INTRODUCTION

There are several theories about the purpose of the U.S. Constitution and of constitutionalism in general. Some of these, such as the idea that a constitution sets up the basic machinery of government, are well established but perhaps too obvious to be particularly interesting.¹ A recently articulated theory that is not so obvious, and very interesting, is based on the story of Ulysses and the Sirens, or alternatively on a psychology experiment with pigeons. This essay discusses the Ulysses-pigeon theory and concludes that it has serious defects. It then proposes an alternative theory regarding the purpose of the Constitution that is designed to remedy these defects.

The Ulysses-pigeon theory has been most fully explored by Jon Elster, who is largely responsible for the analogy to Ulysses and the Sirens.² In book XII of the Odyssey, Ulysses and his crew must pass by the Sirens’ Island. Circe has warned Ulysses that anyone who hears their song will be irresistibly drawn to them and killed, so Ulysses instructs his sailors to stop up their ears with wax and then says to them, as Elster quotes “’you must

¹ In fact, this idea may be tautological in the sense that any political action that did not set up the basic machinery of government would not be called a constitution.
bind me hard and fast, so that I cannot stir from the spot where you will stand me . . .and if I beg you to release me, you must tighten and add to my bonds.’ ” 3 Elster sees this an example of pre-commitment -- a rational agent constraining his actions at some future time because he fears he will be less rational when that time arrives. The Constitution, he argues, is a means by which a society binds itself to a desirable policy so that it can resist the temptation to abandon or compromise that policy in times of crisis.

George Ainslie, a psychologist on whom Elster relies, has observed that pigeons will peck a key that offers an immediate reward in preference to another key offering a larger but delayed reward, but that they will also peck another key whose only effect is to disable the immediate reward key. 4 In the Introduction to his constitutional law treatise, Laurence Tribe compares the U.S. Constitution to the behavior of Ainslie's pigeons. He says: “Just as the pigeon experimenters concluded that any “effective device for getting the later, larger reinforcement must include a means of either preventing preference from changing as the smaller, earlier reward comes close, or keeping the subject from acting on this change,’ so it may be necessary to create mechanisms for enforcing constitutional agreements in a setting carefully insulated from momentary pressures.”5 According to Tribe, judicial review by Article III judges who cannot be voted out of office is our mechanism for achieving this effect.

Part I of this essay criticizes the Ulysses-pigeon theory on empirical grounds. Part II criticizes it on theoretical grounds. In Part III, I propose an alternative theory of

3 Elster, Sirens, at 36. Elster does not specify the translation he is quoting. In fact, it is E.V. Rieu, Homer, The Odyssey (E.V. Rieu, trans., 1946).
5 Laurence Tribe, American Constitutional Law 10-11 (2nd ed. 1988); 1 Laurence Tribe, American Constitutional Law 22-23 (3rd ed. 2000). The second edition of Tribe's treatise presented this theory without qualification. In the third edition, he qualifies it as discussed below, see pp. [ ]
constitutional purpose on empirical grounds, and in Part IV I explore the theoretical aspect of that approach.

I. The Empirical Problem with Ulysses and the Pigeons

What exactly is the Ulysses-pigeons theory asserting? In his initial presentation of the theory, Elster offers five criteria for the claim that a rational agent has pre-committed itself to a course of action. The crucial criterion is the first: “To bind oneself is to carry out a certain decision at time $t_1$ in order to increase the probability that one will carry out another decision at time $t_2$.”6 The remaining criteria, all quite sensible, are qualifications and practical considerations. To be a real pre-commitment, the decision at $t_1$ must exclude at least some options at $t_2$ that would otherwise be possible; it must set up certain conditions in the external world, rather than being a purely internal process; the resistance to carrying out the first decision at $t_1$ must be smaller than the resistance to carrying out the second decision at $t_2$; and the act of binding oneself must be one of commission, not omission.

As applied to the U.S. Constitution, Elster’s basic idea, derived from the first criterion, appears to be that the Constitution’s framers, being rational, understood that decision making during times of crisis would be less than fully rational and might compromise policies that a rational decision maker would adopt. To protect against this, they placed constraints on certain forms of irrational decision making in the Constitution, and provided that the Constitution could only be changed by a lengthy, cumbersome process. By the time this process could be implemented, they hoped, the crisis would be

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6 Elster, Sirens, supra note [ ], at 39.
ended, just as Ulysses could be released from bondage once his ship had passed the Sirens’ island. To switch metaphors, the drafters of the Constitution were like Ainslie's pigeons that voluntarily restrict their range of action so that they will not fall victim to short-term temptations.

This is an appealing theory, but does it provide an accurate account of our experience in constitutional decision making during the two centuries of our national existence? To test it, we need to specify the indicia by which we can recognize its operation. The first, and most obvious, is that the Court must be striking down governmental action rather than upholding it. Decisions upholding governmental action may be important for tracing the contours of constitutional doctrine, but does not represent the kind of apolitical control that Tribe and Elster have in mind. Second, the governmental action that has been struck down must be recently adopted or recently applied in a new way. Pre-commitment devices are designed to counteract lapses into a condition of irrationality or panic, not sustained irrationality. If Ulysses is irrationally irresponsible from the beginning, or the pigeons are demoralized by being in a laboratory and not eating at all, the process cannot operate. Third, there must be some sense that the Court has restored the situation that obtained before the recent legal action, and that the other branches of government that undertook the legal action now acknowledge the validity of the Court’s decision. This indicator may be difficult to apply, since it may require surmises or counterfactuals, but there should be some sense, when examining the subsequent history of the issue, that the political branches have “come to their senses,” rather than engaging in continuing opposition or condemnation of the judiciary’s intervention.
One way to test the empirical validity of the Ulysses-pigeons theory is to see whether the leading cases in American constitutional law display the three indicia that have just been specified. Proposing a list of leading cases is undoubtedly a foolhardy enterprise, but one must start somewhere. Before plunging in, one minor note of caution is that there are at least two alternative tests for determining whether a decision is important: first, whether it had a major impact on American history, and second, whether it had a major impact on current constitutional doctrine. Here are proposed “top ten” lists for each alternative:

1. Marbury v. Madison
   Gibbons v. Ogden
   McCulloch v. Maryland
   Dred Scott v. Sanford
   Lochner v. NY
   Hammer v. Dagenhart
   Schechter Poultry v. U.S.
   Baker v. Carr
   Roe v. Wade

2. Marbury v. Madison
   Gibbons v. Ogden
   McCulloch v. Maryland
   Baker v. Carr
   Brandenburg v. Ohio
   Lemon v. Kurtzman
   Roe v. Wade
   INS v. Chadha
   Lawrence v. Texas

