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## Presidential Popular Constitutionalism

Jedediah S. Purdy

*Columbia Law School*, [jpurdy@law.columbia.edu](mailto:jpurdy@law.columbia.edu)

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# ARTICLE

## PRESIDENTIAL POPULAR CONSTITUTIONALISM

*Jedediah Purdy\**

*This Article adds a new dimension to the most important and influential strand of recent constitutional theory: popular or democratic constitutionalism, the investigation into how the U.S. Constitution is interpreted (1) as a set of defining national commitments and practices, not necessarily anchored in the text of the document, and (2) by citizens and elected politicians outside the judiciary. Wide-ranging and ground-breaking scholarship in this area has neglected the role of the President as a popular constitutional interpreter, articulating and revising normative accounts of the nation that interact dynamically with citizens' constitutional understandings. This Article sets out a "grammar" of presidential popular constitutionalism, lays out the historical development and major transformations in its practice, proposes a set of thematic alternatives for today's presidential popular constitutionalism, and locates presidential popular constitutionalism within the larger concerns of constitutional theory. In particular, it argues that some of the major political developments of recent decades, such as the "Reagan revolution" and the Clinton-Bush era, can be fully understood only by grasping that they are episodes in presidential popular constitutionalism.*

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\* Associate Professor of Law, Duke Law School; Visiting Professor of Law, Yale Law School (2008–09); A.B., Harvard College; J.D., Yale Law School. For comments and conversations on earlier versions of this material and on these themes, I thank Bruce Ackerman, Jessica Areen, David Barron, James Boyle, Reid Cramer, Chris Elmendorf, David Grewal, Larry Kramer, Roland Lamb, Charles Ludington, Philip Pettit, Robert Post, Jeff Powell, Aziz Rana, Lauren Redniss, Jed Rubenfeld, Michael Sandel, Neil Siegel, Reva Siegel, Joe Singer, Zephyr Teachout, Dennis Thompson, Robin West, James Boyd White, Jennifer Wimsatt, Alex Zakaras, participants in presentations at the New America Foundation, participants in the Harvard University Ethics Center seminar, and students in my seminar on Property and Constitutional Order at Duke Law School and Harvard Law School and in Robert Post and Reva Siegel's seminar on Legislative and Popular Constitutionalism at Harvard Law School. Thanks for research assistance go to Laurel Wamsley and Erin Trenda.

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## INTRODUCTION

Presidents interpret the U.S. Constitution. They do so outside the text of the document and beyond the separation-of-powers questions that inhere in executive practice. They submit normative visions of the national community to the public as bases for claims to legitimacy. This practice is not "mere rhetoric" in the sense of being insubstantial, ephemeral, or entirely instrumental. It has a grammar, a persistent structure that defines the kinds of appeals Presidents can make in this register. It also has a history: epochs and themes in which certain kinds of constitutional arguments predominate and others recede into weakness or invisibility.

This Article analyzes the genre and the grammar of “presidential popular constitutionalism” and sets out its eras, particularly those of the twentieth century. Besides contributing to a theoretical and historical understanding of this kind of presidential speech in general, it provides a frame for appreciating the stakes of presidential rhetoric in the elections of 2008.

If one theme distinguishes the past decade of constitutional scholarship, it is that “the Constitution” is more than that document’s text, and that its cast of interpreters runs well beyond the hierarchy of judges that culminates in the Supreme Court of the United States. Scholars have emphasized that the Constitution forms the touchstone of an ethos, a normative vision of national community, shaped out of ideas such as liberty and equality, but only loosely rooted in the constitutional text itself.<sup>1</sup> They have explored the ways in which legislative and popular disputes over the basic principles of national community help to give this ethos its content.<sup>2</sup> They have also identified ways in which these practices of “popular constitutionalism” interact with judicial interpretation, as judges address themselves to constitutional politics and respond to that politics in opinions.<sup>3</sup>

The last decade’s events have also brought fresh attention to the role of the executive branch as a constitutional interpreter. New claims of presidential authority in the years since September 11, 2001, have

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1. See generally LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995); H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* (2002); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (2001); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485 (2004); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001); Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893 (2001); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2006) [hereinafter Post & Siegel, *Originalism*]; Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004) [hereinafter Post & Siegel, *Popular Constitutionalism*]; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) [hereinafter Post & Siegel, *Roe Rage*]; Douglas Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

2. See generally 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 255–344 (1998); POWELL, *supra* note 1; WHITTINGTON, *supra* note 1; Post & Siegel, *Originalism*, *supra* note 1; Post & Siegel, *Popular Constitutionalism*, *supra* note 1; Post & Siegel, *Roe Rage*, *supra* note 1; James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997) [hereinafter Pope, *Labor’s Constitution*]; James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1 (2002) [hereinafter Pope, *Thirteenth Amendment Versus the Commerce Clause*].

3. See generally ACKERMAN, *supra* note 2; POST, *supra* note 1; Post & Siegel, *Originalism*, *supra* note 1; Post & Siegel, *Roe Rage*, *supra* note 1; Reed, *supra* note 1.

highlighted the importance of the executive branch as an interpreter of the separation of powers.<sup>4</sup> This scholarship has dovetailed with a broader revival of recognition that the executive branch has long maintained its own practice of constitutional interpretation.<sup>5</sup> Another important strand in this development is Bruce Ackerman's studies of presidential leadership as critical to twentieth century "constitutional amendments" outside the Article V process.<sup>6</sup>

Serious debates have arisen around all these lines of work. Both descriptive and normative claims about executive interpretation are as contested as one would expect of any complex and high-stakes legal dispute.<sup>7</sup> On the popular constitutionalism front, critics have charged that popular interpretation contradicts the very idea of a constitution, indeed of rule of law, by denying the fixity and finality of basic principles.<sup>8</sup> The disputes have highlighted a range of positions that sometimes run together under the "popular constitutionalism" rubric. Some claim that final interpretive authority has always belonged to the mobilized people, and that assigning it instead to a judicial mandarin is itself anticonstitutional.<sup>9</sup> The people, outside the process, have the final word. Others do not collapse constitutional law into politics, but try to reconstitute the law-politics distinction with a large place for popular mobilization in defining each epoch's iteration of law.<sup>10</sup> Still others give neither politics nor judging the final say, but understand their topic to be the interplay of democratic self-rule and judicial interpretation, two distinct and ultimately irreconcilable principles that interact uneasily but fruitfully in American constitutionalism.<sup>11</sup>

This Article is agnostic toward such basic jurisprudential questions, although agnosticism tends inevitably toward the last position surveyed, which is itself a variant of agnosticism. Its intent is to set out the grammar and historical epochs of presidential popular constitutionalism, then suggest

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4. See generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2006); Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influence on Constitutional Change*, 78 IND. L.J. 363 (2003); Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 41 (2007).

5. See generally POWELL, *supra* note 1; Barron & Lederman, *supra* note 4; Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105; Neil Kinkopf, *Foreword*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 1.

6. See ACKERMAN, *supra* note 2.

7. See, e.g., YOO, *supra* note 4; Barron & Lederman, *supra* note 4.

8. See, e.g., Alexander & Schauer, *supra* note 1.

9. See, e.g., KRAMER, *supra* note 1.

10. See, e.g., ACKERMAN, *supra* note 2.

11. See, e.g., POST, *supra* note 1; POWELL, *supra* note 1; Post & Siegel, *Originalism*, *supra* note 1; Post & Siegel, *Popular Constitutionalism*, *supra* note 1; Post & Siegel, *Roe Rage*, *supra* note 1.

what appreciating this form of constitutional speech might mean for theoretical understandings of constitutionalism more generally.

In Part I, the Article sets out a grammar of presidential popular constitutionalism. Rhetoric in this vein does three things: it sets out a normative social vision of the national community, provides a picture of the dignity or purpose that membership in the community lends Americans, and derives from these an account of the scope and purpose of legitimate American government. This part also makes the case for concentrating on inaugural addresses as exemplars of presidential popular constitutionalism, explaining that these speeches have always occupied a special place as expositions of basic principles and interpretations of the national community.

Part II traces the historical development of presidential popular constitutionalism, explaining how it has fallen into two distinct epochs in which the inaugural address occupied different genres: a nineteenth-century version tied to libertarian basic rights and a broadly republican vision of the country, in which the President's authority was tied directly to constitutional principles, and a twentieth-century version, in which Presidents have taken their legitimacy from a special role as interpreters and articulators of electoral events and popular will. Within the second epoch, several rhetorical periods have brought distinctive accounts of national community, civic dignity, and legitimate government. A Progressive version, which identified a strong state as the only counterpower that could protect vulnerable individuals against complex social and economic systems, was preeminent between the presidencies of Woodrow Wilson and Richard Nixon. This version was not homogenous, but included a variety of distinct ways of accounting for civic dignity in an activist state. In part because of the failure of these efforts, a libertarian version, with a much more restricted view of government, succeeded them and was in turn succeeded by a communitarian normative social vision, exemplified in both Bill Clinton and George W. Bush. The communitarian rhetoric, which frames today's presidential speech, lacks a strong account of legitimate government. These transformations have not been happenstance or purely driven by exogenous forces: they have reflected both imperatives and developments within the rhetorical tradition of presidential popular constitutionalism and efforts by Presidents within that tradition to deal with and make sense of such developments.

Part III sets out the thematic and conceptual alternatives that now confront any effort to revive a more robust account of government's scope and purpose within a presidential constitutional vision, noting the prominence of individualism, consumerism, diversity, and markets as deep and persistent facts in contemporary American life.

Part IV returns to the themes of the Introduction, drawing out the implications for constitutional thought of recognizing the importance of presidential popular constitutionalism.

## I. THE GRAMMAR OF PRESIDENTIAL POPULAR CONSTITUTIONALISM

The approach of this Article is to attend thoroughly to presidential popular constitutionalism itself and then try to understand its significance for constitutional thought more generally, rather than shoehorn it into the finer points of a standing debate. Nonetheless, it is worth setting out the basic theoretical grammar of such speech before getting into particulars. In specifying this grammar, this Article inevitably interprets the speech itself and, at the same time, invokes a set of interpretive presuppositions. In the interest of transparency, it is important to say that the picture of grammar set out here emerged from a process of reflective equilibrium. On the one hand, a careful reading of past presidential speech, particularly inaugural addresses, revealed a pattern of persistent themes that seemed to define the task that Presidents set for themselves in addressing the public. On the other hand, these themes suggested the value of certain theoretical approaches, which in turn informed my later readings of the same addresses.

