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Doing Time: A Theory of the Constitution

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Proceeding inductively, starting with three standard examples of major constitutional change, this short essay offers a theory of the Constitution, derived from its historical imposition on the criminal law. The theory proposes to unite constitutional provision, structure, and operations within a single framework over time.

No topic in political science has received so much historical scrutiny with so little theoretical gain as the U.S. Constitution. It surely would be an exaggeration to say no gain. The last twenty years alone has seen the emergence of an array of richly analyzed constitutional milestones, Supreme Court doctrines, judicial biographies, and interpretive readings on *motifs* ranging from "multiple traditions" to "constitutional evil." But one would be hard pressed to connect the diverse insights of this research within a framework that encompasses the subject matter as a whole, operating over time. It is perhaps symptomatic that the study of judicial behavior, following the most self-consciously rigorous agenda in the law-and-courts subfield, asks, in effect, does history—history in the form of precedents and entrenched institutional norms—matter?; or does constitutional decision making boil down to so many individual attitudes? Perhaps the lack of a unified theory is a result simply of boredom. Having been pestered since grammar school about the framing at Philadelphia and the principal events, figures, and ideas in its background, we are all too willing to concede that little by way of a general overview remains to be added.

This situation might be merely a disciplinary and not an intellectual concern if legal or philosophical scholarship provided constitutional theories to which political science research might attach. Again, the dearth might be overstated: Schmitt and Habermas come to mind. But for the most part, as far as the Constitution of the U.S. is concerned, existing political science scholarship feeds on a menu of descriptive and normative concepts—limited government, the living constitution, negative rights, rights as trumps, originalism, popular constitutionalism. Beyond that, we are left to examine theories about the government's individual parts and invited to read the *Federalist Papers*. While here too there are arguable exceptions, in the end, as broad-scale theory, these are unsatisfying—too thin on process, too light on form.[1]

Obstacles to unified theory are formidable. At the heart of the matter is, well, breadth. The Constitution is at once the government's founding document, operational design, personnel chart, and guarantor of individual rights. A theory of the sort I have in mind must link all of these together and illuminate each. Secondly, these several dimensions mean that the Constitution is wound into society to create not just a problem of chicken-and-egg but an entire poultry industry of causal relationships. Any pulling back initially to focus, for instance, on formal institutions, or on court decisions, invites distortion. A third obstacle is the formidable mound of older scholarship, undertaken by several generations, much of it of outstanding quality and to one degree or another familiar. Scholars must therefore run the gauntlet of tell-me-something-I-don't-already-know. Finally, we come to the knotty problem of time. The Constitution has not stood still. It has been amended, its provisions reinterpreted, the weight among its parts shifted by the political life of two centuries. A unified theory needs to account adequately for changes at the same time that it explains essential continuities, and do both in a manner consistent with the best work already on the record.

Fools rush in, causal chickens' nest and magisterial predecessors notwithstanding. Surely there can be no embarrassment in rearranging what is already well-known when there are so many pieces to be fitted together in a convincing way. I view the Constitution as a system of laws, thus its elision with "constitutional law" in the discussion. As for the eternal quandary of stability and change, the recommended prescription is to periodize, to mark patterns of regularity

1. The most impressive work to date is Bruce Ackerman's *We The People* (New Haven: Yale University Press), beginning with *Volume I: Foundations*, published in 1992. This work, however, suffers in both respects mentioned, perhaps through its concentration on "constitutional moments," defined as points of major constitutional change, rather than on "normal politics." I exclude from consideration theories of constitutional interpretation, which are explicitly normative in thrust, concerned with fundamental law's legitimate application.

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through time. It is where I begin, using major developmental turns as the basis for sketching out the larger idea.[2] I am not arguing that the dynamic described between criminal and constitutional law obtains only at these turns, but simply that they are the place to start.

I.

I take as my *corpus delicti* three standard high points of American constitutional development: Period 1, the framing and ratification; Period 2, Civil War and Reconstruction; Period 3, the New Deal. This periodization is not "court-centered." It corresponds as well, for instance, to party realignment in the electorate and to recurring cycles of presidential leadership.[3] As entry into our considerations here, I focus on the decades immediately preceding these demarcations—on the 1780s, the 1850s, and from the mid-1920s to the mid-1930s—and put forward a single claim. Each period of major constitutional development was driven in significant part by a preceding crisis in the enforcement of criminal law. By criminal law, I refer to those laws which, when violated, may result in "penal" sanctions, that is, fine and/or imprisonment. By crisis in the enforcement of criminal law, I mean an interval in which the criminal law cannot be enforced without negative repercussions such as violence, officer noncompliance, and adverse public opinion. By driven in significant part, I refer to an essential cause, necessary for a convincing account of subsequent events.

For anyone who has read a history of these years, the claim will not be startling; it squares with what one already knows. Only if that were not the case would author and reader be at odds as we move along. Indeed, my argument, as it applies to the 1780s, is so unstartling that it appears in Wikipedia. Of Shay's Rebellion, the sacking and forcible shutting down of courthouses in central and western Massachusetts, the article says: "Most of Shays' compatriots were poor farmers angered by crushing debt and taxes. Failure to repay such debts often resulted in imprisonment in debtors' prison or the claiming of property by the government . . . There was a lack of an institutional response to the uprising, which energized calls to reevaluate the Articles of Confederation and gave strong impetus to the Philadelphia Convention, which began in May 17, 1787."[4] I would add only that in many instances the poor farmers were also unpaid veterans, that the militia sent to crush the rebels changed sides in large numbers (information in the article also); and that Gordon Wood agrees with Wiki as to the constitutional consequences.[5]

One departure on my part is that imprisonment for debt is not, formally speaking, a criminal action; the "civil" designation is based on the rationale that imprisonment is not to punish but to provide the creditor with security against the debtor's absconding without payment. This civil punishment was, however, in its operation eminently penal and even more summary than was most criminal punishment. Arrest for debt in the late eighteenth century was based, as in ancient times, on a writ of *capias ad respondendum* (or attachment), a unilateral declaration by a creditor that a given obligation was unpaid and had been uncollectible through established legal means. Once in prison, the debtor remained there until someone—friends or relatives—came forward to pay the amount due or a lesser sum agreed to by the creditor. Jail conditions were overcrowded, unhealthy, and violent; prisoners had to supply their own food and fuel or go without. Incarceration was provisional until a trial could be held before a judge, frequently several months later. According to even the most balanced of reports, defendants seldom prevailed.[6] Unable to pay the judgments against them, prisoners stayed where they were, often for years, sometimes until they died. Upon relief from one creditor, the debtor's obligation automatically passed on to any second person owed, and then a third, who by that time might himself be in jail for debts he accrued in the interim.

