its grounding in the Constitution.

One noteworthy feature of the three examples I have just provided is that they are not passages from *District of Columbia v. Heller* or *McDonald v. City of Chicago*,¹²³ the gun rights movement’s triumphant successes in driving constitutional recognition of a fundamental and individual Second Amendment right. Instead, they are statements of principle from activists, scholars, and lawyers at the forefront of that struggle. David Cole masterfully analogizes the gun rights’ movement’s success to the campaign for marriage equality, and he carefully documents how the NRA has successfully endeavored “to build a sense of community and identity among its members and supporters.”¹²⁴ Ultimately, as Cole observes, “the vitality of a constitutional right turns in significant part on the extent to which the people, or at least a significant portion of the people, view the right as fundamental and as warranting their attention, support, and political action.”¹²⁵ These social movements stand in conversation with the courts; they are

121. *Id.*

122. See also Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass’n v. Corlet, No. 20-843 (U.S. July 23, 2021), https://www.supremecourt.gov/DocketPDF/20/20-843/184718/20210723101034102_20-843%20Amici%20Brief%20revised%20cover.pdf [<https://perma.cc/DH5P-VKA9>] (arguing that New York’s restrictive gun laws disproportionately burden indigent defendants and people of color, that its gun licensing regime is discriminatory, and that this set of policies violates the Second Amendment); GREENE, *supra* note 74 at 20-21 (Greene makes the noteworthy observation of the history of racial injustice and discrimination against free Black citizens’ ability to keep and bear arms and argues that on the other side of the ledger in this debate is “a right—to be substantially free of private violence”).

123. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (recognizing an individual right of self-defense); *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (incorporating that right into the Due Process Clause as “fundamental”).

124. DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 145 (2016).

125. *Id.* at 147-48.

neither fully upstream nor downstream of judicial decisions. But it is clear that, in large part, the recognitional stakes of a right—its impact on citizens' self-understanding and self-respect—determine its status as fundamental by motivating citizens to engage in constitutional politics and constitutional interpretation.

I doubt at this point that any reader would fully sign on to the substantive claims of all (perhaps any?) of the examples I have provided regarding the recognitional stakes of First and Second Amendment Rights. But that is not their purpose, and the fact of disagreement about rights cuts more in favor of a conception of fundamental rights based in recognition and respect than it serves to undermine it. The fact that interpreters of varying ideological commitments (so long as they are within the liberal tradition, broadly construed)¹²⁶ can vest some individualized conception of the institutional bases of their respect within at least some elements of a scheme of fundamental rights is significant. Even more significant is that disagreement about the content of these different rights as sources of respect shares several common premises—such as the appeal to individual persons as free moral agents and to their status as democratic equals. Where these arguments differ, they are arguing about different interpretive conceptions of the same thing: the proper understanding of what we have called the constitutional bases of respect—what fundamental rights promote.

The same reasoning applies to the other fundamental rights protected by the Constitution—including unenumerated rights that find shelter in the Ninth Amendment's declaration that such rights should not be "disparaged" and are "retained by the people."¹²⁷ One wrinkle, however, is that with these rights there is a significant dispute about the proper level of abstraction to apply to a particular tradition. And this dispute is pivotal. Heather Gerken observes that "the level of generality at which the Court speaks will usually determine who wins."¹²⁸ The difficulty is in negotiating these different levels of abstraction and particularity without inducing vertigo. As Gerken notes:

Anyone who has thought about the problem of statutory construction or constitutional interpretation knows how difficult it is to move from broad, abstract principles to a decision in a specific case. That is why I am always a bit flummoxed when I read, say, Ronald Dworkin on campaign finance. At one moment he is writing under the grand heading 'What is Democracy?' A few pages later, he is speaking authoritatively on the constitutionality of contribution limits, the fairness doctrine, and

126. See, e.g., Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 147, 149 (1987) ("Liberals demand that the social order should in principle be capable of explaining itself at the tribunal of each person's understanding.").

127. U.S. CONST. amend. IX.

128. Heather Gerken, *Larry and Lawrence*, 42 TULSA L. REV. 843, 845 (2007); see also *id.* at 848 ("If the right is the right to sodomize, Lawrence will lose. If the right is the right to form a 'personal bond,' Lawrence will win.") (discussing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

must-carry rules. In reading through such transitions, I get the same queasy feeling that I experience when a plane drops altitude too quickly.¹²⁹

But we can imagine—and I want to defend a theory of—a middle path between the abstract philosophy and rigid specificity, carved by citizens interpreting their fundamental law, filling in the contours of their fundamental rights as interpreted and applied with an eye to their recognitional stakes. This is neither the hard-bound traditionalism of *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (“We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”), nor the freewheeling philosophical approach of Ronald Dworkin and James Fleming, who tend to treat history and tradition as mere tie-breakers or preliminaries before getting to the more important (*i.e.*, normative) questions in play.¹³⁰

Instead, the idea—following the antecedent of fundamental law belonging to the citizens it governs—is to treat custom, tradition, and even history itself as objects of critical examination and constructive interpretation.¹³¹ Under this theoretical frame, the interpreter has better reasons to deploy higher levels of abstraction in constitutional interpretation—because it would promote the constitutional bases of respect and the recognitional stakes of fundamental rights. But, unlike the pure philosophical approach, this moral inquiry remains grounded in the shared constitutional materials of custom, tradition, and history. By treating these materials as objects of constructive interpretation,¹³² my approach to

129. *Id.* at 845.

130. See James Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1350 (1997) (“History is, can only be, and should only be a starting point in constitutional interpretation. It has a threshold role, which is often not dispositive History usually provides a foothold for competing interpretations or competing theories. It alone cannot resolve the clash among [them] [Instead] we must move beyond the threshold dimension of fit to the dimension of justification. History rarely has anything useful, much less dispositive, to say at that point. In deciding which interpretation among competing acceptably fitting interpretations is most faithful to the Constitution, we must ask further questions: Which interpretation provides the best justification, which makes our constitutional scheme the best it can be, which does it more credit, or which answers better to our aspirations as a people?”) (footnotes omitted).

131. *Cf. supra* text accompanying note 45 (discussing fundamental law as custom mediated by reason) and note 59 (considering Wilson’s account of common law principles).

132. To constructively interpret an object—whether a precedent, practice, or institution—is to canvass its features, its characteristics, and the practices that constitute it, identifying the principles that weave these materials into a coherent whole. This coherent set of principles will also supply a normative justification for the object as well, one that resonates with its central purposes and animating values. For a full account of this methodology, see DWORKIN, *LAW’S EMPIRE*, *supra* note 11. For a similar illustration, see AARON JAMES, *FAIRNESS IN PRACTICE: A SOCIAL CONTRACT FOR A GLOBAL ECONOMY* (2012). As an exercise in pursuing normatively justified coherence, the method recognizes the possibility of mistakes or deviations from an institution’s core purposes, although identifying these errors comes at the expense of the institution’s integrity.

fundamental rights calls on interpretive participants—lawyers, judges, and most importantly, citizens—to imbue these shared materials with their conceptions of constitutional justice. In other words, the moral impulse towards recognition and respect that underlies fundamental rights animates the materials—hence, “animating abstraction.”¹³³

The best way to understand the idea is through examples and we have already noted two. First is understanding the individual rights reading of the Second Amendment as the product of a social movement;¹³⁴ The other, by comparison, is the parallel push for marriage equality—evoking Justice Scalia’s question that helped motivate the relationship between fundamental rights, constitutional time, and citizen interpretation. We will return to that case after developing the idea of constitutional time further, at which point the load-bearing concepts to support the idea of animated abstraction will be in place. For now, I will sketch three arguments in favor of this approach, to serve as a kind of scaffolding.