Given the fact that the Tribe endorses the Ulysses-pigeon theory in the introduction to his magisterial treatise on constitutional law, it is somewhat disconcerting to note that only one of these leading decisions, Schechter, appears to provide any support that theory. None of the others invalidated laws that had been adopted in moments of crisis, and none
restored the pre-existing legal rules of saner times. Most of these cases in fact, can be regarded as doing exactly the opposite, namely, striking down -- not only for an embattled present but for a long time in the future -- laws that had been in force for extended periods and represented a well-established status quo. This is certainly true of Gibbons v. Ogden (state business licenses), McCulloch v. Maryland (state taxation laws), Brown v. Board (apartheid laws), Baker v. Carr (unequal state apportionment laws), Lemon v. Kurtzman (support for religious education), Roe v. Wade (abortion laws), INS v. Chadha (legislative veto provisions) and Lawrence v. Texas (anti-sodomy laws), and even true of Brandenburg v. Ohio (criminal syndicalism laws).7 In these cases, moreover, the idea that the laws were the product of emotion, and perhaps irrationality, while the Court’s invalidation of them represented the restoration of calm reason, seems incorrect. The laws in question may have had strong support among the populace, but they were too prevalent and venerable to excite much emotion by the time the case reached the Court. Rather, it was the Court’s decision that created the emotion, sometimes in conjunction with a social movement that opposed the law (Brown, Brandenburg, Roe, Lawrence, maybe Baker) and sometimes largely on its own (McCulloch, Gibbons, Lemon, Chadha).

Most of the cases that struck down less venerable laws also fail to conform to the Ulysses-pigeon theory. *Marbury* invalidated a provision of a recently-enacted law, the Judiciary Act of 1789, but that Act cannot be described as the product of hysteria. The basic structural law that organized the federal judiciary, its necessity was apparent to everyone and most of its provisions remain operative to this day.8 It is certainly true that the situation the Court was required to resolve -- the appointment of the “midnight justices” by

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7 The characterization of Brandenburg is discussed in greater detail below.
8 In modified form, of course. This is even true for the Alien Tort Statute, a minor provision, unrelated to judicial structure, which was included in the Act. See 28 U.S.C. § 1350.
the departing Federalists in an effort to maintain control of the federal judiciary – was the product of partisan frenzy, but this is precisely what the Jefferson Administration was attempting to counteract and that Justice Marshall, by declaring the provision unconstitutional, approved.9

_Dred Scott_ also invalidated a single federal law, not a prevalent and well-established legislative pattern, but the law in question was the Missouri Compromise. Far from being the product of political panic, it was essentially the opposite, namely, an effort to resolve the controversies raging in that highly contentious period known as the Era of Good Feelings. It did so with considerable success, securing Henry Clay’s reputation for statesmanship in the process.10 The law had already been partially invalidated by the Kansas-Nebraska Act, which is a much better candidate for frenzied legislation.11 It was Chief Justice Taney, by invalidating the remainder of the Compromise on behalf of slavery, who was pecking the immediate gratification key.

_Lochner_ and _Hammer_ 12 struck down recently enacted legislation, and the Justices in the majority may well have experienced a subjective sense that they were protecting the nation from a paroxysm of socialist hysteria. But whatever one’s view of regulation may be as a matter of law or policy, it is clear that the Justices were wrong as a matter of fact. Progressive-era legislation was not a temporary aberration but the initiation of a century-long trend and one that, despite the rhetoric of recent Presidents, probably continues to the

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9 The Jefferson Administration may have been motivated by its own partisan frenzy, but Marshall was siding with it in striking down the Judiciary Act provision. The Act itself was Federalist legislation
11 David Herbert Donald, _Charles Sumner and the Coming of the Civil War_ 208-16 (2009); Wilentz, supra note [  ], at 715-19.
12 _Hammer_ may not seem to merit inclusion on the list, but it is included to stand for the great controversy over federalism and federal state relations that raged throughout the Reconstruction, Progressive and New Deal periods. Moreover, its elimination from List 1 would lead only to its replacement by one of the modern cases on List 2.
present day. The nation never came to its senses after the Court’s decisions. Rather, it kept
electing Democrats until the Court’s complexion changed.

This brings us to Schechter, the one case that can reasonably be described as
conforming to the Ulysses-pigeon theory. The National Industrial Recovery Act (NIRA)
that the decision struck down might well be regarded as the product of a sort of social
policy hysteria triggered by the Great Depression. None of the other cases invalidating
economic legislation in this era fit the theory because it is these cases, rather than the laws
that they struck down, that have been subsequently repudiated. But the corporatist
approach to economic legislation that the NIRA embodied has not been revived, perhaps
because of its association with fascism, and the Schechter decision thus remains good law.
It is not very good law, however, since it has never been followed, and the NIRA might
plausibly be regarded as a failed experiment than as a panic-stricken abandonment of
abiding American principles. More speculatively, one might surmise that it was the Court,
not the Roosevelt Administration, that experienced a sense of subjective panic because, by
the time it decided the case, Hitler had given fascism a bad name.13 In the final analysis, the
Ulysses-pigeons theory probably fits this case well enough to be counted as an explanation.
Of the fourteen cases listed, however, it is the only one.

Admittedly, the two lists that generate these cases are somewhat arbitrary, but the
relevant question is whether substituting other possible cases would produce different
conclusions. With respect to many other leading Bill of Rights or Fourteenth Amendment

13 Corporatism was closely associated with fascism, but until Hitler’s seizure of power, the world’s leading fascist was
Mussolini. While far from a nice person, or a particular American favorite, he earned grudging admiration for his managerial
efficiency, and he was neither a warmonger nor an anti-Semite until his alliance with the Nazi regime. See R.J.B. Bosworth,
Mussolini’s Italy: Life Under the Fascist Dictatorship, 1915-1945, at 281-306, 415-20 (2007); Ernst Nolte, Three Faces of
Fascism 229-31 (Leila Vennewitz, trans., 1965). See also Michael Mann, Fascists 136 (2004) (“The targets were political
rather than ethnic . . . Italian fascism was the most benign fascist movement.”)
cases, the legislation invalidated in each case generally represents the same type of widespread legal status quo as the cases on the lists—police interrogation practices (Miranda v. Arizona), administrative hearing practices (Goldberg v. Kelly), compulsory flag salutation (West Virginia Board of Education v. Barnette), libel laws (New York Times v. Sullivan), differential treatment of men and women in various statutes (Craig v. Boren), poll taxes (Harper v. Virginia State Board of Education), and restrictive real estate covenants (Jones v. Alfred H. Mayer). Buckley v. Valeo invalidated a single law, and a recent one, but that law was the Federal Election Campaign Act, which seems like a poor candidate for frenzied legislation.