This "chain of debt," from debtor to creditor to debtor, extended from the American frontier through the ports of Boston and Charleston to London and back. Some scattered numbers will indicate the weight of its American links. Between 1784 and 1786, there were 4,789 actions for debt in the single Massachusetts county of Worcester, amounting to 32 percent of the male population, among whom some considerable number would not have been able to put up security to avoid imprisonment. Between 1782 and 1785, in the six valley counties of Virginia, there were 18,000 trials for debt; in Berkeley

2. By "developmental" I mean displaying durable shifts in governing authority. For an extended discussion see Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004).

3. This is not the only periodization scheme of constitutional or political development extant. These periods, however, are the ones most consistently (and minimally) relied upon on by political scientists. See Walter Dean Burnham, *Critical Elections and The Mainsprings of American Politics* (New York: W. W. Norton, 1970), 1970; David Brady and Joseph Stewart, Jr., "Congressional Party Realignment and Transformation of Public Policy in Three Realignment Eras," *American Journal of Political Science* 26 (1982): 333–60; Stephen Skowronek, The *Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, Mass.: Harvard University Press, 1997).

4. http://en.wikipedia.org/wiki/Shays%27_Rebellion.

5. *Creation of the American Republic*, 1776-1787 (Chapel Hill: University of North Carolina Press, 1969), pp. 325 ff., 485 ff.

6. See on this point and for an excellent account generally, Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Cambridge, Mass.: Harvard University Press, 2002).

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County, the number of debtors' suits equaled half the male population during every year of the 1780s, and in that location it took as long as seven years to reach a judgment. Between 1782 and 1792, 3,400 out of a total of 5,000 families in Berks County, Pennsylvania, experienced foreclosure on their farms or other property.[7]

Shays' Rebellion, which began in August 1786 and lasted through the early months of the following year, may stand for the disruption in law enforcement that plagued the entire decade. Revenue officers refused to collect taxes and instead found themselves in debt to their employing states. Sheriffs executing foreclosures backed off in the face of indebted property owners threatening to shoot them. Justices turned away suits for attachments or stalled their processing so that debtors might sell what they could and flee. Property seized by day was gone again by nightfall. Officers petitioned their legislatures to relieve them from personal liability. Citizens demanded changes in the law and got them. In Virginia, debtors who owed no more than £10 were required to spend only twenty days in prison rather than the former three months before they might be granted relief, which typically entailed surrender of all property except apparel and tools plus "servitude" to pay for anything still due. In Pennsylvania, the Bankruptcy Act of 1785 provided for the discharge of debts owed by (not to) merchants, scriveners, brokers, factors, and bankers. By 1786, seven states had issued paper currency to ease the strain.

The second period of crisis was the breakdown in law enforcement that dogged the Fugitive Slave Law, passed in September 1850. Section 7 provided that anyone who directly or indirectly assisted a slave to escape from labor, or obstructed an arrest or knowingly concealed or harbored a fugitive slave, or assisted in an actual or attempted rescue from custody, was indictable in federal district court and, if convicted, punishable by a $1,000 fine and six months in prison. In addition, civil damages were assessable at a rate of $1,000 per fugitive, payable to the former owner. Of equal importance was the new method Congress provided for all public officers, upon affidavit by an owner or his agent, to arrest and imprison any person claimed be a fugitive from slavery; his or her fate would then be decided by an appointed federal commissioner, who was paid double the fee if he found for the master and not the captive. More arrests and commitments meant, in turn, more punishments for aiding escapes. The law also imposed a $1,000 fine on federal marshals who failed to perform their duties of arrest: should a slave escape from their custody, they were "prosecutable" for the full value of the slave's labor.

That the Fugitive Slave Law was not effectively enforced was a complaint of Southerners throughout the decade and would be a prominent justification for secession. Historians have agreed, with the proviso only that enforcement in the Northern states was impossible "without more trouble and expense than were worth the taking."[8] U.S. slave commissioners heard a total of 191 cases, from a total of 332 black persons arrested. Of these, 157 or 82.2 percent were remanded to slavery; 22 or 11.5 percent were rescued; 11 or 5.8 percent were released; one escaped. The largest number of cases, 47, was heard in 1851. As a measure to stem the flow of fugitives, estimated at some 8,000 a year, the law must be judged a failure.

For the argument here, this last figure may be the one of greatest interest. The safe movement of large numbers of persons of color demanded the participation of locals for guidance and shelter, and each occurrence of assistance violated the law and exposed those involved to prosecution. Free blacks and whites coordinated their actions in an extensive underground railroad, financed and supplied by "stationmasters," with fugitives moved by "conductors" along a network of "depots" or safe houses. Given the constant possibility of arrest, federal indictments seem to have been relatively rare. Federal marshals routinely operated in cities and towns that had long been suspicious of outside authority; now they faced the additional resistance of abolitionist sentiments, often held fiercely among the most prominent citizens. Arrests attracted crowds and incited violence. Rescuers of fugitives and their abettors, as well as rescuers of rescuers, were tried in noisy, highly publicized proceedings, amid legal actions that leap-frogged between state and federal courts.