First, the idea of animating abstraction harnesses the creative churn of broad-scale deliberation, breathing new life into old rights that have atrophied. Gun rights advocates can propel that right from obscurity to the center of our nation’s constitutional conversation. Defenders of abortion need not hitch themselves to the language in *Roe v. Wade* that reads more like it is protecting the rights of the doctors providing abortions than it is protecting the rights of the citizens seeking them.¹³⁵ They can embrace Justice Ginsburg’s vision of a right that does “not seek

133. Other scholars have, of course, observed the problem of how to properly characterize the level of generality and abstraction of a right. See, e.g., Gerken, *supra* note 128, at 845. Others have raised theoretical defenses of heightened abstraction. Lawrence Tribe and Michael Dorf argue that automatically defaulting to the alternative of hardboiled traditional specificity is “equally conclusory,” and, in any case, the inquiry must be a “value-laden approach,” consistent with the Ninth Amendment. See ON READING THE CONSTITUTION 75, 98, 110-11 (1991). Dworkin and Jack Balkin argue that the Constitution itself selects a high level of abstraction for open-texture clauses. See Ronald Dworkin, *Comment*, in SCALIA, *supra* note 23; BALKIN, *supra* note 8. But see Keith Whittington, *Dworkin’s ‘Originalism’: The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197 (2000) (contending that that the operative question of abstraction is itself a historical one and answering it in good faith requires delving into the history, rather than rushing full-on into moral and philosophical argumentation).

134. See COLE, *supra* note 124.

135. See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“[F]or the period of pregnancy prior to this ‘compelling’ point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”). As this Article went to press, the Supreme Court had not yet issued an opinion in *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. argued Dec. 1, 2021). Politico published a leaked draft of a possible majority opinion by Justice Alito. See Josh Gerstein & Alexander Ward *Supreme Court Has Voted To Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>. The draft opinion overturns *Roe* and *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), in their protection of a fundamental right to abortion, concluding that such a right

to vindicate some generalized notion of privacy” but “rather . . . center[s] on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature,” consonant with the moral drive behind the social movement for gender equality.¹³⁶ The same goes for those who embrace the Black Lives Matter movement and believe that remedying past racial injustice can serve as a compelling state interest for government action,¹³⁷ rather than shoe-horning the egalitarian case for racial justice into a diversity interest that will benefit white people.¹³⁸ Fundamental rights protection can also extend outside the judicial domain and into the legislative¹³⁹—we should understand the popular refrain, “Health care is a right!” to mean precisely that.

Second, animating abstraction for fundamental rights is democratic in character because it is channeled through fundamental law. This approach to thinking about fundamental rights invites and responds to broad citizen

is not grounded in American constitutional history and tradition.

136. *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J. dissenting). There are many problems with the opinion in *Dobbs*, too many to go into here. But perhaps the most striking feature of the draft opinion is its cursory discussion of the equality argument for a fundamental right to reproductive autonomy, briefly applying a cramped analysis of outdated equal protection precedents. *See op.* at 10 (arguing that “regulation of a medical procedure that only one sex can undergo does not trigger heightened scrutiny unless the regulation is a ‘mere pretext[t] designed to effect invidious discrimination’”—which “the ‘goal of preventing abortion’” is not (first quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974); and then quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 274 (1993))). An amicus brief submitted by constitutional scholars persuasively argues that *Geduldig* is no longer good law in light of *United States v. Virginia*, 518 U.S. 515 (1996), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 781 (2003). *See* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri et al. as Amici Curiae in Support of Respondents, *Dobbs* (No. 19-1392). The draft opinion also fails to contemplate how equality and liberty arguments reinforce one another. Furthermore, the draft opinion’s highly particularized understanding of history and tradition finds its roots in an era in which women lacked full and equal citizenship. This Section provides a general normative and interpretive argument in favor of a broader, more inclusive, and more abstract understanding of history and tradition. If the Court does overturn *Roe* and *Casey*, citizens can and should lay the groundwork for a more robust and egalitarian foundation for the fundamental right, through activism, dialogue, and contestation.

137. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (“While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.”).

138. *See Grutter v. Bollinger*, 539 U.S. 306 (2003). The more promising interest to cite that benefits all of us is the interest of citizens in living in a just society.

139. *See* CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 115-19, 153-56, 165-71 (2004) (discussing New Deal legislation as “constitutive commitments” carrying constitutional status); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008) (suggesting that positive rights such as a right to health care is best vindicated through legislation).

interpretation, as members of social movements and also through individual roles. Tradition, custom, and history are not just objects for judges and experts to pontificate on; they are also fit objects for citizens at large to interpret and apply—as we will see in the disagreement over *Obergefell v. Hodges*.¹⁴⁰

Finally, there is a distinctive moral value in citizens' undertaking constructive interpretation of these underlying materials—even if they do turn out to reveal substantial historical injustice—because there is only one direction to take: bending the arc of the moral universe towards constitutional justice. To fully understand this notion, we need to develop an account of constitutional time, in Part III.

C. Two Objections and a Way Forward

But first I should acknowledge two objections that have been ominously forming like storm clouds in the distance. First is a problem with understanding fundamental law (and thus fundamental rights, on the account I have put forward) as “citizens’ common reason.” This idea, even if it is well-grounded in constitutional history, remains somewhat gauzy. And it encounters a dilemma: does this idea depend on an empirical assessment of the actual set of values held by citizens at a given moment of time? How much agreement does this “commonality” require, and for how long a time? If the demand is for sustained consensus at a concrete level of particularity, then it is worrisome in light of pitched, reasonable disagreement about all the rights we just considered, just as token examples. But if instead we suppose that this commonality obtains only at a high level of abstraction, can we really say that principles of fundamental law as citizens’ common reason possesses any meaningful normative bite?

A second problem is a worry about recognition and the constitutional bases of respect. Even if individualized citizen interpretation might promote the constitutional bases of respect in a set of *nearly* just institutions (as with Rawls’s discussion of civil disobedience as part of non-ideal theory),¹⁴¹ isn’t that a far cry from our own society, with its more severe departures from what justice requires? After all, didn’t most of the examples illustrating the constitutional bases of respect derives from examples of injustice and its effects? In particular, if we acknowledge a legacy of discrimination against subordinated groups, how can we then expect those citizens to reconcile their self-respect with our constitutional essentials?¹⁴²

My strategy is to confront these two theoretical puzzles in a way that might at first seem counter-intuitive. First, I will construct two parallel and corresponding puzzles that come into view when we observe the connection

140. See discussion *infra* Section IV.C.

141. See RAWLS, *supra* note 67, at 335–43.

142. I partly addressed this sort of concern with my discussion of “emancipatory protestantism” in citizens’ constitutional interpretation, with Frederick Douglass and Judge Bruce Wright as examples in McNamee, *supra* note 33, at 35–58. But I take a different approach here.

between fundamental law and constitutional time. One puzzle deals with the constitutional past (and, not coincidentally, it emerges from the historical traditions of fundamental law). It is essentially a paradox of unalterability: how can the fundamental law, reaching back to time immemorial, remain unchanged even as it continues to evolve through application across the years? The contradiction seems transparent and unshakeable. Another puzzle pertains to the constitutional future: the Panglossian belief that the arc of the moral universe bends towards justice. Why should we think that this is so—and even if it happened to be the case, what could possibly be the cause? It is not easy to explain how moral facts could serve as an independent cause of some other non-moral fact. And even if we can answer that question, an even more puzzling problem emerges when we consider the claim that the arc of the *Constitution*, within the moral universe, would bend towards justice.