Some of the structural cases also involved laws that had been in force for extended periods and represented a well-established status quo, such as the dormant commerce clause cases striking down state home processing statutes (Dean Milk Co. v. Madison). More often, structural cases involve a single law, but the laws in question are generally difficult to characterize as the product of a temporary frenzy. They include the Line Item Veto (Clinton v. New York), the Gramm—Rudman Balanced Budget and Emergency Deficit Control Act (Bowsher v. Synar), the Gun-Free School Zones Act (U.S. v. Lopez), the Low-Level Radioactive Waste Policy Amendments Act (New York v. United States), and the Brady Handgun Violence Protection Act (Printz v. United States). Whether the Violence Against Women Act that the court invalidated in United States v. Morrison is properly regarded as part of a sustained legal initiative, rather than an emotion-driven aberration, is a matter that only the future can resolve.

A few leading cases seem to conform to the Ulysses-pigeon story: Pierce v. Society of Sisters and Meyer v. Nebraska struck down laws that were the product of post-World War I
xenophobia – the first prohibiting private schools from satisfying compulsory education laws and the second prohibiting schools from teaching German. Their significance is impaired, however, because the rationale that they employed was not freedom of speech or religion but the economic due process idea that the laws constituted interference with the occupations of private school and German language teachers.¹⁴ Ex Parte Merryman invalidated Abraham Lincoln’s wartime suspension of habeas corpus, and remains good law. Its significance is somewhat impaired by the fact that Lincoln ignored the decision. This is not the Court’s fault (although the Court’s decreased authority may have been the result of its Dred Scott decision), but it is a constitutional reality. The Court fared better after the war in deciding Ex Parte Milligan, when it held that civilians could not be condemned by military tribunals while the civilian courts remained open, despite his suspension of habeas corpus. In Youngstown Sheet and Tube v. Sawyer, the Court struck down Harry Truman’s seizure of the steel mills to prevent a strike during wartime. The oddity of the case, however, is that the President had the authority to achieve the same result under a clearly constitutional law, the Taft-Hartley Act, that he did not want to invoke for political reasons. Thus, the seizure is more aptly described as the product of realpolitik than of temporary irrationality.¹⁵

It is only when we reach relatively recent times that a consistent pattern corresponding to the Ulysses-pigeons theory seems to emerge. A series of decisions during the Vietnam era struck down recently adopted laws that were a product of war hysteria.

¹⁴ To be sure, there is also language in both decisions about parents’ right to control their child’s education. It is not clear how this can be reconciled with compulsory education laws. It can be argued that the principle of the cases has been reaffirmed in Yoder v. Wisconsin, but that case rests on a more modern religious freedom rationale, and may indeed adumbrate a collective rights jurisprudence that the current Court remains far from recognizing. Modern courts would probably reach the same result as Meyer and Society of Sisters on First Amendment grounds.

notably an amendment to the Selective Service Act forbidding defacement of a draft card (United States v. O’Brien), a school regulation that forbid symbolic protests against the war (Tinker v. Des Moines), a federal law forbidding use of military uniforms in anti-war theatrical productions (Schact v. United States) and an injunction against publication of government documents (New York Times v. U.S., the Pentagon Papers Case). Recent cases involving the so-called War on Terror are perhaps even more notable. During the past decade, the Court invalidated portions of two provisions enacted in response to the World Trade Center bombing, the Joint Resolution for the Authorization for the Use of Military Force (Hamdi v. Rumsfield, Hamdan v. Rumsfield), and the Detainee Treatment Act (Boumediene v. Bush). It is always difficult to make judgments about contemporary times, but the election of Barak Obama suggests that these provisions will come to viewed as temporary, panic-induced reactions, and the cases invalidating them may well be enrolled in some future pantheon of leading Supreme Court decisions.16

There is, of course, an inevitable subjectivity to the choice of leading Supreme Court decisions, and this counsels caution in making claims about any general pattern that these decisions might reveal. But the observation that the Ulysses-pigeons theory does not describe our leading constitutional cases, and only applies to any significant group of cases in relatively recent times, can be buttressed by considering the cases that the Court did not decide, that is, the situations where the Court failed to invalidate constitutionally suspect provisions that were clearly products of short-term hysteria, and seem to have been

16 City of Boerne v. Flores is another recent case that might qualify. It certainly struck down recent legislation -- the Religious Freedom Restoration Act -- but the Act was triggered by the Court’s own earlier decision, Employment Division v. Smith, which is not quite the scenario envisioned in the Ulysses-pigeons theory. The earlier decision, however, conformed to the pattern described in the text, since it struck down the widespread legislative practice of not making an exception for religious practices in facially neutral laws.
subsequently regretted. In a recent book entitled *Perilous Times*, Geoffrey Stone recounts governmental action limiting free speech that America has adopted during the course of its history. 17 Stone’s conclusion is that action of this sort appears exclusively in time of war or threat of war. He identifies six sets of legal initiatives that fit this pattern: the Alien and Sedition Acts adopted during the first Adams Administration’s undeclared war with France; the military arrests and newspaper closures during the Civil War; the Espionage and Criminal Syndicalism Acts of the First World War and its aftermath; the Smith Act and anti-Fascist trials of World War II, and the internment of Japanese-American citizens; the McCarthyite hearings, prosecutions and related actions during the early years of the Cold War; and the various repressive measures adopted during the Vietnam War. We can also add a seventh period – the current War on Terror, which has been accompanied by the USA PATRIOT Act, the abuses at Abu Ghraib, and the detention of suspected terrorists at Guantanamo Bay.

In the first five of these situations, that is, during the first 175 years of our nation’s 220-year history, the federal judiciary made virtually no effort to control the bellicose frenzy that gripped the nation during times of conflict. It was elected officials or private actors who opposed these measures at the time and secured their reversal once the crisis had abated. After the Alien and Sedition Acts were passed, the courts, dominated by Federalist judges, were among the most enthusiastic supporters of the legislation, invariably convicting anyone accused of sedition under the Acts and raising no objection to their constitutionality. Justice Samuel Chase’s biased management of the Thomas Cooper trial is notorious. The courts were generally complicit in the military arrests and

newspaper closures during the Civil War, with the exception of the habeas corpus cases noted above. During the xenophobic fury of World War I and the Red Scare that followed immediately afterward, the courts repeatedly upheld long prison sentences for political advocacy. Adjudicating free speech cases for the first time, a unanimous Court declared that Eugene Debs, a labor leader and Socialist candidate for president who garnered nearly a million votes in 1912, could be lawfully imprisoned for ten years for saying that three other Socialists imprisoned under that Act were “paying the penalty, that all men have paid in all the ages of history for standing erect, and for seeking to pave the way to better conditions for mankind.”