A. *The Work of Presidential Language*

Major presidential addresses, particularly inaugural addresses, seek to establish presidential *authority* or *legitimacy*. Authority is more than the fact of having the power to accomplish one's ends: it is specifically normative, concerned with the rightness of exercising that power. If there is a difference between authority and legitimacy, it is subtle and nonobvious. Legitimacy may imply a formal or objective quality, a condition of public acts that arises from their being taken in the right manner and by the right actors. Authority is perhaps more imbued with the subjective experience of the one who takes the command, in the case of the democratic political authority, the experience of members of the public.<sup>12</sup> Authority might be described as legitimacy felt and tasted. Less metaphorically, a President has authority when it is widely felt that he has the right to act and command.<sup>13</sup>

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12. I would not want to make too much of the contrast between authority and legitimacy. The two are different inflections of essentially the same concern: the normative status of power within a political community. Jeffrey Tulis prefers to write of "legitimacy," and his classic study, *The Rhetorical Presidency*, is as close to the concerns of this Article as any work I have identified. See JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 14 (1987) ("Political rhetoric is, simultaneously, a practical result of basic doctrines of governance, and an avenue to the meaning of alternative constitutional understandings.").

13. As presidential historical and political scientist Stephen Skowronek puts it, Authority . . . [in contrast to power] reaches to the expectations that surround the exercise of power at a particular moment, to perceptions of what is appropriate for a given president to do. A president's authority hinges on the warrants that can be drawn from the moment at hand to justify action and secure the legitimacy of the changes effected.

STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 18 (1997) (footnote omitted).

Presidential popular constitutionalism seeks to generate authority by evoking a *normative image* of the national community. This image is a hybrid creation of fact and value: it at once describes life in the American polity and assesses the life it describes as good or bad, worthy or unworthy, fixing cardinal points of pride, disappointment, and aspiration. It is, as Charles Taylor writes in defining a “social imaginary[,] . . . that common understanding that makes possible common practices and a widely shared sense of legitimacy.”<sup>14</sup> When such a normative image takes hold, it is not an abstract theory of either social activity or legitimacy, but something at once deeper and less articulate: a field of presuppositions about how the world works and what most matters in it, which form the mostly unspoken backdrop to experience. Presidential popular constitutionalism both invokes and tries to shape this field of experience, what Woodrow Wilson in his first inaugural address called “a vision . . . of our life as a whole. . . . [T]he bad with the good, the debased and decadent with the sound and vital,” a key to history and touchstone for approaching “new affairs.”<sup>15</sup>

One critical way in which such a normative image of the national community works is by addressing citizens’ need for *dignity*.<sup>16</sup> This quality involves having a place to stand in one’s own social world, esteem in others’ eyes which reinforces self-regard. One theorist, Axel Honneth, distinguishes usefully between *respect* and *recognition*, with respect referring to a polity’s assignment of formal rights and immunities, recognition to the social honoring of more subtle and particular qualities, those aspects of identity that are specific to one’s own group or personality.<sup>17</sup> A group of legal scholars led by Dan Kahan has focused on a concept closely related to recognition—how competing normative images of national community distribute *status* among social groups.<sup>18</sup> However one chooses to map its facets, dignity in presidential popular constitutionalism bridges civic identity and personal identity more generally. Presidential speech aims to specify what bases of dignity political membership adds to nonpolitical identity.

These three aspects of rhetorical grammar—authority, the normative image of the country, and civic dignity—stand in no unique deductive relationship to one another. Rather, they interact to produce either

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14. CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 23 (2004).

15. President Woodrow Wilson, *First Inaugural Address* (Mar. 4, 1913).

16. For a valuable discussion of the development of this idea in modern life and thought, see CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1992).

17. See AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* 131–40, 145–79 (1995). See generally CHARLES TAYLOR, *MULTICULTURALISM AND “THE POLITICS OF RECOGNITION”* (1992).

18. See generally Dan M. Kahan, *The Cognitively Illiberal State*, 60 *STAN. L. REV.* 115 (2007); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL’Y REV.* 149 (2006); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 *MICH. L. REV.* 71 (2003) [hereinafter Kahan, *The Logic of Reciprocity*]; Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 *HARV. L. REV.* 1071 (2006) (book review).

coherence or dissonance, with any one supporting others that are consonant with it.<sup>19</sup>

### B. *The Special Place of Inaugural Addresses*

The inaugural address falls at a pivotal moment, when the energy and animus of the presidential campaign have begun to drain away and the President takes on a different kind of persuasion: not reinforcing the loyalty of partisan supporters, but convincing voters who lost, who may have spent the past year mistrusting or even disdaining him, why he deserves a share of their loyalty.<sup>20</sup> Presidents have always marked the day as a turn from partisan to national identity, since Thomas Jefferson declared at the end of a bitter campaign, "We are all Republicans, we are all Federalists."<sup>21</sup>

There is a second and more basic reason to focus on the inaugural address. Jeffrey Tulis, the foremost historian of presidential rhetoric, has pointed out that the inaugural address has been the centerpiece of two epochs (one comprising a pair of subepochs) of presidential constitutional interpretation. Throughout the nineteenth century and into the beginning of the twentieth, each inaugural address was an "attempt to articulate the president's understanding of republican principle," the organizing ideals of the American constitutional community.<sup>22</sup> From Thomas Jefferson through Abraham Lincoln, the addresses were fundamentally exercises in this register of constitutional interpretation, tending to derive their policy prescriptions, such as they were, from those principles.<sup>23</sup> After the Civil War, "the form of address was reversed" and Presidents set out constitutional principles in defense of the policy commitments of their parties.<sup>24</sup> In both cases, however, a vision of republican political community was the organizing concern of the address, making it a centerpiece of presidential constitutional interpretation. As we shall see in more depth, Woodrow Wilson used his first inaugural address to revise the convention of the form, linking the President's interpretive authority less to the text and ethos of the Constitution than to the democratic activity of the electorate, and thus deepening the sense in which the address engaged in *popular* constitutional interpretation.<sup>25</sup>

Inaugural addresses, then, form a genre-specific time-slice of presidential popular constitutionalism as old as the Constitution itself. Tracing their development provides a map of continuity and change along the thread of a

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19. This nondeductive, coherence-seeking relationship might be conceived in terms of John Rawls's famous idea of reflective equilibrium. See JOHN RAWLS, A THEORY OF JUSTICE 42-45 (rev. ed. 1999). See generally HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS (2002).

20. See TULIS, *supra* note 12, at 47-51.

21. President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801).

22. See TULIS, *supra* note 12, at 50.

23. See *id.*

24. See *id.*

25. See *id.* at 117-37.

single theme: the shape and meaning of American constitutional community, as interpreted by the President.

## II. THE EPOCHS OF PRESIDENTIAL POPULAR CONSTITUTIONALISM

### A. *Freedom, Dignity, and Presidential Language in the Nineteenth Century*

The predominant nineteenth-century vision of the presidency did not yet make room for innovative engagement with the normative image of national life. In sharp contrast to the President's twentieth-century role as a visionary "interpreter" of collective experience, nineteenth-century Presidents labored under severe suspicion of "demagoguery," a pejorative that might attach to any direct appeal to popular will or sentiment.<sup>26</sup> The independence of the office did not yet rest, as it would in the twentieth century, on the idea that the President had a direct electoral and rhetorical connection to popular will.<sup>27</sup> Instead, presidential independence was derived from the constitutional status of the office, an intermediate and limiting, rather than an immediate and empowering, connection to democratic will.<sup>28</sup> Nineteenth-century Presidents tended to present themselves in the manner of Supreme Court Justices, as nonpartisan exegetes of permanent constitutional principle, rather than proponents of ascendant constitutional visions.<sup>29</sup>

Nonetheless, from Thomas Jefferson through William McKinley, a coherent constitutional vision animated the nineteenth century's presidential language. Its normative social image was of a continent of plenty, inhabited by men (there was only one gender in this epoch of presidential constitutionalism) who were fully capable of mastering their own affairs and shaping their own lives. It was what Jefferson, in his first inaugural address, called "a chosen country, with room enough for our descendants to the thousandth and thousandth generation."<sup>30</sup> By *chosen* he meant not divinely ordained, but that Americans had chosen their country by occupying North America and creating a nation out of revolution and constitutional politics. Westward expansion would enable them to inhabit free, self-governing communities deep into the future.<sup>31</sup> There would be no need for the hierarchy and dependence of feudal orders, where men, crowded together in old countries, rested their wealth and freedom on the abjection of others.<sup>32</sup> This image of American life had a profound affinity with the social vision of free labor, the idea of a country of proprietors who

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26. See *id.* at 27–33.

27. See *id.* at 33–45, 124–32.

28. See *id.* at 33–45.

29. See *id.*

30. See Jefferson, *supra* note 21.

31. See ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSIONISM AND THE EMPIRE OF RIGHT* 3–27 (1995).

32. See *id.*

freely arranged their affairs to the growing prosperity of all.<sup>33</sup> Merging the antimonopolist populism of Andrew Jackson and other Jeffersonians with the antislavery ideology of Northern Republicans, free labor became the defining picture of the United States after the Civil War.<sup>34</sup> Uniting all these inflections of the idea was the normative social vision that Jefferson articulated: a continent of plenty inhabited by men who were, jointly and singly, the masters of their fates.

In this constitutional vision, the authority of government was clear, essential, and circumscribed. As Jefferson put it in his first inaugural, "[A] wise and frugal Government . . . shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. *This is the sum of good government.*"<sup>35</sup> He envisioned, that is, a constitutional scheme of negative liberty, securing citizens from violence and theft and otherwise leaving them to order their own lives. Jefferson's embrace of negative liberty arose from an image of the positive powers of individuals engaged in "industry and improvement" to "regulate their own pursuits" without impeding one another's freedom and to make a good living by their labor.<sup>36</sup> This version of negative liberty begins not in abstract principles, but rather in a picture of the social lives of Americans in a continent of plenty.