Next, I will attempt to provide a plausible resolution to each of these four puzzles by developing a relational conception of constitutional time. I will advance this conception, once again, by defending the following two interwoven propositions: first, that claims of fundamental law can be understood as arguments about constitutional time; and second, that arguments about constitutional time are essentially moral claims that relate the constitutional present to its past and future, as an enduring project that can be justified to those who take part in it. My strategy is to suggest that although each puzzle is vulnerable to skepticism when taken in isolation, the significant normative costs of that skepticism become apparent when we take them all together. The idea of citizens' common reason leaves open the possibility of grounded and constructive disagreements about political morality. The otherwise puzzling notion of "unalterable" and "immemorial" fundamental law becomes clear when we understand claims invoking it as dynamic, presentist, and normative arguments—laying those moral stakes bare. The hope that the constitutional bases of respect might be secured even against the background of a persistent legacy of injustice means that the victims of that injustice need not resign themselves to perpetual alienation and despair. And if the arc of the moral universe does bend towards justice, then we can take seriously that legacy of past injustice even as we look towards the possibility of a redemptive future. If I can show that a relational conception of constitutional time plausibly addresses these puzzles, then we need not abandon these normatively valuable commitments for a constitutional democracy.

IV. FUNDAMENTAL LAW AND CONSTITUTIONAL TIME

We now turn to a proper account of constitutional time and how it related to these ideas of fundamental law and fundamental rights.

A. Unpacking the Puzzles and Going All-In

From this distillation of fundamental law's essentially deliberative character and the recognitional stakes of constitutional citizenship animating fundamental rights through abstraction, we can make two further observations. First, it appears that the theory increasingly depends on a notion of constitutional time, which I

have only developed schematically thus far.

Second, while we have made some progress in delineating fundamental law from other closely-related normative sources (such as the constitutional text, long-standing custom, and the requirements of justice), significant conceptual puzzles linger. This is especially true for the content of “citizens’ common reason” and the dismal prospects for “constitutional bases of respect” in the face of severe injustice. Let’s lay those two puzzles out more thoroughly:

P1: The “Common Reason” Dilemma. We have gained some traction by spelling out the idea of fundamental law as principles that are accessible to citizens’ common reason. But what does it mean, exactly, for an interpretive argument to offer justification according to this distinctive normative source? Is “citizens’ common reason” discernable as an empirical matter, an accretion of the particular beliefs held by (some critical threshold of?) actual citizens? For how long a period of time? On the one hand, it is difficult to imagine empirically-discernable agreement on the sorts of questions of political morality that pervade our constitutional politics. But if instead we opt for the other horn of the dilemma and prescind from the set of concrete shared beliefs that voters hold at any particular point in time, then the only sort of agreement that might constitute “citizens’ common reason” would have to occur at a very high level of abstraction. And it is far from clear whether principles of fundamental law would, in that case, make any moral difference.

Additionally, recall:

P2: Severe Injustice and Constitutional Disrespect. We also still lack a completely satisfactory explanation for how severe injustices, such as our history of structural racism, are still compatible with the constitutional bases of respect. By channeling protest against injustice into a constitutional register, this may even risk entrenching the constitutional bases of *disrespect*, further undermining the equal citizenship of members of structurally disadvantaged groups.

The conjoined ideas of constitutional justice and constitutional time will prove fruitful in addressing these objections. In this Part, I aim to further develop these ideas by advancing a distinctive conception of constitutional time. On this conception, constitutional time is not like the “block universe” of modern physics, the summation of individual time slices that capture each event in four-dimensional space-time. Instead, it is relational and presentist, in that arguments of constitutional time relate the constitutional present of a given moment to its past and future. This presentist relationship adopts a particular moral register—that of constitutional justice, reflecting citizens’ core interests in the constitutional bases of respect and their responsibility for participating in interpretive deliberation.

My approach here is to adopt a sort of “all-in” strategy. I aim to explain not only the above two puzzles about fundamental law, but also two other puzzles about the notion of constitutional time itself. Taken in isolation, each of these

puzzles raises serious problems—but by addressing them all together with the same revised conception of constitutional time, we can thereby rescue the normative values of a constitutional democracy that would otherwise fall prey to skepticism. We can now lay out these four puzzles, arrayed in the Table below:

Fundamental Law	P1: “Common Reason” Dilemma	P2: Severe Injustice and Constitutional Disrespect
Constitutional Time	P3: Pocock’s Paradox	P4: Constitutional Arc of the Moral Universe

Table 1: Parallel Puzzles for Fundamental Law and Constitutional Time (by Author).

Corresponding to the first puzzle, about the possibility and specification of citizens’ common reason, is a puzzle about constitutional time, looking from the present to the constitutional past:

P3: Pocock’s Paradox. Call this puzzle “Pocock’s Paradox,” after the historian who first observed its prevalence in Whiggish constitutional thought. The Paradox begins with the observation that “[i]f the idea that law is custom implies anything, it is that law is in constant change and adaptation, altered to meet each new experience in the life of the people.” But although this dynamic and evolutionary pattern for customary principles should be obvious, Pocock observes that, at any given point, the *actual argumentative practice* of customary law paints a far different picture, of the constitution as static and “immemorial”:

Yet the fact is that common lawyers, holding out that law is custom, came to believe that the common law, and with it the constitution, had always been exactly what they are now, that they were immemorial: not merely that they were very old, or that they were the work of some remote and mythical legislators, but that they were immemorial in the precise legal sense of dating from time beyond memory—beyond, in this case, the earliest historical record that could be found. This is the doctrine or myth of the ancient constitution.¹⁴³

What sense does this make? How can the constitution simultaneously be ever-changing but remain unalterably fixed in historical memory?

And yet! These claims of Whiggish history are replete throughout the legal discourse of the founding era, as we have seen—and they do not stop there. Are the proponents of these arguments so confused about how constitutional time operates?

Next, corresponding to the puzzle about severe historical injustice undermining the constitutional bases of respect, is another puzzle about constitutional time—in particular, about the constitutional future as it relates to

143. POCOCK, *supra* note 38, at 36-37.

the past. Joshua Cohen provides a limited defense of what he calls “ethical explanations”: claims like Dr. King’s famous aphorism that “the arc of the moral universe is long, but it bends towards justice.”¹⁴⁴ Against considerable skepticism—the worry that “[s]uch explanations seem both too relaxed about distinctions between fact and value and too Panglossian: Does right really make might?”—Cohen mounts an impressive and careful defense of one ethical explanation in particular. Namely, he defends the view that the wrongness of antebellum chattel slavery causally contributed to its ultimate demise.¹⁴⁵ The argument proceeds from the recognition that slaves possessed certain “legitimate interests,” in virtue of sharing the same “properties” as other persons (such as the capacity to deliberate about how their lives go well), which are substantially burdened by their enslavement; while the countervailing interest in owning slaves are, necessarily, not so similarly shared.¹⁴⁶ From these observations, Cohen accounts for this wrongness of slavery according to a social contract conception of justice that seeks fair terms of cooperation that can be justified in light of those shared fundamental interests—or, said differently, fair terms that no one possessing those fundamental interests would reasonably reject. On this picture, the justice (or injustice) of a social system causally contributes to its viability (or lack thereof). “What is at stake,” Cohen observes, “is not the appropriate moral attitude toward slavery or philosophical outlook on morality, but the appropriate attitude toward the social world. How accommodating is the social world to injustice? Is it reasonable, from a moral point of view, to hate the world?”¹⁴⁷ I am largely persuaded by Cohen’s cautious and limited defense—my interest is in probing a closely-related and (seemingly) much less plausible notion. And thus:

P4: The Constitutional Arc of the Moral Universe. This greater puzzle is the idea that *constitutional interpretation* bends towards justice across time in a similar way. Somehow, the injustice of an institutional practice contributes to an interpretive conclusion that the practice is *and has been* unconstitutional. This is not a break from the fundamental law of the past, which sustained the unjust practice in question; instead, it is a new understanding that such readings from the past are and have been mistaken. But if the constitutional arc of the moral universe bends towards justice—so that, as we continue outwards across constitutional time, we come to see that the unjust institution was never *really* constitutional—then has the constitutional arc really bent at all? Even if we can grasp (and sufficiently answer) that somewhat mind-numbing question, it is far from obvious what could have been the cause, or whether we can avail ourselves of the kind of ethical explanation that Cohen offers. After all, Cohen’s causal mechanism is that the forces of

144. See Joshua Cohen, *The Arc of the Moral Universe*, 28 PHIL. & PUB. AFF. 91, 93 (1997).

145. See generally *id.*

146. *Id.* at 92.