During World War II, the Court declined to review the Espionage Act conviction and fifteen-year sentence of William Pelley, a Nazi sympathizer, for equally innocuous statements. Most notably and tragically, of course, the Court endorsed the internment of nearly 120,000 American citizens in Hirabayashi v. United States and Korematsu v. United States. The courts were once again complicit in allowing the criminal prosecutions, civil penalties and character assassinations of the McCarthy era. Presented with an opportunity to dampen the anti-Communist frenzy of the time, they instead upheld the convictions of twelve members of the Communist Party’s national board under the Smith Act, essentially on the ground that the defendants subscribed to the general tenets of Communism. The Court did manage to screw up its courage to overturn

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19 Stone, supra note [ ], at 258-72. The statements for which Pelley was convicted included: “No realist in his senses would contend that there is unity in this country for the war’s prosecution.” The government based its case on the assertion that this statement was false; in fact, it is one of the rare statements that proves itself to be true. Pelley was a bit more than an advocate before the War, when he created a quasi-Nazi organization called the Silver Shirts, but he dutifully dissolved it once the War began.
a Smith Act conviction in *Yates v. United States*, but it waited until a month and half after Senator McCarthy was dead.21

During the Vietnam War, as indicated above, the Court did was able to at least approach the level of Ulysses or the pigeons. But the decision of this era that was doctrinally most important, *Brandenburg v. Ohio*, conforms to the more general pattern of leading constitutional cases. In establishing that political advocacy was protected by the First Amendment and could not be criminalized unless it threatened imminent harm, the case overturned the criminal syndicalism laws of the post-World War I era, laws that had been broadly adopted at the state and federal level and had survived for nearly fifty years. The defendant whose conviction were overturned by the case was not a Vietnam war protestor, but a members of the Ku Klux Klan -- hardly a group that was challenging the current war effort. The Court also struck down a number of convictions under laws that had been more recently adopted, or were being interpreted to punish opposition to the War, as indicated above. It is worth noting however, that the political branches had also become much more tolerant by this time. Prosecutions for advocacy alone were rare; most of the cases involved behavior on the border between speech and action, such as defacing a draft card (United States v. O’Brien), desecrating the flag (Street v. New York, Spence v. Washington), wearing a uniform in an anti-war production (Schacht v. United States), or wearing an armband in school (Tinker v. Des Moines). This border remained contested even in the ensuing time of peace, which suggests that the Court was not confronting a particularly high level of hysteria. It is as if a hunter, having thrown aside his gun and

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21 354 U.S. 298 (1957). The case was handed down on June 17; McCarthy had died on May 2. Moreover, the Court subsequently upheld a Smith Act conviction in *Scales v. United States*, 367 U.S. 203 (1961)
cowered in fear when faced by a lion or tiger, had returned home from the safari and shot his neighbor’s pussycat.

In the Pentagon Papers case, on the other hand, the Court confronted an enraged Chief Executive directly, who invoked national security concerns about a currently ongoing war in support of his position. This case thus adumbrates the War on Terror cases, where the Court struck down recently-enacted provisions that had been adopted in direct response to an horrific attack on American territory, and that were broadly popular with both the political branches and the populace. Moreover, the majority of the justices on the Court were members of the same political party that, in its control of the Presidency and both houses of Congress, was the dominant force in enacting these provisions. The pigeons, it would appear, had finally come home to roost.

II. The Theoretical Problem with Ulysses and the Pigeons

Apart from the fact that it rarely describes the way our constitutional courts have performed, the Ulysses-pigeons theory suffers from another difficulty. This difficulty, which is theoretical rather than empirical, is that it is based on an inaccurate analogy. A constitution is simply not a case of self-commitment or self-restraint; the image of Ulysses binding himself to the mast and instructing his sailors not to release him despite his orders, or of the experimental pigeons willingly disabling themselves from pressing the immediate gratification key, does not appear to apply to the American situation, and applies to other cases of constitution-making imperfectly at best.
The basic problem is that the whole notion of self-commitment depends upon the existence of an identifiable self. Defining the self is a complex and profound enterprise that has occupied much of the twentieth century's most sophisticated philosophic inquiries, but the problem can be greatly simplified for present purposes. If we are considering the issue of self-commitment, the concept of a self must involve an entity that is capable of making decisions regarding its own future course of action. Any competent human being fits this definition, as do higher animals. We might have difficulties drawing lines of course; an infant cannot make decisions, so there is some boundary that must be crossed before it becomes a self according to the definition. At some point as we move down the scale of animals, we may no longer be dealing with a self, although we can apparently go as far down as a pigeon without reaching that divide.

Groups made up of separate entities can readily qualify for this definition of a self. All that is needed is some sort of a decision rule by which the people in the group – we will assume that such collective entities are composed of human beings –can reach a definitive decision. There is no great difficulty here. An external observer can only know that an individual has reached a decision when the individual takes some sort of action, and this action will frequently consist of spoken or written words. A collective entity can act in exactly the same way; either some individual is designated to speak for the group or a certain proportion of the group's members indicate assent to document that has been presented to them. Thus, the analogy between an individual actor and an institution is quite convincing and relatively unproblematic when the question involves decision making. Kant uses it in his formulation of the categorical imperative: “every rational being as an end in himself must be able to regard himself with reference to all laws to which he may be
subject as being at the same time the legislator of universal law.” Self-commitment is simply one type of decision to which this analogy between individuals and institutions can be applied. In both cases, it can be defined as a situation where, as Elster says, the entity makes “a certain decision at time $t_1$ in order to increase the probability that [it] will carry out another decision at time $t_2$.”

When Elster discusses constitution making in *Ulysses Unbound*, however, he seems to verge toward the idea that a society is committing itself to a course of action. The problem here is that society is not a self, but an academic or rhetorical abstraction. A society cannot make decisions and therefore cannot bind itself in the required manner; only individuals or institutions within a society can do so. This conceptual inaccuracy on Elster’s part is even more mystifying than the empirical inaccuracy on Tribe’s part. Elster is acutely aware of the complexities involved in making analogies between individuals and collective entities, and refers to this problem explicitly in *Ulysses Unbound*. One section of his chapter about constitutions is entitled “Disanalogies with Individual Precommitment.”

Even more strikingly, the first of the three essays that comprise his volume entitled *Ulysses and the Sirens* (“Ulysses and the Sirens” itself being the second essay) is a critique of analogies between intentional and functional explanations. “[I]n spite of certain superficial analogies between the social and biological sciences,” he writes, “there are fundamental differences that make it unlikely that either can have much to learn from the

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23 Elster, *Unbound*, at 92-96. A later section of the same essay is entitled “Societies Are Not Individuals Writ Large,” id. at 167-68. In it, he states: “Society has neither an ego nor an id.” Id. at 168. But the main point of this observation is to note that the group of people who write the constitution may represent one segment of society, and may not speak for all its members. “Frequently,” he notes, “constitutions are imposed on minorities and one future generations in the interest of a majority of the founding generation.” Id. But this observation still does not lead him to question the basic notion that a constitution is a device for self-commitment.
24 Elster, *Sirens*, at 1-35.
other." 25 Yet Elster’s discussion of constitution often rests on a similarly defective analogy between an individual and the political system or society in general. The disanalogies he notes between the individual and constitutional case is that the constitution may bind “others” or that it may not be binding at all.26 He does not address the basic problem that the constitution typically does not bind the constitution maker.

