The Dark Side of the Creed: Stable Values and Constructed Meaning in American Thought

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MEANING IN AMERICAN THOUGHT

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INTRODUCTION

Americans have long pondered the seemingly unbridgeable
divide between lofty ideal and lived reality. The many dark chapters
in American history—slavery, the slaughter and forced relocation of
Native Americans, Jim Crow, and the periodic bursts of xenophobia,
nationalism, discrimination and nativism most prominent among
them—have continually thrust forward thorny questions that
challenge whether the United States is genuinely committed to its
liberal creed in general, and its egalitarian principles in particular.
This is certainly a sensible object of study; as Theodore Lowi
recently observed, political illegitimacy “can be measured simply as
the distance between form and reality.” 1

Because the distance endures, the debate continues. Today,
scholars range across a wide field. Some, including many of our
most prominent political scientists, believe these episodes are simply

* Clinical Professor, Northwestern University School of Law. Because this article
touches on distinctive elements of the post-September 11 world, I should disclose
possible biases. I was counsel of record for the petitioners in Rasul v. Bush, 542
U.S. 466 (2004), involving detentions of foreign nationals at Guantanamo, and
Presently, I am counsel of record for Abu Zubaydah, for whose interrogation the
infamous “torture memos” were written. These were legal memos written by
attorneys with the Office of Legal Counsel at the Department of Justice which
wrongly concluded that torture, when ordered by the President in his capacity as
Commander in Chief, would not violate domestic or international law. This article
was originally prepared for a colloquium on constitutional law at Cornell
University Law School. I thank in particular Sid Tarrow, Mike Dorf and Mary
Painsod Katzenstein for their comments, and my colleague Bonnie Honig for hers.

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anomalies that represent no true part of American national identity. \(^2\) “A society based on slavery,” Samuel Huntington once wrote, “clearly contradicted virtually all the core values of the American Creed.” \(^3\) This would certainly have come as a surprise to the millions of antebellum southerners, and more than a few of their supporters in the North, who sincerely believed it was the South that was defending the true values of Americanism, not the northern abolitionists. \(^4\)

Many other scholars take an opposing view, insisting that inclusive ideals (“all men are created equal”) and exclusionary behavior (slaves are the property of their owner) are linked in a sort of symbiotic relationship. Some even go so far as to suggest that the United States cannot have the former without the latter. \(^5\) Others in this camp are more circumspect. They maintain that while we cannot say whether national ideals necessarily depend on their betrayal, it certainly is curious that they always seem to travel in pairs, and that neither appears on the national stage without the other. Still, cause and effect remains elusive. \(^6\)

Some arguments are not meant to be resolved and this one is likely among them. Having escaped resolution this long, there is little reason to expect the debate about the nation’s “true” character will come to an end anytime soon. But while the controversy flares, it is important to stress its limits. Whatever academics may think, the fact is that the overwhelming majority of Americans entertain no doubts whatsoever about the genuineness of American ideals. When Americans gaze at themselves in the national mirror, they do not


\(^5\) Smith, op cit. ____.

\(^6\) Id. ____.
suffer the sort of angst that might come from living a lie. On the contrary, Americans have long been in nearly universal agreement that the country is the living embodiment of its finest principles. When asked what it means to be an American, they will say, and with only minor variations have always said, that it amounts to a commitment to a handful of core values and beliefs—liberty, equality, individualism, limited government, and the rule of law prominent among them. They believe passionately, in short, in the existence of an American Creed. Or, in Richard Hofstadter’s oft-quoted expression, “It has been our fate as a nation not to have ideologies but to be one.”

The fact that Americans believe their national identity derives from a shared commitment to core values has important if un-

7 See infra nn. XXX-YYY.

8 Here we risk a quick descent into quibbling about labels. In this article, I use American Creed to refer to the cluster of values and beliefs shared by the great majority of Americans and understood by them as essential to American national identity. The idea of an American Creed was popularized by Gunnar Myrdal in his monumental and enormously influential study of Jim Crow. See Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944). In place of “American Creed,” Herbert McClosky and Jon Zaller use “American ethos,” though they mean the same thing. The American Ethos: Public Attitudes Toward Capitalism and Democracy (Harvard Univ. Press 1984). Other writers have tried to be a little more precise and used the idea of an American “political culture.” See Donald Devine, The Political Culture of the United States: The Influence of Member Values on Regime Maintenance (Little Brown 1972). Devine observes “that the United States has had a high degree of consensus on fundamental political values at the community and regime levels. This political consensus is conceived as having had an important shaping influence upon the content of its public policy, upon the maintenance of its democratic regime, and upon the persistence of its community.” Id. at 33. Devine conceives political culture as the sum of these shared political values and their expression throughout all levels of society in the form of widely observed rules, norms, and patterns of behavior. Id. at 4-43. Devine sees American political culture as Lockean, agreeing with Louis Hartz. Id. at 47-48. As suggested in the text at nn. XXX-YYY, I believe this unduly slights the influence of republican sentiment in American thought. My preference, therefore, is to describe American identity as liberal-republican, though I believe the labels are far less important than the ideas they are meant to convey. The entire thrust of the article is that while values are stable, their meaning is constantly being constructed anew.

9 Quoted in Huntington, Promise of Disharmony 25.
appreciated implications. For one thing, it means that not all language is equally likely to capture the hearts and minds—to borrow a current phrase—of an American audience. Some rhetoric will simply strike the American ear wrong and therefore win no followers in the public square. In his famous account of American liberalism, Louis Hartz gives the example of George Fitzhugh, the antebellum southern social theorist who defended slavery but who insisted it applied to all labor, and not merely African-Americans. Fitzhugh also accepted the inevitability of an aristocracy in the United States. These arguments placed him at odds with the pillars of American identity, particularly the distinctive brand of southern egalitarianism, which in turn guaranteed that his work would be well-received only by a small planter and academic elite. Examples like this can be readily multiplied; if Fitzhugh is a bit too obscure for a modern American audience, we could easily substitute Marx. In a country where “socialist” is an epithet on a par with harlot, Groucho is the only Marx one can safely endorse.

Yet the fact that Americans believe their identity derives from adherence to a limited number of values is complicated by at least two inescapable facts. For one thing, the meaning of these values is constantly changing. Historians have long understood that the keywords of American national identity—what we might call the rhetorical resources available to those intent on persuading an American audience—are both hopelessly abstract and socially constructed. Words like equality, liberty and freedom have acquired radically different meanings over the years as partisans have battled to make one or another definition dominant in public discourse. “The meanings of freedom,” wrote the historian Eric Foner, “have


11 Id.

12 Tocqueville made a similar observation: “In America the majority raises formidable barriers around the liberty of opinion; within these barriers an author may write what he pleases, but woe to him if he goes beyond them.” Alexis de Tocqueville, Democracy in America, Book I, Chapter XV.

13 See Daniel T. Rodgers, Contesting Truths: Keywords in American Politics since Independence (New York 1987).
been constructed not only in congressional debates and political treatises, but on plantations and picket lines, in parlors and bedrooms. … The history of freedom is really the history of contests over its constructions and exclusions.”

What we mean by liberty, writes Cornell’s Michael Kammen, has likewise “changed and broadened over time…, ranging from constraints upon authority to improvements in the conditions of social justice, of privacy, and a growing concern for the protection of personal liberty.” As for equality, its meaning today bears only a distant “family resemblance[]” to the meaning it had at the time of the Founding. Whatever so-called “originalists” may imagine, this process is not only natural but inevitable. As Justice Frankfurter once observed, “Great concepts like … ‘due process of law,’ ‘liberty,’ [and] ‘property’ were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.”

In addition, these values will invariably clash, which stimulates and encourages the endless process of re-definition. One of the most prominent and enduring conflicts has been between liberty and equality, since the full expression of one inevitably runs up against the demands of the other. In particular, the individualistic ideals of laissez-faire capitalism—with its insistence on limited government, unregulated markets, and private control of property and contract—and the egalitarian ideals of democracy—with its reliance on law and the coercive power of the State to assure equality of

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treatment and opportunity—are inherently at odds.\textsuperscript{18} Either one, when taken to extreme, tramples on the other, and precisely when arrangements have reached a trampling extreme is ever in the eyes of the trampled.

Other conflicts arise from the diverse origins of our shared values. Some writers place great emphasis on the religious foundations of American society, and in particular on its Anglo-Protestant heritage.\textsuperscript{19} Many others tend to slight religious influences and stress the tie to Enlightenment thought, with its emphasis on the rule of law and natural rights.\textsuperscript{20} Even the most casual observer of American society is familiar with the debates that result from these two perspectives, but they occasionally erupt with great passion, as they did in 2004, when the Supreme Court was asked to consider whether the last line of the Pledge of Allegiance (“one Nation under God, indivisible, with liberty and justice for all”) was an improper endorsement of religion and therefore contrary to the Establishment Clause of the First Amendment.\textsuperscript{21} The last six words (“with liberty and justice for all”), which have been part of the Pledge since it was written by the Baptist minister and socialist Francis Bellamy in 1892, obviously reveal the influence of Enlightenment thought and liberal ideals. The words “under God,” by contrast, were added in 1954, when a combination of Cold War tensions and red-baiting demagoguery induced Congress to emphasize the contrast between

\textsuperscript{18} See, \textit{e.g.}, Herbert McClosky and Jon Zaller, \textit{The American Ethos: Public Attitudes Toward Capitalism and Democracy} (Harvard Univ. Press 1984).

\textsuperscript{19} See, \textit{e.g.}, Samuel Huntington, \textit{Who Are We?: The Challenges to America’s National Identity} (Simon and Schuster 2004).

\textsuperscript{20} Probably the most prominent in this camp is Louis Hartz, \textit{The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution} (Houghton Mifflin 1955). Hartz’s work has been criticized for its failure to discuss America’s religious tradition. \textit{See, \textit{e.g.}, Richard J. Ellis, “The Liberal Tradition in an Age of Conservative Power and Partisan Polarization,” in Mark Hulliung, ed., \textit{The American Liberal Tradition Reconsidered: The Contested Legacy of Louis Hartz} (Univ. of Kansas Press 2010) 215-222.}

the United States and godless communism. And the bitter controversy that erupted when it appeared the Court would decide whether God had any place in the pledge testifies eloquently to the enormous but potentially divisive power of both traditions. (In the end, the Court avoided the question and this particular issue has faded from prominence).  

And still other conflicts center on the competing demands of the individual and the community. This particular clash has been especially prominent in the last several decades. The suggestion is often made that an extravagant concern for the rights of individual claimants—as, for instance, prisoners held at Guantanamo—threatens the welfare of the entire community. These debates are often the ugliest in American society since they lend themselves so easily to polemics about who is in, who is out, and why, for it is only when one group is perceived as “outside” the rest that its claims are viewed as a demand on the community, rather than a demand by the community. At a fundamental level, in other words, these debates are about community membership, which are the most fractious and contentious debates of all.

This brings us to the nub of the matter. On the one hand, Americans have always defined their national identity in terms of a core set of shared values that have been remarkably stable over the years. On the other hand, the meaning of those values—their shape and content at any moment in time; what they demand of the citizen and her society; who they protect and to what degree; who they exclude and for what reason; how they are prioritized when they inevitably conflict—these vital questions have been subject to endless contest in the public square. In short, values are stable and timeless, but their meaning is constructed and changing. In a 4th of


23 Newdow, 542 U.S. ___ (father lacks standing to assert daughter’s objection to pledge).

24 For a particularly thoughtful discussion of this problem, but from a communitarian perspective, see Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (Free Press 1991).
July address to the National Education Association in 1924, Calvin Coolidge said, “American ideals do not require to be changed so much as they require to be understood and applied.” But what Coolidge failed to appreciate was that the process by which we understand and apply these ideals is precisely what changes them. Bill Clinton was therefore more correct than he may have realized when he said, during his first inaugural address, that “Every generation of Americans must define what it means to be an American.”