147. *Id.* at 96.

social power sustaining an unjust institution falter, or at least become weaker, because (at least in part) their very injustice undermines their viability. This story makes sense of constitutional *rupture*, rather than continuity and coherence, as moral progress. If a constitution at time A promotes (or at least countenances) a set of unjust institutions S, then it must be the case that the summation of all the various causal vectors in play at time A, taking into account all the relevant facts—including the *injustice of S*—is ultimately compatible with the existence and constitutionality of S. The fact of S speaks for itself. It follows that the mere fact of S's injustice *cannot by itself* explain why S is unconstitutional at some later time B. Again, the alternative explanation is not a story of constitutional renewal and continuity; in the moral universe, the arc of a constitution does not bend in response to injustice but breaks. Cohen is right, I believe, to suggest that it is unreasonable from a moral point of view to hate the world. But it is much easier to see why one might hate a constitution.

And yet! Resonant voices have appealed to our better angels and argued powerfully for a constitutional trajectory that does bend towards justice. These range from James Wilson and Abraham Lincoln's arguments about the ultimate demise of slavery,¹⁴⁸ to Frederick Douglass's striking insistence that the antebellum Constitution was an antislavery document despite the forces of white supremacy and Slave Power propping up the institution.¹⁴⁹ These arguments were vindicated—and other claims might also be. Perhaps the constitutional arc of the moral universe does bends towards justice and redemption.¹⁵⁰

There are elements of all four of these puzzles underlying Scalia's question to Olson: *when did marriage equality become constitutionally required?* We now turn to addressing these four puzzles—and, ultimately, Scalia's question—by developing a plausible account of constitutional time, whereby claims of fundamental law can be understood, in part, as arguments about constitutional time, as I describe it;¹⁵¹ and arguments about constitutional time are relational, presentist, and essentially moral arguments of a kind: they relate the constitutional present to moralized notions of the constitutional past and future, oriented at constitutional justice over time.

It might seem surprising to suggest that claims of fundamental law are all essentially temporal in this way. But consider the basic principle that “no one ought to be a judge in his own cause.” Lord Coke famously invoked this principle in *Dr. Bonham's Case*.¹⁵² A century and a half later in 1761, colonial lawyer James Otis cited Lord Coke's example for the proposition that “an Act of

148. 1 THE COLLECTED WORKS OF JAMES WILSON 209-10 (Kermit Hall & Mark Hall, eds. 2007); Abraham Lincoln, Speech in Springfield, Illinois (“House Divided Speech”) (June 16, 1858).

149. See McNamee, *supra* note 33, at 36-46, for a discussion of this last example and others.

150. See generally JACK BALKIN, CONSTITUTIONAL REDEMPTION (2010).

151. See *supra* discussion and sources accompanying note 20.

152. 77 Eng. Rep. 646 (C.P. 1610); see GOUGH, *supra* note 37.

Parliament against common justice or common right is void,” condemning the Writs of Assistance as “against the fundamental principles of law” ensuring that “a man who is quiet is as secure in his house as a prince in his castle.”¹⁵³ Even there, Lord Coke invokes the principle as ancient and timeless—in a framing that blends the normative and the historical, as according with “common right and reason.”¹⁵⁴ Otis’s arguments stretch in precisely the same way, as do those of others who would continue this chain of argument. Claims about “immemorial” constitutional principles are not ultimately arguments about historical fact. Instead, they represent a single thread in a more complex argumentative weave of legality and morality, custom and reason. As historian John Philip Reid writes,

It might be more descriptive, though not quite accurate, to say that we are dealing with a legal fiction. Rights were immemorial, those that exist today have existed from a time before there were kings to grant them, and the only evidence necessary to prove immemoriality was that they exist today. Yet immemoriality was not an insignificant allegation: it was the best, the strongest proof of constitutionality.¹⁵⁵

And, importantly, arguments of political morality offer evidence to vindicate both constitutionality and immemoriality. Reid offers an example from a publication by Robert Walpole: “Whatever are the Rights of Men *in this Age*,” the pamphleteer thundered, “were their rights in *every Age*; for, Rights are independent of Power.”¹⁵⁶ We see a similar fuzziness between custom and reason across constitutional time in Justice Harlan’s influential dissent in *Poe v. Ullman*, arguing for a fundamental right to marital contraception. Harlan tells us that the Fourteenth Amendment’s protection of certain unenumerated fundamental rights reflects a

balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a

153. GOUGH, *supra* note 37, at 192; *see also* KRAMER, *supra* note 16, at 21-23 (discussing John Adams’ contemporaneous notes of Otis’s argument and their application to revolutionary-era constitutional debate).

154. 77 Eng. Rep. 646, 652 (C.P. 1610).

155. JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 69 (1995).

156. *Id.*

substitute, in this area, for judgment and restraint.¹⁵⁷

Harlan concludes—troublingly, in my view—that

Adultery, homosexuality, and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which, always and in every age, it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.¹⁵⁸

In this argument, we can see the admixture of custom, tradition, and reason that should now be familiar from our discussion of fundamental law. We can also see the strands of a more expansive and liberal conception of fundamental rights—that “this tradition is a living thing,”¹⁵⁹ subject to “rational” reflection, leads directly to unmarried contraception,¹⁶⁰ abortion,¹⁶¹ and the unconstitutionality of sodomy laws¹⁶²—as well as more conservative conceptions of custom and tradition that define fundamental rights more concretely and narrowly.¹⁶³ My relational and moral conception of constitutional time sheds light on these interpretive disagreements—between competing normative claims of constitutional justice, about how we in the present should relate to our constitutional past and future.

It is worth hesitating for a moment on Reid’s suggestion that the immemoriality of fundamental law across constitutional time can be helpfully (if “not quite accurate[ly]”)¹⁶⁴ described as a legal fiction. On this picture, arguments about constitutional time are not merely reports of historical facts about the past (although they must, of course, take those facts into account) or predictions about the future. Instead, they are normative arguments that relate the constitutional past and future to moral considerations about the present. In common discourse, legal fictions have received somewhat of a bad rap as a kind of judicial

157. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). It is not trivial that Harlan and his fellow justices are grappling with the legacy of *Lochner v. New York*, 198 U.S. 45 (1905), and the role of fundamental rights in the New Deal settlement.

158. *Id.* at 553.

159. *Id.* at 542.

160. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972).

161. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *supra* notes 135-36.

162. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

163. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (finding no fundamental right to assisted suicide); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (discussing the importance of the level of abstraction in identifying the right).

164. REID, *supra* note 155, at 69.

chicanery¹⁶⁵—“there go those judges again, always just making things up”—but there is nothing inherently objectionable about legal fictions, and they may achieve an even greater sort of verisimilitude so long as two conditions hold. First, as Lon Fuller observed in his seminal discussion of the concept, legal fictions must be *transparent*—they can only be harmful to the extent that we come to believe them as true, and “it is precisely those false statements that are realized as being false that have utility.”¹⁶⁶ Second, and relatedly, legal fictions must serve the underlying legal values in question. The doctrine of attractive nuisance, for example, treats trespassing children as invited guests with respect to dangerous playground equipment or similar hazards.¹⁶⁷ We all know—judges, juries, landowners, probably even the children themselves—that they are not invitees. But the purposes of tort law are better served with the fiction than without it.

If we imagine claims of immemoriality as legal fictions, the central virtue of my account of fundamental law and constitutional time becomes clear: that it lays the fiction bare while articulating the value that it promotes. This is the distinctive value of constitutional justice. We have already observed that principles of fundamental law are orientational, in that they aim to orient the set of constitutional materials towards constitutional justice, and that this trajectory spans across constitutional time. The relational conception of constitutional time that I have put forward places this temporal aspect of constitutional justice front and center.