Expanding on the "essential principles" of American constitutionalism, Jefferson hewed to negative liberty and self-restraint by government, augmented by the political-economy insight that economic expansion would require public spending on infrastructure. The principles were "[e]qual and exact justice to all men," regular elections and majority rule,

economy in the public expense, that labor may be lightly bur[d]ened . . . encouragement of agriculture, and of commerce as its handmaid; the diffusion of information and arraignment of all abuses at the bar of the public reason; freedom of religion; freedom of the press, and freedom of person under the protection of the habeas corpus, and trial by juries impartially selected.<sup>37</sup>

These were principles of constitutional authority for a nation of the upright and strong, people able to take advantage of economic opportunity and apply reason, judgment, and energy to give their lives the shape they sought.

Here the normative social vision and the account of constitutional authority meet in a picture of dignity. The main source of personal dignity in this vision was being the kind of American whose power of self-

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33. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 1-37 (1970) (describing the premises and social vision of free-labor thought).

34. See *id.*

35. Jefferson, *supra* note 21 (emphasis added).

36. *Id.*

37. *Id.*

authorship Jefferson's principles honored. In this vision, a part of the specifically civic dimension of dignity is simple recognition: membership in a polity that honors each white, male, potentially property-holding citizen as master of his own life, standing foursquare with all others. This was an important part of what Jefferson and others meant when they called the United States "republican."<sup>38</sup>

A second meaning of "republican," and another source of civic dignity, was the idea that each American had an equal part in forming the sovereignty of the United States—the body of political power. The idea that power flowed from the whole political community to the government, which held it in "trust," was central to American political language in the nineteenth century.<sup>39</sup> Presidents contrasted this republican idea of sovereignty with the monarchical vision of political power as descending from the king. Thus, speaking in the register of civic dignity, Franklin Pierce held that any American citizen could "stand unabashed even in the presence of princes, with a proud consciousness that he is himself one of a nation of sovereigns."<sup>40</sup> Defending the principle of universal male suffrage even for uneducated former slaves, James Garfield put the republican-monarchical contrast even more starkly: "If in other lands it be high treason to compass the death of the king, it shall be counted no less a crime here to strangle our sovereign power and stifle its voice" by suppressing the vote.<sup>41</sup> In this image, the least able and most scorned citizen claimed the same sovereign dignity as a European ruler.

There was always a large element of myth in the social vision of free labor, but there was reality, too, in the plentiful opportunity of a continent opened for settlement in a time when land was the source of most wealth. That continent, however, changed in the nineteenth century. The Industrial Revolution moved production from farms and workshops, which laborers could hope to acquire for themselves, to factories, which they could not. The national economy overwhelmed local markets and produced

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38. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 1–7 (1997) (setting out an American version of "republican" liberty); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 1–128 (1997) (describing the historical development and conceptual commitments of republicanism).

39. On the origins of this idea, see Jedediah Purdy & Kimberly Fielding, *Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power*, *LAW & CONTEMP. PROBS.*, Summer 2007, at 165, 173–80. For presidential uses of the concept, see, for example, President James Madison, First Inaugural Address (Mar. 4, 1809) [hereinafter Madison, First Inaugural] (referring to his "awful sense of the trust to be assumed"); President James Madison, Second Inaugural Address (Mar. 4, 1813) (invoking "the momentous period at which the trust has been renewed"); President James Monroe, First Inaugural Address (Mar. 4, 1817) (referring to the need for a President to hold "a just estimate of the importance of the trust and of the nature and extent of its duties"); *id.* (referring to American government officials as "the faithful and able depositaries of their trust [of the American people]"); President Martin Van Buren, Inaugural Address (Mar. 4, 1837) (referring to the office as a "sacred trust" that he "received[d] from the people").

40. President Franklin Pierce, Inaugural Address (Mar. 4, 1853).

41. President James Garfield, Inaugural Address (Mar. 4, 1881).

semimonopolist trusts, which regulated their industries in their own favor. In the face of these realities, free-labor thought came to seem more complacent than dignifying. Its principle of negative liberty came to imply that workers and other less wealthy groups could not use politics to change the balance of economic power, in a time when economic life seemed, to many, more a constraint than a source of empowerment.

Grover Cleveland expressed this principle of noninterference at the close of the nineteenth century, denouncing political intervention in economic life as "paternalism. . . . [T]he bane of republican institutions."<sup>42</sup> Paternalism, Cleveland insisted,

perverts the patriotic sentiments of our countrymen and tempts them to pitiful calculation of . . . sordid gain[s]. . . . It undermines the self-reliance of our people and substitutes in its place dependence upon governmental favoritism. It . . . stupefies every ennobling trait of American citizenship.

. . . [W]hile the people should patriotically cheerfully support their Government[,] its functions do not include the support of the people.<sup>43</sup>

When a President could denounce minimum-wage and maximum-hours laws as threats to civic dignity, equating a sometimes brutal industrial economy with Jefferson's open frontier, free labor was near exhaustion. Whatever the experience of earlier generations had actually been, now workers, farmers, and some small businessmen began to feel that they were not at all the masters of their own destinies, but playthings of complex systems that they could only partly understand, let alone change.<sup>44</sup>

These changing realities interacted with changing ideas to challenge the individualistic constitutional vision of free labor. A generation of Progressive elites studied economics and politics at German universities and returned with images of a nation as an organic whole, like a living body, in which the national spirit or character must be deeply entwined with both political and economic institutions.<sup>45</sup> They tended to deplore the political economy of early American republicanism as illusory atomism, a false image of society as an assembly of "sovereigns" rather than the complex organism they believed it really was.<sup>46</sup>

### B. *Wilson's Interpretive Turn and the Challenge of Progressive Dignity*

Both practical and intellectual discontent with free-labor language reached the center of national politics with the presidencies of Theodore

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42. President Grover Cleveland, Second Inaugural Address (Mar. 4, 1893).

43. *Id.*

44. See BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 29-70 (1998); MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA: 1900-1933*, at 7-19 (1990).

45. See DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 52-111 (1998).

46. See FRIED, *supra* note 43; RODGERS, *supra* note 45, at 52-111.

Roosevelt and, above all, Woodrow Wilson. Wilson accomplished two transformations, the first in the President's role as constitutional interpreter, the second in the substance of constitutional vision.

The first of Wilson's changes was to replace the nineteenth-century image of the President as vessel of a timeless and prepolitical constitution with a twentieth-century picture of the President as the unique voice of democratic self-rule, interpreter-in-chief of the electoral tumult that carried him into office.<sup>47</sup> Striking a new note in inaugural language, Wilson in 1913 offered "to interpret the occasion" and argued that the Democratic victory mattered not for the sake of the party, but because "the Nation [sought] to use the Democratic Party. . . . to interpret a change in its own plans and point of view."<sup>48</sup> Wilson's description of the role was romantic and visionary. The President was to be a kind of democratic oracle, tasked with giving voice to the people's power to redefine public life through democratic action—a power which, he implied, would remain mute unless it found its presidential voice. He proposed that the last election had brought "a new insight into our own life. . . . a vision . . . of our life as a whole," and called the challenge of the time "whether we be able to understand our time and the need of our people, whether we be indeed their spokesmen and interpreters."<sup>49</sup>

Wilson not only pioneered this form of rhetoric, but also helped to create the political practices in which it could flourish, that of the President talking politics directly to the electorate. He broke with convention in campaigning extensively in his first presidential run, reaching over the heads of Democratic party bosses to establish an immediate rhetorical link with voters.<sup>50</sup> In his presidency, he emphasized the spoken word in other respects, notably reviving the oral State of the Union address, which since Thomas Jefferson's presidency had been delivered to Congress in written form.<sup>51</sup> A new rhetorical form required not just a register of language, but a practice that constituted a stage and audience. Wilson substantially created each of these.

Wilson's second great change was in the substance of constitutional vision. He brought to the presidency a Progressive vision of social life that was, in critical respects, the opposite of the free-labor picture of individual self-mastery. Wilson instead described Americans—"men and women and children," the first appearance of citizens other than adult males in an inaugural address—as profoundly vulnerable to "the consequences of great industrial and social processes which they can not alter, control, or singly cope with."<sup>52</sup> The normative social vision of the nineteenth century was of limitless individual mastery in a continent of plenty; the twentieth century

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47. See TULIS, *supra* note 12, at 117–37.

48. Wilson, *supra* note 15.

49. *Id.*

50. See TULIS, *supra* note 12, at 117–37.

51. See *id.* at 133.

52. Wilson, *supra* note 15.

opened with a new image of the individual overmastered by forces beyond his, or her, power and comprehension. This social picture became a premise for Wilson's successors. In 1937, Franklin Roosevelt reported that "the ever-rising problems of a complex civilization. . . without the aid of government had left us baffled and bewildered."<sup>53</sup> Nearly thirty years later, Lyndon Johnson described "a world where change and growth seem to tower beyond the control and even the judgment of men."<sup>54</sup>

This social vision brought a new justification for government, a new register of authority. The state was now the only power large and concentrated enough to master the "great industrial and social processes" that would otherwise master citizens.<sup>55</sup> Americans needed the state to perform precisely those functions that Cleveland had denounced as "paternalism": rearranging economic life to make it less merciless, more egalitarian, richer in opportunity even for those of limited luck or uneven gifts.<sup>56</sup> Government was required to fulfill an almost parental duty to succor to the needy and fragile bodies of its people. Wilson argued, "[t]here can be no equality or opportunity, the first essential of justice in the body politic, if men and women and children be not shielded in their lives, their very vitality," from the "great . . . processes" that impinged on them.<sup>57</sup> In the same inaugural address in which he declared individuals baffled by the problem of a complex civilization, Franklin Roosevelt announced a new purpose for government: "to solve for the individual" precisely those problems.<sup>58</sup>

Wilson's changes brought a problem. How did the new image of Americans as vulnerable individuals, watched over by a powerful state, connect with any sensation of personal dignity? Nineteenth-century civic dignity rested foremost on the vision of a nation of autonomous individuals, and secondly on the idea that each citizen formed an equal part of the nation's sovereignty. The normative social vision that Wilson advanced repudiated this idea and rested a new account of the authority of government on that repudiation: government's role was to step in and reshape economic life precisely where individuals were vulnerable and unable to shape their own lives by the free-labor script. The widespread (though not universal) progressive commitment to an organic, evolutionary view of society further undercut the idea of a nation as a sovereign, built out of the original sovereignty of each member—the republican idea that Pierce and Garfield had voiced. Being the socially vulnerable object of the state's solicitude was not the basis of dignity that the nineteenth-century ideas had been.