Evidence of discord among public officers is in ample supply. Here, in 1851, is pro-slavery U.S. Attorney General John Crittenden, dissuading President Fillmore against granting the request of the marshal of the southern district of New York that private counsel be hired to defend him against mounting lawsuits: "it appears to me to be most judicious for the President, as well as more consistent with the form and spirit of our institutions, to forbear from interference with the functions of subordinate public officers . . . ."[9] Here, in 1853, is Attorney General Caleb Cushing, advising on a case currently before a U.S. Commissioner: "the most convenient course will be to combat habeas corpus with habeas corpus . . . if proceedings are instituted against the marshal for a penalty prescribed by the statutes of New York for

7. Figures on debtors are from Christopher Walker, "Debtors and Paper Currency During the Articles of Confederation," typescript, 2010, on file with the author.

8. Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1840–1860* (Chapel Hill: University of North Carolina Press, 1970), 111 and *passim*.

9. 5 Op. Atty. Gen. 287, January 17, 1851.

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disobedience to a writ of habeas corpus, then to defend the marshal and through the succession of the law to bring the case up to the Supreme Court of the United States."[10] Here, in 1855, is U.S. Senator Benjamin Wade of Ohio, standing to oppose legislation for the removal of all criminal actions arising from enforcement of the Fugitive Slave Law from the state courts to the federal courts, linking this proposal to a recent salary raise given federal officers. Wade warns his colleagues: "No doubt that measure contemplated a large increase of business; and if you attempt the execution of this [removal] bill in the free States, you will have business enough for them to do . . . ."[11]

The third crisis of law enforcement, in the late 1920s and early 1930s, consisted in the mounting disruption of law enforcement caused by workers' collective actions. It likewise experienced a low level of actual prosecutions. The legality of quitting work, alone or in a body, had been theoretically affirmed a century earlier, but the techniques of strikes and boycotts remained punishable under various state and federal laws against trespass, assault, interfering with trade, obstruction of interstate commerce, and others. That said, the sheer number of strikes, in peak years engaging over a million workers, combined with the provocations of mass indictments and obdurate juries, made normal police procedures difficult. In their place, employers had recourse to the labor injunction, a court order to cease and desist from whatever activity was underway, accompanied by general admonitions against violence and intimidation, addressed to union members, their leaders, attorneys, aiders, abettors, and, on occasion, sympathizers. The labor injunction had come into use in the early 1880s, achieving notoriety with the Pullman strike and the jailing of its leader, Eugene Debs, in 1894. By the end of the 1920s, it had replaced the nineteenth-century charge of criminal conspiracy to become the employers' principal legal weapon.

Being suits at equity, labor injunctions in themselves were formally civil—not criminal—actions, entailing neither prosecutors nor juries. As in the previous episodes discussed, injunction orders were issued ex parte, upon minimum evidence, in this case based on boilerplate statements attesting to injuries, tangible and intangible, about to be inflicted on company property. Even when only temporary, injunctions constituted a setback to whatever union efforts were underway. More important from our perspective was their inevitable violation, if not through outright union defiance, then by individual members. Most of all illegal picketing, but also violations ranging from leafleting to catcalls, were treated as contempt of court, punishable by fine and imprisonment. Contempt in these cases was, once again, formally civil, not criminal, with fine and imprisonment said to be remedial rather than punitive, often imposed by the same judge who issued the original order. In large strikes, lasting from three to four weeks, arrests commonly numbered from 1,000 to 2,000, and in smaller actions, 100 to 200 individuals. Although far fewer strikers received prison sentences than were arrested, more workers were imprisoned for violations of injunctions than resulted from criminal proceedings against strikers in state or local courts.[12]

The tenor of events brought opprobrium to every agency charged with enforcing the law. Public police officers suffered a loss in prestige as both local governments and employers relied instead on their much-hated private counterparts. The Norris-La Guardia Act, passed in 1932 to eliminate the injunction's worst abuses, made express exception for circumstances where local authorities demonstrated an inability to keep order. Distinguished law professors, leading members of the bar, and members of the press denounced the judiciary, both state and federal, for conducting "government by injunction." The multiple levels of judicial review deepened the sense of confusion. When the U.S. Supreme Court in 1936 upheld a New York high court decision releasing an imprisoned employer who violated a state minimum wage law it had deemed unconstitutional, based on a federal precedent two decades earlier striking down a similar wage law passed by Congress, Republicans and Democrats joined arms to assail the majority's opinion for creating what President Roosevelt described as a legal "no-man's land."[13]

II.

The foregoing discussion highlights tensions in criminal law enforcement that preceded junctures of major constitutional development. My proposition is broader, however, embracing "normal politics" as well: throughout its history, the mandate of constitutional law has been to regulate the criminal law, as it pertains to both citizens and officers of government.[14] By mandate, I mean the law's ingrained purpose and what people continue to expect of it, if

10. 6 Op. Atty. Gen. 237, December 20, 1853.

11. Appendix, *Congressional Globe*, 33rd Congress, 2nd sess., February 23, 1855. The quote from Wade is on p. 214.

12. William E. Forbath, "The Shaping of the American Labor Movement," *Harvard Law Review* 102 (April 1989): 1187, and footnotes 351 and 352. "Criminal" contempt usually refers only to contempts "in the face of the court," before the judge in person.

13. Jeff Shesol, *Supreme Power: Franklin Roosevelt v. The Supreme Court* (New York: W. W. Norton, 2010) pp. 222–24. The decision was *Morehead v. Tipaldo*, 298 U.S. 587.

14. This is also the thesis of my paper "The Criminal Law Foundations of American Constitutional Development and How it Matters," prepared for the 2010 Annual Meeting of the American Political Science Association, Washington, D.C. For the concepts

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not in so many words. By constitutional law, I refer to that law initiated in the seventeenth century that was designed to contain within specified legal limits the authority one person exercises over another, and which is applicable universally, without regard to rank or position in society. This last feature distinguishes the constitutional from the old common law, with which it coexisted for three hundred years. The criminal law is understood to consist in the authoritative designation of acts determined to be harmful to society and to their punishment by fine and imprisonment. This claim is more elaborate than the one stated in the previous section, and in the short space permitted here I can support it only briefly. When fully documented, however, I believe it will persuasively explain essential provisions, structures, and ongoing operations of the Constitution over time.