The heroes of this story are not idealized judges named for ancient demigods or legendary lawgivers of the sort that adorn the chamber of the House of Representatives.¹⁶⁸ We, the citizens of the democratic community, must fill that role. This is true for citizens who belong to groups who have suffered from those longstanding injustices. The work they do to forge that connection between the constitutional past and constitutional future, in part by making claims of justice in the present, charts a course between idle hope and quietist resignation. And crucially, it is also true for everyone else in the democratic community, we who share in those same interpretive endeavors and who bear responsibility for injustices committed in our name.¹⁶⁹ We, too, can interrogate the past unflinchingly without letting slip the constitutional bases of our own self-respect. There is no need to avert our gaze or avoid this confrontation, to bluster, or obfuscate, or ignore. And this is because we can *also* be responsible, *together*, for that hopeful possibility of constitutional justice and redemption—for the

165. Cf. Frederick Schauer, *Legal Fictions Revisited*, in LEGAL FICTIONS IN THEORY AND PRACTICE (William Twining & Maksymilian Del Mar eds., 2015).

166. LON L. FULLER, LEGAL FICTIONS 9 (1967).

167. See RESTATEMENT (SECOND) OF TORTS § 339 (AM. L. INST. 1965).

168. See ARCHITECT OF THE CAPITOL, ABOUT RELIEF PORTRAIT PLAQUES OF LAWGIVERS (Apr. 29, 2016), <https://www.aoc.gov/art/relief-portrait-plaques-lawgivers/about-relief-portrait-plaques-lawgivers> [<https://perma.cc/Y93M-5FPR>].

169. See ERIC BEERBOHM, IN OUR NAME: THE ETHICS OF DEMOCRACY (2012).

interpretive labor in integrating that vision of justice and for taking steps in the present along that trajectory. In so doing, we stand together in a relationship of full recognition and equal respect with our fellow citizens.

There are many stories we can—and do—tell about constitutional time. I have repeatedly evoked the theme of redemption. But originalist accounts of constitutional interpretation tend to tell stories of decline and renewal—a U-shaped arc from the past to the future. The normative valence can be conservative or libertarian criticism of the New Deal and Great Society,¹⁷⁰ or it can be liberal lamentation about our fall from the founding's republicanism and the modern descent into corruption.¹⁷¹ We may not always notice, but these sorts of claims are arguments about constitutional justice and constitutional time, and we would do well to lay their normative stakes bare.

In this way, the guiding aim of constitutional justice promotes the constitutional bases of respect—in that it secures *some* institutional foundation for individuals' self-worth across constitutional time, even in the face of extant injustice. It also promotes the value of citizens' deliberative participation in an enduring project of constitutional interpretation—in that this hope for constitutional redemption in the face of historical injustice supplies an answer for why citizens should continue to perform that work. The sentiment is perhaps best explained with a stanza from poet James Russell Lowell that, Cohen reports, Dr. King would often invoke alongside his aphorism about the arc of the moral universe:

Truth forever on the scaffold,
Wrong forever on the throne;
Yet that scaffold sways the future,
And behind the dim unknown
Standeth God within the shadow
Keeping watch above His own.¹⁷²

In our constitutional democracy, the force that stands behind the scaffold—the object of our constitutional faith—is not a benevolent and all-seeing deity. It is us. Our faith must lie in our own democratic community of citizens—in the aspiration that we will achieve constitutional justice over constitutional time, across the arc of the moral universe.

Having set out a plausible relational conception of constitutional time, we can now consider how it promises to resolve the puzzles we have considered—thus rescuing values of constitutional democracy from skepticism. The resolutions for P4 (The Constitutional Arc of the Moral Universe) and P3 (Pocock's Paradox) are fairly straightforward. The idea of constitutional time is a transparent fiction. Arguments about constitutional time are, at their core, not claims about prediction, causation, or historical fact—instead, we should understand them as

170. See, e.g., BARNETT, *supra* note 73; RICHARD EPSTEIN, *HOW THE PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

171. Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CALIF. L. REV. 1 (2014).

172. Cohen, *supra* note 144, at 133.

moral claims about constitutional justice, relating the present to moralized notions of the constitutional past and future.

This normative task (perhaps surprisingly) is the role of two forms of constitutional “history” that have long been disparaged. First is “law office history,”¹⁷³ a presentist form of advocacy that selectively marshals historical facts as authority in favor of a particular conclusion (rather than adhering to the professional disciplinary norms for how historians approach evidence). Second is the dread “Whig interpretation of history.” Herbert Butterfield, the historian who coined the term, argued against certain seemingly teleological aspects of what he called historical “abridgement,” identifying actors in the past as heroes or villains with respect to our own modern notions. Butterfield claimed, for example, that

it matters very much whether we take the Protestants of the 16th century as men who were fighting to bring about our modern world, while the Catholics were struggling to keep the medieval, or whether we take the whole present as the child of the whole past and see rather the modern world emerging from the clash of both Catholic and Protestant.¹⁷⁴

But, in response, historian William Cronan is correct to observe that “without abridgement, there is no history,” and that “we” historians (or, indeed, others who happen to lack doctorates in history) “cannot evade the storytelling task of distilling history’s meanings.”¹⁷⁵ So long as we acknowledge the presentism in these techniques, then we can see them clearly for what they are: argumentative resources for claims about constitutional time, properly understood. As we have observed, these are essentially moral claims, and they are properly at the disposal not just of judges, lawyers, and historians—but also of democratic citizens attempting to trace the arc of constitutional justice. My account of fundamental law and constitutional time renders these moral claims transparent, subject to ongoing deliberation and contestation.

Similarly, we can resolve P2 (Severe Injustice and Constitutional Disrespect) by drawing on the above insights and the idea of constitutional justice. As we have developed this distinctive normative source, we have seen how it can reconcile citizens to the constitutional bases of respect even in the face of severe injustice. It does so through the presentism of constitutional time—making it

173. See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, SUP. CT. REV. 119 (1965) (coining the phrase); John P. Reid, *Law and History*, 27 LOY. L.A. L. REV. 193 (1993); see also Jonathan Gienapp, *Knowing How vs. Knowing That: Navigating the Past*, PROCESS: A BLOG FOR AM. HIST. (Apr. 4, 2017), www.processhistory.org/gienapp-knowing-how/ [<https://perma.cc/GG82-7A22>]; Balkin, *Lawyers and Historians*, *supra* note 20.

174. HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1931).

175. William Cronan, *Two Cheers for the Whig Interpretation of History*, PERSP. ON HIST., (Sept. 1, 2012) <https://www.historians.org/publications-and-directories/perspectives-on-history/september-2012/two-cheers-for-the-whig-interpretation-of-history> [<https://perma.cc/8MXN-ZXP>].

possible for citizens to interrogate historical injustice with clear-eyed recognition of the legacy of those wrongs, even as they envision a hopeful possibility of redemption and justice at the other end of our constitutional arc. We also observed, however, that there could be many conceptions of constitutional justice or the trajectory of constitutional time, including conceptions that compete or are even exclusive with one another. Even if I am right about unveiling the controversial questions of political morality that underlie these disagreements, don't the disagreements themselves pose a problem for my theory of fundamental law?

This objection is just another way of stating our initial puzzle, P1 (The Common Reason Dilemma). I have said that principles of fundamental law must be accessible to citizen's common reason, which must in turn justify our constitutional order to its citizens. But once again, if so, what is the *content* of "citizens' common reason," and what difference does it make? Does it reduce to the empirically determinable and overlapping set of beliefs that actual citizens have about the Constitution, over some period of time? If so, such agreement seems unlikely at best—and it is unclear what sort of normative force it might have, anyway. But if we go down the other horn of the dilemma and suggest that "citizens' common reason" achieves commonality only through high levels of abstraction, then it becomes unclear what sort of difference principles of fundamental law make—whether they possess any real "bite" or normative force at all.

