Public Reason as Higher Law

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The enclosed article presents a model of higher-law formation reconstructed from John Rawls' concept of public reason. The theory takes the two aspects of public reason, the procedure and the content, and adds a third dimension: time. The model I present takes the procedural constraints of public reason as the gatekeeper of the content: only concepts of political justice satisfying the condition of reciprocity can form the content of public reason. Over time, that public reason forms a three-dimensional overlapping consensus, which suffices for higher law by providing canonical interpretations and interpretive methods for the written Constitution. Public reason as higher law preserves the dualist conception of the higher-lawmaking “People” as the only sovereign actor capable of creating rather than applying or interpreting higher law.

This is a novel concept in American jurisprudence, bringing John Rawls political liberalism into conversation with legal theory. It presents advantages over other interpretive methods such as theories of founders’ intent, which suffer from such pathologies as an unwarranted privilege granted to a founding generation, and a narrow vision of democratic theory based on vote-counting rather than popular sovereignty and inter-generational equality. Public reason as higher law surmounts these limitations.

This article will interest scholars of jurisprudence, Rawls' liberalism, and Ackerman's theory of dualist democracy. I hope that this Journal will find my submission satisfactory for publication.

Gordon Ballingrud
Abstract. This paper presents a model of higher-law formation by employing a modified version of John Rawls’ idea of public reason. The model specifies a theory of public reason that combines the procedural and substantive aspects of public reason, and extends the concept over a third dimension, time. This concept, by virtue of its multi-generational democratic pedigree, forms a repository of political and legal concepts of justice that conform to the duty of civility, and the broad consensus on political and legal norms required of the content of public reason, which forms the overlapping consensus. Thus, public reason as higher law takes the two sides of public reason and stretches them over time, forming a three-dimensional overlapping consensus. This concept takes all of the legal and political concepts deeply entrenched in our history, and forms a uniquely American conception of higher law. This piece argues for public reason as both a useful and normatively compelling model of higher law formation.

Introduction
This paper argues for a method of conceiving of higher-law formation rooted in John Rawls’ concept of public reason. I present a way to modify the concept of public reason to allow it to function as a tool of higher-law creation, and then argue for the merits of this concept as a tool of constitutional interpretation. Public reason, so conceived, provides a useful and compelling tool for producing higher law, as a multi-generational overlapping consensus. Such broad and deep consensus provides certain concepts with a democratic pedigree greater than ordinary legislation, comparable to the Constitution itself.

What is the Higher Law?
I take the higher law to mean the rules by which ordinary legislation is made. The higher law sets the terms of policy-making: the rules and institutions by which law is made, limitations on the process’ output, rules of construction and applications of the text in Court decisions, “super-statutes”, and principles logically inferred from the Constitution’s structure and the theory of constitutionalism (e.g. judicial review, prohibition on state secession, the principle of sovereign immunity, and many others).

To elaborate on each, I begin with the rules of process and institution formation, one category of Hart’s theory of secondary rules. These are familiar

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1 See e.g. *Alden v. Maine* (527 U.S. 706 (1999)) for an extra-textual principle of state sovereign immunity derived from the 10th and 11th amendments. *Alden* stands for the principle that a state may not be sued in its own courts under federal law without its consent. This principle stands outside the 10th and 11th amendments, which ensure that the states retain non-enumerated powers, and that states may not be sued, as such, in federal courts. However, *Alden* relies on general principles of federalism derived from those amendments, and the historical concept of the states as pre-existing sovereigns who retain their sovereign dignity even after delegating broad powers to Congress.

2 H.L.A. Hart, *The Concept of Law* 92-95 (1965). In attempting a taxonomy of law, to which this section is dedicated, it will be necessary to speak clearly about what sort of law I seek to define. Constitutional law is necessarily a category of secondary rules because constitutions primarily serve to create and limit lawmaking institutions; as such, constitutional law helps to “specify the ways in
from high school civics: Article I creates the Congress, and enumerates and limits\(^3\) its powers. Articles II and III create the executive branch and the judiciary, and enumerate and limit their powers. As for limitations on the process' output, one also finds familiar sources: for example, the First and Fourteenth Amendments protect substantive rights, particular realms of human conduct in which law has no place (e.g. speech, assembly, press, private affairs, etc.) An exhaustive list of these limitations is not necessary; here I attempt only a taxonomy of the higher law.

For the next two categories, rules of construction and Supreme Court exegesis, and principles inferred from constitutionalism itself, I stand on what Tribe called the "invisible Constitution", rules of positive higher law which have a tenuous ground in the words of the document itself. Tribe writes that the invisible constitution is twofold: the trivially invisible constitution is "concepts and propositions that all but the most literal-minded and short-sighted reader would readily 'see' and feel no need to defend in any elaborate way"\(^4\); the genuinely invisible constitution is "those [principles] that go beyond anything that could reasonably be said to follow from what the Constitution expressly says".\(^5\) The former is characterized by what Tribe calls common-sense elaborations, such as the idea that the "speech" protected by the First Amendment extends not just to the spoken word but to written and expressive speech as well.\(^6\) The genuinely invisible constitution is more abstract and detached from the text, largely consisting in political and legal axioms, such as the principle of the rule of law, and popular sovereignty.\(^7\) The key difference between the two is the degree of their connection to the written Constitution, but both stand for the principle that the constitution is not wholly comprised in the written Constitution.\(^8\)

\(^3\) See primarily Article I, § 8 for enumeration; see (Contract Clause, Suspension Clause) for such limitations.


\(^5\) *Id.* at 28; The end of Tribe’s book is to dispel the myth that all of the Constitution's meaning and power are exhaustively defined in the document's words. He argues against the strict textualist that legal interpretation must be limited to the plain meaning of the text, arguing both that the text often has no plain applicable meaning, and that the words' literal meaning can be either impractical to implement, or lead to an impoverished applicability of the Constitution's meaning. Other constitutional principles, regularly applied and widely taken as assumed, simply have no grounding in the literal meaning of the text. I take Tribe's book as canonical; I offer here mainly a rule of construction of the invisible Constitution.

\(^6\) *Id.* at 25.

\(^7\) *Id.* at 28.

\(^8\) Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 Philosophy and Public Affairs 3 (1992). By “Constitution”, I understand the written American document ratified in 1789 and amended twenty-seven times since then. By “constitution”, I shall understand the whole body of higher law as defined in this section, and defined by Samuel Freeman: “[T]he political constitution of any regime is that system of publicly recognized and commonly accepted rules for making and applying those social rules that are laws. This system of highest-order rules constitutes a political system in that it defines offices and positions of political authority, with their respective
Rules of construction and judicial exegesis are familiar concepts for the lawyer and philosopher. Interpretive rules, such as *expresio unius est exclusio alterius* are often used in constitutional interpretation, but are not themselves legally binding: there is no general rule of constitutional construction. The Constitution itself is largely silent, with the exception of the Ninth and Tenth Amendments, on how one ought to read it. Judicial exegesis is also a familiar category of higher law: supposedly only applications of the Constitution’s words and precedent, is judicial exegesis a category of higher law in itself?

I argue that it can be. Here I rely again on Tribe, who argues for several methods of interpreting the invisible constitution. For our purposes, he points out the role that precedent plays in several of his methods of constructing the invisible constitution, including Geodesic Construction, in which landmark Supreme Court rulings, such as *Miranda v. Arizona*¹¹ or *Brandenburg v. Ohio*¹² give substance to qualifications, rights, powers, duties, immunities, liabilities, and so on, and the procedures officials are to observe for making, applying, and enforcing valid laws." (*Id.* at 6) However, I disagree with Freeman as he writes that popular sovereignty and constitutional legitimacy are what “everyone can reasonably accept the Constitution whatever his situation—that is, we could all agree to its terms in our capacity as free and equal sovereign citizens, if we were given the opportunity, our judgments were informed, and we freely and publicly exercised our reason.” (*Id.* at 14) I would amend this to say that the constitution is what we have agreed to rather than what we could agree to, and that popular sovereignty consists in government by what the People have wanted rather than what people might hypothetically agree to. This renders constitutional interpretation less an exercise in philosophy, or thought experimentation, which judges are ill equipped to do.

Bruce Ackerman, *We the People: Transformations* 70-77 (1998) Ackerman addresses the argument that the rule of construction, *expresio unius est exclusio alterius* governs Article Five interpretation: if only one method of amendment is spelled out in the Constitution, then its inclusion excludes other candidates by implication. Ackerman dismisses this argument by reference to the Founding itself: the Federalists did not rely on existing higher-lawmaking structures when advancing their new constitution; they relied on a theory of popular sovereignty which requires that the People always retain the power to revise the terms of their government. Ackerman argues that although the Federalists instructed future generations to use one tool to solve constitutional problems, reference to their own actions, which relied neither on the ratification procedure in the Articles of Confederation nor Article Five, implies that other tools are appropriate as well. Ackerman argues that just as the Federalists bypassed existing higher-lawmaking structures to advance their agenda through the voice of the People, future generations may bypass Article Five with the same popular power. I believe that John Rawls’ conception of democratic citizens as free and equal supports this claim of Article-Five non-exclusivity. I will elaborate more on this concept below.