But we should be careful what we set in motion. Beginning a new contest each generation to decide “what it means to be an American” may lead to a result we hardly recognize. Indeed, the long history of racism and discrimination in this country suggests the contest may end poorly, producing something deformed and grotesque. Put differently, this history suggests that the rhetorical resources of national identity—the language of the American Creed, if you will—may be sufficiently capacious and elastic that it can justify not only the best of American behavior but the worst as well. It suggests, in other words, that national identity is eternally a work in progress, subject to constant construction and change as the meaning and content of shared values is given new expression.

This article grapples with the implications of stable values and constructed meaning. In Part Two, I use the congressional debates over the legitimacy of Jim Crow to show that national identity is the subject of constant contest in the public square. Champions for different conceptions of “what it means to be an American” worked opportunistically to define and manipulate the shared and stable values of American identity to construct and justify competing national forms. In the end, a modern conception of


26 Clinton First Inaugural Address [CITE].

27 See infra nn. XXX-YYY; see also, e.g., Carol A. Horton, RACE AND THE MAKING OF AMERICAN LIBERALISM (Oxford Univ. Press 2005).
equality prevailed, and we have the civil rights movement to thank for the elementary proposition that in the tussle and struggle that is life, the government may not add to a man’s already considerable burdens simply because of his race or ethnicity. Yet as obvious as this now seems, it would be a terrible mistake to suppose this result was foreordained or, more importantly, that the opposing view did not also speak the language of American national identity. On the contrary, it most certainly did, and the southern spokesmen for segregation and Jim Crow sincerely believed they advocated for the very essence of Americanism.

And this in turn leads to what I call the nihilism puzzle, which I take up in Part Three. If American identity is sufficiently capacious that it can be constructed to justify Jim Crow—what many today would call a quintessentially un-American arrangement—are we left with the conclusion that anything goes, and that national identity is whatever society makes it? Could we, for instance, return to Jim Crow or something very much like it if the construction were once again favored? Or could Americanism be constructed to justify some other equally loathsome policy, like state-sanctioned torture? But on the other hand, and somewhat more optimistically, if national identity is simply a combination of socially constructed preferences, how do we account for what appears to be the steady elimination of exclusionary policies in this country and the gradual realization of inclusionary ideals? Why, in other words, does the construction so often trend in one general direction rather than another? Perhaps this history suggests something intrinsic about our national identity. Perhaps there is something after all to the wisdom of the crowd.

But before taking up these questions, I briefly summarize the literature regarding the presence of a core set of shared values in the United States.28

I

STABLE VALUES

The enduring commitment by Americans to a small set of values and beliefs is a tale at least thrice told. Visitors comment upon it, scholars study it, and those who live here experience it every day. The authorities who have described aspects of this phenomenon over the centuries—Crèvecoeur, Tocqueville, Bryce, Myrdal, Hartz, Hofstadter, Bell, Rossiter, Boorstin, Bercovitch, Schlesinger, Bellah, Lipset, Huntington, McClosky, Zaller, and many others—speak for themselves. To be sure, writers differ somewhat in their account of these values but these differences can be traced to the idiosyncrasies and biases brought to the task by individual authors.

The sociologist Gunnar Myrdal, for instance, whose purpose was to point out the myriad ways in which Jim Crow was a betrayal of the American Creed, naturally tended to emphasize its egalitarian and humanistic aspects. The Creed, he wrote, captured “the essential dignity of the individual human being, of the fundamental equality of all men, and of certain inalienable rights to freedom, justice, and a fair opportunity.” When the historian Arthur Schlesinger, Jr., penned his broadside against a multiculturalism that, at least to his mind, slighted the European contribution to American identity, he wrote of “the great Western ideas of individual freedom, political democracy, and human rights.”

In AMERICAN POLITICS: THE PROMISE OF DISHARMONY, the political scientist Samuel Huntington described the periodic outbursts of “creedal passion” in this country as the nation repeatedly tried to bridge the gap between what is and what ought to be. At that time, he thought the “core” values of the Creed were “liberty, equality, individualism, democracy, and the rule of law under a constitution.” But two decades later, in WHO ARE WE?: THE CHALLENGES TO

29 [CITES].

30 Myrdal, AN AMERICAN DILEMMA ____.

31 Arthur Schlesinger, Jr., THE DISUNITING OF AMERICA ____ (____).

32 Huntington, PROMISE OF DISHARMONY ____.

33 Id. at ___.

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AMERICA’S NATIONAL IDENTITY, Huntington lamented what he saw as the waning influence of our Anglo-Protestant heritage in American culture. Unlike his earlier treatment, he then stressed the distinctive contribution of this heritage to the liberal values of the Creed.\textsuperscript{34} Seymour Martin Lipset thought the Creed could be described “in five terms: liberty, egalitarianism, individualism, populism, and laissez-faire.”\textsuperscript{35} Lipset, however, perhaps because he was a sociologist, tended to slight the significance of constitutionalism and the rule of law as an element of American identity. This is unfortunate. The United States is an intensely legalistic society and its reverence for the Constitution and the rule of law is almost limitless. As Mary Ann Glendon has observed, Americans “look to law as an expression of the few values that are widely shared in our society: liberty, equality, and the ideal of justice under law. … Legality, to a great extent, has become a touchstone for legitimacy.”\textsuperscript{36} Others have often made the equivalent observation.\textsuperscript{37}

In their description of American political culture, Myrdal, Schlesinger, Bell, Hofstadter, Huntington, and Lipset—like many others—emphasized the liberal elements of American thought. They stressed classical liberal values like liberty, equality, and the rule of law, and in that way stand in the tradition of Louis Hartz and Alexis de Tocqueville. Others, however, like Robert Bellah, have identified

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\textsuperscript{36} Mary Ann Glendon, \textit{Rights Talk: The Impoverishment of Political Discourse} 3 (Free Press 1991).

\textsuperscript{37} \textit{See}, \textit{e.g.}, Judith Shklar, \textit{Legalism} 1 (Harvard 1964) (describing American society as legalistic, and defining legalism as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”). But note that reverence for the great symbols of the law in this country has never been much cluttered by knowledge of their content. For an extended discussion of the eternal chasm between the constitution as revered symbol and studied document, \textit{see} Michael Kammen, \textit{A Machine That Would Go Of Itself: The Constitution In American Culture} (Alfred Knopf 1986).
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an additional value that has coursed through American thought and found expression at various times in American history. It stresses the welfare and integrity of the community and the obligations of the virtuous citizen to the community’s welfare. 38 “Many in our country do not know the pain of poverty,” George W. Bush once said. “But we can listen to those who do. And I can pledge our Nation to a goal: When we see that wounded traveler on the road to Jericho, we will not pass to the other side.” 39

This republican sentiment, with or without its religious symbolism, has a long history in American thought. 40 The more secular version is captured in the title of Hilary Clinton’s book, It Takes a Village. 41 Yet this sentiment may exist quite apart from any connection to liberal values. In fact, it is sometimes invoked in opposition to egalitarian claims that seek to extend civic participation to particular groups. 42 The complaint is not simply that equal treatment for one group threatens the liberty of another, thus pitting liberal values against each other (though that claim is often made), but that extending civic participation to this group threatens the welfare of the entire community, thus pitting liberal value against republican ideal. 43


39 George W. Bush First Inaugural Address [CITE].

40 Bellah and his collaborators distinguish between civic republicanism and biblical religion as a source of this communitarian sentiment, but acknowledge their overlap. HABITS OF THE HEART 20-31.

41 Hilary Rodham Clinton, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US (Simon and Schuster 1996).

42 See infra nn. XXX-YYY.

43 Note that acknowledging the republican element of American political culture does not make it necessary for us to choose sides, or even wade into the dense academic underbrush of the debate over the relative importance of liberalism and republicanism in American thought. See Daniel T. Rodgers, “Republicanism: The Career of a Concept,” The Journal of American History 11-38 (June 1992). Pushing back against treatments like Hartz’s THE LIBERAL TRADITION IN AMERICA, historians began to point out the importance of republican ideas in early American history, which stressed the value of local, participatory democracy by a small, more or less homogenous community of civic-minded citizens who placed the welfare of
Still, these differences in the account of the American political culture should not be taken as proof of deep disagreement about basic values. No doubt Myrdal considered liberty to be a value of some significance to American identity, though it did not make his list, and it is impossible to imagine that Huntington thought freedom was irrelevant to the American experience or that he did not share a republican concern for the welfare of the community. For their part, the political scientists Herbert McClosky and John Zaller used freedom and liberty interchangeably. “No value in the American ethos is more revered than freedom,” they wrote, but added almost immediately thereafter, “Equality and popular sovereignty, of course, are given their due, but liberty is more deeply embedded in the nation’s system of values than any of the others.”

Omissions and quirks like these merely underscore that the words are meant to stand in for an inherently imprecise idea—viz., that cluster of core values and beliefs widely shared by the great majority of Americans. It is this inherent imprecision that allowed the historian Daniel Boorstin to write an entire book about the American tendency to view their defining values as “a given,” and yet never pause to articulate what those values were (and to give his book the immodest title, THE GENIUS OF AMERICAN POLITICS). The

the group over the success of the individual. See, e.g., [CITES]. There is no question that republicanism has played an important and too often neglected role in American thought. More than that, however, is a matter of dispute, as scholars disagree about the relative weight and enduring importance of the liberal and republican traditions. The debate seems to have died down of late as scholars have come to accept the wisdom of the historian Lance Banning’s observation that intramural squabbles like these matter a great deal more to academics than to the people whose thought we purport to parse. [CITE TO BANNING ARTICLE] It requires no great stretch to suppose that a person can concern herself with both the rights of the individual and the welfare of the community without feeling a need either to weigh one value against the other, or to choose whether her thought processes are predominantly liberal or republican. But see Carol Horton, RACE AND THE MAKING OF AMERICAN LIBERALISM (Oxford Univ. Press 2005) (insisting that republican thought became insignificant in the twentieth century). I simply disagree with Horton’s reading of twentieth century American thought. As discussed below, republicanism figured prominently in the debate over Jim Crow. See infra nn. XXX-YYY.


45 Daniel Boorstin, THE GENIUS OF AMERICAN POLITICS 8-10 (Univ. Chicago Press 1958). Boorstin believed this sense of “givenness” made Americans especially
list itself, in other words, is less important than what the values are meant to convey, which is the answer to the question asked more than two centuries ago by Hector St. Jean de Crèvecoeur in his letters to Europe: “What then is the American, this new man?”

There is not much dispute about the existence of a shared set of core values and beliefs in American thought. They have been observed too often, for too long, and with too much consistency to allow much room for doubt. Yet when it comes to settling on the significance of all this, writers are in deep disagreement. Many who have commented on the shared values and beliefs take a curious view of the dark chapters in American history. These moments represent, at least to modern eyes, a startling betrayal of the very ideals that Americans profess to believe. Yet in many accounts of the Creed, these periods are treated as aberrations, emanating, as one thoughtful observer has recently described it, “merely from the slip between the theoretical cup and actually-lived lip of liberalism’s historical promise.”