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53. President Franklin Delano Roosevelt, Second Inaugural Address (Jan. 20, 1937).

54. President Lyndon Baines Johnson, Inaugural Address (Jan. 20, 1965).

55. Wilson, *supra* note 15.

56. See Cleveland, *supra* note 42; *supra* note 42 and accompanying text.

57. Wilson, *supra* note 15.

58. Roosevelt, *supra* note 53.

*C. The Progressive Search for Civic Dignity*

Seizing on the presidential role that Wilson created—that of interpreter-in-chief of a changing constitutional vision—Presidents throughout the twentieth century tried to articulate a progressive vision of civic dignity. The following four approaches to this task are ideal types, made up of elements that overlapped in practice. Nonetheless, they emerge from a survey of twentieth-century presidential speech as the landmarks of a decades-long effort to reconcile a new social vision with the persistent demand for a language of civic dignity.

*1. Vision*

One approach to the problem of civic dignity was to portray the nation as a single personality, which had fallen into confusion or failed to realize its full potential, but was now approaching a new wholeness that would bring moral as well as material greatness. In this line of rhetoric, citizens were supposed to be elevated just by recognizing their connection with this improving whole. In his first inaugural, Wilson described Americans as holding “a vision . . . vouchsafed us of our life as a whole.”<sup>59</sup> He lamented the self-confident individualism of free labor as a period of callowness and callousness, which brought forward “something crude and heartless . . . in our haste to succeed and be great.”<sup>60</sup> Under his presidency, Wilson declared, the aim would be to overcome these deficiencies in character, “to cleanse, to reconsider, to restore[,] . . . to purify and humanize every process of our common life without weakening or sentimentalizing it.”<sup>61</sup> Emphasizing the new and distinct qualities of this image of politics, Wilson called the work ahead “no mere task of politics but a task which shall search us through and through,” not a merely practical enterprise but a challenge at the level of identity.<sup>62</sup> In his second inaugural, he pressed further these images of spiritual and psychological insight, identifying authenticity as the standard for the country’s self-transformation through politics: “The shadows that now lie dark upon our path will soon be dispelled, and we shall walk with the light all about us if we be but true to ourselves . . .”<sup>63</sup>

Wilson’s visionary language was something new. No previous President had based his claim to govern or his version of civic dignity on a national personality in which each citizen participated. Wilson’s debt to the organic image of society which some Progressives borrowed from European social thought is evident here, as is the influence of Romanticism: Walt Whitman, that touchstone of American Romanticism, had warned a half century earlier that the national spirit was in decline and required new interpreters,

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59. Wilson, *supra* note 15.

60. *Id.*

61. *Id.*

62. *Id.*

63. President Woodrow Wilson, Second Inaugural Address (Mar. 5, 1917).

poets, and literati to renew it.<sup>64</sup> Franklin Roosevelt, who was in many ways a successor to Wilson, would later pick up this imagery, describing the country as having, like a person, a mind, body, and spirit, of which the spirit—its animating values—was the most precious and essential.<sup>65</sup>

## 2. Mobilization

Franklin Roosevelt was the leading rhetorician of a second approach to civic dignity: the language of mobilization, in which politics and social reform figured as what William James had called “the moral equivalent of war.”<sup>66</sup> In this imagery, collective action imparts clear purposes, dramatic effect, and intense solidarity, all more charismatic and dignifying than the scattered acts of individuals. Roosevelt announced in his first inaugural that

if we are to go forward, we must move as a trained and loyal army willing to sacrifice for the good of a common discipline, because without such discipline no progress is made, no leadership becomes effective. We are, I know, ready and willing to submit our lives and property to such discipline, because it makes possible a leadership which aims at a larger good. . . .

I assume unhesitatingly the leadership of this great army of our people dedicated to a disciplined attack upon our common problems.<sup>67</sup>

The dignity that mobilization offered rested in “the warm courage of national unity[,] . . . clear consciousness of seeking old and precious moral values,” and “clean satisfaction that comes from the stern performance of duty by old and young alike.”<sup>68</sup> This lucid, vigorous, and effective action required a leader to provide command and coherence—a military version of Wilson’s interpreter-in-chief.<sup>69</sup> Thus the American people proved their vitality, in Roosevelt’s account, when they “asked for discipline and direction under leadership” and “made [him] the present instrument of their wishes.”<sup>70</sup>

These two rhetorical approaches shared a difficulty. If the nation were united in one purpose, shared in the spirit and action of all its members, that might indeed recapture the old spirit of mastery, with a tincture of Romantic authenticity. Assigning that spirit to the whole country, however, could mean sacrificing it in the individuals who formed the nation. Securing the lives and property of individuals against such “discipline,” as Roosevelt

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64. See WALT WHITMAN, *Democratic Vistas*, in THE PORTABLE WALT WHITMAN 389, 392–96 (Mark Van Doren ed., 14th ed. 1969).

65. President Franklin Delano Roosevelt, Third Inaugural Address (Jan. 20, 1941).

66. William James, *The Moral Equivalent of War*, in REPRESENTATIVE ESSAYS IN MODERN THOUGHT 519 (Harrison Ross Steeves & Frank Humphrey Ristine eds., 1913).

67. President Franklin Delano Roosevelt, First Inaugural Address (Mar. 4, 1933).

68. *Id.*

69. See *supra* text accompanying note 47.

70. Roosevelt, *supra* note 67; see *supra* text accompanying note 47.

warmly offered, had been the touchstone of the free-labor image of civic dignity.<sup>71</sup> That image had rested on the idea that Americans could organize their individual and common lives around rights of life and property without favoritism, paternalism, or, worst of all, outright incursion on those rights. Those inviolable rights were the anchor of the self-mastery that animated nineteenth-century civic dignity. In Roosevelt's language, the same rights became objects of sacrifice to a national purpose set out by a charismatic leader. This was, perhaps, too sharp a break from the main chords of American civic dignity to that time.

### 3. Ecological Enablement

Franklin Roosevelt also pioneered a third Progressive approach to civic dignity, which did not repudiate the free-labor idea but tried to adapt it to a new era. In this register, Roosevelt did not present the expanding Progressive state as the antithesis of self-reliant individualism; instead, he described his government as the only power that could secure those old values in new times. In a 1932 address to San Francisco's Commonwealth Club, Roosevelt identified two perennial American rights, the first being free conscience and judgment, and the second being protection of property.<sup>72</sup> Free conscience, he claimed, was unchanged since the time of Jefferson, whom Roosevelt evoked as his model.<sup>73</sup> Property rights, however, had changed in the industrial age. The point of property rights, Roosevelt argued, was to enjoy personal security: assurance against starvation, sickness, and old age, and a place to stand in the world.<sup>74</sup> In the twentieth century, that security was not as simple as it had (Roosevelt maintained) been on the frontier. Roosevelt called "the highly centralized economic system . . . the despot of the twentieth century, on whom great masses of individuals relied for their safety and their livelihood, and whose irresponsibility and greed (if it were not controlled) would reduce them to starvation and penury."<sup>75</sup>

Roosevelt's image depended on moving civic dignity up by one level of abstraction, from the rights that had secured it in the free-labor scheme to the conditions the rights were meant to maintain: autonomy and freedom from domination. In a changed world, Roosevelt argued, those conditions might require legal instruments, the opposite of those that had preserved it in an earlier time. At one time, firm property rights had helped to free men and women from monarchical tyranny, feudal privilege, and enslavement, the defining enemies of free labor.<sup>76</sup> Now, however, a complex economy, built from those same property rights, created not security, but insecurity,

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71. *See supra* text accompanying note 70.

72. Franklin Delano Roosevelt, Address to the Commonwealth Club of San Francisco (Sept. 23, 1932).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

the vulnerability to "great social and economic forces" that Wilson had evoked.<sup>77</sup> The solution was to revise and abridge those rights to create new sources of economic security and opportunity.<sup>78</sup> According to Roosevelt, this was not an anti-individualist position: it was only a way of doing for industrial self-reliance what simpler economic arrangements had done in the agrarian age. Twentieth-century Americans needed "a more permanently safe order of things. . . . not to hamper individualism, but to protect it."<sup>79</sup> What was required was creating the institutional conditions in which individuals could freely flourish, the aim that this Article calls "ecological enablement."

Lyndon Johnson later extended Roosevelt's idea in a description of his "Great Society," now often remembered as a half-failed war on poverty, but intended as a new vision of democratic life in an affluent age. He portrayed that society as one of ceaseless self-discovery and self-creation, "not . . . the ordered, changeless, and sterile battalion of the ants. . . . [but] the excitement of becoming—always becoming, trying, probing, falling, resting, and trying again—but always trying and always gaining."<sup>80</sup> Roosevelt had described the founding spirit of the United States as the power to begin the world anew in one's own life, and had called that spirit the engine of democracy throughout history.<sup>81</sup> Johnson rendered this ideal as an individual goal made possible by an ecology of laws and institutions, forming a humanist paradise

where leisure is a welcome chance to build and reflect, not a feared cause of boredom and restlessness. . . . where the city of man serves not only the needs of the body and demands of commerce but the desire for beauty and the hunger for community. . . .

. . . .

. . . where the meaning of our lives matches the marvelous products of our labor.<sup>82</sup>

#### 4. Constitutional Faith

The languages of vision and mobilization made little room for individuality in their imagery of the individual absorbed into a coherent national movement. The language of ecological enablement was strongly individualist in its core values, but presented individuality as a social product, a creature of laws and institutions that tamed and shaped a

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77. Wilson, *supra* note 15.