¹⁰ Except for super-statutes, even these various species of higher laws must arrive through the Constitution in order to be applicable by courts—and often find their way into law through vagaries like “due process”. Indeed, certain vague provisions of the Constitution seem to contemplate this continual higher-law development. One example of this approach is the deliberately vague Eighth Amendment, which prohibits “excessive” bail and “cruel and unusual” punishments. *Atkins v. Virginia* (536 U.S. 304 (2002)) and *Penry v. Lynaugh* (492 U.S. 302 (1989)) relied on evolving public standards of appropriate punishment for the mentally retarded to produce the rule against it (*Penry* noted that the necessary public consensus had not evolved; *Atkins* found that it had). The recent *Hall v. Florida* (572 U.S. 1 (2014)) confirms the principle that malleable constitutional protections cannot be given hard-and-fast rules of application (*Hall* ruled that the standard test of mental retardation, an I.Q. score below 70, was not sufficient to satisfy *Atkins* and the Eighth Amendment).


textual guarantees by marking the outer boundaries of government regulation of constitutionally sensitive areas.\textsuperscript{13} Miranda warnings, in other words, serve the end of preventing self-incrimination, as guaranteed by the Fifth Amendment, by ensuring that an arrestee is perfectly familiar with his rights, including his right to remain silent, and that an advocate be present when interrogations take place. These rules are nowhere in the Constitution, as its critics have been quick to point out, but they serve the Fifth Amendment’s end of preventing self-incrimination as a geodesic shield around the core of the constitutional right. Brandenburg serves much the same role: though the “imminent lawless action” test does not appear in the Constitution, establishing a line beyond which the government may not cross protects the fullest extent of free speech rights permitted by non-chaotic conduct. Firmly setting the burden on the government of tolerating as much speech of whatever kind is allowable by public safety protects the core of the free speech clause of the First Amendment. Another example of Court jurisprudence as higher law includes the Exclusionary Rule of Mapp v. Ohio\textsuperscript{14} ensuring that the Fourth Amendment retains its full power. This is one example of a way in which the Supreme Court contributes to the substance of the higher law rather than simply its enforcement: it can fortify, but not create, the higher law with such principles.

The concept of super-statutes I borrow from Eskridge and Ferejohn\textsuperscript{15} who argued that some landmark statutes achieve higher-law status by virtue of their embodiment of abstract principles of justice (e.g. equality as non-discrimination), the constitutional-moment-like struggles which created them which lend them a legitimacy above ordinary legislation, and their role in shaping future law and interpreting existing law, even the Constitution. One example is the Civil Rights Act of 1964, which meets all three criteria, which survived intense political and normative debate, has entrenched itself into American public life, and has shaped constitutional and statutory interpretation.\textsuperscript{16} For our purposes, public reason as higher law imbues super-statutes with a superior pedigree of legitimacy in the same way as for transformative Court opinions, substantive principles, or canonical constitutional interpretations—the process is the same. I include super-statutes as a category of higher law in that they take on a democratic pedigree similar to other categories of the higher law, and that as Eskridge and Ferejohn argue, super-statutes inform constitutional interpretation.

This conception of the higher law is not unique. Many scholars,\textsuperscript{17} including Tribe and Freeman, offer a definition of the higher law, our constitution, not simply

\textsuperscript{13} Tribe, \textit{supra} at 172-209.
\textsuperscript{16} \textit{Id.} at 1237
\textsuperscript{17} Ernest A. Young, \textit{The Constitution Outside the Constitution} 117 The Yale Law Journal 408 (2007) is another example; Young argues that our constitutional order has changed without the use of Article Five because the document’s meaning is not entrenched in a singular understanding. The Constitution is defined by function rather than form, and as such, the Constitution has evolved to permit such modern developments as the administrative state. Constitutional principles such as dual sovereignty or individual rights, Young argues, are general in form and thus malleable in function, and are also relevant to statutory construction, suggesting that the constitution consists of both
as the words of a document but the basic animating principles of American politics. The constitution as such extends to the specific rules of the document, the principles of construction for enforcing those rules, canonical principles of legal construction whether statutory or constitutional, and principles of legitimacy, which give the Constitution its place as the skeleton of our constitution. My contribution to this scholarly literature is to offer public reason as a device for constructing the higher law.

**Procedure of Public Reason**

We begin with the procedure of public reason: rules of discourse that define the content of public reason. The procedure of public reason forbids legal and political rules or justifications of public actions that do not satisfy the constraint of reciprocity: that is, which depend on comprehensive religious or philosophical doctrines, which other citizens of different stripes could not reasonably be expected to endorse. Procedurally, public reason forbids any concepts dependent on comprehensive doctrines. It eliminates religious law and philosophical concepts that stem from assumptions which other citizens in a pluralistic polity cannot reasonably be expected to endorse.

Rawls writes, "A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected to endorse."¹⁸ Public reason’s procedure requires that "we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support."¹⁹

Public reason is thus a language, a method of communication based on viewing citizens as such, free and equal, and unlikely—given reasonable pluralism—to understand or accept public policies made to accord with comprehensive doctrines, whether secular or religious. It filters out those concepts and arguments for them in the public sphere. Public reason is divorced from theology or comprehensive philosophies, instead built on arguments addressing questions of political justice, tailored to citizens as free equals.

**Content of Public Reason**

"...[T]he content of public reason is given by a family of political conceptions of justice, and not by a single one. There are many liberalisms and related views, and therefore many forms of public reason specified by a family of reasonable political conceptions...The limiting feature of these forms is the criterion of reciprocity, viewed as applied between free and equal citizens, themselves seen as reasonable and rational."²⁰

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¹⁹ *Id.* at 776.
²⁰ *Id.* at 773-774.
Public reason is both a method for communicating with citizens as free and equal, and a family of conceptions of political justice. The history of public reason represents the content that has survived the centuries as the product of an historical filter. Those legal and political traditions which both pass the test of public reason’s procedural demands, and have long remained part of the American content of public reason, form the moral repository to which I refer.

The sum total of political conversation agreeing with public reason’s requirements, taking place in the United States throughout its history, and including its remaining legal and political baggage from the Old World, comprises the content of public reason as I employ it here. In this way, public reason’s procedural requirements define its substantive content over time.

Over the extent of our political time horizon, including the baggage from the common law, generations of free and equal citizens have regarded certain rights and liberties as within a reasonable political conception of justice. As long as such concepts can be separated from their comprehensive doctrine and still defended as reasonable within a liberal framework, they constitute this modified public reason.

Public Reason as Higher Law

Time is the key variable I introduce into public reason in order to translate its content into higher law. Time instills durable concepts of public reason with a respect founded on inter-generational consensus, a respect that can translate ideas into orders. The model of higher law formation I advance in this paper combines the procedure and content of public reason, but adds time as a third dimension, and relies not on distinctly liberal concepts of political justice, but on polity-specific concepts of political justice.21 Combining the procedural and substantial aspects of public reason produces a political-moral consensus ratified over time. The procedure of public reason acts as a filter, preventing the entry of concepts that citizens cannot reasonably be expected to endorse politically from their own belief systems. Ideas of political justice acceptable to the procedure form the content.

21 Though these concepts of public reason (procedure, content, higher law) stem from a liberal theory of justice, this concept need not be uniquely liberal in nature. I invite the reader to consider Kelsen (Pure Theory of Law (1971)), who argued that legitimate law stems from a basic norm unique to each society. I consider higher law formation to take place on these terms rather than Rawls’ or Freeman’s distinctly liberal terms. For example, whereas Rawls and Freeman argued that the First Amendment cannot be removed from the U.S. Constitution on grounds that to do so would destroy liberal justice, the First Amendment, like all parts of the Constitution, is always open to revision; if a constitutional provision loses its higher-law standing in public reason (if it loses its standing as part of the basic norm, in Kelsen’s terms), then it does in fact fall from the higher law. Further, I would argue that insofar as the overlapping consensus is formed by the processes of public reason, I argue, closer to Kelsen, that the content need not be uniquely liberal, over and beyond the constraints of public reason. Insofar as it is possible to fulfill the procedural constraints of public reason with non-liberal or theoretically illiberal concepts (by which I do not mean necessarily something cruel or oppressive), then such concepts are admissible into the overlapping consensus/basic norm, and thus into the higher law. Confronting the First Amendment scenario, Rawls and Freeman appear to want to retrofit the process of public reason and overlapping-consensus formation with a liberal supralaw, catch-all shield against anything distasteful which might find its way past public reason’s procedure.
Sustained across generations, these concepts form a broad, deep overlapping consensus that supplements and informs the interpretation of the constitutional law.

By public reason as higher law, I then understand both a written constitution broadly and deeply accepted as law, and principles of law or political justice that penetrate so deeply into a political structure that a simple, transient majority cannot alter it. In addition to enumerated powers, limits, liberties, and rights, the higher law may contain concepts fundamental to a polity’s identity, concepts which would require a constitutional moment, a basic shift in political identity, to overrule. If an overlapping consensus exists on a two-dimensional plane as the family of political conceptions of justice that disparate groups might share, then the higher law is the overlapping consensus given depth across time.