The implication of this argument is that Americans knew in their heart of hearts that this behavior was indefensible and that it was simply a matter of time before the great corrective force of the Creed brought lived reality closer in line with lofty ideal. This was certainly Myrdal’s position in AMERICAN DILEMMA, and in the same vein, Schlesinger believed the Creed “has been the means by which Americans have haltingly but persistently narrowed the gap

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46 Myrdal, AMERICAN DILEMMA.

47 For discussion of the widespread empirical support for these values when they are stated in the most general terms, see, e.g., Devine, POLITICAL CULTURE; McClosky and Zaller, AMERICAN ETHOS; Huntington, PROMISE OF DISHARMONY.


49 Myrdal, AMERICAN DILEMMA.
between performance and principle.” But this relentlessly optimistic perspective has proven unsatisfying to a number of scholars. They argue convincingly that we cannot simply discount these periods, which recur too frequently, last too long, and cut too deeply to be ignored as if they were insignificant impurities in an otherwise flawless jewel. Repeated betrayal demands a better explanation than yet another apology, offered long after the fact.

II
CONSTRUCTED MEANING

Americans can always be counted on to do the right thing, after they’ve exhausted all the alternatives.

Winston Churchill

Every nation maintains a salutary belief in its own virtue. There is nothing inherently wrong with this, though at the margins it risks an ugly turn to nationalism. In the main, however, it endows the country with a necessary sense of national unity and moral purpose. But such a belief is not without peculiar consequences, the most prominent of which may be a curious approach to history. Certain interpretations of the past may become sacrosanct. When historians uncovered evidence suggesting that the bombings at Nagasaki and Hiroshima were as much a warning to the Soviet Union as a blow to Japan, and were perhaps as much the start of a cold war as the end of a hot one, they cast an unwelcome shadow across the sacred national memory of “the Good War,” when a selfless and benevolent nation saved democracy from the rapacious evil of totalitarianism. Their thesis was met with scorn and derision, and scholars who promoted it were publicly damned as unpatriotic

50 Schlesinger, DISUNITING OF AMERICA 145.

51 The most prominent of these critiques is Rogers Smith, CIVIC IDEALS (Yale University Press ____).

52 I am indebted to my colleague, Bonnie Honig, for a variation of this image.

53 [CITE]
revisionists. This habit of mind produces a sanitized, sanctified history—what the historian William McNeill called mythistory.

But no amount of historic scrubbing can erase the stain left by certain elements of the American experience. To protect the belief in national virtue from the destructive reality of these shameful periods, we relegate them to a dark and regrettable past. That was then and this is now. History takes on a teleological glow, an endless journey toward the fulfillment of our unique national promise. Deviations from the path are walled off in the national memory as temporary aberrations. We hold them up as cautionary lessons that mark how far we can fall should we ever be so foolish as to stray from the Creed again. And we assimilate them into the myth of national virtue by using them to gauge how far we have progressed in our eternal march toward “a more perfect Union.”

But psychic defenses like these, so essential to the preservation of a shared national identity, are not built in a day. It takes time to reshape the past, to erase mistakes from the national memory and transform them from settled understandings to temporary misjudgments. In September 1992, Lynne V. Cheney, then chair of the National Endowment for the Humanities, was the principal author of an angry little pamphlet called, Telling the Truth, which excoriated liberals in academia for their over-glam assessment of the American experience. Cheney applauded the State of

54 CITE to MEMORY WARS


56 Today, the expression, “a more perfect union” is nearly as much of a cliché as “We the People.” It therefore bears recalling that both are from the Preamble to the Constitution:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

57 Lynne V. Cheney, TELLING THE TRUTH: A REPORT ON THE STATE OF THE HUMANITIES IN HIGHER EDUCATION (National Endowment For the Humanities 1992). For an account of some of the controversy surrounding this report, see
California for its decision to teach its students the “common truth” that Americans were united by a shared “belief in equality and freedom.” She quoted approvingly from the California curriculum, which, as one may have expected, put the matter in the immediately recognizable language of the Creed:

The American Creed is derived from the language of the Constitution, the Declaration of Independence and the Bill of Rights. … The Creed provides the unifying theme of Martin Luther King, Jr.’s oration, “I have a dream that one day this nation will rise up and live out the true meaning of its creed: We hold these truths to be self-evident, that all men are created equal. ... This will be the day when all of God’s children will be able to sing with new meaning, ‘My Country, Tis of Thee, Sweet Land of Liberty.’”

It is all perfectly good today to believe that Dr. King’s vision of the Creed is shared by all Americans, but that was certainly not evident in April 1963, when Alabama Governor George Wallace told Attorney General Robert Kennedy that it was King who was “advocating … lawlessness” in his insistence on civil rights for African-Americans. It was not evident later that year when Attorney General Robert Kennedy authorized J. Edgar Hoover and the FBI to tap King’s phones. Hoover firmly believed that King’s private conversations would confirm Hoover’s public insistence that King was connected to the Communist Party. It was not evident for many years after 1968, when Representative John Conyers (D-MI) annually introduced legislation to make Dr. King’s birthday a national holiday, only to have it derailed in committee or defeated on the floor of the House. And even in 1983, the year the bill passed both chambers by an overwhelming margin and was reluctantly

Margaret MacMillian, DANGEROUS GAMES: THE USES AND ABUSES OF HISTORY (Modern Library 2010).
58 Id. at 44.
signed into law by President Reagan, it was still not evident to Senator Jesse Helms (R-NC), who voted against the bill and attacked King for “action-oriented Marxism.” Cultural change calls upon us to create new champions and to mold flesh and blood into mythic symbols. Today we celebrate Dr. King for the courage of his dream. But we deceive ourselves if we pretend it was always so.

Countless volumes have been written about the darker episodes of the American past. Writers, and particularly academics, seem to relish the chance to point out the frequent illiberality in American thought and behavior. But less attention has been paid to how a nation so deeply committed to the values of the American Creed justifies its misdeeds. Certainly the fact that we view things differently in the fullness of time provides a partial answer; problems that seem trivial today once loomed large in the public imagination. But this does no more than state the obvious—priorities change and perspective is a virtue—and does not tell us how American thought justified illiberality at the time. How, to put it plainly, do Americans avoid the damning charge of hypocrisy? When confronted with the chasm between ideal and reality, what do they say?

Lincoln’s famous observation on this score is instructive. In June 1857, at a speech in Springfield, Illinois, Lincoln said the drafters of the Declaration “meant to set up a standard maxim for a free society which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though not

\[\text{\textsuperscript{61}}\text{\textsuperscript{61}}}\text{For accounts of Dr. King’s “appropriation” by the political and cultural mainstream, see Denise M. Botsdorff and Stephen R. Goldzwig, “History, Collective Memory, and the Appropriation of Martin Luther King, Jr.: Reagan’s Rhetorical Legacy, 35 Presidential Studies Quarterly 661 (Dec. 2005); Francesca Polletta, “Legacies and Liabilities of Insurgent Past: Remembering Martin Luther King, Jr., on the House and Senate Floor,” 22 Social Sciences History 479 (Winter 1998).\]

\[\text{\textsuperscript{62}}\text{To another generation, we could just as easily have replaced Parks and Connor with Louis Post and Mitchell Palmer. Post was the Labor Department lawyer who tried to bring a measure of sanity to the “deportation delirium” of the First Red Scare in 1919-20; Palmer was the Attorney General for whom the infamous Palmer Raids are remembered. Somewhat more recently, we could have used Korematsu and DeWitt. Fred Korematsu has become the symbol of innocence imprisoned during Japanese internment; General Francis DeWitt authored the report that falsely described internment as a military necessity—a report the United States Government later tried to destroy. [CITES].}\]
perfectly attained, constantly approximated.”\textsuperscript{63} As with so many of Lincoln’s insights, this one has much to commend it. A nation reared to believe in something can be roused to protest its absence, and the inevitable gap between lived reality and cherished ideal can be a powerful catalyst for change. In that way, our ideals have become the North Star by which we guide our national ambition.

Yet the notion of ideals as aspirations supposes that we recognize illiberality as a deviation from our true path. It suggests, in other words, a conscious willingness to betray the Creed. But the fact is that, for the great majority of Americans the great majority of the time, illiberality is \textit{not} viewed with regret or twangs of conscience. It is accepted as a routine feature of life, perfectly consistent with American ideals. A moment’s reflection is enough to show why this is the case. Americans who grow fond of a particular social arrangement will not likely say to themselves and others that their attachments are a fraud and a sham, or that they are contrary to our foundational principles and sacred beliefs—in short, that they are un-American. The very universality of American political culture—of the Creed—means that American thought will nearly always cast itself as fundamentally harmonious with American values. And so Lincoln’s memorable expression still does not tell us how a people so deeply committed to liberal ideals can face themselves in the national mirror.

Paradoxically, the answer lies in the very malleability of the American Creed, which provides all the space a nation could need to construct, justify, and come to accept whatever social arrangement it wants, no matter how dark. And one period which reveals the dark side of the Creed with tragic clarity is the struggle of the civil rights movement to end Jim Crow, for the same Creed that inspired Dr. King stoked the angry fires of George Wallace.

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The popular image of the southern segregationist (at least, outside the South) looks vaguely like Bull Connor, the scowling, jowly, pot-bellied Commissioner of Public Safety in Birmingham, Alabama, who gave the order to unleash attack dogs and fire hoses

\textsuperscript{63} Roy Basler, ed., \textsc{The Collected Works of Abraham Lincoln}, II at 406 (1953).
on peaceful civil rights marchers in 1963. Myth works that way, waving a kernel of truth like a magic wand to make nuance and complexity disappear. But recent scholarship has been unkind to this image. Segregationists were not at all monolithic. From the virulent racism of the Ku Klux Klan, to the more moderate and considerably more popular White Citizens’ Councils (who still insisted on “massive resistance” to desegregation), to still more moderate leaders like the Atlanta and Charlotte business elite (who favored minor strategic compromise as a way to prevent racial violence and avoid federal intervention), defenders of Jim Crow were a complex and diverse group. Still, in a world of means and ends, this diversity had nothing to do with the latter and everything with the former. On the fundamental question of the day—whether the South should be desegregated—the white Jim Crow South thought with one mind and spoke with one voice. As the liberal southern journalist Hodding Carter, Jr., put it in 1948, “The white South is as united as 30,000,000 people can be in its insistence on segregation.”

This alone should be enough to dispel any idea that segregationist ideology would have considered itself at odds with American ideals. When nearly every white man, woman and child dispersed over an entire quarter of the country holds to a single view for generations—through the galvanizing force of two World Wars, years of public education, scores of July 4th celebrations and hundreds of other national holidays, as well as countless sermons, editorials, and speeches extolling the virtue of “the Southern Way of Life”—it is impossible to imagine they would consider themselves as anything other than good Americans. And as the historian Paul Gaston has described, Jim Crow was conceived and designed

64 [CITES]

65 Hodding Carter, Jr., Atlanta Journal (Sept. 3, 1948), quoted in Lillian E. Smith, KILLERS OF THE DREAM 79 (Norton 1961). To put this in perspective, the South in the nineteenth century is often viewed as the very picture of a monolithic society, at least after the rise of northern abolitionism in the 1830s. Yet a leading scholar of southern dissent in the nineteenth century points out that there was substantially more dissent from the racial orthodoxy in the nineteenth century south than there was in the first fifty years of the twentieth. Carl Degler, THE OTHER SOUTH: SOUTHERN DISSENTERS IN THE NINETEENTH CENTURY 371 (University of Florida Press 2000) (“for the first fifty years of [the 20th] century, there was no large-scale dissent in the South comparable to the great popular movements of the nineteenth.”).
precisely in order to resolve the inherent tension between the lofty ideals of the American Creed and the lived reality of Southern life—that is, between “the Southern faith in white supremacy” and “the American image of itself as a just and humane society.”