With respect to the American example, to which Elster devotes considerable attention in his essay, the important point is that the U.S. Constitution was drafted by a specially-convened Convention27 and then ratified by a specially-designed voting procedure in the thirteen states.28 The decision making self in this case was the Convention or, more problematically, the Convention and the eligible voters in each state. Having drafted or enacted the Constitution, these entities then passed out of existence. Thus, the U.S. Constitution is simply not a case of self-commitment; rather, it is a case of superior giving a written order to a subordinate,29 and thus structurally identical to an ordinary statute. When the legislature passes a statute instructing an administrative agency to perform certain functions, it is not committing itself to anything, but rather issuing the sort of command that is the very essence of government. The fact that the agency cannot properly change the order does not make the statute an act of self-commitment on the legislature’s part. In order to be engaged in an act of self-commitment, the statute would

25 Id. at 1. Elster’s basic critique is that biological systems can display only locally maximizing behavior, while humans can display globally maximizing behavior.
26 Elster, Unbound, at 92-96.
28 John Kaminski, Federalists and Antifederalists: The Debate Over the Ratification of the Constitution (1998); David Siemers, Ratifying the Republic: Antifederalists and Federalists in Constitutional Time
29 Interestingly, Elster argues in a separate piece that a constitutional convention and the legislature that ultimately convenes under that constitution should have separate identities. He writes: “More generally, other institutions or actors whose behavior is to be regulated by the constitution ought not to be part of the constitution-making process.” Jon Elster, Deliberation and Constitution Making, in Jon Elster, ed., Deliberative Democracy, 97, 117 (1998). He makes these two principles the first two of his “optimal conditions for deliberation” by a constitutional convention, id. at 116. Of course, this account is normative, not descriptive, but it indicates that Elster is attuned to the continuity issue, and raises further questions about why he would refer to constitution making as self-commitment.
need to place some limits on what the legislature itself can do in the future. This may be possible, but it is certainly not the nature of an ordinary statute. Similarly, for constitution-making to be an act of self-commitment, the Constitutional Convention would have had to place limits on what it could do in the future. The document it drafted does not do this; instead, it places limits on the government that will be organized according to its precepts.

Can the willingness of U.S. government officials, or the people generally, to be bound by the Constitution be regarded as an act of self-commitment? The Constitution, after all, is just a piece of paper and has no force unless people are willing to treat it as worthy of obedience. But this is not what Elster means by self-commitment and probably not what most people mean by it. Elster’s definition is that the actor itself makes a decision at t₁ that will bind it at t₂, not that it decides at t₁ to obey some external entity. One can define self-commitment more broadly if one wishes, and perhaps even so broadly that it includes any act of obedience, but this would not distinguish the Constitution from any other governmental rule. If obeying the Constitution is a form of self-commitment, then so is obeying a statutory rule or administrative regulation. It is true, as Tolstoy and the existentialists remind us, that we are always free to disobey, but this inspiring insight tells us very little about the purpose of national constitutions.

What about the fact that the Constitution itself provides a mechanism -- a new constitutional convention -- by which the same process that led to its creation and adoption can be revived and used to change virtually all of its provisions?³⁰ Does this make the

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³⁰ U.S. Const., Art V. The exact language is: “The Congress, . . . on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which . . . shall be valid . . . when ratified by the Legislature of three-fourths of the several States, or by conventions in three-fourths thereof . . .” This is not quite the same process as the original drafting and adoption. For the sake of the argument, however, it can be assumed to be the same, or we can pose a hypothetical where it is the same. In the same spirit, we can overlook the limitation that no state’s representation in the Senate can be altered without its consent.
initial drafting or adoption an act of self-commitment? The answer must be no, based on the definition of a self. The self, that is, the decision-making entity that drafted the Constitution, passed out of existence after the Constitution was adopted, and a new constitutional convention, organized according to its provisions would be a different self.  

If the Convention engaged in an act of self-commitment, it did so by disbanding, not by propounding the constitutional provisions.

Suppose, by way of an analogy, that the owner and chief executive officer of a company decides to relinquish all her ownership and control one year in the future. Because she is aware that she has made some bad decisions by acting on her own, she decides to establish a managing committee to run the company, and place all the stock she owns in escrow. Because she is also aware that she built the company acting on her own, however, she also decides that if the committee fails to show a profit for three successive years they will be required to appoint a single executive officer to replace them, with exactly the same authority as she originally possessed, and that this officer would be given all the stock. We would certainly be willing to describe her decision to relinquish control and ownership of the company as an act of self-commitment. In doing so, she might firm up her resolve with many of the mechanisms that Elster discusses, such as throwing away the key (killing herself), giving away the key (entering into a binding contract with the members of the future managing committee), imposing costs (telling her family and friends she will resign, so that her family will be angry and her friends contemptuous is she reneges), creating rewards (arranging for that year-long, round-the-world cruise she’s always wanted to take), or avoiding exposure to cues (not going into her office as often

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31 For a proposal to call a new convention, see Larry Sabato, A More Perfect Constitution: 23 Proposals to Revitalize Our Constitution and Make America a Fairer Country 198-220 (2007)
32 Elster, Unbound, at 63-77.
during that last year). But the document by which she organizes the company after she relinquishes control cannot be regarded as an act of self-commitment; it binds others, not herself. Nor does it become an act of self-commitment because it provides for the possible re-establishment of her position. She will be dead or in Tahiti by that time, and it is her successors who are making the decision.

If the act of constitution making by convention is not a case of self-commitment, what about amendments to the constitution? Finding that amendments represent self-commitments would not rescue the Ulysses-pigeons theory, which is supposed to explain the purpose of a constitution itself. It would, however, be of considerable significance in the American case, where nearly all of our human rights protections are embodied in amendments.\(^3\) Once again, however, the problem lies in the identification of a decision making self. Amendments not only require a vote in the national legislature, but also approval by three-fourths of the state legislatures. Some amendments, however, impose restrictions on the state governments exclusively (XVII, requiring the direct election of Senators) or primarily (XIV, granting rights to state citizens, XV, XIX, XXIV and XXVI, rules for suffrage) or the federal government exclusively (XI, limiting federal court jurisdiction, XII, Presidential elections, XX, XXII, and XXV, Presidential terms and succession, XXVII, Congressional salaries).