Within this framework, concepts like rights and representation and arrangements like separation of powers are modalities of the pattern described. Regulating the criminal law is by no means the only thing agencies empowered by the constitutional document "do." My claim concerns those activities and arrangements associated with constitutionalism as a distinct historical phenomenon, and not those that can characterize any government, regardless of its form or underlying principles. Debtor relief and the elimination of slavery, for instance, while certainly compatible with values of constitutionalism, are in themselves not unknown under authoritarian governments. Likewise, public policies—transportation, health care, taxation, and the rest—pose constitutional issues only in so far as their adoption or methods of implementation transgress boundaries like due process and impermissible forms of discrimination. Structural elements, for instance, centralization and decentralization, may or may not have constitutional salience, depending on the government in question, to which we now turn.[15]

For the new United States, criminal law had heightened meaning; punitive legal action against colonial officers and citizens was the standard vehicle of British control. As each state and territory except Louisiana received English criminal law along with the rest of the mother country's common law and statutes as of some stipulated date—the colony's founding, statehood, national independence—into its own legal system, the constitution of each moved to protect its residents from familiar abuses. Of the first eight amendments to the federal Constitution, half pertain to criminal arrest, trial, and punishment, and three others contemplate unjust prosecution; one anticipates government oppression by means of civil litigation. Criminal law in the United States, then as now, was primarily the jurisdiction of the states; however, there were some three dozen federal crimes, at least eight punishable by death. The English common law hierarchies—master and servant, husband and wife, parent and child, guardian and ward—which at this time organized much of American society, depended on the criminal law for their continuation.

The connection is not just historical, but ongoing. This can be shown further with respect to constitutional *provision*. In the latter part of the eighteenth century, speech that was defined by law as treasonous, libelous, immoral, or otherwise harmful to the welfare of the community was punishable by fine and imprisonment, but only after, not before, it was expressed; in other words, speech was protected against "prior restraint," as it had been in England. Therefore, that was the First Amendment's original understanding as to what was allowed and prohibited in the way of congressional lawmaking. Over time, as freedom of speech was given a more expansive legal interpretation, eventually including protection against laws in the states and encompassing many previously forbidden speech acts, both before and after the fact, the criminal law correspondingly contracted. Today, political invective and commercial speech are constitutionally protected, but not pornography, which is still subject to criminal penalties. Similarly, government officers are liable to criminal punishment if they break and enter into a private residence without a properly issued warrant, the meaning of which has expanded and contracted over time; and so on, through the Bill of Rights.

The two systems of law show a similar relationship with respect to constitutional *structure*. The criminal law inspires the theory of the constitutional separation of powers. The tyranny to be avoided through the enumeration of powers in each constitutional branch must be understood historically against the background of criminal penalties imposed on English judges and members of parliament, and on colonial authorities. Officers in each branch of the U.S. government have rights under the Constitution to perform their duties, without forcible interference by members of the others; legislators may not be "questioned in any other place" about their speeches

of "constitutional moments" and "normal politics," see Ackerman, *We the People*.

15. The question might well arise whether this is not old wine in a new bottle, that the crimes described here are simply what other scholars have described as the oppressive exercise of government or private power. This dismissal is defeated, I believe, by the *causal* connection between law breaking and constitutional development—specifically, and not as a proxy for, say, a social movement explanation of constitutional change. As for the issue of redundancy more generally, I know of no theory whatever that links the constitutional and criminal law systematically rather than episodically (e.g., through criminal cases like *United States v. Cruickshank*), let alone across the full spectrum of constitutional affairs. Whether this produces a compelling picture of constitutionalism will remain open to argument. Whether one finds the prospect of unifying theory more satisfying than fragmented and localized theory may, in the end, come down to a question of intellectual taste.

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in debate.[16] Running through the text is the premise that acts of government officers will regularly deprive citizens of property and personal liberty; structural boundaries by definition coincide with the immunity to punishment granted officers of each branch in performing these acts. Refinements by the Supreme Court regularly draw on the criminal law: for instance, officers lose immunity only if violating "clearly established" limits of which they can reasonably be expected to be aware—awareness distinguishing the criminal from the noncriminal act.[17]

The reliance of constitutional law on the criminal law in its *operations* is evident in the forms of action available to citizens and government officers to challenge unconstitutional acts by officers and agencies of government in a court of law. These are first, a habeas corpus suit, available to persons accused or convicted of a crime or otherwise held in custody, brought against the officer presently in charge—the sheriff, say, or the warden. The other is a suit against an officer or agency for damages or injunction against an injurious act, either accomplished or prospective, in violation of an existing constitutional right. Neither of these actions is a constitutional right in itself. Though habeas is mentioned in the Constitution's text, it is guaranteed against suspension only where it is already provided, which is ordinarily by statute.[18] Like the arrest actions discussed in the previous section, these suits are designated as civil, not criminal, for they do not themselves end in punishment, but each is inextricably entwined in the criminal law. Prior to the 1960s, the rules for bringing other suits against officers required that the plaintiff show some common law injury, normally an intentional injury to one's person or property, that is, an act that would have been indictable as a crime if committed by someone other than an officer; most suits continue to claim such injuries today.[19]

As an independent, up-and-running system, the criminal law has its own characteristic principles, obedience to which is important to its honor and legitimacy. Befitting a foundation, one principle is stability, both as it characterizes the criminal law's inner workings and its presumed role in society. If the beginning of constitutional law as it is understood here can be located in the seventeenth century, then the criminal law is at least five centuries older—a lifespan remarkable even among English historians well acquainted with antiquity.[20] The crimes laid down under Henry II, both felonies and misdemeanors, have been supplemented and refined over time but not fundamentally displaced. Contravening the instability endemic to society has, throughout this long time, comprised the criminal law's *raison d'être*. A closely related principle is due process. Due process appears under the alias "law of the land" in Magna Carta and in its own name a century later. The principle was vital to a law regularly requiring the seizure of persons and their belongings; it had particular importance to an invader-dynasty like the Normans. Ever since, due process has been a legal marker, distinguishing legitimate acts by government officers from crimes like breaking-and-entering and kidnapping.