The solution to this dilemma was an ingenious but perfectly sincere exercise in rationalization. The first challenge was forced upon the South by the Fifteenth Amendment, which prevented the States from denying any citizen the right to vote “on account of race, color, or previous condition of servitude.” This forced the South to square white supremacy with black voters. In resolving this conundrum, the champions of the New South accepted the liberal principle of universal adult male suffrage. At the same time, however, the view was commonplace (at least among whites) that blacks, owing both to their prior servitude and innate inferiority, were not yet ready to exercise the franchise responsibly. Political participation, they insisted, required a virtuous citizen who appreciated the needs of the (white) community, and must therefore rest “with men of wealth, character and intelligence.” If blacks would simply place themselves under “white tutelage,” they could gradually be equipped for the demands of responsible citizenship. When that day came, the vote would be theirs. “This, they believed, did no violence to the American commitment to freedom and was the only way to make the Fifteenth Amendment a working reality.” Of course, most white southerners were confident such a day would never arrive and were not at all troubled by this lacuna in their argument. And in this way, “freedom, universal manhood suffrage and white supremacy” were not only compatible “but were mutually bound together.”

The second challenge facing southerners was the Fourteenth Amendment’s command that “[a]ll persons” receive the “equal

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67 U.S. Constitution Amendment XV.

68 Gaston, NEW SOUTH CREED 131.

69 Id. at 132.

70 Id. at 135.
Yet almost no white southerner and precious few whites in any part of the country remotely imagined that Blacks were in fact the equal of whites, despite what the post-Civil War Republican Congress may have declared. It was widely believed at the time that God, in His infinite wisdom, had made the races different and had obviously made the Anglo-Saxon superior. And let no man “tinker with the work of the Almighty,” warned Henry C. Grady, the prominent editor of the Atlanta Constitution. If blacks and whites were forced unnaturally to compete in the same arena, the innate superiority of the Anglo-Saxon race would be the black man’s ruin. In whites this created an obligation to shelter blacks from starting a race they could never win; in blacks, it created a sense of gratitude (or so whites believed) that they had been spared the humiliation of beginning a hopeless contest. In both, it created a shared preference for segregation. A desire for racial preservation was perfectly natural, and led blacks and whites to prefer their parallel spheres, producing deep, “inbred instincts toward separation.” So was born the southern principle of “separate but equal,” which allowed whites to “create their desired image of a rational and humane system that rested on consent, not force” even as it permitted them “to limit the areas of movement of Negroes and restrict contacts between the races.”

For decades, the rest of the country did not much trouble itself with the regional oddity of Jim Crow, especially after 1896, when it received the Supreme Court’s blessing in Plessy v. Ferguson. As it endured, southern society seemed increasingly foreign to the rest of the country. But that was perfectly fine with the South, which quite

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71 U.S. Constitution Amendment XIV.

72 The literature on 19th century racist thought is voluminous. One of the best single volume treatments is Thomas F. Gossett, RACE: THE HISTORY OF AN IDEA IN AMERICA (Southern Methodist University Press 1963). See also, e.g., Gaston, NEW SOUTH CREED 125.

73 Quoted in Gaston, op cit. at 137.

74 Id. at 139.

75 Id. at 140.

76 Plessy v. Ferguson, 163 U.S. 537 (1896).
naturally developed a preference for its unique approach to race relations, coming to believe that the familiar was also the good. Things are, Daniel Boorstin would say, as they ought to be. If the rest of the country didn’t like it, that was too damn bad. And as the storm clouds of civil rights began to appear and intensify, southerners wondered why sovereign States could not be left to develop their society as they saw fit. So long as “the Southern Way of Life” did not violate the Constitution (and the Supreme Court had said it didn’t), what business was it of Washington? So took shape a third argument in favor of Jim Crow, the 20th century version of the great antebellum contention—States’ rights.

Throughout the civil rights era, segregationists would find support for their world in the Bible as much as science, in ancient history as much as modern sociology. But the core and most enduring arguments were these: the right to suffrage depended on evidence of civic responsibility which was not yet present; segregation was a natural state of affairs that both races wanted and did no violence to equal protection; and the rest of the country should mind its own business. “[W]e in the South are not trying to tell the West how to handle their Indian problem,” Louisiana’s Russell Long said in a 1960 Senate debate, “and we are not trying to tell people in New York or Chicago how to handle their affairs[.] But … we might have occasion to point that that they have a civil rights situation of such proportions that they ought to look after their own problems before trying to tell us what to do.”

By these arguments, southerners insisted that Jim Crow was not at all contrary to American ideals. The South would argue the two were entirely compatible, and that it was the assault on Jim Crow, not its defense, that threatened the American Creed.

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77 Boorstin, THE GENIUS OF AMERICAN POLITICS ____.

78 For a discussion of the States’ Rights argument in defense of Jim Crow, see, e.g., [CITES].

79 For a collection of pro-segregationist thought, see [CITE].

One of the many ways in which Jim Crow systematically disenfranchised Black voters in order to maintain white supremacy was the poll tax. Alabama, Georgia, Mississippi, South Carolina, Tennessee, Texas and Virginia required payment of a fee, which varied from one to two dollars, to vote in federal, state, and local elections. This proved too much for a significant fraction of blacks and poor whites; studies undertaken during the Second World War indicated that roughly ten million otherwise eligible voters stayed home election day because of the tax. Federal legislation that would have outlawed the poll tax had been introduced before, but the first serious challenge came in 1944, when legislation easily cleared the overwhelmingly liberal House and came to the Senate with broad bipartisan support. Debate in the Senate began in May 1944.

Senator Patrick McCarran (D-NV), the legislation’s chief Senate sponsor, opened deliberations with a simple statement of the American Creed. “This country,” he said, “is a democracy. The right to vote is a part of the democratic privilege, guaranteed to every citizen of the United States. … To deny that privilege is to deny that this country is a democracy.” At the same time, McCarran warned that the poll-tax was contrary to the nation’s cherished ideal of equality. “To say to one man that because he has money he may vote, and to say to another man that because he does not have money he may not vote, is to preclude the idea of equality before the law. We would be putting our democracy on the basis of wealth and of wealth alone. … That was not the contemplation or in the

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83 For an excellent account of the legislative debate over repeal of the poll tax, see Keith Finley, DELAYING THE DREAM: SOUTHERN SENATORS AND THE FIGHT AGAINST CIVIL RIGHTS, 1938-1965 (Louisiana State Univ. Press 2008), 56-104.

contemplation of those who wrote the Constitution which is basic to this country.”

Other supporters spoke in similar terms, invoking the time-honored image of the nation’s steady march toward universal suffrage. According to Senator James Mead (D-NY), the legislation to end the poll tax was “in keeping with the trend of our times; namely, to expand, to become more liberal, to add to the number of those who may vote, and to add to the interest in voting.” This trend, he thought, had been continuous. “[F]rom 1789 all the way down to 1943, while the democratic experiment was proving itself, the Congress, in response to the will of the people, has been eliminating one obstacle after another so that the masses of our citizens could participate in the basic privileges that go with

\[85\] *Id.* It is important to bear in mind that the partisan divisions we now take for granted were entirely different in the 1940s and 50s. Senator McCarran, for instance, though a Democrat, was among the most conservative members of the Senate and is much better remembered today for his rabid anti-communism and enthusiasm for strict immigration quotas than for his support for civil rights. In the classic language of the American Creed, McCarran once decried the risk of uncontrolled immigration:

I believe that this nation is the last hope of Western civilization and if this oasis of the world shall be overrun, perverted, contaminated or destroyed, then the last flickering light of humanity will be extinguished. I take no issue with those who would praise the contributions which have been made to our society by people of many races, of varied creeds and colors. America is indeed a joining together of many streams which go to form a mighty river which we call the American way. However, we have in the United States today hard-core, indigestible blocs which have not become integrated into the American way of life, but which, on the contrary are its deadly enemies. Today, as never before, untold millions are storming our gates for admission and those gates are cracking under the strain. ... I do not intend to become prophetic, but if the enemies of this legislation succeed in riddling it to pieces, or in amending it beyond recognition, they will have contributed more to promote this nation’s downfall than any other group since we achieved our independence as a nation.

\[86\] 90 Cong. Rec. 4258 (May 10, 1944); see also *id.* at 4260 (statements of Sen. Mead).
citizenship.” And of course, Mead contrasted the present with a benighted past when the country had not been faithful to the Creed. “There was a time in the early history of our country, when democracy had not yet proved itself, when traffic in slaves was still tolerated, when education was costly and not the prerogative of the poor. There were in those days defenders of such impositions as the poll tax, as we know it. But those days are past, those times are gone…”

The time had finally come to finish on the course that destiny had set for this country. And when southern politicians fretted the chaos that would come from repeal of the poll-tax, their opponents mocked the fear of too much democracy. “[A]s long as any group of people in a democracy or anywhere in this world are deprived of the right to vote, are segregated, Jim Crowed, discriminated against, and treated as second-class citizens, so long will there be unrest; so long will those conditions cause unrest, and what is more, those conditions are intolerable as long as we remain a democracy. …”

Collectively, these arguments against the poll tax are classic and immediately recognizable expressions of the American Creed. They describe a nation committed to the universal application of fundamental rights in order to break down barriers of class and race and thereby attain a more equitable and representative democracy. Because this position ultimately prevailed, contemporary readers may find these sentiments self-evidently true, so much so that they cannot imagine another argument. But any suggestion that this view had a monopoly on American ideals and creedal rhetoric simply cannot be maintained. The defenders of Jim Crow in the House and Senate—the so-called ‘Southern Caucus’—launched a sustained and eloquent argument against the repeal of the poll tax that relied on an entirely different vision of “what it means to be an American” and an entirely different conception of American society. Yet the southern argument is no less recognizable as an expression of the American Creed, and no less faithful to American ideals.

87 Id. at 4260.

88 Id.

To begin with, Senator Wayne George said, the United States is quite obviously not a democracy. “It never was a democracy,” the senior senator from Georgia explained, “and I hope that it never will be one. Pure democracy means dictatorship. It is impossible for 130,000,000 people to get together and govern a country. It is impossible for 50,000 people to get together and govern the city in which I live. Washington would be perfectly unbearable if the attempt should be made to govern the city by a democracy composed of everyone in the city...”\(^9^0\) Instead, the Founders established “a representative democracy in which representatives of the people administer the laws, conduct the business of legislation, and give an account every 2, 4, or 6 years to those who elect them. That form of government is representative democracy. It is American republicanism. That is what we mean by ‘the Republic.’”\(^9^1\)

And the genius of the Republic, George insisted, was its careful balance between state and federal power. Championing the ideal of classic republicanism, he warned that “human liberty depends finally and at last upon local self-government, upon government administered by local officials, selected by the people of the community, responsive to public opinion in the community. The farther we travel away from self-government, even local self-government, the farther we travel away from freedom itself.”\(^9^2\) This fragile balance of power, George and the other members of the Southern Caucus warned again and again, is the unambiguous command of the Constitution, the obvious intent of the Founders, the only guarantee of a virtuous citizenry, and the last bulwark against centralized tyranny. It is, in short, vital to all that the nation holds dear.

Much of the southern argument was devoted to the constitutional text and its interpretation over the years. Members of the Southern Caucus parsed a portion of Article I, Section 2, to show that the drafters of the Constitution, “all the great and brilliant men who adorned the Convention at Philadelphia by their presence,”

\(^9^0\) 90 Cong. Rec. 4247 (May 10, 1944) (statement of Sen. George).