I intend to include in this definition not political and legal concepts explicitly endorsed or shared by most groups and individuals in each successive generation. Not even the Constitution would pass muster under so rigorous a test; we must rely on implicit consent. Further, I intend public reason and the higher law not to be simply majoritarian. I intend the public reason in the higher law to abide by Rawls’ rules for procedure and substantive content: any religious or philosophical comprehensive doctrines, no matter how dominant in a given period, must defend their claims to the higher law in terms of political conceptions of justice which other free and equal citizens can reasonably be expected to endorse. Finally, I rely not on what judges may suppose to be the proper rights and liberties endorsed by the family of reasonable conceptions of political justice, but those that have been historically endorsed by the People rather than their delegates or adjudicators, and have withstood the test of time.

\[\text{\textsuperscript{22}}\] In other words, even a constitutional moment must abide by the procedural terms of public reason. As I will argue in full later, a constitutional moment is nothing more than a rapid change in public reason as higher law. Therefore, like all public reason, it must abide by the duty of civility, the moral requirement that all citizens frame their political arguments and beliefs in terms that all other citizens can reasonably be expected to endorse. A proto-constitutional-moment might push for the repeal of the First Amendment, for example, but such a moment must justify its claims on terms others could reasonably endorse: not, for example, that the First Amendment must fall so that we might constitute a fully Christian nation, but rather, the First Amendment does not suit us, for the People believe that the Court has misused its powers of judicial review; the People wish to reconstitute the First Amendment into several separate amendments so as to underscore the importance of each protected right. The entrance of a purported constitutional moment into higher law, its status as a true constitutional moment, depends on the content of its arguments.

\[\text{\textsuperscript{23}}\] It seems appropriate here to remark on capitalization games I intend to play in this essay. First, the Constitution refers to the document that forms and regulates the American government; the constitution refers to the wider, more general term that Rawls and Samuel Freeman employ to refer to the basic structure of a society. Second, I borrow Bruce Ackerman’s terminology when referring to the people of the United States, whose ordinary lawmaking duties are carried out by their elected delegates in the normal course of politics, and the People, which refers to a higher lawmaking voice, animated at discrete moments of unusually strong national attention and solidarity. In sum, where the Constitution refers to a particular document, the constitution refers to the basic structure of society. Where the People refers to the higher lawmaking voice of a polity, the people refers to ordinary periods of delegated lawmaking, where the polity operates under the rules established under earlier constitutional moments.
The Model: Geometric

Now, let us move to spatial descriptions of my argument. I believe that these will help to illustrate what I have claimed in the preceding sections. I describe two models of public reason as higher law: a geometric model, and an algebraic.

Imagine a circle. Let this circle represent a cross-section of the content of all actual conceptions of political and legal justice in American and colonial history. Let us call this circle C. So, this circle C can represent the universe of political conceptions and concepts of justice held in the United States or the colonies at any one moment in time.

Now imagine a smaller circle inside circle C. We will call this circle P, because it will represent the subset of C according with the procedural demands of public reason. All concepts of justice that can be justified on bases apart from any comprehensive doctrine are contained within this circle. This represents the overlap of the procedural rules of public reason, which demand common public justification, and the unique content of American political concepts and conceptions of justice. We are left with a common public repository of American conceptions: the overlapping consensus.

Now, to form higher law out of this public reason, imagine the circle C stretched to become a cylinder. Let us call the third, vertical dimension time (T). We have two cylinders: the larger cylinder, the content of all American political conceptions past and present, and the content meeting the demands of public reason. We now have a three-dimensional overlapping consensus, filtered through time. This figure, cylinder P within cylinder C, is public reason as higher law.

But surely the content of the overlapping consensus does not stay constant in shape over time, as this figure suggests. For the sake of simplicity, time will not affect the shape of P, so as not to show an historical pattern of the overlapping consensus expanding and contracting over time. To avoid delving into such problems as the classification of specific concepts of public reason, problems of how finely concepts in the overlapping consensus can be parsed out and which of those
qualify, and especially how to represent a concept of justice as part of the area of a cylinder, I will avoid this problem. It is meant merely to represent the mechanism of public reason in a simple, intuitive way without delving into complex historical and legal criticism. And because this figure does not delineate between higher law pertaining to power and constraints, or rights and liberties, it seems safe to assume that the growth of rights and liberties by amendment and supplemental public reason has tracked the contrary expansion of government (federal) power in the 20th century fairly cleanly. Perhaps not perfectly, but the spatial particulars are best left for another study.

Nonetheless, we must remember that constitutional moments and gradual accumulation and erosion shape the three-dimensional overlapping consensus. Thus we might think of Reconstruction as producing a shape something like a tiered-wedding cake: a sudden expansion of the overlapping consensus within the cylinder P. Gradual erosion may have occurred in the Jim Crow era, like taking sandpaper to a chair’s leg to shave away at it gradually.

So we should not think of public reason as higher law as though it were a constant. But for the sake of simplicity, I have illustrated it so.

Further, in reality, both the circles C and P and this cylindrical model would resemble something more like a marble cake. Political conceptions according with public reason’s requirements would rise up, but then either die out or become absorbed into more general conceptions. The clean cylinders-within-a-cylinder model, as well as the neat circle P, is only spatial simplifications to illustrate the point more clearly.

Public reason as higher law is the content of American conceptions of justice, comprising the overlapping consensus, stretched over time to account for multi-generational consensus. The procedural requirements of public reason act to remove the illiberal, fractious concepts that cannot be justified on terms common to adherents of all reasonable comprehensive doctrines (the integral of C – P with respect to T), leaving the time-honored concepts of public reason which constitute the higher law.

Such is public reason as higher law. Through this formula, the content of the overlapping consensus may be conceived as a higher law on a democratic par with our Constitution.

The Model: Algebraic

Alternatively, imagine an algebraic model instead of a geometric one. We have three variables: time, the content of the overlapping consensus, and the higher law itself. Finally, we have one constant: the procedural demands of public reason, which operate as constraints on the conceptions of justice that can count as the overlapping consensus. Consider the higher law (HL) as our dependent variable; content (C) and time (T) as our independent variables, and procedure (P1 and P2) as constants, in this case constraints on the variable C.

Then we have the following model:

\[ HL = \begin{cases} \int_0^T f(C, T) dC & \text{if } P1 < C < P2 \\ 0 & \text{else} \end{cases} \]
This function represents the line integral of the function from P1 to P2 of the content of public reason with respect to time. Assume that the bounded distribution includes only those concepts shared over time—thus we will retroactively assume that the exterior of the distribution represents concepts illiberal, or discarded over time. Thus, the content of public reason, bounded by the procedural constraints, is integrated over time to form the content of the higher law.

Given that both content and time are linear variables, integrating them produces simply the area under the curve created by the functions. The boundaries of the integral on content represent the procedural constraints of public reason; variable T is generally unbounded, extending indeterminately into the past, subsuming common-law, colonial, and post-Revolutionary history, up to the present. However, I set the integral's domain to range from zero to P, where P represents the present day. I chose zero as the starting point not to imply that there is any identifiable starting point on the time through which the content of public reason will be integrated, but rather to imply that there is some such point, or perhaps a range of points in time. It would be rather odd to suggest that the whole of human history provides the content of public reason. To speak of a uniquely American concept of public reason requires a limit on how far back in American or British history we might go. Such an abstract concept cannot be fixed cleanly in time, but is necessary to this model.

In this function, let P1 and P2 constrain C to be within the bounds of procedural public reason. There is no reason to have two procedural constraints on C other than not to give the reader the impression that C is unbounded in any direction. C, in other words, is not infinite; to have only one procedural constraint on a two-dimensional space might give such an impression. The political concepts meeting public reason's demands are finite.

Public reason, however, necessarily has both procedural and content-based components; it makes little sense to think of the procedural constraints as bounding the content of public reason when to refer to public reason necessarily implies boundaries on what can count. However, I remind the reader that the variable C refers not to public reason's content, but to the universe of American concepts and conceptions of political justice. Thus, C bounded by P1 and P2 constitute public reason's content, much as the small circle and cylinder in the geometric model were a mere subset of the entire content of American thought on political justice.

Thus, though the procedural constraints P are inherent in the content of public reason, they bind the content of public reason with respect to the whole of the C-axis. So, though C may be restricted on either side by P, the higher law is bounded only by the slow advance of time, not by any discrete point in its past.

Of course, there are some spatial constraints on this diagram; this paper is meant only to describe the theory, not the history, of the higher law. Its content varies over time, whereas in the previous two models, the variations of time are not well accounted in spatial terms. One needs a historical-philosophical analysis to determine the actual extent of the overlapping consensus at any given point in time. This I do not aim to do here.
These two models are heuristic devices: ways to think about what public reason as higher law is, and how it is formed. The content is constrained by the duty of civility, and accrues over time, forming a deep and broad overlapping consensus.

*The Proof*

So we have models of public reason as higher law, but we have not systematically criticized this concept in the context of American constitutional law. After all, public reason and the overlapping consensus are abstract, meta-legal concepts; the law has concrete force. Even if public reason can form a sort of higher law, how does it achieve concrete power in American law? Should it not remain a sort of moral ideal? Is it perhaps better conceived as existing only indirectly in law, through the minds of the people, assumptions standing behind the normal political process?