Knitting together the whole is *jurisdiction*. This capacious organizing idea of medieval government was the principle by which officers were placed in multiple stations, hierarchically, according to an intricate web of finely delineated rights, enforceable at law. At risk of penalty, the medieval sheriff could not attend to a dead body without the presence of the coroner; nor, in most places, can his modern successor. This characteristic hairsplitting comports with the penchant of the criminal law for distinctions and technical rules. Rights of office were property, its boundaries established by the details of any given jurisdiction. In a more extensive discussion I have named the entire bundle "officism," to denote a law that is above all concerned with its own efficacy and reputation, an attitude well suited to an operation whose mission requires that it regard society as an alien sea of potential wrongdoers. Even the innovations in criminal law—the preliminary hearing, for instance, and the defense attorney—were defensive, inward looking, prudentially motivated. When regular criminal appeals were first instituted in the original American states (well over a century before England), the purpose was not to benefit defendants, but to secure uniformity, thereby improving the national standing of the fledgling legal systems.[21]

The constitutional law does not entirely override these principles; on the contrary, they continue as its backbone. But constitutional momentum for its

16. See Karen Orren, "Officers Rights: Toward a Unified Field Theory of American Constitutional Development," *Law and Society Review*, 34 (2000), 873–905.

17. The current "clearly established" standard is usually located in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), p. 815.

18. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held habeas appeal available in immigration disputes, setting the habeas appeal directly under the Supremacy clause. In 2005, Congress passed the REAL ID Act, aimed expressly to reverse that decision. The Court has yet to resolve the Act's constitutional validity. In *Boumedienne v. Bush*, 553 U.S. 723 (2008), the Court held that prisoners at Guantanamo Bay had full rights to congresssional provision in accordance with the Suspension clause.

19. Since the 1960s, most suits against officeholders have been filed under Sec. 1983 of the federal civil code. Section 1983, first promulgated in 1871, has a criminal counterpart, punishing many of the same acts by fine and imprisonment under various sections of the U.S. Criminal Code, principally Chap. 18, Sec. 242.

20. For instance, S. F. C. Milsom: "The miserable history of [criminal law] in England can be shortly told. Nothing worth-while was created. There is no achievement to trace." *Historical Foundations of the Common Law* (London: Butterworths, 1969), p. 353.

21. David Rossman, "'Were There No Appeal': The History of Review in American Criminal Courts," *Journal of Criminal Law and Criminology* 81 (1990): 549.

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part proceeds on a different set. Stability in constitutional law implies equilibrium, adjustment, and not simply past practice. Constitutional officers are organized in jurisdictions, but these are regularly contested, contingent, inviting of innovation. Constitutional rights are inherently aspirational; they exist on-balance. Constitutional law, conceived in change, faces outward, onto a constituent citizenry whose happiness is a stipulated pursuit. In short, in place of "officism," constitutional law exhibits "citizenism."[22] All persons as such are answerable to both constitutional and criminal law. Developmentally, the question becomes, what is the changing and respective authority of the two?

It may be helpful to visualize this interaction by means of two images—loosely speaking, "models"—of constitutional change. The first is the "Thin Blue Line" model. Here, the constitutional law draws a line against the criminal law, dividing acts in society and government that can legally be punished by fines and imprisonment and those that cannot. Over time, the line shifts, is adjusted back and forth by legislation, judicial decisions and constitutional amendments. The same line delimits the authority of officers—presidents, legislators, prosecutors, policemen, social workers—and the protection of individual citizens, distributing rights and liabilities between and among them, constraining one party as it widens the leeway of another. This model is applicable to specific domains of activity in which constitutional protection has obtained—religion or race relations, say, or search and seizure. It might be used to track development in particular courts or in electoral or legislative proposals, or public attitudes toward existing criminal or constitutional law, and, in multiple lines, to follow the timing of separate events.

The second is the "Take a Bite out of Crime" model. In this model, the constitutional law over time "eats" or absorbs the criminal law on which it rests. To depict this process, I borrow from a late-nineteenth-century diagram in a book about religious fundamentalism, showing a rectangle stood on end, containing small squares as on graph paper.[23] In that illustration, the squares at the top, going from side to side and forming a band several spaces deep, are filled in white and represent the earth's Protestants; the gray squares in a deeper band just below represent the combined adherents of Catholicism, Chinese and Greek religion, Islam, and Judaism; and the black squares in the band beneath—by far the deepest—represent the population of heathens. The objective was to show how many black and gray squares in the world were still waiting for the missionaries to turn them white ("Take a Bite Out of Satan"). In our version, the white squares stand for the constitutional law, the black squares the criminal law, and the gray squares the territory occupied by halfway provisions like habeas corpus and the civil fine. This model is better suited than the "Thin Blue Line" model to convey the relative position of the constitutional law and the criminal law in their entireties and, in successive showings, the speed of change over time. It can better depict broader dislodgements—of due process by equal protection or "officism" by "citizenism"; and it expresses the anticipatory dimension of constitutionalism, the "normative" momentum with which it is culturally hardwired.

The moving force in both these models is persons and groups, inside and outside of government, who advance proposals and positions on one or the other side of the constitutional-criminal law divide. Nothing is presumed about why given actors might adopt one posture or another; ideologies, interests, personalities, strategies, historical situations will be various and relevant of study. My argument is that, for purposes of analyzing constitutional development, all can be meaningfully organized along the lines suggested, at "constitutional moments" and during "normal politics" alike. For an example of the latter, and with the caveat that the analysis is by no means limited to the judiciary, we might focus on the Supreme Court. This method should be capable of explaining multiple decisions, however grouped over subject matter and time. I will briefly consider only one, the widely discussed *Citizens United v. Federal Election Commission*, decided in 2010.[24]

Citizens United was a suit for an injunction against enforcement of Section 203 of the Bipartisan Campaign Reform Act (BCRA) of 2002. This section prohibited campaign expenditures by corporations and labor unions drawn from their general treasury funds during specified periods in the presidential election cycle. Criminal penalties for violating this and other sections of the bill included five years in prison. Citizens United, a nonprofit membership corporation, sought an injunction restraining the F.E.C. from enforcing the act. It claimed that the provision was, first, on its face, a violation of freedom of speech protected by the First Amendment; it further claimed that if the act's requirements for public disclosures and disclaimers were applied to a film about Hilary Clinton that the corporation planned to air and advertize, it would be unconstitutional for the same reason. The Supreme Court majority agreed with the first of these claims and, reversing an expedited panel of district judges below, overturned the offending section.