\(^9^1\) Id.

\(^9^2\) Id. at 4255.
meant to leave this question to the various states. And they recounted in great detail the consistent interpretation of this language to provide further proof that the matter had always been understood as a question exclusively for the States. But a careful reading of the debates suggests that the Caucus did not rest its case so much on particular provisions of the Constitution as much as it did on the Constitution itself—that is, on the idea of the Constitution as a symbol. Senator Connally, for instance, urged his colleagues to read the text and “listen to these words which were inspired, and which have come ringing down to us through the corridors of 150 years. They have come down to us with the veneration of a great people. They have come down to us with blood and tears all over them, blood and tears which have been shed in the defense and in the maintenance of the rights which were guaranteed.”

In addition to the liberal values of constitutionalism and the rule of law, the Southern Caucus also placed weight on the classic republican obligations of citizenship. The republican ideal envisions government by the virtuous citizen who places the well-being of the community ahead of his own narrow self-interest. Consistent with this conception, the members of the Southern Caucus spoke at length about the role of the poll tax as both a means to support the community and a way to mold a good citizen. By this reckoning, the able-bodied man who is not willing to make what they considered the very modest annual sacrifice of a few dollars to help support the community is not the sort of person who deserves to have a say in the community’s affairs. It has nothing to do with discrimination, they insisted, since the tax applied to white and black alike. It is a matter of citizenship, of demonstrating a commitment to the community, of doing one’s part to help defray the cost of roads, police, schools, and hospitals. And conversely, if you relieve the good citizen of this

93 Id. at 4173 (May 9, 1944) (statement of Sen. Connally).

94 Id. at 4173-74.

95 See, for instance, the extended remarks of Senator Bailey (D-NC). By the poll tax, “it is said to a man, ‘If you do not pay your poll tax, you should not vote. If you are not willing to make any contribution for the schools and the police and the fire-protection systems and the prevention of the spread of disease—if you are unwilling to pay anything—why should anyone be greatly concerned as to whether you vote or do not vote?’” 90 Cong. Rec. 4246 (May 10, 1944) (statement of Sen. Bailey).
obligation, you induce him to favor “a free ride” and that “is a hurtful thing to the citizen.” “I am saying something about the hurt done the self-respect of any able-bodied person by making him believe that if he is not permitted to have a free governmental ride a great injustice is done to him. That does not make for good citizenship in a democracy.”

The Caucus also invoked the right of the States to be different and decried the determination of meddlesome northerners to subjugate the South for its own good. Comparing the anti-poll tax legislation to the Spanish Inquisition (!), Senator Connally said “that is the kind of political inquisition under which we are put.”

Because some State in the Union, such as my own State of Texas, does not conduct its affairs as the State of New York thinks it should conduct them, these crusaders, these Sir Galahads, mount their steeds and come down into Texas to ‘modify’ us, and to Christianize us, and to liberalize us, and to modernize us, and to intelligence-ize us. [Laughter.] Mr. President, we do not think it is right. We do not think it is just. We do not think it is in accordance with the proper concept of the Constitution and the traditional political equality of the United States.

Finally, the Southern Caucus spoke with great passion about the risk to the liberties of every American should Congress take this step. If Congress can order states to eliminate the poll tax as a qualification for voting, Tom Connally warned, “then Congress has the power to prescribe any other qualification it may see fit to prescribe. It not only has the right of prohibition or denial, requiring that voters shall possess certain qualifications but it has the affirmative power to require the States to impose certain conditions

96 90 Cong. Rec. 3763 (April 27, 1944) (statement of Rep. Sumners). The argument “that good citizenship required that electors also be taxpayers” has a long history and appears in the post-Reconstruction constitutional conventions at which the poll tax became law. See Williams, “The Poll Tax as a Suffrage Requirement” 496. Williams maintains that advocates of this philosophy “appear to have been fewer by the turn of the century,” id., but as the legislative arguments in 1944 make clear, they were by no means gone.

97 90 Cong. Rec. 4176 (May 9, 1944) (statement of Sen. Connally).
or requirements with respect to suffrage within the States.”

Connally was the senior senator from Texas and at the time the head of the southern caucus. “In effect,” he said, granting Congress the power to repeal the poll tax “would amount to a delivery by the States to the Federal Government of the control of suffrage, the very root, the very foundation, the very subsoil of liberty and free government itself.”

Richard Russell, the junior senator from Georgia who would soon replace Connally as caucus leader, was no less apocalyptic. “Whereas today the victim on the rack might be Texas, tomorrow it might be any other State. We would have a Federal clerk presiding over the enforcement of a Federal law, to be enforced, if necessary, at the point of a Federal bayonet. Such a system could eventually eliminate the States as subdivisions of government…. When that day comes, democracy will, indeed, be dead in this country.”

It is foolish to suggest that the southern arguments in favor of the poll tax were somehow a betrayal of American ideals or that they represent the interposition of some foreign tradition unknown to American political culture. The constituent pieces—the veneration of the Constitution, the rule of law, and the founding generation; the paean to the virtuous citizen and the welfare of the community; and most of all, the fear that an oppressive federal government will rob the States of their rights and the people of their liberties, “if necessary at the point of a Federal bayonet”—are as much a part of American identity as the counter-arguments in favor of fundamental

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98 Id. at 4186.

99 Id.

100 Id. at 4176 (statement of Sen. Russell). Or as Senator Wayne George put it, “our Nation is divided into States not only for the purpose of local self-government, but also for the purposes of diluting the strength of the central government, preventing the spread of its power, and protecting the people against it.” Id. at 4247. In language that every modern student of campaign finance reform would immediately recognize, George cautioned that “in a country of this kind, a representative democracy, or a republic, there are temptations. There are temptations to cater to groups like those which are bringing pressure in connection with the pending proposed legislation, and to cater to demands such as those which have been made by labor organizations. Men can rise to power by way of catering. However, those who yield to such temptations should remember that in doing so they lay their self-respect upon the altar of their ambitions, and with their self-respect they surrender their country.” Id. at 4255.
rights and universal equality. In various forms, the Southern Caucus would repeat these arguments for decades. And on this occasion, as they so often were until Jim Crow’s ultimate end in 1964, the Southern Caucus was successful. The anti-poll tax legislation was defeated.\textsuperscript{101}

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Just as the poll tax was part of the elaborate southern machinery designed to nullify the Fifteenth Amendment and prevent African-Americans from voting, the fantasy of “separate but equal” was constructed to defeat the Fourteenth Amendment and its promise of equal protection. At the same time Congress was debating whether to end the poll tax, it also took up proposals “to prohibit discrimination in employment based on race, creed, color or ancestry.”\textsuperscript{102} Bills introduced in both chambers declared that the right to work and to seek work without discrimination “shall not be abridged by any State or by any instrumentality or any creature of any State.”\textsuperscript{103} Speaking in favor of the bill he had introduced, Representative Thomas Scanlon (D-PA), told his colleagues, “If there is any more vicious denial of American democracy than discrimination in jobs because of a man’s race, creed, or color, I cannot imagine what it is.” Far worse than discrimination against a man because he is a member of a union, “discrimination because a man is a Negro, a Jew, a Catholic, or because his ancestors came from another country” is a “gnawing evil” and “a slap in the face to every decent American who believes in American fair play.”\textsuperscript{104}

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\textsuperscript{101} It is worth pointing out that many members of the Southern Caucus were personally opposed to the poll tax and supported its repeal. And many members came from States that had already repealed the tax. Nearly to a man, however, the caucus insisted that this was a matter that could not be legislated by Washington and must be left to the States. See “Poll Tax on Way Out, Russell Declares,” Atlanta Journal Constitution (Nov. 20, 1942). As Keith Finley relates, their position on the poll tax stemmed from a well-grounded fear of the camel’s nose poking into the segregationist tent. Finley, \textit{DELAYING THE DREAM}.

\textsuperscript{102} Bills were introduced in both the House and Senate. The text of each proposal is reproduced at Hearings to Prevent Discrimination in Employment, 78\textsuperscript{th} Congress, Committee on Labor, June 1, 1944, at 1-15.

\textsuperscript{103} \textit{Id.} at 1.

\textsuperscript{104} \textit{Id.} at 14 (statement of Rep. Scanlon).
This is the time for the Congress of the United States to say to the people of America that their Government guarantees their right to jobs, regardless of their color, race, or their form of divine worship. This is the time to say to the world that we in America mean what we say when we tell them this is a land of opportunity in which a man can go as far as his ability can carry him. This is the way to show the people of the world that we practice what we preach.\textsuperscript{105}

Hearings on the bill opened in the House Committee on Labor June 1, 1944, and continued as U.S. troops stormed ashore at Normandy, beginning the invasion that would eventually destroy the Nazi regime and end the carnage of World War Two in Europe. The ugly contrast between imminent freedom abroad and enduring discrimination at home served as a powerful backdrop to the debates. “There are nearly 1,000,000 Negroes in the Army, Navy, and Marines,” Scanlon said. “The men on Bataan were largely of Mexican origin from Arizona and New Mexico. The first heroes of our war were of many religions, colors, and national origins. … If our returning servicemen, who fought side by side with these heroes, are barred from jobs because of color, religion, or national origin, what a hollow thing our victory will be.”\textsuperscript{106} On February 20, 1945, the day after U.S. Marines landed at Iwo Jima, the House Committee recommended that the bill be passed, once again invoking the war. “When the war comes to a victorious end, and our men and women return to peacetime occupations from the battlefields …, there must be equal opportunity for all. The men who fought for economic freedoms for peoples throughout the world will not, and should not, be satisfied with anything less in our own country.”\textsuperscript{107} And in March and April, 1945, while the Allies were liberating the concentration camps at Buchenwald, Bergen Belsen, and Dachau, supporters of the bill repeatedly pleaded with the House Committee on Rules to let the legislation come to a vote in the House. “The men and women

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.} at 16-17.

serving in the armed forces are of all creeds, color and national origin,” Representative Mary Norton (D-NJ), the Chair of the Committee on Labor, said.

Their service to the country is not predicated on color or ancestry or anything else other than that they are good Americans. They are Americans fighting for a common objective—freedom, in the broadest sense of the word. We have repeated over and over again that this war is being fought to preserve freedom in our own country and to extend it to the peoples of the world. If we are honest …, there remains one way to prove it, and that is to end discrimination in our country.108

All of this is immediately recognizable to the modern reader as the language of the Creed as we presently understand it. The views expressed, and the legislative position under consideration, have been so thoroughly assimilated into American national identity that it is almost impossible to imagine the argument against them. In fact, however, many thought the legislation was dangerously radical, and were so alarmed by its various provisions that the legislation’s sponsors considered it prudent to disavow the apparently inflammatory suggestion that they intended to promote genuine equality. “This bill,” Scanlon assured his colleagues, “has nothing to do with racial equality, or social equality. It simply says that all people must have an equal opportunity, according to their abilities, to work for their living regardless of their race, color, creed, national origin, or ancestry.”109 The House Committee on Labor repeated this insistence when it recommended that the bill be passed. “Let it be clearly understood this bill has for its purpose economic opportunity only. The opponents of this bill are attempting to confuse the issue by bringing up the question of social equality. We repeat, there is


109 Hearings to Prevent Discrimination in Employment, 78th Congress, Committee on Labor, June 1, 1944, at 17 (Remarks of Rep. Scanlon).
nothing in the bill concerned with anything other than economic equality.”