78. *Id.*

79. *Id.*

80. Johnson, *supra* note 54.

81. See, e.g., Roosevelt, *supra* note 65 ("[T]he spirit—the faith of America . . . is the product of centuries . . . born in the multitudes of those who came from many lands . . . who sought here, early and late, to find freedom more freely.").

82. President Lyndon Baines Johnson, Remarks at the University of Michigan (May 22, 1964).

complex economy. A somewhat different register of civic dignity is that of constitutional faith. This language eschews the organicist and collectivist impulses of much of the Progressive language from the first half of the twentieth century, but, unlike the rhetoric of ecological enablement, envisions civic identity as essentially connected with shared values.

The language of the civil rights era has been the twentieth century's defining expression of constitutional faith. In his major addresses on civil rights, Lyndon Johnson expressed the elements of this idea.<sup>83</sup> The country is tied by its founding and subsequent transformations to a creed of equal individual freedom and dignity.<sup>84</sup> These define an ideal constitutional community of mutual respect among citizens.<sup>85</sup> This ideal illuminates a history of failure and disappointment as much as success, and marks the present as an imperfect achievement.<sup>86</sup> It also provides a compass for the present, an image of the country to steer by.<sup>87</sup> In the language of constitutional faith, repudiating an earlier version of national life is not simple rejection, but a crooked road to consummation: rejecting a cramped vision of the country is a step toward entering a larger one.<sup>88</sup>

This language has a good deal in common with the first register of civic dignity, the language of vision. It does not, however, rely on the image of the country as a single organism or personality; nor, for that matter, does it require the collective and concerted action that animates the language of mobilization. It is democratic in relying less on a commander- or interpreter-in-chief than the language of Wilson and Franklin Roosevelt did. Its core is the individual citizen's relationship to a tradition of civic

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83. See President Lyndon Baines Johnson, Remarks upon Signing the 1964 Civil Rights Act (July 2, 1964) [hereinafter, LBJ, 1964 Civil Rights Act Remarks]; President Lyndon Baines Johnson, Speech Before Congress on Voting Rights (Mar. 15, 1965) [hereinafter LBJ, Voting Rights Speech].

84. See LBJ, 1964 Civil Rights Act Remarks, *supra* note 83 (defining the purpose of the American founding as being "to establish the rule of justice in the affairs of men"); LBJ, Voting Rights Speech, *supra* note 83 (claiming a place for the United States as "the first nation in the history of the world to be founded with a purpose . . . a promise to every citizen that he shall share in the dignity of man").

85. See LBJ, 1964 Civil Rights Act Remarks, *supra* note 83; LBJ, Voting Rights Speech, *supra* note 83.

86. See LBJ, Voting Rights Speech, *supra* note 83 ("[T]he harsh fact is that . . . men and women are kept from voting simply because they are Negroes. Every device of which human ingenuity is capable has been used to deny this right. . . . a century has passed . . . since the Negro was freed. And he is not fully free tonight. . . . A century has passed . . . since equality was promised. And yet the Negro is not equal. A century has passed since the day of promise. And the promise is unkept.").

87. See LBJ, 1964 Civil Rights Act Remarks, *supra* note 83 ("We can understand—without rancor or hatred—how [racial hierarchy] happened. But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.").

88. See LBJ, Voting Rights Speech, *supra* note 83 ("[T]here is cause for hope and for faith in our democracy in what is happening here tonight. . . . [R]arely in any time does an issue lay bare the secret heart of America itself. . . . For with a country as with a person, 'What is a man profited, if he shall gain the whole world, and lose his own soul?' . . . The real hero of this struggle is the American Negro. . . . He has called upon us to make good the promise of America.").

ambition, the wish to take some of one's own dignity by contributing to a polity of equal dignity. Its faith—the reason to give it that term—is that breaking with the past and disrupting the present are not acts of betrayal, but ways of making good on a commitment that is partly inherited, but necessarily reinterpreted in each generation and, even, each individual.

D. *The Turn Away from Progressive Constitutionalism:  
Nixon Through Reagan*

1. Nixon's Departures

This sometimes awkward, always experimental language was all along vulnerable to rejection in favor of a more familiar register of dignity: the idea that men and women were inherently the masters of their own lives, government was mainly a threat to their mastery, and there was no need for a new formula of civic dignity. These ideas, the heart of the nineteenth-century presidential formula, reentered the center of political language with Nixon's presidency. Nixon was in many respects tied to the mid-century consensus that a powerful government was necessary in modern conditions, a conviction that united Democrats such as Harry Truman and Republicans such as Dwight Eisenhower.<sup>89</sup> Nixon, however, faced a distinctive set of political pressures: he had to answer attacks on government from the New Right of Barry Goldwater and Ronald Reagan and the anti-integrationist populism of George C. Wallace.<sup>90</sup> He was, moreover, a man with a finely developed sense of resentment, able to register the ways that others felt hemmed in and disrespected—as he did himself, even as President—and translate those into political rhetoric.<sup>91</sup> This blend of political strategy and personal temperament opened up several paths in Nixon's language. He first brought to presidential speech the theme that the most important values are private and personal, and stand in contrast to government, rather than enabled by it as Johnson envisioned. He moved toward locating civic dignity in the private virtue of personal responsibility. His first inaugural, in 1969, was also the first to use *responsibility* in a private sense which, as we shall see, became a touchstone of presidential speech in later decades. Nixon argued that national greatness rested above all on “those small,

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89. See President Richard Nixon, First Inaugural Address (Jan. 20, 1969) (“In this past third of a century, government has passed more laws, spent more money, initiated more programs, than in all our previous history. In pursuing our goals of full employment, better housing, excellence in education; in rebuilding our cities and improving our rural areas; in protecting our environment and enhancing the quality of life—in all of these and more, we will and must press urgently forward.”).

90. On the role of these strands of insurgent politics in shaping the political climate of the later twentieth century, see JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* 40–93 (2004).

91. See *id.* at 68–71 (on Nixon's temperament and its role in shaping conservative language and ideas in the 1960s and 1970s).

splendid efforts that make headlines in the neighborhood newspaper instead of the national journal.”<sup>92</sup> Four years later, he pressed the theme further:

A person can be expected to act responsibly only if he has responsibility. . . . Let us locate responsibility in more places. Let us measure what we will do for others by what they will do for themselves. . . .

. . . .

Let us remember that America was built . . . not by welfare, but by work—not by shirking responsibility, but by seeking responsibility.<sup>93</sup>

Private virtue, particularly “responsibility,” was Nixon’s counterpoint to “government” and the Progressive welfare state, here represented by the “welfare” that did not build America. It was a major theme of both Nixon’s inaugurals, especially the second, that Americans had asked too much of government and not enough of one another and themselves. Nixon self-consciously echoed one of John F. Kennedy’s most famous lines, to very different, entirely private-regarding effect: “let each of us ask—not just what will government do for me, but what can I do for myself?”<sup>94</sup>

## 2. Reagan’s Break

Nixon’s language was inconsistent, lurching between mid-century pieties on the importance of government and fierce slashes at paternalism. Ronald Reagan brought force and clarity to these themes, reasserting the nineteenth-century version of civic dignity and rejecting outright the normative social vision and theory of legitimacy that Wilson had introduced. In this way he brought to an end what might be called the short twentieth century of presidential popular constitutionalism.

In his first inaugural, Reagan rejected the centerpiece of the Progressives’ normative social vision: the idea that personal mastery in modern conditions requires strong government. Referring to recession and growing deficits (which would increase greatly under his administration), he declared, “In this present crisis, government is not the solution to our problem.”<sup>95</sup> He went on, “From time to time, we’ve been tempted to believe that society has become too complex to be managed by self-rule, that government by an elite group is superior to government for, by, and of the people.”<sup>96</sup> While Reagan ran together several targets in this sentence, his overarching aim was to attack the presumption that complex, impersonal systems outstripped individual will and understanding, a belief that Presidents from Woodrow Wilson through Jimmy Carter had mostly accepted. Reagan responded that this was nonsense: the Progressive social

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92. Nixon, *supra* note 89.

93. President Richard Nixon, Second Inaugural Address (Jan. 20, 1973).

94. *Id.*

95. President Ronald Reagan, First Inaugural Address (Jan. 20, 1981).

96. *Id.*

vision was simply wrong. If it fell, the Progressive theory of legitimacy—that government is necessary to master otherwise overwhelming social forces—fell with it. Indeed, in a highly effective rhetorical reversal, Reagan provided an alternative explanation for any feeling Americans might have that they were not the authors of their own fates: “[O]ur present troubles parallel and are proportionate to the intervention and intrusion in our lives that result from unnecessary and excessive growth of government.”<sup>97</sup> Reclaiming lost or compromised mastery, then, required disciplining government and, ultimately, getting it out of the way.

Reagan remained firmly within Woodrow Wilson’s redefinition of presidential rhetoric even as he broke decisively with the substance of Wilson’s constitutional vision. He presented himself as very much the master-interpreter of American political experience, but turned that role to reviving much the same constitutional vision that Wilson and his allies had denounced. Reagan’s revived constitutional vision focused on that old register of civic dignity, the inherent power of men (and now women) to author their own lives. He described the twentieth century as marked by capitulation to growing government, which went hand in hand with failing will and self-confidence. The end of the decline came in 1980, when “we knew it was time to renew our faith, to strive with all our strength toward the ultimate in individual freedom, consistent with an orderly society.”<sup>98</sup> In defining where this optimal balance lay, Reagan sounded a libertarian chord of personal dignity as strong as anything free-labor ideology had ever offered: “There are no limits to growth and human progress when men and women are free to follow their dreams.”<sup>99</sup> Citizenship, moreover, required self-confidence above all, “our willingness to believe in ourselves and to believe in our capacity to perform great deeds.”<sup>100</sup> In the substance of his constitutionalism, then, Reagan offered a libertarian normative social vision, in which men and women are naturally the authors of their own lives and fates; a picture of government authority anchored in the nineteenth-century imperative to honor that inherent self-mastery and avoid setting impediments in its path; and an image of civic dignity centered, like that of free labor, on being in fact the author of one’s own life and part of a polity that honors that power in its members. The break with the constitutional vision that reined between 1917 and 1973 was complete.