22. "Officism" and "citizenism" are more fully elaborated in Orren, "Criminal Law Foundations of American Constitutional Development," footnote 14 above.

23. The diagram, originally published in 1886, is reprinted in George M. Marsden, *Fundamentalism and American Culture* (New York: Oxford University Press, 1980), p. 69.

24. 558 U.S. 50 (2010).

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Using the "Thin Blue Line" model, *Citizens United* draws a line against the criminal punishment of campaign expenditures of the type proscribed; using the "Take a Bite out of Crime" model, the constitutional law takes the campaign expenditures covered by the Act out of the criminal law's territory into its own. The movement is argued and justified according to the principles predicted. The Court majority, striking down Section 203, aligns itself squarely with the First Amendment, that is to say, with the constitutional law. It closely tracks the position taken by the plaintiff corporation, whose attorney opens both of his oral arguments before the Court on the theme of his astonishment that the acts of speech in question could be punishable by imprisonment; it is also the last statement he lays before the Court. The most interesting of the justices' opinions on the constitutional law side is Chief Justice Roberts's, when in concurrence he addresses the principle of *stare decisis*, explaining why it is sometimes obligatory for the Court to override precedent and why it has a special obligation to do so in disputed constitutional questions of the sort presented here.

The government, speaking on behalf of the criminal law, offers, also true-to-pattern, largely technical and procedural—"officist—reasons for its position, both in the briefs and oral arguments of the defendant regulatory agency. This also describes the long dissenting opinion penned by Justice Stevens. The dissent's first sections are given over to the Court's absence of jurisdiction, based on certain alterations in the pleadings; it also protests that the majority has inappropriately evaluated the statute's constitutionality by a facial standard instead of as-applied. Justice Stevens insists that the majority should have decided the case on narrow grounds, letting the constitutional issues stand on earlier cases, and that it misread recent precedents pertaining to identity-based distinctions.

The government comes close to mounting a "citizenist" equal-protection argument of its own when it takes up the issue of "antidistortion." Several years earlier, in *Austin v. Michigan Chamber of Commerce*, the Court decided that campaign speech could be banned purely on the speaker's corporate identity because of the great wealth aggregated in such institutions and the unfair advantage they enjoy over individual citizens as a consequence.[25] The majority opinion in *Citizens United* strongly denies the validity of this distinction, and in the second round of oral arguments the (new) Solicitor General disowns antidistortion as appropriate justification as well. Justice Stevens devotes the final section of the dissent to the theme of the deleterious mismatch between corporations and representative institutions. But instead of making this argument in constitutional terms, perhaps by placing the statute's provisions within citizens' protected interest in equal access to candidates for public office, either under the Fifth Amendment or the guarantee of republican government in Article IV, he instead defends the distinction made in the BCRA between corporate and individual entities.

Skeptics might well argue that the small-n (of one) makes the example of little value, and that what is evidenced here is mere rhetoric. But provisionally at least, we have a metric, a set of ideal types that arguably corresponds to what moves judges philosophically, politically, and also—not versus, as judicial behavior might have it—legally, and does so better than a count of how many times precedent is followed or who votes with whom on what ideological ordering and under which Chief Justice. In short, we have an analysis that can better capture what justices "do," and, most important, what is at stake for the place of government in society—that is to say, constitutionally—in their decisions.

For cases besides *Citizens United*, one might speculate on the constitutional fate of same sex marriage, against which the argument has been significantly weakened, if not altogether vitiated, by *Lawrence v. Texas*, decriminalizing intimate relations between persons of the same sex.[26] Another question instructively viewed in the same light is legal abortion, where the fortunes of the opposition is likely to depend on its successful characterization of abortion as murder, justifying indictment and punishment.[27] Or, more subtly: some laws are written as a means of avoiding challenge by indicted persons. For instance, a law passed by the voters of California in 1996 to prevent affirmative action in state education and employment inherently resistant to citizens' suits for the impairment of civil rights, precludes prosecutions through non-provision of criminal penalties.[28] To repeat, my interest is in understanding disparate disputes within the same theory of constitutional change.

III.

It remains to return to the episodes of crisis that opened the discussion and ask: What does their location in the historical interplay between criminal and constitutional law suggest about constitutional development besides the fact that development occurs there? In the first place, the constitutional remedy applied to a particular breakdown of law

25. 494 U.S. 652 (1990).

26. 539 U.S. 558 (2003).

27. A formulation of the pro-choice argument consistent with these remarks is in Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: Oxford University Press, 1996).

28. See Cynthia C. Jamison, "The Cost of Defiance: Plaintiffs' Entitlement to Damages under the California Civil Rights Initiative," 33 *Southwestern University Law Review* 521 (2004); and *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (1997).

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enforcement will vary in its impact on the criminal law at issue. In terms of the models above, the specific act in question may or may not change its position relative to the line between criminally punishable and constitutionally protected. The Constitution of 1789 established, for the first time nationally, the punishable status of many acts, both of citizens and of officers. The disorder surrounding the issue of debt left its mark on the provision for federal bankruptcy legislation. It has also has been credited with the establishment of federal diversity jurisdiction and the full-faith and credit clause.[29] The ban against the states' coining money or issuing bills of credit, permitting acceptance of any "thing" in exchange other than gold or silver, and impairing the obligations of contract—all in the same constitutional sentence—are plausibly traceable to the debt crisis as well. But unpaid debts were still punished by penal sanctions. A wave of reform in the 1830s abolished imprisonment in some states for some debtors, but the practice did not die out legally altogether until after the Civil War; and indeed, if the institution of peonage is included, not until the 1960s. Put in terms of rights, the new Constitution redistributed rights among federal and state officers, and citizens gained rights protected in the Bill of Rights and elsewhere in the document. Rights of creditors and debtors as such, however, did not substantially change from where they stood before the framing.