I argue for the presence of public reason as higher law in American constitutionalism by way of a proof. I propose five postulates and argue for each in turn; I believe that the five postulates are axiomatic in political and legal parlance, and lead irrevocably to the conclusions that public reason as higher law represents the a useful method to conceive of the extra-textual higher law.

**Postulate 1**: The Constitution creates our basic political structure.

The first two postulates need little argument. It is axiomatic that the Constitution forms the scaffolding of our polity, both structurally and to a large degree morally. The Constitution contains broad pronouncements of political morality by protecting such essentials as the equal protection of the laws, due process, expansive, even categorical, protections for speech, religious exercise, press, assembly, contract, the writ of habeas corpus, petitioning the government, etc. Specific enough to bind, but broad enough to be acceptable to all: whatever our political stripe, when we are debating essential matters of political justice, the first place we usually look is to the Constitution.

**Postulate 2**: The Constitution is ever open to amendment by Article Five.

With some limited exceptions, Article Five leaves the Constitution open to amendment at all times. Again, this statement is uncontroversial. The limited exceptions to Article Five reflect political expediency in the Convention more than statements of broad entrenched principles (although the entrenchment of the Two Senators Clause could be interpreted as both, but it is hard to imagine why only it would be entrenched, rather than other provisions protecting representational purity, if principle rather than expediency were at stake). Because it has no substantial limit, Article Five is perpetually available for the People as a tool to amend their constitution.

**Postulate 3**: The Constitution presupposes the People as sovereign.

Here is the first potentially controversial postulate in my proof. It requires arguing for the People, not the states, as the Constitution's creator and master. But granted this, I believe it follows cleanly from the preceding two postulates. If the

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24 Aside from the limited practical relevance of the Two Senators Clause, it is difficult to see how any amendment could truly be entrenched. An amendment repealing the entrenched provision of Article Five in its first clause and replacing the Two Senators Clause in its second would seem to suffice.
Constitution is our basic political structure, and if the Constitution is ever open to amendment by the People, then clearly, the Constitution presupposes the People as the nation’s ultimate sovereign, notwithstanding the fact that Article Five provides for no referenda on proposed amendments, but instead requires ratification by the state legislatures or special state conventions. It is clear that absent a massive political groundswell, no amendment would succeed.\textsuperscript{25} But more than the functional role of the people in prompting their delegates into action, the Constitution arose from the People’s will rather than the assent of the sovereign states.\textsuperscript{26} As such, it is fundamentally an article of popular will and sovereignty rather than a welding of internally sovereign nations.

Because of Article Five, the People remain constantly free to update the text of the Constitution. To be able to change the Constitution contemplates the People as the Constitution’s master, and source of authority. If this is true, then it is clear that the People, authors and masters of the Constitution, are thus the authors and masters of the federal government as well. If both of these statements are true, then there is no political power that can set itself above the People, who are therefore the sovereign.

\textbf{Postulate 4:} Article Five is not the exclusive method of amending the higher law.

The clearest argument for this theory stems from the definition of the higher law given above. The higher law, I argued, includes precedent and principle as well as the Constitution’s written word. So, for example, when the Supreme Court recognizes protected classes of the \textit{Equal Protection Clause},\textsuperscript{27} the Court is fleshing

\textsuperscript{25} Peter Mayhew, \textit{Congress: The Electoral Connection} (1971). The main idea behind Mayhew’s book is that the men and women in Congress seek reelection above all else. Whether a senator or representative is a base political animal or a high-minded public servant, all aims require reelection. Thus, Mayhew’s book serves my argument in that an individual federal delegate has every incentive to follow their constituents’ desires (although, it is worth noting, not the desires of the people as a whole). The primary idea here is that though the states and Congress are the institutions through which the Article Five amendment process works, the driving force of the People pushes amendments through the Article Five process, not the impetus of the state legislators. My argument, and that of my cited sources, is that the states follow the People’s lead; never, or very seldom, do the states act first without a populist incentive, and even in this case, the People retain a veto over their delegates’ actions.

\textsuperscript{26} Amar, \textit{America’s Constitution} 5-53 (2006). Amar describes both the popular-sovereign, revolutionary roots of the Constitution, and the states under the Articles of Confederation as independent nations in an international treaty rather than a consolidated union. Only the ratification produced a new nation, a singular People, rather than a treaty among fractious nations. Relevant to this argument also is the fact that to ratify the Constitution, the Federalists and the People did not rely on the existing Congress or the existing state legislatures. This suggests that the existing, legitimate state governments were considered as having no role to play in the ratification process, that it was a true act of the People and not the States. Further, that Article Five provides two methods of amendment—the state legislatures or special state conventions—suggests that the real author of the amendment has a choice of which method the People will employ. Also see Ackerman, supra note at 9.

\textsuperscript{27} For example, \textit{Craig v. Boren}, 429 U.S. 190 (1976) recognized sex as a quasi-protected class, or \textit{Graham v. Richardson}, 403 U.S. 365 (1971) which recognized non-citizens as a protected class with respect to state law. These cases did not change the Equal Protection Clause, but they recognized its
out the Clause’s meaning, applying it to different peoples and policies, setting
standards for how it applies to government actors and the specific rights that
citizens can expect to find in it. The higher law thus can change by judicial exegesis
and public consensus, because it need not include the text of the Constitution.

I note briefly Dworkin’s argument in “Law as Interpretation” that the
function of lawyers and judges is to debate what the law is, not what it should be.
So, when judges rule on the Equal Protection Clause, they are not producing new
law but pronouncing the meaning of the law as it stands. I think that Dworkin’s
argument is generally true: lawyers and judges are not philosophers, and they
generally do not trade in normative arguments for what the law should be, and thus
legislate from the courtroom. However, I believe that Dworkin’s argument could
lead to the statement that judges and lawyers are merely divining the true, ideal
meaning of the law rather than changing or producing it in any sense. Obviously,
either extreme—that judges and lawyers read legal tea leaves, or that they drum up
new law as their moral sensibilities command—is untenable. In a sense, judges
produce new law by specifying the meaning of the existing law. Judges provide
necessary practical exceptions—Brandenburg allows the government to skirt the
First Amendment when grave lawlessness is percolating—or give concrete meaning
to legal vagueness—when the Court defines what is due process, or what suffices for
a speedy trial, as in Barker v. Wingo—fleshing out the details of what the law is.
While in a sense this is not creating new law—judicial review entails a
pronouncement that a government action is not in fact law, pursuant to existing law,
rather than a statement that government action is no longer law—it is also not a
Platonic exegesis. Interpretation involves not creating law, but giving or changing
its meaning. In this sense, the higher law changes as its practical application
changes.

Ackerman’s dualist theory, on which I rest my argument, supposes that
constitutional change has proceeded, and may proceed, by means of mass, sustained
popular mobilization, expressed through successive decisive elections (a
constitutional moment), thus making use of the unique American system of the
separation of powers. Specifically, Ackerman writes that the unique genius of the
American separation of powers is its function as a tool of higher lawmaking either as
a supplement or a substitute for Article Five. As for Reconstruction, he notes that

30 Ackerman, Id. at 160-186. In this segment, Ackerman describes his theory of higher lawmaking as
the solution to the Reconstruction dilemma (described in the next footnote). In his view, the fact that
the Northern states repeatedly affirmed the Republicans’ higher-lawmaking mandate suffices to
smooth over the “formalist dilemmas” of Reconstruction’s failure to comply fully with Article Five.
Relying on a theory of popular sovereignty, Ackerman argues that since the Congressional
Republicans came before the American people with their constitutional agenda every two years, and
won escalating majorities in Congress, they won a constitutional mandate to compel the Southern
states to ratify the Thirteenth and Fourteenth Amendments. The deep and broad consensus of the
Northern states legitimates the Congress’ use of the unique American separation of powers system to
the separation of powers and the Constitution’s system of staggered elections forced the People to articulate their call for constitutional change in several iterative elections, testing and refining their message through Congress against an intransigent President who was protected, but not immune, from congressional challenge. The two, four, and six year election cycles of the House, President, and Senate forced the People to send their delegates to Washington many times over, signaling to the government that their marching orders had indeed changed for good. This mechanism helps to ameliorate the Article-Five deficiencies of the Reconstruction amendments. The same pattern evinces in the New Deal, but without the use of Article Five at all.\textsuperscript{31}

One of the primary theses of Ackerman’s volumes is that constitutional change has not and need not take place by way of Article Five alone. The sustained popular mobilization he defines as a constitutional moment is aptly described as a shift in higher law through public reason; the theory easily picks up this conception of constitutional change, because rapid shifts in popular judgment on issues of constitutional essentials translate into changes in the content of public reason. As described above, changes in content feed into the three-dimensional overlapping consensus, the conception of the higher law. Further explanation of how higher law changes through public reason awaits a later section. For now it suffices to note that cow the President into submission; Congressional supermajorities, because their constitutional plan was repeatedly affirmed by the People (at least, the northern People), were justified in using the impeachment power to compel Andrew Johnson to stop resisting the ratification of the Fourteenth Amendment. This is one emblematic case of the use of the American separation of powers as a tool of higher-lawmaking: using the mechanisms of the Constitution to resolve inter-branch conflict on a popular constitutional mandate.