#### E. *Constitutionalism Without Politics: The Bushes and Clinton*

The two decades of presidential rhetoric since the end of Ronald Reagan’s second term express the struggle to fill out a constitutional vision on the landscape Reagan created: one in which government operates under strong suspicion of incompetence, if not malign design, and personal

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97. *Id.*

98. President Ronald Reagan, Second Inaugural Address (Jan. 21, 1985).

99. *Id.*

100. Reagan, *supra* note 95.

dignity is very much a quality of the individual, not a condition of the social or political order. Accordingly, since the election of George H. W. Bush in 1988, the normative social vision of American Presidents has scarcely been political at all. Across party lines, in a time of venomous partisan animus, the last three Presidents have consistently concentrated on personal virtue, qualities that uphold families, workplaces, and civic groups. Although the kind of political rhetoric has deep historical roots, it is new in important ways. Its central ideas—character, responsibility, and service—have never before figured so prominently, or in such intensely nonpolitical ways, as they do now.

This rhetoric is particularly pronounced in the presidencies of Bill Clinton and George W. Bush. Imagine reading these Presidents' major addresses as a visitor from another century, unfamiliar with local partisan cues such as the allegiances of teachers' unions. Some difference in religious language would be apparent, although only a matter of degree: God figures in the critical passages of Clinton's speeches and throughout Bush's.<sup>101</sup> Otherwise, the overriding impression would be of a culture of profound moral consensus, where the same central terms anchored both parties' rhetoric.

*Responsibility* is a keystone word for both Clinton and Bush. Clinton in his first inaugural defined "what America does best: offer more opportunity to all and demand more responsibility from all."<sup>102</sup> He declared it time "to break the bad habit of expecting something for nothing from our Government or from each other," and time for "all [to] take more responsibility not only for ourselves and our families but for our communities and our country."<sup>103</sup> Four years later, he announced that "we need a new sense of responsibility for a new century" and, again, that "every one of us, in our own way, must assume personal responsibility not only for ourselves and our families but for our neighbors and our Nation."<sup>104</sup> George W. Bush dedicated his 2000 Republican Party nomination address to the theme of responsibility, urging a "responsibility era."<sup>105</sup> In his first inaugural, he called America "at its best . . . a place where personal responsibility is valued and expected."<sup>106</sup> He celebrated responsibility as "a call to conscience" which, although "it requires

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101. See, e.g., President George W. Bush, Second Inaugural Address (Jan. 20, 2005) ("From the day of our founding, we have proclaimed that every man and woman on this Earth has rights and dignity and matchless value because they bear the image of the Maker of heaven and Earth."); President William Jefferson Clinton, First Inaugural Address (Jan. 20, 1993) ("The Scripture says, 'And let us not be weary in well doing: for in due season we shall reap, if we faint not.' . . . And now, each in our own way and with God's help, we must answer the call.").

102. Clinton, *supra* note 101.

103. *Id.*

104. President William Jefferson Clinton, Second Inaugural Address (Jan. 20, 1997).

105. Governor George W. Bush, Nomination Acceptance Speech at Republican National Convention (Aug. 3, 2000).

106. President George W. Bush, First Inaugural Address (Jan. 20, 2001).

sacrifice," brings people into "the fullness of life not only in options but in commitments."<sup>107</sup>

*Service*, too, is central in both Presidents' language. In his first inaugural address, Clinton "challenge[d] a new generation of young Americans to a season of service," called "serving" the key to the "simple but powerful truth [that w]e need each other," and declared, "From this joyful mountaintop of celebration we hear a call to service in the valley."<sup>108</sup> In 2001, explaining that "[w]hat you do is as important as anything government does," Bush urged citizens "to serve your nation, beginning with your neighbor" and "build[] communities of service and a nation of character."<sup>109</sup>

*Character* is another defining word in this lexicon. In an alliterative catalogue of personal virtues, Bush in 2001 called for "a new commitment to live out our nation's promise through civility, courage, compassion and character."<sup>110</sup> Four years later, he argued that

[i]n America's ideal of freedom, the public interest depends on private character—on integrity and tolerance toward others and the rule of conscience in our own lives. Self-government relies, in the end, on the governing of the self. That edifice of character is built in families, supported by communities with standards, and sustained in our national life by the truths of Sinai, the Sermon on the Mount, the words of the Koran, and the varied faiths of our people.<sup>111</sup>

Clinton did not rely in the same way on the word *character*, but he did declare in 1997 that "the greatest progress we have made and the greatest progress we have yet to make, is in the human heart. In the end, all the world's wealth and a thousand armies are no match for the strength and decency of the human spirit."<sup>112</sup>

This constellation of virtues is essentially about people's ineradicable ties to others—in a word, interdependence. Interdependence is the key to the normative social vision that both Presidents present, and it unites their language across partisan differences. While Clinton announced the "simple but powerful truth [that w]e need each other, and we must care for one another[.]"<sup>113</sup> Bush explained that "the exercise of rights is ennobled by service . . . [because l]iberty for all does not mean independence from one another."<sup>114</sup> In keeping with that emphasis, this political language also leans heavily on *community* and *communities*, not as mere descriptions, but as moral terms for groups of people who recognize their interdependence and responsibility of service to one another. Character, similarly, is not

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107. *Id.*

108. Clinton, *supra* note 101.

109. Bush, *supra* note 106.

110. *Id.*

111. Bush, *supra* note 101.

112. Clinton, *supra* note 104.

113. Clinton, *supra* note 101.

114. Bush, *supra* note 101.

only a descriptive term but a moral designation of the qualities of responsibility and service that preserve community.

This presidential language is surprisingly new. To be sure, George Washington maintained that a country's political institutions depend ultimately on the virtue of its people,<sup>115</sup> but for roughly the first two centuries of American independence, presidential constitutionalism concentrated on specifically political ideas. *Character* was a description of personality or outlook, not a moral term, while *virtue*, its obvious cognate, tended to mean such political virtues as love of liberty and respect for rule of law.<sup>116</sup> *Responsibility* and *service* overwhelmingly referred to the duties of public office, usually the presidency itself.<sup>117</sup> *Community* was a neutral noun rather than a moral concept: it designated communities of interest, political jurisdictions, and the international community of civilized nations.<sup>118</sup>

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115. See President George Washington, First Inaugural Address (Apr. 30, 1789) ("[T]he foundations of our National policy will be laid in the pure and immutable principles of private morality.").

116. See, e.g., President Grover Cleveland, Second Inaugural Address (Mar. 4, 1893) (warning against policy that "saps the strength and sturdiness of our national character"); President William Henry Harrison, Inaugural Address (Mar. 4, 1841) [hereinafter W. H. Harrison, Inaugural] (referring to a love of power as anathema to the "character of a devoted republican patriot"); President Rutherford B. Hayes, Inaugural Address (Mar. 5, 1877) (describing civil-service reform as ensuring that an occupant of certain positions should keep his job "as long as his personal character remain[s] untarnished"); President Andrew Jackson, Second Inaugural Address (Mar. 4, 1833) (asserting that successful foreign policy "has elevated our character among the nations of the earth"); President Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805) (referring to the "reflecting character of our citizens at large" in considering public affairs and the "zeal and wisdom of the characters" whom they elect); Johnson, *supra* note 54 ("Our destiny in the midst of change will rest on the unchanged character of our people and on their faith."); President James Monroe, First Inaugural Address (Mar. 4, 1817) ("We must support our rights or lose our character"); Washington, *supra* note 115 (referring to "[s]ervice of my Country" as military and political service).

117. See, e.g., President John Quincy Adams, Inaugural Address (Mar. 4, 1825) (referring to his ensuing presidential term as "my public service"); President Grover Cleveland, First Inaugural Address (Mar. 4, 1885) (referring to his "solemn sense of responsibility" upon assuming the presidency); President Warren Harding, Inaugural Address (Mar. 4, 1921) (using "universal service" to refer literally to draft enlistment); President John F. Kennedy, Inaugural Address (Jan. 20, 1961) (identifying the "call to service" with American soldiers buried abroad); Madison, *supra* note 39 (referring to "the honor and the responsibility allotted to me"); President James K. Polk, Inaugural Address (Mar. 4, 1845) (insisting that the President, in executing his office, "shrinks from no proper responsibility"); Wilson, *supra* note 63 (referring to "an America united in feeling, in purpose and in its vision of duty, of opportunity and of service"). It is worth noting that *service* does get an early use in something close to its contemporary sense, although with a more civic inflection than is typical now.

118. See, e.g., President John Adams, Inaugural Address (Mar. 4, 1797) (referring, in a discussion of republican political culture, to the "general dissemination of knowledge and virtue" as the test of such a government); President Benjamin Harrison, Inaugural Address (Mar. 4, 1889) (referring to "virtues of courage and patriotism"); W. H. Harrison, Inaugural, *supra* note 116 (referring to love of country and of liberty as "public virtue"); Monroe, *supra* note 116 (proposing to maintain the near perfection of American government by "preserving the virtue and enlightening the minds" of citizens). The first hint of a contemporary sense of

What accounts for the moralization of these terms and their new centrality to political language? Perhaps, without the Progressive normative social vision that defined much of twentieth-century presidential rhetoric, Presidents struggled to find a language that could uphold both a new normative social vision and a sense of civic dignity within it. The paradoxical evacuation of government from constitutional vision, which Nixon began and Reagan completed, is the shared premise of the rhetorical register that we are now examining. Bill Clinton's language of service and responsibility was an effort at working out the idea that, while government was not the source of all problems, "[g]overnment is not the solution. We—the American people—we are the solution."<sup>119</sup> The language of personal and social virtue addressed the "work that government alone cannot do" and "the bad habit of expecting something for nothing from our Government or from each other."<sup>120</sup> Indeed, Clinton's insistence on the limits of government was louder than George W. Bush's, perhaps because he was pressing against the mid-century stereotype of the big-government liberal, while Bush did not labor under that shadow. In George W. Bush's speeches, it has not been necessary to contrast private virtue with statist ambition because grand visions of government's role are so clearly finished as anchors for presidential constitutionalism. The divorce of civic identity from government, which Nixon set in motion, is nearly complete in Bush's speeches.