Assurances like these, however, did not mollify opponents of the legislation, who denounced the bill as un-American. Foremost, it represented an assault on property and the market, the twin pillars of *laissez faire*. Representative Clark Fisher (D-TX), for instance, complained that the bill “is a departure from the traditional American system of free enterprise,” which has historically allowed employers “to use their own sound judgment in selecting loyal and capable employees. It is through that system of competition and improvement that private enterprise has succeeded in America when it has failed in other countries.” Any proposal that stripped businesses of this prerogative, Fisher warned, “smacks strongly of totalitarianism.” Fisher’s southern colleague, Representative L. Mendel Rivers (D-SC), likewise considered it impossible to enact the legislation and still maintain “the American way of life,” which demands that “no law should try to tell an employer whom he must hire.”

A bill that strips a man of control of his business “will be destructive of initiative, destructive of progress, and would destroy forever any remaining vestige of democracy.” Rivers said the bill was obviously unconstitutional since it “runs headlong into the fifth amendment to the Constitution,” which guarantees that a man’s property shall not be taken without due process. “By passage of this bill,” Rivers said, “you would in fact repeal the Constitution.” And it is simply fanciful to suggest that these arguments were not a faithful construction of American ideals. The fact that the construction did not prevail obviously does not, in and of itself, prove

110 Report on H.R. 2232, The Fair Employment Practice Act, by the Committee on Labor, Feb. 20, 1945, at 1. The fear that political reform was really meant to impose “social equality” was a bugbear that had haunted the South since Reconstruction. Degler, THE OTHER SOUTH ____; Gaston, THE NEW SOUTH CREED 140-41.


113 *Id.* at 57.
its illegitimacy. Indeed, responsible scholars continue to argue that anti-discrimination legislation is unconstitutional.\textsuperscript{114}

Nor would the legislation achieve its ostensible purpose. One exchange between Mississippi Congressman William Colmer and New Jersey’s Mary Norton, the bill’s principal sponsor, was especially revealing. “As you know,” Colmer said, “I come from a section of the country that has quite a large Negro population. I am just wondering, as one who really feels kindly toward those people…, whether this type of legislation would not harm rather than help that class of people?”\textsuperscript{115} “There will be a little difficulty in the beginning,” Norton granted, “but, after all, is not this very much worthwhile? Do you believe in the objective we are setting for the world at the present time? … [I]f we cannot solve the problem of freedom and justice for all, in our own country, it would be futile to attempt to influence the world.”\textsuperscript{116}

\begin{quote}
COLMER: I know that a big majority of the white people in my section of the South feel kindly, and act accordingly, toward the Negro population.

NORTON: What have they done for the Negroes in more than 200 years?

COLMER: I fear you are not accurately advised as to that condition in the South. … We feed the colored people when they are hungry; we clothe them when they are naked; we provide medical attention when they are sick. We see to it that they do not suffer.\textsuperscript{117}
\end{quote}

Like many other southern legislators, Colmer’s South was a bucolic idyll. Jim Crow had finally solved the problem of racial conflict. It allowed the entire community to flourish together, in harmony and tranquility, so long as the Negro and white kept to their

\textsuperscript{114} See, e.g., Richard Epstein, \textbf{[CITE]}.

\textsuperscript{115} Hearings before the House Committee on Rules on H.R. 2232, 79\textsuperscript{th} Congress First Session, Mar. 8, Apr. 19, 20, 25, 26 (1945), at 27 (remarks of Rep. Colmer).

\textsuperscript{116} \textit{Id.} (remarks of Rep. Norton).

\textsuperscript{117} \textit{Id.} at 27-28.
separate but equal spheres. But all of this would disappear in an instant if the bill were to become law. The community would be engulfed in “strikes, riots, and violence,” Representative Price Fisher of Texas warned, leading to “racial prejudices and discrimination.” And the true victim would not be the white man but the Negro “because it would retard his progress and would be calculated to foment racial feeling and bitterness against him.”

As with the debate over the poll tax, the southern construction of national identity prevailed and the anti-discrimination legislation was defeated—a state of play that would last for two more decades, until the Civil Rights Act of 1964.

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The legislative battles over the poll tax and employment discrimination were critical to the early struggle for civil rights. But they do not figure as prominently in modern memory as the 1954 Supreme Court decision in Brown v. Board of Education, which struck down segregated public schools. The link between Brown and our current conception of the Creed needs no elaboration; though scholars vigorously debate its true legacy, today Brown is widely regarded as one of the great triumphs of the civil rights era. But once again, we are unfair to the historical record if we suppose that the southerners who defended segregated schools and other institutions of southern society were motivated by something other than complete fidelity to the values and beliefs of the American Creed. The southern defense of segregation, just like the southern opposition to the poll tax and the anti-discrimination legislation, was thoroughly steeped in the language of American ideals. One of the most prominent arguments, for instance, resurrected the (white) southern belief in an idealized community with harmonious race relations. In 1957, Mike Wallace interviewed the staunch segregationist Mississippi Senator James Eastland, who offered a classic defense of segregation. “It’s a matter of choice,” Eastland said, “by both races.”

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119 CITE
WALLACE: Are you suggesting the Negro …

EASTLAND: I’m suggesting that the vast majority of Negroes want their own schools, their own hospitals, their own churches, their own restaurants ….

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WALLACE: Are you suggesting that the Negro in the south wants segregation?

EASTLAND: I’m suggesting … oh, certainly.

WALLACE: The Negro in the south wants segregation.

EASTLAND: 99% yes.

Segregation had been a boon to the African-American, Eastland insisted. “Now the biggest business in my home is a Nigra insurance company. I employ a Nigra in an executive capacity. … As I said, we have more Nigra professional men, more businessmen, we have substantial Nigra cotton planters. In fact, they have made more progress in the south than in the north.”120

But mostly, segregation was a matter for each State to decide on its own:

Well, what we are fighting for is a great principle and that is for each state to handle its own domestic affairs. If the North wants segregation, integration, it’s their affair—if New York wants it, it’s their affair—under our system of government, the genius of the American system is control by the state of the domestic affairs of the states and we just want the right to handle it in our state for the best interest of all concerned and the way it is handled is endorsed by ninety-nine percent of the people of both races who

live in peace and harmony and we have more peace and harmony than any section of the country. … We’ve worked out the system that is harmonious.¹²¹

Eastland’s view was widely shared. The day after the decision in Brown, Senator Price Daniel of Texas warned it would be a disaster for both black and white alike:

I sincerely believe that the great majority of members of the Negro race in my State prefer to have their children go to separate schools and receive instruction from teachers of their race. I believe they wish to continue to enjoy the opportunities they have enjoyed in the past, under our separate school system. I do not believe they could enjoy as many advantages and as many opportunities if separate schools are abolished.¹²²

And in 1960, Russell Long of Louisiana lamented desegregation in higher education. In colleges and universities “where whites predominate,” Long said that African-Americans “have difficulty competing with the white students, and it would probably be better for them if they went to college among their own people.”¹²³ For instance, “white men” who started law school “were probably better qualified … than the colored boys were when they entered law school.” And if they were forced to compete, black students would probably not be able to graduate. Segregation was thus for their own good. In any case, “[t]he colored people prefer to have their own teachers. They have pride in their race, and … every race should have pride in its own.”¹²⁴

But the most comprehensive and succinct statement of the southern position on segregation, at least as it was expressed in Congress, was the so-called “Southern Manifesto,” the famous statement condemning the Supreme Court decision in Brown and

¹²¹ Id.

¹²² 83rd Cong. 2d Sess., 6750 (1954).

¹²³ CITE

introduced into the congressional record in March 1956 by Senator Walter George on behalf of nineteen Senators and 77 Representatives.125 Styled a “Declaration of Constitutional Principles,” the manifesto is a ringing tribute to the liberal values of the Creed. The decision in Brown, the signers of the manifesto warned, was “now bearing the fruit always produced when men substitute naked power for established law.” The Court, they said, had ignored “the inescapable lesson of history,” recognized by the Founders and enshrined in the Constitution, “that no man or group of men can be safely entrusted with unlimited power.” The Founders had drafted the Constitution “in order to secure the fundamentals of government against the dangers of popular passion or the personal predilections of public office holders.”126

Time and again, “separate but equal” had been upheld by the Supreme Court and left in place by Congress. Over the course of long years, it thus “became a part of the life of the people of many of the States and confirmed their habits, traditions, and way of life. It is founded on elemental humanity and commonsense....”127 And now the Court has thrown all this into disarray. In deciding as it had, the Court threatened the very foundation of democracy, “undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.” And the result of this “unwarranted exercise of power by the Court, contrary to the Constitution,” is “chaos and confusion in the States principally affected. It is destroying the amicable relations between the white and Negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and


126 Id. at ___.

127 Id. at ___.

39
suspicion where there has been heretofore friendship and understanding.”  

Yet the signers of the manifesto remained hopeful, placing their faith in the people. “Even though we constitute a minority in the present Congress, we have full faith that a majority of the American people believe in the dual system of government which has enabled us to achieve our greatness and will in time demand that the reserved rights of the States and of the people be made secure against judicial usurpation.” In the end, and acting out of “the gravest concern for the explosive and dangerous condition created by this decision and inflamed by outside meddlers,” the signers reaffirmed “our reliance on the Constitution as the fundamental law of the land”; decried “the Supreme Court’s encroachment on the rights reserved to the States and to the people, contrary to established law, and to the Constitution”; commended “the motives of those States which have declared the intention to resist forced integration by any lawful means”; and appealed “to the States and people who are not directly affected by these decisions to consider the constitutional principles involved against the time when they too, on issues vital to them may be the victims of judicial encroachment.”  

This is creedal rhetoric at its very best: the appeals to “the Constitution as the fundamental law of the land,” the fear of “judicial usurpation,” the belief that the Court had substituted “naked power for established law,” the tribute to “the dual system of government which has enabled us to achieve our greatness,” and the ominous warning that “the rights reserved to the States and to the people” were in jeopardy. In its grandeur and sweep, this appeal is every bit as faithful to the American Creed as the decision in Brown itself. Limited government under a written constitution, the rule of law, the defense of republicanism, the reverence of the Founders—it is nothing if not a statement of American identity.
The Supreme Court decision in *Brown* was denounced throughout the South but few spoke with the eloquence of James J. Kilpatrick, the distinguished wordsmith and influential editor of the Richmond *News Leader*. In 1962, Kilpatrick wrote *The Southern Case for School Segregation*, where he defended Jim Crow with a dignified passion that drank deeply from the bountiful reservoir of creedal rhetoric. “The South’s position,” he wrote, “rests upon a foundation of law, history, and constitutional construction as old as the Union itself.” Like the southern caucus, Kilpatrick relied on the right of the various States to fashion their most cherished institutions in a way that fit their local traditions. He insisted on the right of a sovereign State “to be wrong—to be foolish, to be unwise, to be out of step, to do those acts and things which independent States may of right do, simply because they are States.” Northerners may not like it; the Supreme Court may not like it; the whole world may not like it. But so long as a State does not violate a particular provision of the Constitution, the relative unpopularity of her institutions is nobody’s damn business.

“This principle,” Kilpatrick insisted, “is the élan vital of the whole American Republic; it takes in the whole body of governmental and philosophical principles by which American greatness has been achieved.” And unless this “delicate balance” between State and Federal spheres is carefully maintained, “the whole organism of American government will be subtly transformed.” The federalism that has so far proven her “greatest strength” will give way to an “immoderate centralism that will prove its greatest weakness.” The South’s struggle, therefore, was not simply a regional claim for segregated schools, but a national claim “for the preservation of an American plan of value to all the States and all the people.”

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132 Id. at ___.