\textsuperscript{31} Ackerman, \textit{Id.} at 99-120. Here Ackerman describes his basic historical dilemma: the Thirteenth and Fourteenth Amendments cannot both be Article-Five compliant. The Congress recognized the Southern state governments as legitimate for purposes of ratifying the Thirteenth Amendment, but then denied them seats in both houses of the legislature both for purposes of ordinary lawmaking and for deliberation on the Fourteenth Amendment’s drafting. Resumption of full statehood status depended on the former confederacy’s ratification of the Fourteenth Amendment. Ackerman’s dilemma consists in this: if the southern states were full states for Article-Five ratification purposes with respect to the Thirteenth Amendment, then how were those same states not qualified to resume normal legislative functions immediately thereafter, and how could the resumption of their full statehood depend on ratifying the Fourteenth Amendment? If the southern states were competent to ratify the Thirteenth Amendment, then surely they ought to be qualified to sit in Congress for more mundane purposes. Further, to condition southern reacceptance into Congress on ratifying the Fourteenth Amendment is a Congressional power never contemplated in Article Five. Congress has power to propose amendments, but not compulsory process to ensure their ratification.

\textsuperscript{32} Ackerman, \textit{Id.} at 349-350. “[Further], It has encouraged others to make the same demand—yielding a far more serious public dialogue over constitutional principle than would have been obtained under Wheeler’s mechanical alternative.” Ackerman is surely correct that the Wheeler amendment alternative, which would have given Congress the power to overrule the Court with a 2/3 vote, would have been worse. This approach would only have created an indecipherable hodgepodge of statutes and Court opinions, two institutions talking past one another without a serious effort to bridge the gap between the laissez-faire, dual-federalist past, the demands of the Great Depression, and a people ready to see themselves more as a consolidated nation.
Article Five, both historically and normatively, is not and need not be considered the only method for amending or altering the Constitution.\textsuperscript{33}

Is it possible that the rule of construction \textit{inclusio unius est exclusio alterius} ought to apply to interpreting Article Five’s entrenchment provisions? This principle might exclude any method but Article Five on the ground that for the Constitution to express one method of amendment is implicitly to exclude all others. Does this method suggest that Article Five ought to be the only method for amending the Constitution?\textsuperscript{34}

\textit{Expressio unius} ought to bind judges, because the Constitution binds the institutions and offices that it creates. But because the People are not an institution, nor an office, and because the People create, and are not bound by the Constitution, the rule ought not to apply to the actions of the sovereign. To deny the sovereign the power to deploy the discretionary power that it has reserved, through the interpretive rule of the Ninth Amendment, and the principle of popular sovereignty enunciated by James Wilson\textsuperscript{35} would be to violate the text itself in addition to the theory undergirding it. The rule of \textit{expressio unius} can serve as a way to interpret the Constitution in such a way as to bind the government and lawmaking procedures it creates, but not the Creator itself.

It would be strange indeed to deny successive iterations of the People the same discretionary higher lawmaking power enjoyed by the ratifying generation. The Federalists did not feel themselves bound by the existing legal institutions of their time; they encouraged the People to exercise their sovereign prerogative to throw off the legal contract between the states (in a sense, to incorporate as the People for the first time), and to create a new one better suiting their needs. It would be odd to say that the Constitution, itself not created by an Article Five process, limits the same sovereign prerogative that allowed it to supplant its predecessor. Just as the signatories to the Articles of Confederation and each state’s constitution prior to 1789 had no power to limit the sovereign prerogative in their time, so the voters in the 18\textsuperscript{th} century have no such power either. As Ackerman

\textsuperscript{33} Nor need it be the only method for amending the constitution, the constitutive fabric of our polity, which includes but is not limited to the Constitution. Indeed, Article Five can lay claim to being a method only of altering the document, not the general concept of the institutions and principles by which Americans go about the business of law and politics. The substance of this concept is the higher law as described above, and is subject to change far above and outside of Article Five.

\textsuperscript{34} Ackerman, \textit{Id}. at 69-77. This passage describes Ackerman’s argument on the non-exclusivity of Article Five: pursuant to the concept of inter-generational equality, which Ackerman accepts implicitly, the fact that the Federalists deliberately rejected the existing higher-lawmaking tools renders it presumptively legitimate for future generations to do the same, especially in light of the fact that Article Five does not claim to be exclusive. Therefore, \textit{expressio unius} does not apply, as it would restrict the power of the People to claim the same popular sovereignty as their Federalist forbears.

\textsuperscript{35} In the Pennsylvania Ratifying Convention, Wilson remarked, “...for the truth is, that the supreme, absolute and uncontrollable authority, remains with the people.” He expanded on this principle by remarking that this supreme authority of the people included necessarily the power to grant power to governments, and the power to revoke it at will, because this is the necessary implication of wielding supreme authority.
argued, Article Five does not govern the amendment process completely; my claim is less ambitious. I only claim that the existing text's meaning can be changed substantially by popular consensus, and that those long-held, considered judgments on fundamental matters become binding on governments as they become canonical interpretations or principles of the higher law.

**Postulate 5:** The Ninth Amendment and the Due Process Clauses allow for recognition of rights not explicitly mentioned in the Constitution’s text.

The Ninth Amendment and the Due Process Clause, the former expressly acknowledging the presence of rights unenumerated in the constitution, the latter interpreted in much the same way, allow for areas of human life to be shielded by the Constitution from political interference. The Ninth Amendment’s meaning is clear: there are constitutional rights that the Bill of Rights’ framers could not enumerate. The Due Process Clause, especially the Fourteenth Amendment’s, has been imbued with substantive protections for individual liberty largely at the Court’s hands. The text of the Ninth Amendment and the long-recognized concept of substantive due process confirm that some constitutional concepts, in this case, protected liberties, do not subsist in the Constitution’s express wording.

So both the amendment and the concept contain a message: do not suppose these listed rights are exhaustive; the rights to be recognized here ought to be discerned by a process similar to the one which created the others in the Bill: by democratic pedigree, by broad and deep consensus.

Public reason as higher law provides a way of discerning their content without philosophical exposition by judges, or the shifting sands of politics. Indeed, as substantive due process has become an inextricable part of modern American jurisprudence through (at least) the incorporation doctrine, and certain incorporated aspects of the common law, it provides a candidate for both substantiation and criticism by the concept of public reason as higher law.

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36 Ackerman, *supra* note at 28.

37 Tribe, *supra* at 111-112. Tribe notes that the doctrine of substantive due process extends back to *Scott v. Sandford* (60 U.S. 393 (1857)), the infamous Dred Scott decision, which held that no black man or woman could be considered an American citizen. Justice Taney argued that “…an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.” (*Id.* at 450)

38 “This ranking of laws reflected a democratic gradient. The Constitution trumped all other laws because it derived more directly and emphatically from the highest lawmaker: the entire American people, whose ordainment would set the whole system in motion.” Amar, *supra* at 300. In this passage, Amar describes the Constitution’s legitimacy as stemming from its superior democratic pedigree, consistent with the Supremacy Clause’s hierarchy of law: the Constitution, the laws made pursuant to it, treaties, state constitutions, and state laws. Though the clause makes no direct statement of hierarchy, Amar argues that the order implies it. The hierarchy is based on the democratic strength of the laws: the Constitution first, because it stems directly from the people; federal laws, because they come from the delegates of the whole people, treaties, because they come from the presidency and one branch of the Congress, and then the laws of the states, which only bear the mark of a small subset of the people. The Supremacy Clause implies democratic pedigree as the determinant of a law’s strength.
Substantive due process, both insofar as it is thoroughly entrenched, and questionable in content, signals the need for a legitimating principle like public reason, but also thus allows for criticism and limitation.

Postulate 6: The best way to conceive of this non-textual higher law is by reference to the People’s considered judgments, held broadly and deeply.

This argument extends from Postulates 3, 4, and 5. We have established that the Constitution supposes the People as the nation’s sovereign; that Article Five is not exclusive; and that the Ninth Amendment is a blank check to expand constitutional rights. By terms of postulates 3 and 4, I argue here that this blank check extends to each and every generation of the People, as the Constitution’s trustees, not to judges to create any whole-cloth rights they deem fundamental.

First, I borrow Rawls’ own concept of civic equality. If citizens are equal, is there any right for one generation, or an aggregate of generations, to partition certain constitutional provisions from the considered (even if misguided) judgments of any other generation? If no one generation may claim a privileged place, then I submit that as each generation bears a right to contribute to constitutional understanding pursuant to its own pressures and ideas, the higher law consists in the sum of these constitutional theories, held (mostly) constant through time, and restricted by the demands of public reason’s procedure.

To say that there is such a right gives a founding or framing generation a special right to define constitutional terms for its successors violates the demands of equality founded on a baseline threshold of the two moral powers, which are reasonability, the notion that a person is capable of formulating a conception of justice for him or herself, and rationality, the notion that a person is able to pursue their conception of the good with the best means available, and to revise their conception if it proves necessary or beneficial. To the extent that each generation is comparable in their exercise of the two moral powers, their judgments on constitutional essentials ought clearly to be treated with equal deference.