Instead, as noted, the normative social vision of this presidential rhetoric centers on interdependence. Its version of civic dignity arises from filling out the moral demands of interdependence: responsibility, service, character, and loyalty to community. In this vision, circles of moral obligation move outward from the family through church, friendship, and other concrete forms of moral community. The only political quality in this speech, however, is that the speaker occupies the country's most powerful and visible political office. It speaks to people as moral and social beings, but not as citizens, unless *citizen* means simply a person who is aware of interdependence and takes it seriously. This last point is particularly important: no clear theory of legitimacy, of presidential and governmental role, emerges in this political language. Government is the slightly shamed moral underling of private virtue. As in the nineteenth-century language of free labor, the President's role is partly to recognize and honor the moral authority of individual virtue. Without the special role that *laissez-faire* individual rights played in the free-labor vision, however, today's language lacks even a precise if minimalist libertarian view of the state. It is instead a kind of notional communitarianism, with little that is specific to say about

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"community" is Dwight D. Eisenhower's "virtues most cherished by free people—love of truth, pride of work, devotion to country," which he held out as bases of civic dignity. President Dwight D. Eisenhower, First Inaugural Address (Jan. 20, 1953). The word does not appear in inaugural addresses thereafter.

119. Clinton, *supra* note 104.

120. Clinton, *supra* note 101; Clinton, *supra* note 104.

the legitimate use of political power, or even the specifically political aspects of a dignifying civic identity.

This is the situation in which the 2008 presidential race engaged the question of whether rhetoric matters and, if so, what self-understanding a President should help the country to achieve. Having brought the story to its present moment, this Article now turns to the alternatives at issue today in presidential popular constitutionalism.

### III. TODAY'S ALTERNATIVES

This Article has diagnosed poverty in today's dominant register of presidential popular constitutionalism. Most markedly, the normative social vision and the image of civic dignity do not add up to a robust—or even, perhaps, a realistic—account of legitimacy. As noted earlier, a time-traveling visitor might judge from today's presidential rhetoric that she had encountered a culture of profound moral consensus. She might also conclude that she had found a culture with no idea what to do with its government.

In considering the resources for those who might wish to develop a new or renewed presidential constitutionalism, this analysis of the last two centuries suggests a few fixed points, which any constitutional vision likely must take into account, and some choices that will represent important alternatives.

#### A. *Some Fixed Points*

For one thing, any constitutional vision will likely have to accept some of the personal-virtue consensus that unites Bill Clinton and George W. Bush. The emphasis on private life and personal-scale interdependence reflects a strong tropism to concreteness: Americans experience freedom, purpose, and satisfaction most strongly and distinctly in family and individual life.<sup>121</sup> These are archetypes for understanding what it means to be connected with others and have commitments beyond ourselves.<sup>122</sup> We have not so much “mystic chords of memory”<sup>123</sup> as felt inhabited bonds with others whom we have seen healthy and sick, elated and sad, and at all hours of day and night. It is not just that these are what we live for, though that is often true, but that they are how we know what it means to live for something, rather than just to exist.<sup>124</sup> Recent Presidents' choice of these rhetorical anchors reflects an apt perception of their importance: the problem is that, in

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121. See ALAN WOLFE, *ONE NATION, AFTER ALL* 228–322 (1998). For a vivid, if somewhat less sympathetic image of the concreteness and immediacy of American moral life, see ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 3–26 (1985) (describing archetypal Americans and their organizing values).

122. See WOLFE, *supra* note 121, at 228–322.

123. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

124. See WOLFE, *supra* note 121, at 228–322.

themselves, they provide little link outward to a political register of constitutional vision.

Any constitutional vision will also have to acknowledge that much of the dignity of self-mastery now resides in purely private life, serviced by consumer sectors specializing in experience and self-transformation. The search for a fuller life, and a life more fully one's own, is the engine of the pharmaceutical industry, lifestyle magazines, psychotherapy, mega-churches, and health clubs, to name just a few examples.<sup>125</sup> These are not ersatz, but as real and concrete as the forms of personal interdependence that stand stead for political community. Like those forms of interdependence, these pursuits tend to remove anything distinctly political, even anything distinctly civic, from the time-honored pursuit of self-authorship. They nonetheless represent real achievements in self-creation and self-revision, and there is no reason to expect or wish that their role in defining personal dignity would diminish.

Finally, any constitutional vision that looks back to Progressive antecedents will have to address a country that is more diverse and, in important ways, equal, than any previous version of the United States. The New Deal, the greatest American political experiment in social solidarity, addressed a national community with white-supremacist struts.<sup>126</sup> The part of Lyndon Johnson's "Great Society" that is now most widely remembered, the "War on Poverty," had real failings, but it was also broken on racial resentment, precisely because Johnson would not limit its reach along the racial lines that Roosevelt accepted. As political scientist Robert Putnam has documented, decades of growing diversity, tolerance, and openness have made the country at once more humane and more nearly a nation of strangers.<sup>127</sup> Although, as Putnam also argues, there is no reason in principle to deny that diversity and solidarity can exist together, it is also true that, so far, they lack a convincing register for coexistence in American politics.

### B. *Alternative I: Dependence or Mastery*

The idea that each American is the author of her own life, constrained only by her talent and energy, implies a social world of open opportunity, where anyone might become anything. Some two-thirds of Americans say that skill and effort, rather than luck or social conditions, determine where a

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125. For a discussion of these dimensions of consumer culture and community life more generally, and an argument about their significance for the prospects of political culture, see TED NORDHAUS & MICHAEL SHELLINGER, *BREAK THROUGH: FROM THE DEATH OF ENVIRONMENTALISM TO THE POLITICS OF POSSIBILITY* 188–215 (2007).

126. On the role of race in early-twentieth-century reform, see MORTON KELLER, *REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900–1933*, at 251–81 (1994).

127. See generally Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johann Skytte Prize Lecture*, 30 SCANDINAVIAN POL. STUD. 137 (2007).

person ends up in life; that is twice the share of Europeans who say so.<sup>128</sup> Demonstrating their confidence in the upward mobility that this social vision implies, fully thirty-nine percent of Americans say that they either are or will soon be in the country's wealthiest one percent.<sup>129</sup> This optimism, however, is linked to a merciless judgment: whoever cannot pull off success bears the full burden of her failure. Abraham Lincoln, no apologist for inequality but a deeply convinced free-labor politician, neatly combined these two aspects of the idea of self-mastery when he declared that, because the American market economy provided everyone an opportunity for dignity and equal standing, "If any continue through life in the condition of the hired laborer [rather than become a landowner and employer of others], it is not the fault of the system, but because of either a dependent nature which prefers it, or improvidence, folly, or singular misfortune."<sup>130</sup>

Wilson and his successors rejected this conclusion as the sign of an inadequate constitutional vision. As we have seen, their answer was frequently to deny the fact of self-mastery that was essential to the nineteenth-century normative social vision, asserting a Progressive countervision of vulnerability and dependence. That, in turn, was the vision that Ronald Reagan triumphantly dispatched.

The Progressive vision struggled to find a register of civic dignity as compelling as the idea of self-mastery. The vision that has replaced it has little account of the terms and purposes of legitimate government. The question, then, is whether this opposition is unavoidable or, alternatively, if there is a way to anchor a robust account of legitimate government in a vision of self-mastery. If there is, it seems likely to be a version of ecological enablement: the idea that self-authorship is a worthy ideal, but requires a strong set of public institutions to make it real.

A contemporary version of ecological enablement might involve a gamble on this proposition: that it was not the idea that failed, but its deep implication in a web of bureaucratic institutions that came to seem anticharismatic and ineffective.<sup>131</sup> Reclaiming that idea, then, would mean building institutions to promote equal opportunity—the premise of the image of self-mastery—that have the virtues of nimbleness, efficiency, and individuation widely associated with (if not always present in) markets.

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128. See ANDREW KOHUT & BRUCE STOKES, *AMERICA AGAINST THE WORLD* 53–54 (2006) (reporting that two in three Americans reject the idea that success is determined by factors outside the individual's control, compared with forty-eight percent of Britons and thirty-one percent of Germans).

129. See David Brooks, Op-Ed., *The Triumph of Hope over Self-Interest*, N.Y. TIMES, Jan. 12, 2003, at WK15.

130. President Abraham Lincoln, Address Before the Wisconsin State Agricultural Society (Sept. 30, 1859).

131. See, e.g., Reagan, *supra* note 95 ("We are a nation that has a government—not the other way around. . . . [I]t is time to check and reverse the growth of government, which shows signs of having grown beyond the consent of the governed. . . . [O]ur present troubles parallel and are proportionate to the intervention and intrusion in our lives that result from unnecessary and excessive growth of government.").

From citizen-based public health insurance to market-modeled income supports, there are many proposals to combine Progressive ends with market means.<sup>132</sup> The contribution here is to understand that these might form parts of a constitutional vision with the potential to combine elements that are often opposed: the ideal of self-mastery and the Progressive social vision of vulnerable individuals in complex systems. An updated, market-oriented set of social supports would not so much combat those systems with the counterpower of government, as the old Progressives imagined, as it would re-engineer the system itself to promote equal opportunity.

*C. Alternative II: Private Life as Buying In or Opting Out*

As noted, the central place of private life in the contemporary moral vision is quite basic. That said, however, there are competing versions of the moral significance of private life and of its potential for integration into a constitutional vision. The privatized, quasicommunitarian language that George W. Bush and Bill Clinton share exemplifies one version. In this approach, the moral drama of private life is the steady, not always successful effort to behave properly, connect with others, and maintain the basic commitments of one's family and institutional roles. In this version, these personal and social virtues are the struts of all common life and the anchor of dignity for those who cultivate them.

Another version of private life is, so to speak, more "Californian": the ideal of private life as self-improvement, self-discovery, and self-invention, which a wealthy and free society makes possible. This is the ideal that Lyndon Johnson evoked when he described the "Great Society" as marked by "the excitement of becoming—always becoming, trying, probing, falling, resting, and trying again."<sup>133</sup> The first ideal conjures up the life of family dinner tables, religious meetings, and community service: a life of continuity and interdependence. The second calls up a world of change: entrepreneurship, emotional insight, a move to a region or religion or relationship, not adrift but steering toward greater clarity and self-realization.