133 Id. at ___.

134 Id. at ___.

135 Id. at 106.
The largest part of The Southern Case collected the "evidence" in favor of segregation. It makes for difficult reading. "In terms of enduring values," he asked at one point, "what has man gained from the history of the Negro race? The answer, alas, is 'almost nothing.' From the dawn of civilization to the middle of the twentieth century the Negro race, as a race, has contributed no more than a few grains of sand to the enduring monuments of mankind."136 "The South earnestly submits that over a period of thousands of years, the Negro race, as a race, has failed to contribute significantly to the higher and nobler achievements of civilization as the West defines that term."137 The southerner "rebelliously clings to what seems to him the hard core of truth in this whole controversy: Here and now, in his own communities, in the mid-1960s, the Negro race, as a race, plainly is not equal to the white race; nor, for that matter..., has the Negro race ever been the cultural or intellectual equal of the white race, as a race."138 As for the much ballyhooed language in the preamble of the Declaration, Kilpatrick had little but scorn. "Perhaps in the divine plan, all men are indeed 'created equal.' Here on earth they patently are not." Jefferson's "hyperbole," he said, "was never meant to be taken literally."139

Yet the fact that Kilpatrick labored so slavishly for a position we now consider morally and intellectually bankrupt is less important than the language he used in making his case. His defense of segregation, like that of the Southern Caucus, reveals again the almost infinite elasticity of the Creed. Naturally, southern spokesmen like Kilpatrick slighted liberal principles like equality.

136 Id. at 50.
137 Id. at 43.
138 Id. at 26, emphasis in original.
139 Id. at ___. The year after The Southern Case, Kilpatrick prepared an article for The Saturday Evening Post with the proposed title, "The Hell He is Equal," in which he wrote, "The Negro race, as a race, is in fact an inferior race." The editor of the Post elected not to run the piece after a church bombing in Birmingham, Alabama, killed four young black girls. See Richard Goldstein, "James J. Kilpatrick, Conservative Voice in Print and on TV, Dies at 89," New York Times (Aug. 16, 2010). Some writers have suggested Kilpatrick's views in this unpublished piece were more extreme than what he had written a year earlier in The Southern Case. Goldstein, supra. This slices his writing a little too fine, and it is not evident how his unpublished remarks of 1963 differ from his published views of 1962.
Kilpatrick was downright dismissive of the idea. Instead, they described the South as distinctly republican. The South was a homogenous society whose (white) members shared a common identity. There is, Kilpatrick insisted, “a sense of oneness here, an identity, a sharing,” that the rest of the country cannot match. Southerners had an innate and salutary preference for local autonomy and a corresponding distrust of remote, central authority.\textsuperscript{140} Southerners “do not like authority …, and a broody pessimism constantly evokes the apprehension that government, if given half a chance, will pull a fast one over on the people.” (emphasis in original). Standing with Jefferson and the founding generation, Kilpatrick announced that “In the eternal struggle between man and the state, the South stands in spirit, at least, firmly on man’s side.”\textsuperscript{141}

This rhetoric, no less than the liberal rhetoric of civil rights leaders, claimed fidelity to the American Creed. Kilpatrick believed his defense of Jim Crow put him on the side of the country’s “greatest strength.” And in mounting this defense, Kilpatrick and the members of the southern caucus fired many of the arrows in the creedal quiver: the reverence of venerated symbols like the rule of law and the Constitution; the appeal to the founding generation; the recognition of “American greatness”; and the looming threat of government tyranny. Nor should it be supposed that southerners sensed, at perhaps some barely conscious level, that segregation was contrary to the Creed. As noted, support for segregation was nearly universal throughout the white South and was widely believed, at least by whites, to be good for both races. And southerners as a group hardly thought of themselves as evil. On the contrary, as Kilpatrick put it, “the South in general feels no sharp sense of sin at its treatment of the Negro. The guilt hypothesis is vastly overdrawn.”\textsuperscript{142}

The empirical evidence supports Kilpatrick on this score. In 1956, for instance, just two years after \textit{Brown}, the National Opinion

\textsuperscript{140} \textit{Id.} ___.  
\textsuperscript{141} \textit{Id.} ___.  
\textsuperscript{142} \textit{Id.} __.
Research Center conducted a survey to determine whether white Americans believed blacks were treated unfairly in the United States. The question is important, since the notion of fair play is so integral to the Creed. The substantial majority of (white) Americans nationwide and the overwhelming majority in the South believed blacks were treated fairly. Indeed, comments to the pollsters revealed “little soul-searching, hesitation, or feeling of guilt.” Interpreting the results, the Center concluded “that the appeal to the American Creed of fair play as an argument for integration is not a widely effective argument.” And this despite obscene differences in resources and opportunities that were apportioned strictly along racial lines, widespread *de jure* and *de facto* discrimination in nearly every aspect of public life, and sustained efforts by southern elites, including nearly every elected official, to maintain these disparities in order to preserve “the Southern Way of Life.”

None of this should surprise us and the lesson is clear enough: The practices Americans want to preserve will never be seen as contrary to American identity, and will always be cast in the infinitely malleable language of the Creed. National identity is what we make it.

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The demands of a single article prevent a close study of the rhetoric used to justify other dark chapters in American history. To my surprise, no such comprehensive study exists. I strongly suspect, however, that the student who makes the attempt will discover that the sort of shifting creedal justifications mounted in opposition to the civil rights movement are not at all unique. The particular language will change, of course, but there is every reason to suspect that treasured social arrangements will consistently be defended in a language that provides people the most comfort, which is the malleable but pleasant sounding rhetoric of shared national values. And this is certainly the conclusion of other scholars. Laura Scalia, for instance, studied the state constitutional debates over suffrage in the mid-nineteenth century and concluded that the political language

143 The polling data from the National Opinion Research Center is quoted in _____ Workman, THE CASE FOR THE SOUTH (_____ 1960). The literature on Jim Crow is voluminous. For an insightful discussion of the role of the Southern caucus in apportioning the opportunities and largesse of the New Deal and the Fair Deal along racial lines in order to preserve and protect the segregated South, see Ira Katznelson, WHEN AFFIRMATIVE ACTION WAS WHITE (Norton 2005).
of liberalism “helped rationalize various illiberal policies.” Liberalism, she concluded, “is not always the language of greater empowerment and inclusion; it can be the language of exclusion as well.”

Likewise, Robert Lieberman, in a study of the civil rights movement, found that “concepts such as ‘liberty’ or ‘equality’ might be invoked to support very different practices in different contexts by people who all the while believe themselves to be upholding a timeless and unchanging political tradition.”

Our common point, however, is simply that while values are stable—“timeless and unchanging,” as Lieberman put it—their meaning is constantly being constructed in the public square, and that the construction can justify illiberal as easily as liberal forms. And this forces us to confront one last matter.

III

THE NIHILISM PUZZLE

If, as it seems, the rhetoric of national identity is sufficiently capacious that it can be made to justify the very worst of American

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146 This relationship between stable values and constructed meaning also sheds light on another contentious issue in American thought—viz., the persistence and occasional virulence of the so-called “culture wars.” Compare James Davison Hunter, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (Basic Books 1991) with Morris P. Fiorina, et al., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (Pearson Longman 2007). There is no denying the intense partisan polarization between opposing political elites (and their most engaged supporters). See, e.g., Richard J. Ellis, “The Liberal Tradition in an Age of Conservative Power and Partisan Polarization,” in Mark Hulliung, ed., THE AMERICAN LIBERAL TRADITION RECONSIDERED: THE CONTESTED LEGACY OF LOUIS HARTZ (Univ. of Kansas Press 2010) 215-222. The rhetorical bombasts lobbed by these groups hardly seem to reflect the language of shared values. But in fact, as Samuel Huntington and Seymour Martin Lipset both explain, it is precisely because the values are shared that the rhetoric is heated. Huntington, PROMISE OF DISHARMONY _____; Lipset, AMERICAN EXCEPTIONALISM ______. The rhetoric employed by these camps is simply evidence of the battle taking place in the public square to control the meaning given to these values, a meaning which will eventually be understood and used by the politically engaged and apathetic alike.
behavior, is national identity whatever society constructs it to be? Could we return to Jim Crow or adopt some other equally loathsome exclusionary policy? We should approach these questions with some urgency. As my colleague Dorothy Roberts has recently demonstrated, there has been a dangerous resurgence in racialist thinking that claims the support of science and is being used to justify and legitimate race-based categories. [FURTHER DISCUSSION AND CITE TO DOROTHY’S BOOK] At the same time, the alarming enthusiasm for anti-Muslim and anti-Islamic rhetoric and policies in this country suggests the enduring attraction on the part of a great many Americans to exclusionary or ascriptive categories. Yet we can safely assume that nearly all of the people who endorse these categories believe—like the supporters of Jim Crow—that they represent the best of American ideals.

Naturally we are tempted to protest against the question and attack it as sophistry and moral relativism. Some constructions are simply illegitimate and cannot be acknowledged as a faithful rendering of American ideals—or so the argument would go. Regardless of the rhetorical mask, for instance, fascism—to take an easy example—is not the same as liberalism, and if someone were to champion the former in the language of the latter, it would not become liberalism simply by virtue of the words she employed. That is certainly what Samuel Huntington had in mind when he said that slavery “clearly contradicted virtually all the core values of the American Creed.”

But this is not a satisfactory answer—at least not by itself. For one thing, it summons to mind Churchill’s famous quip, “History will be kind to me for I intend to write it.” Naturally we say that Jim Crow is a perversion of our values; we have constructed those values precisely in order to compel this conclusion. The challenge is whether we can prove that our values compel this conclusion apart from the fact that we say so. Throughout the entirety of the nineteenth century, the fact is that we could not, which is not an auspicious foundation for any argument about their intrinsic character. And what of the “easy example” I proposed before? Certainly fascism is not the same as liberalism, but neither is socialism, and yet a substantial number of Americans seem to harbor the sincere belief that President Obama is a socialist. It appears, therefore, that the space between categories is as much a social construction as the categories themselves. As much to the point,
resting on the easiest examples is a law professor’s oldest trick, since it draws attention away from the more difficult—and more realistic—possibilities. The fact that the United States will never have a Mussolini does not prove we are safe from another McCarthy.

We may also be tempted to read a rule into historical events. Anti-Catholicism, anti-Semitism, slavery—only the most ardent and petulant critic of the United States can deny the slope of the historic curve. Perhaps the discarded “anti’s” and “isms” of the past testify to something intrinsic about the American Creed. This is certainly what Americans want to believe. But at least as a logical matter, the past proves no such thing. Instead, this history may prove simply that some beliefs come true because we will them to be. It is certainly the case that Americans believe the country is on a march toward a more perfect Union, and that the journey has been and ever will be characterized by a steadily greater compass of human liberty. As a consequence, there is always at least a potential reservoir of social pressure for the nation to live up to its promise. This was precisely Robert Merton’s point in his seminal 1948 article, The Self-Fulfilling Prophecy: “If men define situations as real,” Merton wrote, “they are real in their consequences.”147 For good or for ill, myth (or prejudice, the particular subject of Merton’s article) has its own power to shape behavior and produce the very reality that the myth describes. Myth, in other words, creates its own truth. But this reveals more about the nature of myth than about the truth of the Creed.148

So we are once again back to the nihilism problem. If the great triumphs of American history prove nothing about our enduring values (at least nothing conclusive), are the values simply what we make them? Could we make them into anything?