Insofar as Rawls’ concept of the overlapping consensus as the content of shared political conceptions of justice crosses generations, this precept violates the equality of citizens as moral beings. Even if no one generation gets to say that an amendment is entrenched, then a gaggle of citizens on one side of a debate is able to dictate the terms of self-government (paradoxically) for the present and many future generations. It would be as though the generations of an overbearing past...

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40 The animating principle is that a generation is free to determine the terms of their self-government. Should one generation feel that the First Amendment is not salutary—nor even tolerable—to the terms of their political beliefs, then that generation is free—morally and realistically—to overturn it. If a later generation believes the opposite, then it is free to re-enact the amendment just as its predecessor was free to overturn it. Both Rawls and Freeman thus presume an oppressive revolution accompanying such an amendment. Such dire conditions need not accompany this amendment—in fact, I should wonder whether such revolutionaries would feel the need to comply with Article V if their schemes were so nefarious, and clearly contrary to our constitutional tradition. If such conditions do evince, and a constitutional revolution were at hand, then one wonders whether the Court would have any power to resist it anyway. If such conditions
were able to govern from the grave. Or, it would mean that members of one living generation were able to impose their higher-lawmaking voice on younger generations despite the youth’s dissent and equality. Even if Rawls did not argue explicitly for generations as free and equal, surely generational co-equality is a necessary extension of any argument for free and equal citizens. Multiple generations co-exist in modern pluralistic democracies. And there appears to be no tenable reason for which past generations ought to hold a presumption over the living.

That proposition depends on inter-generational equality: values and practices ought to be regarded as co-equal across generations, and thus aggregated to produce a higher law, an intergenerational consensus which gives depth to the thin overlapping consensus. The following argument makes the point clear.

a) Each generation is equal with respect to the others for purposes of higher law production. b) Each generation is sovereign in its time, but conditionally bound by the considered judgments of its predecessors. c) Because all generations are co-equal and sovereign, free to accept and reject what it wishes from its predecessors, what several successive generations have been able to agree upon, what has survived the successive judgment of all peoples in all of our country’s time, takes on a special character, just the Constitution has; it becomes super-democratic, not just with the seal of a set of voters in one time and place, but of innumerable implicit voters in many times and many places.

As the Constitution carries similar levels of democratic legitimacy and inter-generational approval, I argue that the best place to continue the search for other ideas of extra-constitutional law is the concepts which have attended the Constitution: political and legal principles that have survived a similar level of inter-generational, three-dimensional scrutiny.

So, we arrive at the finish: the People are sovereign; the Constitution is always amendable; the Constitution derives its higher-law status from its superior democratic pedigree; it need not be amended only through Article Five; the Ninth Amendment and the Due Process Clause give just cause not to assume that the Constitution’s words comprise the sum of all higher law.41 If all of these are true, then our conclusion follows cleanly.

Conclusion: Because the People create their Constitution, and because a right need not be textual to be constitutional, those concepts long recognized and protected by the People obtain constitutional status; the People’s judgment trumps government’s moral or political conceptions.

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41 A similar argument can be made for the federal government’s powers by means of constitutional moment, particularly in the context of the New Deal. By my earlier arguments, it is possible that the New Deal, mainly serving as a rule of construction of Article I powers, did not need the level of popular engagement it achieved. However, unlike Atkins, since the New Deal not only squared off with pre-existing rules of construction of Article I powers, but also the doctrine of substantive due process in the Fourteenth Amendment, there were higher hurdles to climb. Atkins, by contrast, faced no such Goliaths.
This proof has shown the need for a concept of higher law outside of the Constitution’s text. Public reason is a useful tool for conceiving of this form of higher law, and for interpreting the vague concepts in the higher law’s text.

We must remember what public reason really is: the terms and content of public conversation, the concepts embedded in the public consciousness; it its higher-law form, it is those ideas so inured by time in the political and legal culture that they become almost secondhand. They become constitutional by virtue of the people’s consciousness. Consider a counterfactual: if our Constitution were replicated—to the letter—by a different people in a different time and place, the political result would undeniably be different. It would be driven by a different culture, different political ideas, a different legal history. Ours, those particulars that give our Constitution’s text, in practice, a unique flavor are the content of public reason; with the consent of successive generations, this content becomes higher law. It is everything essential to the American conception of constitutionalism.

So, changes to the public consciousness can happen either suddenly, as in a collective moment of public self-awareness, or gradually, as new interpretations of old principles come to be accepted in the public mind; say, as new minority groups come to be accepted under the ambit of “equal protection”, or as the People decide gradually that certain kinds of human conduct are—or are not—due the process of law. This proof will be useful later on, when arguing for the merits of public reason as higher law, and for describing how public reason and higher law change.

Merits of This Approach

Why should we think of public reason as higher law? What are the virtues it can offer over other methods? Which weaknesses of other retrospective methods can it parry?

By its procedural terms, public reason excludes illiberal or other fractious concepts that are not broadly shared by the people, and not held across generations. No doctrines that depend on the reasoning or assumptions of comprehensive traditions are permitted by public reason’s demand of reciprocity. As such, public reason deflects other tradition-based concepts’ failure to account for the distinctly religious character of the pre-Revolutionary American colonies and its people, which would fail the duty of civility in the procedural requirements of public reason. All such methods can plead is the protection of the Religion Clauses, which in this context is little more than a retrofitted filter. Though the First Amendment might exclude much of these religious conceptions of political justice from the higher law, public reason more elegantly solves this problem by incorporating a protection against fractious doctrines directly into its machinery. Blander tradition-based conceptions of higher-law formation exclude such historical baggage only in an ad hoc manner.

Tradition-based conceptions of higher law also often fail the test of generational equality. Thus another advantage is public reason’s constant

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42 In *Cruzan v. Director* (497 U.S. 261 (1990)), Justice Rehnquist incorporated in his opinion the idea that the common-law principle of forced medicine as battery, as it was “deeply embedded” in our history and tradition (though, of course, that principle was not dispositive because Nancy Cruzan had
renewability: it is always open to revision as each generation has power to influence the content of public reason as higher law, either by reinforcing existing traditions, creating candidates for future generations to judge, or by means of a constitutional moment, accomplishing a substantive shift in a short time on its own. Thus, public reason’s jurisprudence is not limited to, or predicated mainly on, a single generation, as is some jurists’ reliance on the founding generation (or a given amendment’s founding generation). When, for example, Justice Scalia relies primarily on the conception of “cruel and unusual punishment” in 1789 to interpret the Eighth Amendment, he ignores all but one slice of the universe of public reason. Such a method ignores possible changes since the founders’ time, and the power implicit in the equality among generations to offer or revise canonical interpretations of constitutional provisions.

Yet another advantage is this method’s empiricism. It relies not on abstract, philosophical, or subjective principles, but on historical fact. Thus, it limits judges’ discretion, and makes constitutional law more resistant to individual judges’ moral conceptions. Public reason as higher law is a meta-method, a method about methods: it tells judges not to rely on their own conceptions of political justice or of proper democratic values, but on those ratified by the People. It should thus be less controversial than, for example, methods which rely on judges’ estimations of the most essential liberties in a constitutional democracy, or historical methods which

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43 For Scalia’s commentary on this issue, see "Originalism: The Lesser Evil," 57 University of Cincinnati Law Review 862 (1989), in which he writes, “Orginalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system,” echoing the procedural conception of democracy of other originalist jurists. Scalia’s defense of his preference for the founding generation’s constitutional interpretation consists in a contrast to the blank-check moral constitutionalism he attributes to other jurists, who engage in an open-ended quest to find new constitutional rights and powers to further their own preferences, or in a rudderless search for the most prudent legal outcomes (see Planned Parenthood v. Casey, Scalia J., dissent). He further fails to address the concept of inter-generational equality. As I have argued, rejecting the privileged place of the ratifying generation need not lead to the kind of subjective, structure-less jurisprudence Scalia seems to fear.

44 Without wishing to seem biased or flippant, I include in this category Roe v. Wade (410 U.S. 113 (1971)), because it provides little argument justifying its central holdings: that a general right to privacy has independent constitutional standing, and that it is broad enough to encompass a woman’s right to have an abortion. I also include Planned Parenthood v. Casey (505 U.S. 833 (1992)) because it does little to criticize or reinforce Roe, instead relying mainly on stare decisis to uphold it.
either provide arguments on the merely procedural nature of democracy, and the anti-democracy of investing the Constitution with rights not within its “four corners,” or a convincing democratic argument for the continuing, inter-generational legitimacy of the Constitution.

There should be limited dispute as to those concepts which make the cut, and no one generation holds a privileged place; missing in much founders’ intent jurisprudence is an explanation as to why that generation, or more, that particular group of folks who gathered in Philadelphia or in the first Congress, ought to be granted the professor’s chair at the table of constitutional interpretation.

How does Public Reason as Higher Law Change?