The emancipation of slavery, on the other hand, did end criminal offenses under the Fugitive Slave Law of 1850 and other related federal and state laws. The Fourteenth Amendment made acts of state officers that deprived persons of equal protection or of life, liberty, or property without due process of law (or citizens of their privileges and immunities) criminally indictable under legislation that might be passed by Congress. The Fifteenth Amendment made acts of state and federal officers that denied citizens the right to vote because of race or previous servitude similarly indictable under future congressional statutes. In terms of constitutional rights, former slave owners were denied constitutional protections they had enjoyed earlier. Former slaves were guaranteed personal liberty, state and federal citizenship, the vote, and rights against the aforementioned acts by state and federal office, all to be implemented by Congress. Federal officers were given rights against state officers in the implementation and enforcement of these amendments; otherwise, both groups of officers retained their constitutional rights, subject only to new limits on the contents of the criminal law. The doleful results of this continuing arrangement for the rights of former slaves are well known.

From 1936 forward, the Supreme Court interpreted the Constitution in a manner that no longer placed employers' actions in the workplace beyond the reach of criminal punishment. That is, masters' acts previously protected under the Constitution as inherited common-law rights were now indictable at legislative option. Conversely, federal officers were now given authority under the commerce clause to pass and enforce criminal laws pertaining to hours and wages and other aspects of the workplace that earlier were at the inviolate discretion of employers. On the other hand, the acts for which workers had been arrested for contempt—that is, for coercion, intimidation, and violence—retained their position as crimes, indictable in circumstances determined by state and federal legislatures.

In terms of constitutional rights, those of legislative and executive officers expanded relative to judicial officers, and the rights of federal officers expanded relative to state officers. The constitutional rights of employers contracted; those of workers were unchanged. This is not to argue that the demise of the law of master and servant was not of great legal advantage to working people, it was; or that they did not materially benefit. Pursuant to statute, federal judges no longer punished strikers by injunctions or presumed criminality in the commission of facially noncriminal offenses at common law. But nothing in the Constitution guaranteed that workers' collective actions would not be punished if they violated the criminal law as the Congress and state legislatures defined it.

Notice the lack of symmetry between positions on either side of the "Thin Blue Line." Acts protected by the Constitution are absolutely prohibitive; actions that violate these protections may be struck down, legally enjoined as unconstitutional, and criminally punished as provided by law. Over time, the precise limits of what is protected are legally argued and redefined; but within these limits, no discretion is admitted. Put differently, layers of legal appeal are designed to ensure this condition prevails. On the other side, acts that are indictable under criminal law are discretionary, both in their legislative definition and enforcement. Neither citizens nor officers have available actions by which to compel the passage of a criminal law, an indictment, or enforcement in any particular instance; these decisions are the jurisdiction—the right—of legislative and executive officers. The offense of unpaid debt, without constitutional protection to the contrary, remained punishable by imprisonment for many decades until it was not. Likewise, left to implementation by Congress, the constitutional rights of former slaves awaited nearly a century for the disallowance of officers', and later, private citizens' adverse acts. In the case of workers' collective actions, without even the bare constitutional platform afforded former slaves, it was

29. See, for instance, Henry J. Friendly, "The Historic Basis of Diversity Jurisdiction," *Harvard Law Review* 41 (1928): 496–97; and Mann, *Republic of Debtors*.

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left to the discretion of federal and state officers what to prohibit and how. Despite organized labor's victories of the 1930s, criminal punishment overall has fallen as heavily on workers—some have argued more heavily—than on their more recently vulnerable employers.[30]

In other words, attending to the interplay between criminal and constitutional law offers an explanation for why all constitutional rights are not equal, not even all "negative" rights, not even after the Supreme Court has declared them to be rights. As already suggested, this observation has relevance for "constitutional moments," which historically have imposed new legal vulnerability on superior parties in hierarchical relations, without necessarily inverting legal authority. This applies to "normal politics" as well. For instance, husbands were traditionally protected by the judiciary against criminal punishment for physically chastising their wives, based on common law rights in the marriage relation. Judges, exercising their right of judicial review, could and did interdict any prosecution "in derogation" of the husband's right. On the other hand, legislation to protect women against spousal violence by defining it as a crime has faced a number of political, procedural, and jurisdictional difficulties pertaining to both the authority of officers and the rights of defendant husbands. Constitutional rights against various kinds of unlawful discrimination, whether by private or public agencies, face similar obstacles. The point here is not that reconstructing social relations is arduous, but that constitutional laws organized to interrupt the imposition of criminal laws have characteristic limits.

The perspective endorsed also explains a related anomaly, which is the fact that the constitutional impact of historic breakdowns in criminal-law enforcement has extended beyond the crime at issue and the immediate participants in the disorder. The turmoil of the 1780s was followed by the monumental event of the Constitution itself. The Civil War was followed by emancipation, of course, but likewise under the Fourteenth Amendment the program of American industrial expansion. The 1930s, after interruption by the World War, was followed by a "rights revolution," indeed at the same time that organized labor's position under the criminal law arguably deteriorated. Put in terms of our models, the total "Bite out of Crime" in periods of major constitutional development may be disproportionate to the original pressures on a given "Thin Blue Line," and even at odds with subsequent shifts in its position.