Our discussion of constitutional time makes clear in which direction we need to go in resolving this puzzle. The content of "citizens' common reason" *must* be abstract, on the supposition that constitutional interpretation is an enduring enterprise, in which citizens take part and which spans across the generations. Abstraction is necessary because we live and die, because the world changes radically over large time scales, because we cannot possibly share identical conceptions across these yawning temporal divides. This is not to say that we must be radically alienated from the constitutional past or its future. Indeed, I have argued that this sort of engagement is morally valuable in a constitutional democracy. A presentist and relational conception of constitutional time makes this endeavor possible.

Chief Justice John Marshall made a similar plea for abstraction in constitutional interpretation in one of the most famous sentences in the constitutional canon. My account of fundamental law and constitutional law explains an under-appreciated moral reading of this famous dictum, that "we must never forget that it is *a constitution* we are expounding."¹⁷⁶ The reason is that it is valuable for citizens to participate in constitutional interpretation as an enduring enterprise. A constitution, in other words, must *constitute* us as a people—creating an enduring enterprise of self-government that spans generations. The participants in this enterprise *must* be able to apprehend its meaning, even as they (and Congress, and the courts) continue to argue over how its general provisions apply in new circumstances. And thus President Franklin

176. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

Roosevelt's pronouncement a century later that the Constitution is "a layman's document, not a lawyer's contract."¹⁷⁷

This persistent disagreement about abstract principles is the same problem that remains for both of our puzzles about fundamental law, P1 and P2. The next Section will argue that this mere fact of disagreement, by itself, does not pose an objection to my account of fundamental law. Citizens' common reason, even understood abstractly, still has significant normative implications. The key is that these abstract principles ground and channel our interpretive disagreements so that they are constructive—thus promoting the core interests of constitutional citizenship, the constitutional bases of respect and engagement with an enduring project.

B. Distilling and Addressing the Core Objection

We have resolved the puzzles that beset fundamental law and constitutional time, further developing the normative values they promote. The thread that remains is an important problem: the problem of pervasive disagreement over abstract principles and their application. If we require consensus for citizens' common reason to have any content, will this agreement occur at such a high level of abstraction that it carries no real normative force? This Section begins by answering this objection, which then enables us to answer Scalia's question from the scene at the outset of the chapter: when did marriage equality become constitutionally required?

First, principles of fundamental law as abstract common reason can have significant normative bite—they can operate, as we said, *as law*, altering the profile of agents' rights and duties—even if they do not give rise to any particular duty to obey a particular rule. The moral predicate of a claim of fundamental law is not a *pro tanto* and defeasible reason to obey the law.¹⁷⁸ Instead, the moral predicate of a claim of fundamental law is a *pro tanto* reason to engage in interpretive argument. This finding is morally significant, in that it promotes important values of a constitutional democracy, such as the constitutional bases of respect. And, as we have seen, the abstractness of a principle of fundamental law is helpful to this interpretive endeavor, and it in no way interferes with an interpreter's capacity to reason towards a particular application.

Second, the objection presupposes that, without some mechanism to resolve disagreements, principles of fundamental law are indeterminate—to say that the content of fundamental law as citizens' common reason reduces to the force of the better argument is to say that it has no force at all. But this rests on a further

177. President Franklin Delano Roosevelt, Constitution Day Address (Sept. 17, 1937), available at: http://www.fdrlibrary.marist.edu/_resources/images/msf/msf01104 [<https://perma.cc/N2MH-AQDH>].

178. *See supra* discussion and sources accompanying note 66. There might be good reasons to believe that this would be the proper moral predicate for a rule of ordinary law—I leave that question an open one.

assumption, that for citizens' common reason to have real content, there must be some external standpoint from which we can evaluate these disagreements and determine, ultimately, which set of interpretive arguments prevails. But to rely on this assumption is to commit the same Archimedean fallacy that Ronald Dworkin relentlessly pursued in his writings.¹⁷⁹ There simply is no way to determine the content of citizens' common reason without taking up that enterprise and engaging in the practice of interpreting our fundamental law. And once we adopt that internal perspective, we see that the mere fact of disagreement is itself no objection to principles of fundamental law or to citizens engaging them through interpretive deliberation.¹⁸⁰ The key is that abstract principles of fundamental law effectively ground and channel citizens' disagreements about political morality. They promote interpretive deliberation and the exercise of citizens' interpretive responsibilities, rather than hindering them.

Third, the idea of constitutional justice implies certain core interests in constitutional citizenship that, taken together, work to exclude some views from the domain of citizens' common reason.¹⁸¹ These core interests of constitutional citizenship emerge from my constructive interpretation of American constitutionalism and the practice of citizens engaging in constitutional interpretation. They include, at least, citizens' interest in some institutional recognition of their own self-worth, which is closely related to the idea of the constitutional bases of respect as we have developed it. These interests also include citizens' interest in engaging in constitutional interpretation, in participating in that enduring enterprise across constitutional time, in carrying out their deliberative and interpretive responsibilities.

C. Answering Scalia's Question

Let's return to where we started and consider an example of how principles of fundamental law ground interpretive disagreements about citizens' common reason over constitutional time. Recall Justice Scalia's question: "When did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the 14th Amendment was adopted . . . [H]ow am I supposed to know how to decide a case, then, if you can't give me a date when the Constitution changes?"¹⁸² The easy answer that Ted Olson could have given is that such a ban was *never* unconstitutional. But this mistaken "never" answer misunderstands the nature of an interpretive claim of fundamental law, in the same way that Pocock misunderstands the "myth" of an "ancient" and

179. See Ripstein, *supra* note 35.

180. Compare, in different context, DWORKIN, *LAW'S EMPIRE*, *supra* note 11, at 239 (defending Law as Integrity with the suggestion that, to the extent that a reader disagrees with one of Judge Hercules's interpretive conclusions, she has not refuted integrity but has instead joined its enterprise).

181. Cf. BEITZ, *supra* note 99, at 107-17 (1989) (discussing "recognition," "equal treatment," and "deliberative responsibility" as "regulative interests of citizenship" that inform his contractualist account of political equality).

182. See Oral Argument, *supra* note 26.

“immemorial” constitution.

When we talk about the past, present, and future of fundamental law, we offer *constructive* arguments, identifying principles that pull these different temporalities into equilibrium with one another. The real answer to Scalia’s question is that the constitutional meaning changed, for anyone applying the Fourteenth Amendment’s guarantees of liberty and equality, when it became clear that refusing to recognize a marital union because its members were of the same sex is to deny their equal status as citizens. This determination does not come with a time stamp; it is the end-product of responsible consideration of a set of interpretive arguments. And Olson is correct to note that the reason there is no such time stamp is that this determination is at once cultural and societal, the result of citizens reasoning about these principles together.¹⁸³ The constitutional text stayed the same; it was our collective understanding that caught up, redeeming its promise and fulfilling its principled potential. The crisp and direct answer to Scalia’s question (for a judge, at least) is this:

*Before now. If you mean, “When was there some operative text, duly enacted, that decides the question?” the answer would be: July 9, 1868 (with the Fourteenth Amendment). If you mean, “When did your interpretation of that text become the law of the land?” the answer would be: sometime between 2003 and now.*¹⁸⁴

This wasn’t because of any one thing that some judge had to say—not even Justice Kennedy—any more than one grain of sand turns a pile into a heap. It was, instead, the product of citizens (and officials, too) deliberating together about what our living traditions mean. Think back on what Justice Harlan said about contraception—it worked just like that. You don’t agree with this interpretation. The ghost of Justice Harlan wouldn’t either. But that doesn’t make it wrong.

Only an argument of political morality, drawn over the arc of constitutional time, will do that.