Even when the Amendments affect both the federal government and the states, it seems difficult to describe the combination of decision-making entities as an entity of its own, particularly since the process may extend over substantial periods of time. Faced with such an institutionally and temporally diffuse process, the analogy with an individual

\(^3\) Recent constitutions in other nations, in contrast, almost always include these rights in the original text.
decision maker begins to break down. While it is certainly true that each legislature, considered separately, is limiting itself, it is also true that each one is also limiting other decision making entities. This dynamic is apparent in the history of the Constitution’s principal human rights amendments. The Congressional vote on the Bill of Rights was not so much an act of self-commitment as an obligation that had been imposed on the national government as the price of the Constitution’s ratification by the states. The states, in voting for these amendments, saw them as limiting the national government, rather than themselves. The Thirteenth Amendment did not apply to the Northern states that adopted it, but only to the Southern states that did not vote. The Fourteenth Amendment was seen as something Congress and the Northern states were imposing on the Southern states, not on themselves, and the Southern states ratified it under duress. 34

Going beyond the United States to either other nations or hypothetical situations, it would appear that a constitution or constitutional amendment approaches a true self-commitment as the process of adoption involves fewer and fewer actors other than the legislature. Once the legislature is empowered to enact a new constitution or amend the existing one without the participation of any other decision maker, then it is genuinely binding itself. 35 It is declaring that it will not alter the constitutional provisions in the future although it has the authority to do so. Thus, at t2, consistent with Elster’s definition, the legislature will willingly change ordinary statutes but refuse to change the constitutional provisions. When the legislature must act in concert with other institutions to amend the constitutional provisions, it is no longer exhibiting the same level of restraint, and no longer acting on the basis of its own previous commitment.

35 This is precisely the situation that Elster advises against in his essay on deliberation and constitution making. See note [ ] supra.
Not only is Elster’s analogy between self-commitment and constitution making open to question, but the image that he uses to describe it is open to question as well. Elster seems to think that Ulysses chose to bind himself to the mast, presumably because he wanted to hear the Sirens’ song, and that this decision represents a pure act of self-commitment on Ulysses part. Elster begins his essay by quoting Ulysses’ instruction to his men: “‘you must bind me hard and fast, so that I cannot stir from the spot where you will stand me . . . and if I beg you to release me, you must tighten and add to my bonds.’” In fact, the decision to bind himself to the mast, rather than simply stopping up his ears the way his men do, is not his at all; he has been instructed to do so by the goddess Circe. When she tells him, in Book XII, about the dangers he is going to face in the next stage of his journey, she says, in Pope’s translation:

Fly swift the dang’rous coast; let ev’ry ear
Be stop’d against the song! ‘tis death to hear!
Firm to the mast with chains thy self be bound,
Nor trust thy virtue to th’enchanting sound.
If mad with transport, freedom thou demand,
Be every fetter strain’d, and added band to band.36

When Ulysses ship actually approaches the Sirens’ island, he instructs his men as follows:

O friends, oh ever partners in my woes
Attend while I what Heav’n foredooms disclose . . .
Me, me alone, with fetters firmly bound,
The Gods allow to hear the dangerous sound
Hear and obey: if freedom I demand,
Be ev’ry fetter strain’d, be added band to band.37

Thus, Ulysses is perfectly clear that he is not making a decision of his own, but rather following the explicit command of a god. Of course, he could have chosen not to obey, but

36 Homer, The Odyssey 433 (Alexander Pope, trans., 1967) (XII, ll. 61-65)
37 Id., at 441 (XII, ll. 191-92, 196-99)
the epic clearly indicates that disobeying a god is a very bad idea. This is established at the very beginning, when Ulysses’ basic character is described:

On stormy seas unnumber’d toil he bore,  
Safe with his friends to gain their natal shore:  
Vain toils: their impious folly dar’d to prey  
On Herds devoted to the God of Day:  
The God vindictive doom’d them never more  
(Ah men unblem’d) to touch that natal shore.38

In fact, the episode described, where all Ulysses’ men perish because they ate the Sun God’s cattle, occurs almost immediately after the ship passes the Sirens’ island.39

The reason why this excursion into the analysis of an ancient text is worth pursuing is that Elster’s reading of the text reveals something about the motivation for his theory. In essence, Elster emphasizes Ulysses’ autonomy, his ability to make decisions freely and implement them effectively. Like many people, Ulysses finds himself in a situation where he must be subject to constraint, but, in Elster’s view, he has imposed these constraints upon himself in his desire for knowledge.40 That is the way we modern like our heroes.

J.B. Schneewind identifies autonomy as an essential element of modernity, and traces its emergence to the rejection of the tradition-bound idea that morality is grounded on

38 Id. at 28-29 (I, ll. 7-12). This is the only incident mentioned in the Invocation. It can thus be argued that in addition to the famous Homeric epithet *polytropos* (variously translated as wise, resourceful, never at a loss, of many twists and turns) the other essential feature of Ulysses’ personality is his obedience to the gods.

39 Using this translation may seem a bit unfair to Elster because Pope, as an eighteenth century poet (and a Catholic poet for that matter) tends to use more religiously-oriented language than contemporary translators. But in this case, the wording of the modern translation by E.V. Rieu that Elster uses is equally sacerdotal. Homer, supra note [   ] , at 25:

He suffered many hardships on the high seas in his struggles to preserve his life and bring his comrades home. But he failed to save those comrades, in spite of all his efforts. It was their own sin that brought them to their doom, for in their folly they devoured the oxen of Hyperion the Sun, and the go saw to it that they should never return.

40 Moreover, according to Elster (who derives the interpretation from Cicero), the Sirens play upon this desire in their efforts to entice Ulysses to their island. See Elster, Unbound, at 3. Since the reader has already heard both Circe and Ulysses describing the Sirens – Circe in warning Ulysses and Ulysses in instructing the sailors – the only surprise is how the Sirens actually tempt Ulysses. Elster claims that it is with the promise of knowledge, apparently based on the line “Approach! and learn new wisdom from the wise.” Homer, supra note [   ] , at 443 (XII, l. 226). This is not a convincing interpretation because the Sirens then go on to say: “We know what’er the Kings of mighty name, Atchiev’d at Ilion in the field of fame.” Id. (ll. 227-28). What they are tempting Ulysses with is honor for his victory in battle, and that is what is he wants. This is clear from his early interaction with the Phaeacians (to whom he is telling his entire story). Before he reveals his name to them, he asks their bard to sing “How stern Ulysses, furious to destroy, With latent heroes sack’d imperial Troy.” Id. at 291 (VIII ll. 541-42.
obedience to some higher power or authority.\textsuperscript{41} Kant, who Schneewind treats as the culmination of this process, explicitly identifies autonomy as the basis of self-legislating a categorical imperative. He says: “Autonomy of the will is the property that the will has of being a law to itself… The principle of autonomy is this: Always choose in such a way that in the same volition the maxims of the choice are at the same time present as universal law.”\textsuperscript{42}

This is inspiring, but it is not a convincing interpretation of the Odyssey. While Ulysses displays a considerable amount of resourcefulness, it would be more accurate to describe him as the plaything of the gods than as a paragon of autonomy. When the epic begins, Calypso has been holding him on her island as her boy toy for seven years, and his only recourse is pathetic sorrow: “With streaming eyes in briny torrents down’d, And inly pining for his native shore.”\textsuperscript{43} He has literally been blown back and forth across the seas by Poseidon, who will shipwreck him again after he leaves Calypso’s island. He escapes from Calypso through the intervention of the gods, not his own efforts, just as he has had Athena or Circe’s help in escaping from his other perils, and he will need Athena’s help once more in order to regain his kingdom. He unquestionably has free will, but his wisdom consists in exercising that will – unlike his foolish companions who ate the Sun God’s cattle – by being obedient to divine authority.