One explanation for this result might be that the intuition behind these remarks is simply wrong, that there is no causal connection between the episodes of criminal disorder and the constitutional development that ensued, or at least no more connection than any number of events that might be described as precipitating or destabilizing after the fact. The relationship tightens, however, if we run the story in reverse. Although wider in reach, the rights revolution of the 1960s was premised expressly on the union-induced expansion of the Commerce Clause and on the Court's withdrawal from oversight of "economic" crimes legislated by Congress. That is what Justice Stone famously anticipated in *United States v. Carolene Products*.[31] The Court's overturning of Lochner-era state police powers on the basis of substantive due process followed directly on the new constitutional rights afforded the federal judiciary by the Civil War amendments. Indeed, the doctrine of substantive due process makes a premonitory appearance in *Dred Scott v. Sanford*.[32] Going further, the pro-slavery advance of the antebellum period is inseparable from protections afforded the southern states under diversity jurisdiction and the full-faith and credit clause, both directly associated with the criminal punishment for debt.

A different working through of these sequences would build on what in the previous section is referred to as "citizenism," that is, the confident, thrusting, citizen-regarding orientation associated with constitutional law and its supporters, including, for instance, supporters sitting as members of the Supreme Court. Under this interpretation, the Court's initial moves are conciliatory, measured; those that follow take on the momentum of a new judicial majority while at the same time remaining faithful to original compromises—on debt, black freedom, trade unionism—at their source. A similar argument might be made for advocates' arguments. "Officism," by contrast, is defensive, highly sensitive to public criticism and to the effectiveness of law enforcement. For instance, in this reading, the "switch in time" of Justice Owen Roberts in 1936 would have less to do with the political battle shaping up in Congress than with the seemingly universal public disdain for the Court's recent decisions and the manifest failure to quell industrial violence.

To further give this argument legs into the present, consider as a hypothetical precursor of major constitutional change the current breakdown in criminal law enforcement associated with the prohibition of narcotics. It is difficult to find an article in a respectable scholarly journal that does not pronounce the "war on drugs," of some forty years' duration at this writing, a failure: it is expensive, a cause of violent crime and police corruption, suffers from racially disparate enforcement, corrodes civil liberties, and is a shadow on U.S. foreign policy—all without stemming

30. This situation is fully analyzed in James Gray Pope, "The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of Constitutional Law, 1921–1935," *Columbia Law Review* 102 (2002).

31. 304 U.S. 144 (1938), f.n. 4.

32. 60 U.S. 393 (1857).

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the rise in drug usage. This crisis bears all the typical earmarks. Enforcement incentives are skewed: like the slave commissioners given double fees for returning a prisoner to captivity, police departments are allowed under state and federal laws to retain a portion of assets seized in arrests, resulting in a concentration on street crime rather than white-collar traffickers, and on buyers rather than sellers. Another resemblance is procedural: drug arrests are criminal, but as in other episodes, judges usually determine commitments without the participation of a jury after plea bargaining. A third earmark is a disaffection among the ranks: among judges, who ignore prescribed minimum sentences or refuse to process further drug cases, and local district attorneys and other state officers, who resist federal intrusion in traditionally state domains.[33] A prominent interest group in favor of the legalizing of narcotics is Law Enforcement Against Prohibition (LEAP), which describes its membership as 15,000 active and former prosecutors, judges, federal drug agents, and police officers (including, for instance, the former police chief of Seattle).

How might the constitutional law respond to this crisis in criminal law? One of the changes favored by drug law reformers is the return of drug policy to state and local jurisdiction, with only a marginal and passive financial role for the federal government. Suppose the Supreme Court were in some future decision to overturn their 2005 decision in *Gonzales v. Raich*, that individual states may not interpose their own laws legalizing marijuana for medical purposes only against federal enforcement of congressional law criminalizing all marijuana use by private parties.[34] That decision was 6–3, defeating arguments that might plausibly prevail today over the then-reigning federal-preemption doctrine. For instance, a reversal might be justified by the increasing dangers to the federal system of an unbounded definition of commerce, or by the constitutional prohibition against commandeering state officers to enforce federal laws, or by a call, like the one made by Justice O'Connor in her *Raich* dissent, for Brandeis-style state experimentation.[35]

If the past is a lesson, one might imagine that such a change, ardently sought by advocates of drug legalization, could turn out to have little lasting impact on the war on drugs. States and local legislators might not prove to be the liberalizers the reformers expect; or it might be that no U.S. Supreme Court majority would support state over federal drug laws for other than medical purposes. On the other hand, *Raich's* overruling might spearhead a fundamental redistribution of citizens' and officers' rights on a range of currently polarizing constitutional questions for which local control could provide an answer—school prayer, abortion, gun control, same-sex marriage.

Please be reminded that the aim of the foregoing remarks has not been oracular, but exploratory, of possible lines of thinking opened up by the connection between constitutional and criminal law. There are many avenues to survey. One, for instance, is an examination of the impact on existing constitutional rights generally of a continued reliance on forms of action connected to the criminal law for their enforcement. Another is to determine in what ways the character of constitutional law may change as the criminal law on which it has historically rested is "devoured" by successive episodes of constitutional development. A third is the question of whether national security issues pose unique or only intensified issues for the relations between constitutional and criminal law. These and other concerns of interest must rest until another occasion.

33. See examples in John S. Baker, "State Police Powers and Federalization of Local Crime," *Temple Law Review* 73 (1999); Nathan Greenblatt, "How Mandatory are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences," *American Criminal Law Journal* 36 (2008); Susan Klein and Sandra Guerra Thompson, "DOJ's Attack on Federal Judicial 'Leniency,' The Supreme Court's Response, and the Future of Criminal Sentences," *Tulsa Law Review* 44 (2009).

34. 545 U.S. (2005) 1.

35. Ibid., 42. *Gonzales v. Oregon*, 546 U.S. 243 (2006) upheld the Oregon judiciary's interpretation of that state's provision for physicians to administer medications regulated by federal law to assist the suicides of terminally ill patients, against U.S. Attorney General Ashcroft's decision that such administration was in violation of the Controlled Substances Act. 546 U.S. 243. Justice Thomas's dissent argues the majority's opinion is a repudiation of its reasoning in *Raich*. 546 U.S. at 299.

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