Scalia’s rhetorical question commits three related errors of hyper-precision. First, he supposes that the principal—indeed, the only—interpreters here are judges in black robes, not citizens at large. Second, he demands a constitutional time stamp to warrant this interpretive conclusion, as though he is some sort of auditor glancing at his watch while Olson rifles through a shoebox full of receipts. And third, the time stamp he demands corresponds to an overly-particularized right to the recognition of “homosexual . . . marriage[s].” The response to each of these errors flows from the theory of fundamental law as a set of deliberative principles. As we have seen, citizens have a vital role to play in interpreting and applying these principles. As we saw in the previous Part, they

183. See COLE, *supra* note 124.

184. *I.e.*, after *Lawrence v. Texas*, 539 U.S. 558 (2003) and, especially, after *United States v. Windsor*, 570 U.S. 744 (2013).

do so by engaging with the abstract questions of political morality that these principles invite, as animated by the particulars of a case. And as we will see in this Part, those abstract principles cut across time, generating coherence, much the same as they cut across cases.

Consider the development of the arc of gay rights cases over time. In 1986, the Court declined to recognize a “fundamental right to engage in homosexual sodomy.”¹⁸⁵ *Bowers v. Hardwick* held that, because of the longstanding tenure of anti-sodomy laws, there could be no fundamental right—which must be “deeply rooted in this Nation's history and tradition”¹⁸⁶—to engage in such conduct. As with Justice Scalia’s characterization of a right to “homosexual marriage,” this hyper-particularized description all but dooms the purported claim. That same year, Justice Anthony Kennedy joined the Court, and ten years later he authored an opinion striking down a Colorado referendum that sought to nullify local protections from discrimination on the basis of sexual orientation. Beginning with this *Romer* decision, Justice Kennedy laid the groundwork for the Court to reverse its course and cognize the fundamental rights claims of gay plaintiffs—sounding in the compound registers of liberty, equality, and dignity—at a higher level of abstraction.¹⁸⁷ The Court explicitly overturned *Bowers* in 2003, in *Lawrence v. Texas*. Justice Kennedy’s opinion once again raised the level of abstraction in characterizing the right at stake, suggesting that the “liberty” protected by the Due Process Clause “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁸⁸ It is this heightened level of abstraction—equating the right to “intimate conduct” free from state intrusion with basic liberties of self-expression and association protected by the First Amendment—that drives the reasoning in the case.¹⁸⁹

In 2013, Justice Kennedy wrote yet another opinion striking down a discriminatory statute—this time, the federal Defense of Marriage Act, which barred the government from acknowledging same-sex marriages as a matter of federal law.¹⁹⁰ The Court’s reasoning blended an element of federalism into the recurrent cocktail of liberty and equality—seizing on states’ sovereign function to protect and even enhance the rights of their citizens by officially recognizing the dignity of their intimate relationships. Two years later in *Obergefell v. Hodges*, the Court struck down state-level bans on same-sex marriage under the Fourteenth Amendment.¹⁹¹ Once again, Justice Kennedy’s key move is to deploy abstraction—characterizing the fundamental right to marriage equality in light of our traditions and customs as they have evolved over time. “The ancient origins of marriage confirm its centrality, but it has not stood in isolation from

185. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

186. *Id.* at 194. Any claim to the contrary must be “at best, facetious.”

187. *Romer v. Evans*, 517 U.S. 620 (1996).

188. *Lawrence*, 539 U.S. at 558.

189. *See Gerken*, *supra* note 128.

190. *United States v. Windsor*, 570 U.S. 744 (2013).

191. 576 U.S. 644 (2015).

developments in law and society. The history of marriage is one of both continuity and change.”¹⁹² With the rise of an egalitarian conception of marriage, such “new insights have strengthened . . . the institution” because “changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.”¹⁹³

This same egalitarian and inclusive arc swept over the late twentieth and early twenty-first century, beginning to erode the institutional markers of homophobia and gay Americans' second-class status as citizens. Our constitutional principles, Justice Kennedy suggests, are capable of cognizing that change:

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.¹⁹⁴

And as Kennedy argues, the interwoven principles of liberty, equality, and dignity, as well as an inclusive conception of our shared traditions, all counsel in favor of recognizing marriage equality. Crucially, this conclusion has been informed by substantial public deliberation about these basic questions of principle.¹⁹⁵

Justice Kennedy is deploying principles of fundamental law in the same manner as the American founders and seventeenth-century Whigs we surveyed earlier—engaging in a “framework for argument” and “custom mediated by reason.”¹⁹⁶ And in Kennedy’s analysis, we can see how principles of fundamental law generate ongoing interpretive deliberation, cutting across time at a heightened level of abstraction. Crucially, this interpretive dialogue is not strictly—not even primarily—a matter for judges in black robes, although they must also sometimes engage in those questions. When they do so, judges must follow Justice Kennedy’s example—forthrightly and transparently addressing the value questions at stake, rather than hiding behind the technical and doctrinal “lawyers’ work” that is their expertise.

Justice Kennedy’s final opinion in this arc of gay rights decisions came in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*,¹⁹⁷ a case that sets the right to marriage equality and its attendant values against the free exercise rights of those who oppose it on religious grounds. A gay couple filed an antidiscrimination claim against Jack Phillips, a baker who refused to prepare

192. *Id.* at 659.

193. *Id.* at 660.

194. *Id.* at 664.

195. *See id.* at 676.

196. *See* KRAMER, *supra* note 16, at 14; Sherry *supra* note 45, at 1129.

197. *Masterpiece Cakeshop Ltd. v. Col. C.R. Comm’n*, 138 S. Ct. 1719 (2018).

their wedding cake because of his religious opposition to same-sex marriage. At Phillips's hearing, one commissioner remarked:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.¹⁹⁸

Colorado's civil rights division also dismissed several other cases where a customer alleged religious discrimination against bakeries who refused to prepare cakes expressing opposition to same-sex marriage in inflammatory and offensive terms. When the Colorado Court of Appeals decided Phillips's case, it found that the state's differential treatment of Phillips's refusal (based on religion) and these other bakers' refusal (based on their disapproval of hateful speech) to be unobjectionable. In total, Justice Kennedy and the Court found that the commission treated Phillips with impermissible "hostility" towards his religious beliefs, in violation of the Free Exercise Clause.

Once again, Justice Kennedy declined to resolve the case on simpler and more straightforward doctrinal grounds that were available: that the Colorado anti-discrimination law, as applied by the commission to Phillips, unconstitutionally compelled his speech. Instead, Justice Kennedy addressed the purported conflict of rights and values, between antidiscrimination law and religious liberty, head-on. And his resolution illustrates how principles of fundamental law facilitate and ground citizens' interpretive disagreements, even the most heated ones, in two respects.

First, we can see how the application of principles of fundamental law *particularizes* disputes to promote ongoing interpretive dialogue. Justice Kennedy's opinion operates the same way. Again, his reasoning avoids the more formalistic, doctrinally convenient, and somewhat artificial solution to the case (compelled speech) in order to confront the substance of what the case is really about: the state's failure to respect Phillips's religious liberty. Indeed, Kennedy's opinion draws energy from the concrete facts of the case in order to animate the overarching principle that resolves it. Additionally, these particularized facts also serve to limit the bounds of the interpretive disagreement, reducing its sweep and permitting temperatures to cool before the Court addresses this front of the culture wars again.¹⁹⁹

Second, like the rest of the marriage equality cases, Kennedy also deploys an abstract synthesis to navigate these principles of fundamental law. But instead of promoting coherence over time, this move operates as a strategy to reconcile the purported conflict of rights in question, by unifying them as manifestations of a single, coherent value. Justice Kennedy writes that

198. *Id.* at 1729.

199. See SUNSTEIN, *supra* note 80. But from Kennedy's example, we can see that the deliberation-enhancing virtues of minimalism and particularism can sit comfortably alongside ambitious theoretical disagreement within an opinion. Cf. Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. . . . Nevertheless, . . . it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.²⁰⁰

As a result, it cannot be the case that

all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case. . . . The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.²⁰¹

And so Phillips’s claim prevails because his religious objection was treated with hostility, even as Colorado’s public accommodation law continues to apply to cases like his.