Elster’s reading of the Sirens story as an example of autonomous decision making seems to be motivated by his interest in rationality, which serves as the starting point for his entire inquiry. A rational decision is necessarily an autonomous one, and Elster is interested in the reasons why it might be rational for a decision maker at $t_1$ to restrict her

\textsuperscript{41} J.B. Schneewind, The Invention of Autonomy: A History of Modern Moral Philosophy (1998)

\textsuperscript{42} Kant, supra note [ ], at 44.

\textsuperscript{43} Homer, supra note [ ], at 180-81 (V, ll. 194-95).
own decision at t_2_. He extends the inquiry to constitution making because he is interested in the deliberative democracy component of democratic theory, which relies on rational discourse. The idea, inspired in part by the work of Habermas, is that free and open communication between people, designed to reach mutual understanding, can serve as both an operative mechanism and a legitimizing principle for modern government. Elster wants to explore the extent to which constitution making can serve as an arena for rational discourse of this kind, and how it can conceivably impose that rational standard on the all-too-evident irrationalities of quotidian political discourse. To do so, however, he must make a number of highly questionable claims, as he himself is aware; to use the Sirens story as a parable of this process, he must turn Ulysses into modern man, which is questionable as well.

III. The Empirical Pattern of Leading Constitutional Cases

As discussed above, the Ulysses-pigeons claim that one major purpose of a constitution is to impose rational constraints on government during times of fear and passion suffers from serious empirical and theoretical problems. Is there is an alternative account that can explain the pattern of cases in the United States more accurately and that possess more theoretical coherence? Can we find a literary image (or a psychology experiment) that captures this theory the way the Sirens story does (and does less violence

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44 Two obvious reasons, which Elster discusses at length, are passion and weakness of the will. See Elster, Unbound, at 118-41.
46 In addition to Elster, Unbound, 88—174, see Jon Elster, Deliberation and Constitution Making, in Elster, supra note [ ], at 97.
to the original text) (or deals with something more inspiring than pigeons)? This section addresses the empirical question; the next section addresses the theoretical, mythological and psychological ones.

The modal form of leading constitutional cases has been identified above; it strikes down a set of laws that has been in force for an extended period and represents a well-established status quo. There was obviously nothing short-term or hysterical about the adoption of state business licensing laws, state taxation laws, apartheid laws unequal state apportionment laws, support for religious education, abortion laws, federal legislative veto provisions and anti-sodomy laws. These laws were adopted by the separate states or the federal government in the case of legislative veto provisions, over long periods of time, and represented a sustained political consensus about preferable social policy. It was this consensus, not some short-term legal paroxysm, that the Court was rejecting when it acted as it did.

In addition, the process of “coming to one’s senses” that is implicit in Elster’s theory and the Sirens story is absent from these cases. To be more specific about this element of Elster’s idea, if it can be rational “[t]o bind oneself is to carry out a certain decision at time t₁ in order to increase the probability that one will carry out another decision at time t₂,”\(^4\) then an element of this rationality should be that there exists some t₃ when the actor recognizes that the t₁ decision was preferable to the t₂ decision. \(^4\) The two most obvious reasons why a decision at t₂ would be less rational than an earlier decision are passion and weakness of the will, and both are almost by definition temporary conditions from which

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\(^4\) Elster, Sirens, supra note [], at 39.
\(^4\) I am unable to explain why Elster does not discuss this issue in either of his Ulysses essays.
the actor should recover at some future time.\(^4^9\) If that does not occur, then there would be no time at which the actor himself would recognize the superior rationality of the first decision, and it might be difficult for an external observer to assert that this decision was rational from the actor’s perspective. In the Sirens’ story, Ulysses certainly assumed that a \(t_3\) would shortly follow his \(t_2\) so that he could be safely released from bondage. His men must have believed this to be the case as well, since they were committing mutiny at \(t_2\) and would be subject to execution once they released him unless he had come to his senses by then.

While it is admittedly difficult to reduce the complexities of the real world to \(t_1\)’s and \(t_2\)’s, there do not appear to be any leading cases that fit this cyclical pattern. When the Court strikes down a long-established, widely-adopted group of laws, it is rarely restoring a legal situation that existed before those laws were adopted. Typically, laws of this nature reflect legal, political and social attitudes that stretch back either to the very beginning of the Republic (state licensing laws, state taxation laws) or into a misty past, and the Court’s action represents a new, unprecedented situation.\(^5^0\) If the past is misty, it is often because

\(^4^9\) In an illuminating discussion, Elster identifies a third rational reason for preferring the \(t_1\) decision. Elster, Sirens, supra note [ ], at 91-93. This can be described in simplified form as consistency. In part, it recognizes the need to make credible commitments to other actors and relates to the observation that “efficient breach” of a contract may be inefficient due to reputational effects. But it also recognizes that it may be better to be consistent as an overall strategy, even if a decision that conflicts with the pre-adopted strategy seems more rational at the moment. This relates to the value of heuristics in rational decision making. It might be argued that a truly rational agent would take the need for consistency into account at \(t_2\) and only act inconsistently with the \(t_1\) if that inconsistent action were more rational, all things considered. But the possibility of doing so at \(t_2\) may disable the actor from making certain types of commitments and adopting certain types of strategies at \(t_1\).

\(^5^0\) The term “Court” here is a synecdoche for the federal judiciary. Leading cases may be affirming an appellate court or trial court decision that was actually the first articulation of the new legal doctrine. These cases are obviously comprised within the descriptive account being given in this section. There are also some situations when the Supreme Court denies certiorari on a path-breaking case by the lower courts. This is nonetheless counts as judicial review based on the Constitution, and is subject to the same analysis. An good example is the set of decisions establishing and implementing the principle that the Eighth Amendment’s ban on cruel and unusual punishment applies to conditions of confinement in state prisons and demands an elaborate set of standards for the nutrition, housing, health and disciplining of the inmates. See, eg., Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); 300 F. Supp. 825 (E.D. Ark. 1969); Ruiz v. Estelle, 503 F. Supp. 1265 (1265 (S.D. Tex. 1980); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 19760, aff’d in substance sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), rev’d in part and remanded sub nom. Alabama v. Pugh, 438 U.S. 781 (1978); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), aff’d, 501 F.2d 1291 (5th Cir. 1974). For descriptive accounts of these cases, see Malcolm Feeley and Edward Rubin, Judicial Policy Making and the Modern State: How the Court’s Reformed America’s Prisons 37-128 (1996); Steve Martin and Sheldon Ekland-Olsen, The Walls Came Tumbling Down (1987) (Texas); Larry Yackle, Reform and Regret (1989) (Alabama).
the issue in question was not salient prior to a certain time. In the nation’s early days, for example, no one was thinking about gay rights, abortion or the constitutionality of state apportionment.