I propose two methods for how the People can change their higher law. The first is through a constitutional moment; the second is by gradual acceptance and accumulation. The net result of either method is a shift in the popular conception of the proper ambit of the powers and limits of the governments constituted by the People’s will. Recognition of powers, limits, and rights firmly embedded in the popular consciousness, which constitutes the higher law formed by public reason, can change either rapidly through a constitutional moment, or gradually across generations.

Rapid shifts are accomplished by constitutional moments as defined in Bruce Ackerman’s theory of dualist democracy; constitutional moments can be understood as changes in public reason. Indeed, the New Deal moment that he describes is best understood as such—as this period saw no Article Five amendment, the constitutional changes in this period are shifts in public political theory. The existing textual powers of Congress were reconstituted in the public’s understanding to extend beyond federalism and the liberty-of-contract doctrine.

Ackerman describes a constitutional moment as a unique product of American constitutionalism. It is characterized by mass public engagement on constitutional essentials, and inter-branch conflict within the federal government driven by sustained public consensus on a fundamental matter of political justice. Ackerman describes how the separation of powers is transformed from an ordinary...
lawmaking structure ensuring that unwise or exploitative laws are weeded out into a system of higher lawmaking due to institutional separation and staggered election cycles. The different term lengths of representatives, presidents, and senators ensures that the higher-lawmaking drive of one party, represented in one or more branches of government, presents itself before the people on multiple occasions, testing its popular mandate. For example, Ackerman notes how the repeated, overwhelming elections of the Reconstruction Republicans to Congress after the Civil War, and the New Deal Democrats to the Congress and White House during the Depression, signaled a broad and deep public consensus on a new direction in constitutional law. During Reconstruction, it was a decisive shift toward political racial equality, the supremacy of national identity over state identity, and federal oversight of state politics. During the New Deal, there was a decisive repudiation of the economic due process doctrine of the *Lochner* era, and approval of the extensive reach of federal commerce power. In constitutional moments, there is a rapid, deep, and broad change in the public conception of political fundamentals. A successful constitutional moment, defined by institutional acquiescence and legal consolidation of the public’s achievements, marks a shift in higher law through a deep and broad change in public reason. The sustained intensity of the public’s opinion allows a constitutional moment to compensate for the decrease in the depth of time over which the consensus is made. The other method of higher-law formation by public reason substitutes this intensity with length of time.

This definition resembles public reason as higher law in that a constitutional moment, defined by a fever pitch of public awareness and debate on fundamental political matters, produces a shift in the very foundations of the American polity. Whether by constitutional amendment, separation-of-powers machinery, or both, Ackerman’s constitutional moments refer to changes in the basic understanding of American political justice: in identity, fundamental rights and liberties, and the extent of government power. They are changes in public reason, movements of the overlapping consensus to cover new ideas. Public reason becomes higher law in this way by an unusually dedicated public committed to changing the basic rules by which its government does business.

A constitutional moment is a seismic shift in public reason accomplished in a short time, by a single generation or a set of co-existential generations. So, we see that a constitutional moment represents a massive, rapid shift in public reason. Now, we move to the gradual accumulation of public reason, a preponderance of which suffices to constitute higher law.

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48 Ackerman, *supra* note at 28.

49 Though, to be sure, this shift to racial equality was largely abandoned after Reconstruction ended. Though those commitments would have to wait until after World War II to begin vindication, they were embodied in the Fifteenth Amendment and the Equal Protection Clause.

50 Examples of the marks of a successful constitutional moment, surrender and consolidation, include the surrender of the Supreme Court during the New Deal and the transformative opinions (e.g. *U.S. v. Darby*, *Wickard v. Filburn*, *NLRB v. Jones and Laughlin Steel Co.*) solidifying the legal legitimacy of the New Deal, respectively. In Reconstruction, the defining marks would be the surrender of President Jackson to the Congress, and the ratification of the 14th Amendment.
On the other hand, gradual changes in public reason occur by slow accumulation: traditions of law and politics adopted and maintained over time. As shown above, there is a higher law outside of the Constitution’s text; I have further argued that insofar as the People ordained their Constitution, their actions suffice to supplement it or alter its meaning. In that vein, in the effort to add substance to vague constitutional clauses, it is best to look to the actions of the lawmaker—not the founders, nor the founding generation, but the successive iterations of the People, who speak in their higher-lawmaking voice not only by amendment or constitutional moment, but by inter-generational dialogue.51

Insofar as the People remain the unchecked sovereign in the United States, and insofar as the presumption rests with the People’s mandate in matters of constitutional interpretation, the first place that one ought to look when debating the meaning of vague clauses is the People’s public reason: the terms of debate widely shared, long held, which comport with the demands of civility and reciprocity. This jurisprudential approach maintains popular sovereignty by keeping the presumption of the nature of the higher law firmly in the People’s collective hands.

One should look first to constitutional moments. The People’s voice is, of course, loudest and clearest as such moments of crisis. But at times, our ringing voice is quieter. What the People have said unequivocally52 in times of constitutional moment is bright and clear, and may drown out the voices of preceding generations in one sweeping moment. But when filling in the details of the broad pronouncements of one generation, or giving meaning to any opaque part of the text, the quieter voices that speak across generations suffice to provide guidance.53

To illustrate the differences, take Ackerman’s account of Reconstruction and the concept of forced medicine as battery as recognized in *Cruzan*. On the one hand, we have a single generation in the post-war north uniting to put forth long overdue concepts in American democracy: the equal protection of the laws, due process of

51 This principle also depends on essentiality of protected concept to American concept of democracy. Peripheral concepts, which do not pertain to matters of political justice, may be changed without regard to the higher law.

52 The unequivocal (loud) voice usually only extends to broad statements of principle, like union over confederacy, or equal protection of law, due process to all; the courts, successive generations, and the political branches may then intervene to help fill in the gaps—if long shared over generations, these may too bear the name of higher law, as corollaries of the broad statements of principle, but no less part of the higher law for their ancillary nature. This is the quiet voice, described in the following footnote.

53 Again I emphasize that the quiet voice does not speak from one generation. Nor should the minutiae of a constitutional moment be drawn only from the generation responsible for it. It is ultimately speculative whether the framers of, say, the Fourteenth Amendment, intended for the Equal Protection Clause to apply only to matters of racial discrimination (and it risks an outcome-driven approach to argue this). So as not to privilege one generation over another, so as not to force the meaning given by successive generations to fall silent, one ought not to limit one’s jurisprudence to discrete moments in time. When able, a broader perspective, accounting for multiple generations, is best: more democratic, better comporting with popular sovereignty and inter-generational civic equality.
law, and voting rights, all against the state governments as well as against the federal. On the other, we find a general rule of consent: physicians may not perform medicine on an unwilling patient, recognized long ago at common law. There was no grand, singular pronouncement, but rather a long-recognized, broadly shared rule comporting to the procedure of public reason. Through time, it becomes content.54

I have put forth the argument that common-law rules, like that recognized in *Cruzan*, deserve special recognition by virtue of their long implicit acceptance. However, I recognize that the common law is judicially made, but I have argued that the People ought to be put at the forefront of constitutional interpretation; their judgment on constitutional essentials only can suffice for higher law. How can judge-made rules at common law occupy a privileged place, whereas judge-made rules made by institutions formed by the American Constitution are suspect? Here I argue that judge-made rules at common law like the one in *Cruzan* are not presumptively legitimate in the American system.55

In the American system, judges occupy a uniquely reactive, preservationist role, as Ackerman described in his dualist theory.56 I adopt that theory in this paper. At common law, judge-made rules were presumptively legitimate by the lack of a written constitution like ours, the lack of a separation of powers system like ours, which did not include an independent judiciary wielding constitutional review. This system did not contain the unique features which define our dualist democracy: the separation of powers system defined by staggered elections which allows the People to speak in the higher law through their federal delegates reduces judges not to the role of lawmakers by the king’s delegation or by Parliament’s leave, but rather to preservers of the People’s higher law through judicial review. It is the role left to them, as the higher-lawmaking function has been delegated to other institutions. This role comports with the American conception of judges from Hamilton to Marshall to Ackerman: judiciary as rear guard. Whereas judges at common law

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54 Any rule of recognition for informal constitutional changes will be vague; the clarity of Article Five is one of its great virtues. This does not counsel the abandonment of mechanisms like public reason, but is rather an inherent weakness of which scholars and jurists must be aware: “The boundary problems [a vague rule of recognition]...cannot be fixed by coming up with a more creative or sophisticated theory. Whenever one confers constitutional status on a norm that does not meet the document’s formal criteria, similar dilemmas are certain to arise.” (Young, * supra* at 454.) See footnote 61 for reference to a recent empirical effort to create a scientific rule of recognition for a constitutional moment.

55 *Cruzan* is a legitimate rule of due process, but not because it was made by judges at common law. Instead, it is legitimate because it passes the procedural test of public reason, and has sustained great breadth and depth of public consensus. Different rules apply to judge-made rules at common law than apply in the American dualist system.

56 Bruce Ackerman, *We the People: Foundations* 3-33 (1993): here Ackerman highlights his theory of dualism, and the courts’ role in the defense of the higher law from transient majorities. He describes the courts as the rear guard of the higher lawmaking process, intended to safeguard the achievements of prior generations against the carelessness of future generations.