Jamal Greene laments *Masterpiece Cakeshop*, suggesting that Kennedy’s opinion does not sufficiently diffuse the high stakes of the fundamental rights clash at hand—with oral argument hypotheticals painting the parties as segregationists, Klansmen, and Nazis.²⁰² Even though (perhaps because?) Justice Kennedy “was sincere in his regard for both sets of rights,” his resolution emphasizing hostility towards Phillips’s beliefs is another “categorical way out” that does not “resolv[e] the basic conflict,” a “dodge [that] won’t work for long.”²⁰³ But this analysis misses the key move. Justice Kennedy’s reasoning here

200. *Masterpiece Cakeshop*, 138 S. Ct. at 1727. The Supreme Court has continued to strengthen religious exemptions to antidiscrimination law in, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). But in that case, much like *Masterpiece Cakeshop*, the majority opinion favorably resolved the free exercise claim in light of narrow and case-specific circumstances—by reading the city’s anti-discrimination requirements for adoption agencies not to be generally applicable because they permitted discretion to lift those requirements in other instances.

201. *Id.* at 1728-29.

202. GREENE, *supra* note 74, at 150-51.

203. *Id.* at 159-60.

is not an empty, herky-jerky back-and-forth, flipping between “on the one hand” and “on the other.” Instead, we should understand his efforts as a profound attempt to reconcile these competing claims as emanating from a single principle, what we might call the “anti-hostility” principle. Neither gay citizens nor religious objectors deserve stigma or opprobrium from our public institutions—singling them out, either for their protected viewpoint or their protected status, simply because other members of our divided polity disapprove. For the state to lend its imprimatur to such stigma and aspersion is indeed to convey impermissible “hostility,” and it undermines what we have already called the “constitutional bases of respect.” This effort at abstraction serves to ground this intense disagreement, between pressing claims of liberty and equality, in a way that promises to reconcile them together. By deploying principles of fundamental law aimed at citizens’ *common* reason, it anchors their claims of cherished liberty, even when at odds with one another—and, just as importantly, the bases of their respect—in a single and shared constitutional project. This is the right way to think about fundamental rights.

In his dissent in *Obergefell*, Chief Justice Roberts deploys the old charge that the Court is resuscitating *Lochner v. New York*, stifling the democratic process. The Constitution, he writes, “does not enact John Stuart Mill’s *On Liberty* any more than it enacts Herbert Spencer’s *Social Statics*,” paraphrasing Justice Holmes’s memorable dissent in that case.²⁰⁴ His opinion closes with what seems to be a grace note, ending with a curious insistence:

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.²⁰⁵

But the Chief Justice is wrong about that, because he fails to see that Justice Kennedy is engaging with *the Citizens’ Constitution*—principles of fundamental law, drawing on citizens’ common reason, cutting across the entirety of a trans-generational project. When citizens celebrate the decision, expressing their views on social media or incorporating its closing paragraph in their wedding ceremonies, it is precisely the Constitution that they are celebrating. For both those citizens who would celebrate *Obergefell* and those who would oppose it, it has *everything* to do with the Constitution, even as they disagree about what its principles mean. That is the work that fundamental law does, the value it instills in an enduring constitutional democracy.

204. *Obergefell v. Hodges*, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting) (citing, somewhat oddly, an unpublished draft opinion by Judge Henry Friendly on abortion rights; see A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly’s Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL’Y 1035, 1039 (2006)).

205. *Id.* at 713.

V. CONCLUSION: CAN WE BE HEROES? FIDELITY, RESPONSIBILITY, AND
DISAGREEMENT ABOUT FUNDAMENTAL RIGHTS

In a recent article, H. Jefferson Powell discusses the phenomenon of “Judges as Superheroes,” engaged in a cosmic battle between good and evil not unlike the denizens of the Marvel Cinematic Universe.²⁰⁶ Powell’s observations are astute, and the humility, charity, and decency he encourages are a welcome corrective to the corrosive forces at play in many a federal appellate opinion. But it is far from clear what the proper alternative is. After all, pitched and pervasive disagreement about constitutional values is with us, and we cannot wish it away. And as Powell notes, “[i]f Thanos is indeed mounting his final assault on the planet, superheroes are needed.”²⁰⁷ One possibility is for the courts to truly confine themselves strictly to technical questions of ordinary law—although it is far from clear how to realize that goal.²⁰⁸

But even if judges should not portray themselves as constitutional heroes, that conclusion does not suggest that citizens pursuing their conception of constitutional justice should similarly prescind that role. I began this article by suggesting that we need new heroes, and I agree with Powell that they should probably not be Article III judges. But I do not think that we should abandon heroism, or the ideal of constitutional justice that it would promote. It is suitably democratic, perhaps, that the task then falls to citizens themselves. I have suggested that citizens should serve as the primary interpreters of their Constitution as fundamental law. In meeting this responsibility, they must keep faith—not only with the document and its principles, but with one another, as fellow participants in an enduring enterprise. In this way, the Constitution and its ongoing interpretation continually establishes a genuine social contract. Keeping faith with fellow citizens across deep disagreements and across constitutional time requires that we show charity and offer a presumption of good faith to one another. But it does not require that we hide our light under a bushel. This is especially true because the task falls to us to fill out the recognitional contours of fundamental rights in order to show our respect for our selves and one another, and also to relate our Constitution’s past and future to the present, bending the trajectory towards constitutional justice.

I have defended a partially moralized conception of fundamental law—one that is accessible and justifiable to citizens’ common reason, that orients itself along the arc of constitutional justice over constitutional time, that promotes citizens’ constitutional bases of respect and constructively channels their interpretive disagreements. Other moralized conceptions of law, like that of Ronald Dworkin, have been beleaguered by the criticism that they rely on a

206. H. Jefferson Powell, *Judges as Superheroes: The Danger of Confusing Constitutional Decisions with Cosmic Battles*, 72 S.C. L. REV. 917, 941 (2021).

207. *Id.* at 942.

208. *See* Doerfler & Moyn, *supra* note 15.

heroic (and undemocratic) notion of the judiciary.²⁰⁹ To be sure, the courts have a vital role to play in pursuing justice, or at least in pushing our world towards its more just possibilities. But it is every bit as certain that the courts, alone, will not save us. Perhaps the most important upshot of all this role responsibility talk is that when our institutions are imperiled, it falls to us to save ourselves. David Bowie wrote a beautiful song about two lovers embracing one another at the Berlin Wall. “We can be heroes,” he crooned, “just for one day.”²¹⁰ In interpreting our fundamental law, this sort of everyday heroism is what the conscientious citizen—not Hercules, the judicial avatar—is cut out to do. It requires that we carry out our interpretive responsibilities in our individual roles. But even more importantly, we must share mutual recognition and respect for one another as citizens; we must share some faith in the possibility of constitutional justice over time; we must share at least the glimmers of a kind of civic love. Heroically interpreting the Citizens’ Constitution as fundamental law is something we, the citizens, can and must do together.²¹¹

209. See, e.g., Allan Hutchinson, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637, 637-38 (1987) (parodically reviewing DWORKIN, *LAW'S EMPIRE*, *supra* note 11) (“In his own version of The Greatest Legal Story Ever Told, Indy finds himself in a procession of tight corners, close calls, and near-misses which he manages to survive by dint of his own ingenuity and imagination. With a knowing wink and deceptive ease, he reassures us that ‘I’m making this up as I go.’ But, not only does he survive these escapades unscathed, he manages to come through a stronger and better person for them, stronger in his conviction about Law’s potential and better in his ability to justify its Empire.”).

210. David Bowie, *Heroes*, HEROES (RCA Records 1977).

211. “We can be heroes, for ever and ever. What d’you say?” *Id.*