In addition to their other differences, each version of private life has distinct potential to fit into a less privatized constitutional vision. In either case, the aim would be to understand private life less in contrast or opposition to public life than as unavoidably complementary—taking place in dynamic interaction with public institutions and principles, which both create the concrete circumstances of private life and impart some of the identity that people inhabit within it. For the Bush-Clinton version of private life, this would mean deepening the ideal of reciprocity among citizens, taking seriously the idea, often glimpsed in those Presidents' addresses, that civic responsibility is as essential as the personal and social

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132. See MICHAEL LIND, NEW AM. FOUND., A CITIZEN-BASED SOCIAL CONTRACT 1-8 (2007) (setting out an approach to safety-net policies incorporating this approach).

133. Johnson, *supra* note 54.

sorts.<sup>134</sup> For what this Article called a moment ago the “Californian” version of private life, the hook would likely be something nearer the ideal of ecological enablement that was evoked but never achieved in connection with the Great Society.

Such rhetorical achievements could not likely survive as rhetoric alone. Their most forceful expression would come in association with programs that instantiated their visions as concrete experience. For ecological enablement, as mentioned earlier, this might mean opportunity-creating and social-protection programs compatible with a cultural premium on flexibility and individuation. For the personal-virtue approach to private life, it might take the form of a national-service program linked to benefits such as a “social inheritance” or “stakeholder” grant, connecting the hallmarks of social and economic self-reliance with the civic reciprocity of service.<sup>135</sup>

#### IV. LESSONS FROM PRESIDENTIAL POPULAR CONSTITUTIONALISM

##### A. *Public Policy and Constitutional Vision*

Possibilities for public-policy reform interact dynamically with developments in constitutional vision. As Jeffrey Tulis points out, the inaugural address has always been a defense of a President’s and a party’s public-policy vision; it has also, in a series of registers, been an articulation of constitutional vision. In this, it is a microcosm of presidential leadership.

Presidential popular constitutionalism creates the field of presuppositions in which one public-policy agenda or another becomes plausible, powerful, or nearly inevitable. Its normative social vision frames problems and their possible solutions. Under the strong free-labor vision, the economic arrangements of the nineteenth century seemed a self-authorizing marriage of freedom and self-interest, state intervention, and the selfish and sapping “paternalism” that Cleveland denounced.<sup>136</sup> Under Wilson’s Progressive interpretation of social life, by contrast, unequal, constraining, and sometimes devastating economic power was a premise, and only strong and deliberate state action could mitigate. The market was no longer the epitome of free society, but instead the basic problem to which government power addressed itself. In rejecting the Progressive vision, Reagan helped to reinstate libertarian premises in the definition of policy problems and their potential resolutions.

The picture of civic dignity that presidential popular constitutionalism puts forward also frames policy problems and their perceived solutions. Ecological enablement suggests the importance of empowering, or at least

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134. For a discussion of the social-psychological appeal of this sort of ethic of civic responsibility, see Kahan, *The Logic of Reciprocity*, *supra* note 18.

135. See generally BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999) (proposing such a policy).

136. See *supra* text accompanying note 42.

protective social policies in maintaining the equal status of citizens. (Consider the place of Social Security in electoral politics today as a persistent instance of this connection.) Constitutional faith makes equal liberty a touchstone in the identity of each citizen who identifies with it, and enables a sense of personal affront at, for instance, racial classification (however understood) or interference with speech. The strong premise of self-mastery that Reagan helped to restore, by contrast, casts suspicion on regulation and safety-net policies as being not just inefficacious, but corrosive of a certain kind of civic spirit—in a phrase, un-American. A theory of legitimate government, inasmuch as it is part of a constitutional vision of the kind under discussion here, will take much of its shape from these other variables: the framing of problems and solutions in a normative social vision and the picture of moral imperatives in versions of civic dignity.

This is not, of course, to say that rhetoric or ideas could ever be the main or only cause of a policy program's success. The dynamic interaction between the two domains means that successful policies lend support to the constitutional vision with which they are associated, while visions connected with programs seen to fail will be weakened accordingly. Both Nixon and Reagan addressed a perception that many mid-century policies had grown burdensome and ineffective. By the same token, they helped to create a normative social vision in which such policies would have the suspicion of failure around them axiomatically.

### B. *The Topical Scope of Constitutionalism*

Many scholars have sought ways of understanding the Constitution's relation to economic justice and so-called social rights.<sup>137</sup> Some have concentrated on institutional competence, arguing that courts have good reason not to create and enforce such rights, but that legislative commitments of major scope take on constitutional dimensions that courts might accordingly enforce for consistency at the margin.<sup>138</sup> Others have considered the popular currency of economic and social constitutionalism, examining the use of Thirteenth Amendment principles and other claims to economic liberty and/or equality in debates well outside the courts, such as in labor-union politics.<sup>139</sup> Some have examined the language of legislative debates on major social commitments as instances of constitutional interpretation within the political process.<sup>140</sup> Bruce Ackerman, in considering the constitutional status of the New Deal, has placed particular

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137. See generally ACKERMAN, *supra* note 2; WEST, *supra* note 1; Forbath, *supra* note 1; Michelman, *supra* note 1; Pope, *Labor's Constitution*, *supra* note 2; Pope, *Thirteenth Amendment Versus the Commerce Clause*, *supra* note 2; Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993).

138. See Sager, *supra* note 137.

139. See generally Forbath, *supra* note 1; Pope, *Labor's Constitution*, *supra* note 2; Pope, *Thirteenth Amendment Versus the Commerce Clause*, *supra* note 2.

140. See generally WEST, *supra* note 1.

emphasis on presidential leadership in non–Article V constitutional amendments.<sup>141</sup>

Attention to presidential popular constitutionalism complements these approaches to the question. Presidential articulation of constitutional vision has been essential in legitimating major legislative acts on social and economic rights, tying them to normative social vision and images of dignity in a way that the diffuse activity of legislative debate is much less likely to do. Particularly since Wilson's turn, linking presidential interpretive authority to democratic activity, the President has played a unique role in giving voice to the fabric of constitutional presuppositions in which such legislative measures find their significance.

### C. *The Importance of Rhetoric*

It was a defining debate of the 2008 presidential campaign whether language matters or is simply window dressing for what really counts: substantive policy commitments and clashes of interest groups.<sup>142</sup> This political question, as it happens, corresponds to a question in legal and political-science scholarship: whether language is best regarded as tactical or as something distinct—an effort to communicate genuinely and create a field of common understanding.<sup>143</sup> Without trying to solve basic questions in the philosophy of language or the theory of action, this Article illuminates one setting in which language operates in a way that, while plainly strategic and essentially linked to the operation of power, is also much more than merely tactical.

If tactical rhetoric can be understood as taking for granted existing alignments of interests and power and seeking advantage on their margins, the rhetoric of presidential popular constitutionalism is its opposite. It seeks to create and reinforce the distribution of interests by appealing to listeners' sense of where their dignity resides and which aspects of their material situations are most salient as bases for political and social demands. It also works to revise the normative premises—rules, standards, and norms—against whose background tactical action proceeds. It thus addresses the scope of what listeners believe they are entitled to demand, what can correspondingly be demanded of them, and, indeed, what politics can and cannot accomplish.

None of this denies the significance of tactics, but it does deny their comprehensiveness. All political action takes place in a world already interpreted—an imagined community, to borrow a phrase. Presidential

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141. See generally ACKERMAN, *supra* note 2.

142. See, e.g., Aswini Anburajan, *Obama Jabs at Clinton's "False Hope" Claims*, FIRSTREAD, Jan. 6, 2008, <http://firstread.msnbc.msn.com/archive/2008/01/06/554337.aspx>.

143. For a discussion of the debate in political theory, see, for example, Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 (1992). For the philosophical issue, see 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 1–142 (Thomas McCarthy trans., Beacon Press 1984) (1981).

popular constitutionalism is one of the foremost ways that the interpretive presuppositions of that community are created and reworked. On reflection, this is not at all surprising. The twin sources of legitimacy in American political culture are constitutional principle and democratic will, principles of notoriously awkward and sometimes paradoxical fit.<sup>144</sup> Presidents' accounts of the ethos and basic commitments of the constitutional community, particularly when delivered at the close of an election cycle and a change of administration, are one point of convergence, in which democratic will changes or confirms popular-constitutional principles even as its spokesperson anchors the electoral decision in deeper and more lasting commitments.

### CONCLUSION

Presidential rhetoric forms a part of American political practice that is essential to any adequate understanding of "popular constitutionalism." Presidential language provides normative pictures of social life and the national community, connects these with dignity and purpose in the minds and lives of listeners, and creates theories of political authority and legitimacy out of these elements. Although presidential popular constitutionalism dates to the earliest years of American politics, it became truly "popular" with the transformation of the President's rhetorical and interpretive role under Woodrow Wilson, who linked the independence and authority of the office directly to its electoral mandate and capacity to address the people in a single voice. Wilson also initiated a Progressive version of presidential popular constitutionalism, which produced a robust image of legitimate government as the only adequate defender of vulnerable individuals in a complex social order. That language, however, encountered difficulty in maintaining a persuasive view of civic dignity, and partly for that reason it gave way to a much-diminished account of legitimate government and a normative social vision that is, by turn, libertarian (Reagan) and communitarian (Clinton and George W. Bush). We remain, half-unknowingly, adrift in that constitutional vision.

Those who seek a more robust account of government's role will need to pick up old rhetorical tasks in a manner that takes on the new circumstances of individuality, diversity, consumerism, and the centrality of markets to the political imagination. They will need a normative social vision and register of dignity that can integrate these considerations with a view of the distinctive capacities of government. They will need to put this rhetorical vision in dynamic interaction with a set of policies that give it concrete life. And, first, they will have to acknowledge that presidential language is not

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144. For various canonical approaches to mediating between constitutionalism and democracy, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3-33 (1991); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1-33 (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43-72 (1980); POST, *supra* note 1; JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

just cheap talk, but matters to the political community's understanding of the appropriate, the necessary, and the possible.