58 *Marbury v. Madison* 5 U.S. 137 (1803): “It is emphatically the province and duty of the judicial department to say what the law is..... The powers of the legislature are defined and limited; and that
were rule-makers in the monarchy’s name, in the dualist system, judges are not legislators but protectors. They give vitality to public reason, but do not define it.

Therefore, we must not assume that if *Cruzan*’s rule against forced medicine, which has its roots in the common law, is part of public reason, that any judge-made constitutional rule can achieve the same status. The *Cruzan* rule, and other common-law rules like it, survives because it is a roundly accepted relic of a system with different rules, imported but not born of the same system.

Take as an analogy: a new principal at an elementary school may keep many of the rules of her predecessor, even if those rules did not abide by the same meta-rules of formation which her predecessor used. Such rules may comport with the theory undergirding other, new rules, and they may be deeply entrenched in the school’s collective identity. That these rules do not abide by the same meta-rules, which are now in effect, does not presumptively render them illegitimate; on the contrary, their deep acceptance in the school’s collective mind cautions against their removal. Nonetheless, the rule-formation techniques between administrations are different. Adopting some rules of the previous administrators does not require recognizing outdated methods.

*Judicial Enforcement and Further Research*

The end of this study is to provide a theory of public reason as higher law, so that this concept might help legal scholars to conceive of how higher law is formed, part of which is to illuminate the meaning of such concepts as due process of law, cruel and unusual punishment, and other vague and inherently moral constitutional concepts.

In particular, I believe that public reason as higher law might serve as a useful way of thinking about the due process of law. It may help to resolve some of the vexing questions of legitimacy surrounding substantive due process, in particular, or if this is too ambitious, it may at least provide one way to think about the concept. Of course, finding a common basis on which to reason about a concept can erase much of the academic and judicial bickering by providing a common set of concepts from which to reason. At its best, it can provide a unifying theory for some of the disparate concepts underlying due-process jurisprudence. Public reason as higher law would clearly support some due-process concepts, such as the incorporation doctrine, at least some of the principles of the common law entrenched in the due process clause, and perhaps even some of the specific privacy protections announced by the Supreme Court in the last century. However, I reserve my more specific thoughts on those matters for a future study. The relevant point now is that public reason provides a theory able to capture much of the existing substantive due process jurisprudence, and grants a useful tool for thinking about which aspects of the theory are constitutionally legitimate. How have the People thought about it? What have the People considered the most hallowed spheres of human conduct? What is too hallowed for the law to touch, or perhaps,

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where must the law not deign to interfere? Public reason can give an answer to these questions detached from free-form judicial subjectivity and obtuse insistence on eighteenth-century constitutionalism.

The most obvious problem of this approach is when does public reason become higher law? What is the threshold depth for the overlapping consensus to achieve the status of higher law? I can offer no firm answer to this question. This is irredicably a qualitative historical-legal judgment. Any firm quantitative answer, one that established threshold duration for a political concept to become deeply entrenched in the unwritten higher law would necessarily be arbitrary and virtually impossible to enforce. To argue that there is a singular day, month, or year at which such a broadly held concept becomes worthy of the name of higher law would both ignore the difference between gradual accumulation and constitutional moments, and infringe on the People’s authority to define the terms of their higher law at their own pace. No quantitative standard will do. There cannot be a mechanical formula for determining the requisite depth or breadth of public consensus necessary to fulfill this approach. Nonetheless, judges create standards for such subjective terms as compelling, unreasonable, cruel and unusual, equal protection, and more. If judges are good at anything, it is to come up with workable standards for enforcing subjective concepts. Interpreting the depth and breadth of the content of public reason is no Gordian knot.

We have seen how Ackerman’s definition of a constitutional moment provides a partial answer. Though less a temporal solution than a mechanical one, Ackerman’s description of a constitutional moment as achieved through multiple election cycles, and a process of popular constitutional engagement and inter-branch competition offers a way to think about when constitutional ideas become revolutions. Further, Young provides a scientific method for describing a

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60 This way of framing the question was in part inspired by Lawrence v. Texas (539 U.S. 1 (2003)), in which Justice Kennedy remarked that the law was stripped of its dignity by interfering in intimate sexual affairs, because such conduct was too private and personal for the law to touch. (Id. at 11, 18) Further, to label homosexuals as criminals weakened public respect for the law. (Id. at 11-12) Justice Kennedy frames the question of substantive due process the search for places of human conduct into which the law may not tread, both because the law is too dignified to sully itself in pursuit of norms it cannot adequately enforce, and because some parts of life are too private to be public. However, I believe this theory of due process is not consistent with the “right to liberty” (Id. at 3, 18) theory that Lawrence advances as well. It seems to me nonsensical to speak of a right to liberty as though the Fourteenth Amendment spoke of specially protected spheres of liberty—better is to say that due process protects any and all liberties, as long as the process is due to that area of human conduct. This is, in my estimation, the heart of substantive due process: the spheres of human conduct to which the process of law is due. The language of the amendment seems to foreclose the avenue of “right to liberty” jurisprudence: it implies that liberty may be denied with due process. The appropriate question is, where is the process of law due?

61 Daniel Taylor Young, How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling To Evaluate Bruce Ackerman’s Theory of Constitutional Change, 122 Yale L. J. 1990 (2013). This paper helps to shore up Ackerman’s dualist theory and his concept of a constitutional moment against a charge common to other theories of higher lawmaking: a vague rule of recognition (see Ernest Young, supra note 15). Daniel Young provides an empirical method for retroactively assessing the strength of a constitutional moment by looking to the content of popular discourse. Young finds that during Reconstruction, newspaper discourse was dominated by discussions of the
constitutional moment, which may prove useful to future, attempts to critique and define the extent of such moments and their legal impact. Though Young provides a measure for a constitutional moment, the threshold for higher law by gradual accumulation remains inherently and largely a subjective process. It requires the assent of multiple generations, but the requisite length cannot be fixed.

Nonetheless, some examples of public reason as higher law existing in current constitutional law may help to answer these questions: few still question the legitimacy of the federal government to pass laws regulating intrastate commerce; the New Deal’s constitutional contributions have largely been settled. In addition, such a principle as medicine-as-forced battery, recognized in such cases as Cruzan, is not questioned as a principle of law and medical ethics; doctors are generally understood not to perform medicine on an unwilling subject, or a subject unable to give consent. The incorporation of most of the Bill of Rights into the Due Process Clauses is perhaps the best, least controversial example to date: few question (few are even aware of) the idea that states may not infringe the freedom of speech or of the press, etc., notwithstanding the content of a state’s constitution. All of these concepts, from medical ethics to federal regulation to the Bill of Rights as the hallmark of American due process can be covered by public reason as higher law. All three, whether by gradual consensus or constitutional moment, have become embedded principles of public reason and higher law.

But not all debate on these topics is over. Of course, there are daily debates on the constitutional extent of federal power. Rather, generally the debate is settled: there is nothing approaching a constitutional moment seeking to dismantle the regulatory state. Though public discord may be rising against government power in some circles, it has not yet approached the level of a constitutional moment, and it will take far more than a few years and a nascent political sub-party to achieve that end. For now, the principle is settled; mostly, debates over policy prudence predominate rather than serious, broad constitutional inquiries.

Once more, continuing litigation of civil rights cases against states for constitutional violations shows that debate over the extent of constitutional protections as applied against the states still exists; the principles themselves are well established, but the debate over the application of the principles continues. The key point is that the debate on the general principle ought to be settled; its application, of course, will always still be up for debate no matter how settled is the principle.

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62 If nothing else, technological advances provide occasion to revisit constitutional principles. Look no farther than Maryland v. King (569 U.S. 1 (2013)), addressing police use of suspicion-less DNA swabs of arrestees, tested against a cold-case database to achieve genetic matches against an increasingly sophisticated law-enforcement DNA database, or Riley v. California (573 U.S. 1 (2014)), examining warrantless searches of an arrestee’s smartphone. Both cases test the long-settled Fourth Amendment principle that the government may not search or seize a person, papers, home, or effects without a warrant or a pressing probable cause. The presumption against suspicion-less intrusion is largely unchallenged. The particulars testing the extent and appropriate applicability of this principle will be never-ending. Much the same is true of most constitutional rights and powers.
Conclusion

This paper has presented a model of higher law formation that relies on John Rawls’ concept of public reason, modified to include multi-generational consensus as a criterion for distinguishing fleeting from duly considered concepts of public political justice. The procedural requirements of public reason inform its content, the substance of the overlapping consensus. The overlapping consensus, durable through time, constitutes higher law. Thus, public reason functions as a device of higher lawmaking, providing the People an avenue to continue to make their will into law, inside or outside the constraints of Article Five. This criterion allows principles of legal and political justice to approach the democratic pedigree of the Constitution itself, and provides a method for conceiving of the higher law that avoid the pitfalls of other methods. For example, public reason as higher law avoids the thorny issue of the privileged place of the eighteenth-century ratifying generation by embracing a principle of generational equality. It also avoids juridical free-form moral constitutionalism by placing constitutional thought squarely in the hands of the People.