I think not. Merton wrote about the enduring power of racism, and was clear that such beliefs are not eternally fixed. To escape our prophecies, he said, “[t]he initial definition of the situation … must be abandoned. Only when the original assumption is


148 My thanks to Cornell’s Mary Fainsod Katzenstein for this particular turn of phrase.
questioned and a new definition of the situation introduced, does the consequent flow of events give the lie to the assumption. Only then does the belief no longer father the reality.” Merton was probably too cynical about the conditions that permit us to escape from the vicious cycle of social prophecies, but he was certainly right that it required at a minimum some willingness to question “the original assumption.” But there is no remote possibility that Americans will abandon the belief that theirs is a nation on the march toward a more perfect Union, committed to ever-greater liberty, equality, and freedom. As each new generation reaffirms the myth, this foundational belief becomes only more firmly entrenched, creating a greater and greater likelihood that it will “father the reality.”

This is a matter of great significance, for it means that while there may be no intrinsic reason why we could not return to Jim Crow (or any of the “anti’s” and “isms” in our past), such an outcome is nonetheless extremely unlikely. Returning to what we now consider the benighted, illiberal past would call into question what may literally be “the original assumption” of American national identity—viz., that we are on a great and endless journey, ever upward, ever forward to the creation of a more perfect Union. Or, in the words of the 1996 Republican Party Platform, “America’s finest hour is never a memory and always a goal.” This conviction makes it extraordinarily difficult to appear to be moving backwards—that is, to appear as though the nation is retracing its steps and reneging on a set of legal or moral commitments that the country has successfully assimilated into the myth of triumph, virtue, and innocence. And to put this in the language employed by this article, there are simply fewer rhetorical resources available for a construction project that would rebuild the abandoned forms of the past.

Does this resolve the nihilism problem? Does it imply that, regardless of the Creed’s intrinsic content, the national myth of a steady march toward greater and greater inclusiveness will “father

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149 Merton, “Self-Fulfilling Prophecy,” at ___.

the reality” and that the country will, at least over the long run, move toward its image?

This is a more difficult question. It may well be that society cannot appear to return to a benighted past. But the whole point of a capacious, elastic language is that it allows forms to be renamed but not fundamentally reshaped. As we have seen, Jim Crow was conceived precisely in order to preserve the white supremacy that prevailed prior to the Civil War—not in exactly the same terms or to the same degree, of course, but nonetheless a comprehensive and thorough-going system of law and custom that relegated Blacks to a permanent second-class status backed by the entire coercive force of the State. The genius of Jim Crow was its capacity to adopt the elastic rhetoric of American ideals as they were understood in a post-Civil War era to the felt needs of white supremacy as they existed before the War. And because the North allowed it to take place, and because it did not look like slavery, the nation avoided the damning criticism that it had returned to a benighted past. In that way, it preserved the myth of innocence and virtue by re-naming the present and forestalling the future.

So it was with the end of Jim Crow. Vesla Weaver and other scholars have observed the opportunistic way that “law and order” came to be a rhetorical rallying cry—especially potent in the South—just as the civil rights movement completed its successful attack on Jim Crow. Many of the actors who doggedly defended Jim Crow, and who deployed a distinctive rhetoric in the process, became eager champions of “law and order,” and quickly began to speak an entirely different language. James J. Kilpatrick, for instance, who bitterly denounced the use of federal troops to enforce desegregation as an invasion of southern sovereignty, was an enthusiastic supporter of Nixon’s use of federal troops to suppress race riots. [INSERT KILPATRICK QUOTE]. And on this score, it is not for nothing

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151 On “re-enslavement,” see Douglas Blackmon, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (Doubleday 2008).

152 [CITES].

153 Id. at ____.

154 [CITE].
that Michelle Alexander entitled her recent attack on the American prison state as *The New Jim Crow*.¹⁵⁵

Obviously this line of thinking should not be taken too far; no one can credibly claim to trace an unbroken line from slavery to Jim Crow to modern criminal justice policy, as though all were equally loathsome. The better point is simply that purporting to eliminate illiberal forms by the stroke of a pen—as, for instance, by signing the Civil Rights Act into law in 1964, or issuing a unanimous decision in *Brown v. Board of Education* ten years earlier—does not by itself eliminate the impulse to preserve the exact same form under a different name. The impulse will undoubtedly remain, and, unless it is continually fought, may well recover and flourish.

And if the elastic language of the Creed does not prevent us from pouring old wine into new bottles, what can be said about some newly minted practice? As long as this is simply a hypothetical exercise, let’s be completely outrageous and ask whether we can imagine an American Creed that rationalizes something like torture as official state policy. Can we construct a creedal preference for torture?

There was a time, not so long ago, when asking such a question would elicit the sort of indignant guffaws that signal decisively that this is just an academic exercise, since such a thing could obviously never happen here. Indeed, pollsters did not even begin to ask whether respondents could ever endorse torture till October 2001.¹⁵⁶ But now these questions are routine, appearing as predictably as the setting sun whenever events seem to present an occasion for debate between the “old” and “new” way of handling terrorists. And today, depending how the question is worded, more than half of all Americans support torture as official government policy; substantially more than half support torture when it is known by its modern euphemism, “enhanced interrogation techniques.”¹⁵⁷


¹⁵⁷ [CITE]
As with so many of the post-September 11 issues, the results divide along partisan lines. Support for torture is substantially higher among people who identify themselves as conservatives or Republicans.\footnote{158} Yet once again, it is simply foolish to suppose that these people are any less (or more) “American” in their outlook and convictions than those who reject torture. They no doubt are among the great majority of Americans who define national identity by the shared commitment to a small set of stable values. They have simply constructed those values to mean something very different. Like the supporters of Jim Crow, they have constructed stable values in a way that reconciles torture to the American Creed.

To trace precisely how this happened would take us too far afield of our topic. It began with a constructed sense of imminent peril accompanied by a systematic process of dehumanization. These two components were firmly in place within weeks of September 11. But danger and dehumanization were not enough to overcome the pre-September 11 understanding of the Creed, as demonstrated by a close study of the earliest polling results. On October 5 and 6 of 2001, Gallup, CNN, and \textit{USA Today} posed this question: If the U.S. Government “thought it was necessary to combat terrorism,” would respondents be willing for the Government to “torture known terrorists if [the terrorists] know details about future terrorist attacks in the U.S.”? In what appears to be a classic glass-half-full-or-half-empty moment, 45\% of Americans supported torture under these circumstances, 53\% opposed it, and 2\% had no opinion. Under one view, the poll revealed an astonishing degree of support for a policy that only three weeks earlier would have been unthinkable. Many commentators read the results that way.\footnote{159}

Yet given the unprecedented level of fear gripping American society at that moment—the polling started only weeks after September 11, when the fear of another attack was at its peak, and at the height of the anthrax scare; polling began the day after the public announcement that a person had been poisoned by anthrax, and ended immediately after he died—perhaps the more noteworthy fact is that over half the population still opposed torture. To put the point

\footnote{158}{\textsc{CITE}}

\footnote{159}{See, e.g., “Talk of the Nation,” National Public Radio (Oct. 30, 2001).}
in perspective, most polls consistently show that approximately 70% of Americans support capital punishment, regardless of the level of threat present in society. This means people were substantially more willing to kill a convicted terrorist for a murder he had committed in the past than to torture him for information that the federal government believed would prevent mass murder in the future.

Indeed, the fact that fewer than half of the respondents in this poll supported torture is even more significant given the way the question was worded. Social scientists have long known that polling data is extremely sensitive to variations in wording. Here, though Gallup is well-regarded as a meticulous polling organization, the wording of the poll was critical. Respondents were asked to assume that the person to be tortured was a “known terrorist”; that he knew “details about future terrorist attacks in the U.S.”; and that the U.S. Government had concluded his torture “was necessary.” This phrasing all but invited people to imagine the ticking bomb. In addition, it signaled that the most trusted voice in American society at that moment—that of the federal government—had already concluded torture was congenial to American values. And yet support was still below 50%.

Moreover, the following month, The Christian Science Monitor phrased the question somewhat differently, asking respondents whether they could “envision a scenario in the war against terrorism in which [they] would support … [the] torture of suspects held in the U.S. or abroad.” While the threat environment was essentially the same, this question did not direct respondents to assume the prisoner was a terrorist with information about future attacks whose torture had been determined necessary by the government. This time, support for torture dropped significantly. Only 32% supported it, 66% opposed it, and 2% had no opinion. And as further evidence in this regard, Gallup repeated its poll in January and November 2005, during a substantially different threat


environment. Here, even though the question once again directed respondents to assume the federal government had concluded the person was a known terrorist with knowledge of future attacks, and that torture was “necessary” to avert those attacks, the percentage of people who supported torture fell to 39% and 38%, respectively.162

In short, a sense of danger and dehumanization was not enough to overcome the ingrained sense that torture is contrary to the American Creed. Two additional elements were required. The first, and by far the most important, was elite— and particularly official— support for torture, which began in September 2006, when the Bush Administration acknowledged and defended the “enhanced interrogation techniques” that had been used by the CIA, and accelerated dramatically after President Obama took office. Whatever latent support there may have been for new policies within the population as a whole, the best evidence is that it represented an inchoate and directionless rage that required considerable elite guidance before it could be channeled into support for anything like torture. Elites have almost always played this role in society. As the presumed High Priests of the Creed, they play a vital role in explaining new events and describing how they should be understood. And since September 2006, and especially since January 2009, they have articulated how something so apparently foreign to American sensibilities—torture—was in fact perfectly consistent with Americanism.163

But the second step in the process, as trivial as it may sound, was reconstructing the same behavior as something other than torture. The Bush Administration, with considerable justification,

162 Id. at ___.

163 The success of this elite guidance is reflected in the polls. From 2001 through mid-2006, support for torture never exceeded 46% and in most polls was below 40%, sometimes substantially below. Gronke & Rejali, op cit.at Table 1, 439. From 2006-2009, however, support for torture never fell below 40% and by the end of 2009 had passed 50%. Id. Yet by May 2011, in a substantially less dangerous threat environment but substantially more vituperative political environment, 60% of Americans said torture was “often” or “sometimes” justified, and only 39% said it was “rarely” or “never” justified. Associated Press-GfK Roper Poll (May, 2011), available at: http://surveys.ap.org/data/GfK/AP-GfK_Poll_MayFULL_Topline_051011_POLITICS.pdf. And as noted, when the question is cast as support for “enhanced” interrogations, rather than “torture,” support climbs significantly. [CITE].
believed the construction project would be substantially easier if it were building public support for something other than torture. Indeed, it became part of the Bush Administration’s mantra that the “enhanced” techniques are not torture. The distinction, though false and contrived, has been remarkably successful. Speaking at a Republican debate in 2007, for instance, former Massachusetts Governor Mitt Romney said he supported “not torture but enhanced interrogation techniques,” a position quickly echoed by the other Republican candidates (except John McCain who, as someone who has been tortured, refused to parse the space between “enhanced” techniques and torture).164 And in the 2010 special election to fill the senate seat opened by the death of Ted Kennedy, Scott Brown, an attorney and former Judge Advocate General in the military, defended the use of waterboarding. “I believe that it’s not torture,” Brown said. He then added, as if by way of explanation, “America does not torture. We used aggressive enhanced interrogation techniques.”165 Distaste for torture in the abstract thus stands alongside enthusiasm for torture as renamed, and both have become part of “what it means to be an American.”

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In the end, the solution to the nihilism puzzle may take its lead from the nature of the puzzle itself. If stable values acquire a constructed meaning, the moral of the story may be that the contest for control of the public square never ends. Until meaning is as stable as the values themselves—a day which will certainly never come—we cannot be confident how the contest to “define what it means to be an American” will end, and the struggle continues.