One might argue that the Court, in striking down long-established laws, is restoring the legal situation that is embodied in the Constitution itself. But what the Constitution embodies is a contested matter and, in some sense, the entire question at issue. The inquiry for the moment is an empirical one – not what the Constitution inherent meaning may be, but what how it has actually been used during the course of American history. It would be rather odd, from an empirical perspective, to argue that everyone in the nation was misinterpreting the Constitution -- with respect to gay rights, abortion and state apportionment, for example -- from the moment the Constitution was adopted until the time the Court struck down those interpretations. With respect to Southern apartheid, the cyclical pattern may be vaguely discerned, but only if we assume that the nation followed the real meaning of the Fourteenth Amendment for about fourteen years, and then ignored it for the next seventy-five until the Court intervened. That is a rather long paroxysm, a long time to be passing by the Sirens island.

The smaller group of leading cases where the Court tried to forestall developing legal initiatives born of sea changes in political sentiment rather than sudden panic -- *Dred Scott*, *Lochner*, *Hammer* and *Schechter* -- could conceivably be viewed as restoring a pre-existing legal situation where there was no economic or social regulation. 51 Interestingly, however, the nation did not come to its senses after these decisions were handed down. After *Dred Scott* was decided, the Constitution was amended to repudiate the Court's

51 Dred Scott could be described as restoring the legal situation that existed prior to the Missouri Compromise, but since the Missouri Compromise preserved rather than transformed the status quo, that is not saying very much.
decision. After *Lochner* and *Hammer*, the political branches continued to enact the types of laws that the Court invalidated in those cases, and ultimately changed the Court’s view of the matter by means of opposition and appointments. In other words, Ulysses’ crew pulled the wax out of their ears, untied Ulysses, and they all swam off together to the Sirens’ island. According to some dogged opponents of the regulatory state – a small minority, at present – they died there, as Circe predicted. Most people’s view, however, is that the Sirens were only kidding about the never-return-home thing, and instead gave Ulysses and his men a better boat. The exception, once again, may be *Schechter*; perhaps the nation “came to its senses” about delegating executive authority to private parties, but it has certainly not done so regarding delegations to either executive and independent agencies.52

It would appear, exactly contrary to the Ulysses-pigeons theory, that when the Court invalidates relatively recently enacted legislation, it has considerably less success than when it acts against a long-standing legal consensus. Its decisions do not last; the legal initiatives that the Court was attempting to suppress reassert themselves and the Court’s vision is dismissed as oppositional or retrograde. The decisions of the Vietnam War era are only a partial exception, since their central effect was to invalidate long-standing legislation against political advocacy. It is only with the cases striking down the Anti-Terrorism initiative that we reach a genuine exception to this general pattern.

A pattern of this sort might generate contradictory oscillations in constitutional doctrine, a group of precedents that cannot be organized into even a vaguely coherent unity. But our constitutional doctrine achieves a reasonably high level of coherence because American law has been moving in a specific and identifiable direction over the

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52 *Marbury* is too unusual a case to characterize. On the one hand, it involved rather recent legislation; the Judiciary Act had become law only fourteen years earlier; on the other hand, the legislation could not possibly have been any older.
course of our nation’s history. Three general trends can be discerned: increasing authority of the central government, both in absolute terms and relative to the states; legal equality, and human-rights based limitations upon governmental action. An elaborate documentation of these trends lies beyond the ambit of this essay, but the general contours of each one can be quickly outlined.

The colonial administration that the new nation inherited was located entirely in the separate colonies, to the extent that it was not controlled by the now-rejected mother country. There was no overarching British administration in the area that became the United States. The first organized American government, under the Articles of Confederation, more closely resembled an alliance of independent states than a functioning nation. Dissatisfaction with this arrangement led directly to the Constitutional Convention, which was largely directed toward creating a more effective national government. But that government, when first formed, was diminutive; most of the real governance authority remained with the states. It grew steadily but gradual during the so-called federal period but moved rapidly and dramatically forward during the Civil War, when the Southern States objections to national control ironically elicited an enormous increase in national power. The possibilities and demands of industrialization then cemented the central government’s Civil War gains, and successive waves of regulation – the Progressive movement, the New Deal, and the social and environmental legislation of the 1960s and 70s – expanded them by successive orders of magnitude. The Republican Party, which dominated Congress between 1994 and 2006, paid obeisance to the principle of states rights, and yet it federalized large areas of criminal law, business law and welfare law.
The trend toward legal equality is even clearer. In terms of race, it can be traced in the abolition of slavery, which required a civil war, the Civil War Amendments, the Civil Rights Act and the Voting Rights Act, and affirmative action. In terms of gender, the married women’s property acts, women’s suffrage, and changes in divorce laws reflect an ever accelerating change in women’s status. This process culminated in the post-War era; it can be plausibly argued that women made more progress toward equality in the U.S. during the half-century since 1960 than they had in the entire history of the world prior to that time. The evidence on economic equality is more mixed, particularly once slavery is factored out as a separate issue; the progressive federal income tax, the minimum wage law, and the various federal welfare laws suggest that there has been some movement in this direction, but political resistance to this principle is strong, and it is difficult to discern a definitive trend.

A third trend, which obviously overlaps with legal equality, involves the growth of human rights constraints on government. The development of free speech doctrine that Stone traces in his book, and that was summarized above, clearly indicates that governmental tolerance for dissent in times of crisis has increased dramatically, although perhaps only in recent years. Governmental tolerance of divergent religious practices presents a less obvious pattern, as it has been relatively common throughout our history, with a few significant exceptions such as the nineteenth century treatment of the Mormons.53 Constraints on search and seizure, police practices and modes of punishment have all increased dramatically since our history began. It is dangerous to be overly self-complimentary in this area, but any examination of nineteenth and even early twentieth

century practices will reveal horrors that are no longer deemed acceptable in our legal system or society.

The leading cases where the court has overturned well-established and long-standing bodies of law are those that have anticipated and catalyzed these trends. Courts have acted when the political branches are too conventional, too unconcerned or too pusillanimous to overturn existing legal rules that are losing their rationale and their support. Their role, in other words, has been to break up political and legal logjams, to sweep away the impediments to the motive forces that have acted throughout our nation’s history. When they have done so - when the have discerned the current implications of the trend correctly – their decisions have been influential in shaping legal doctrine, and American government in general, because the political branches and the populace have acceded to the judiciary’s vision. To be sure, their agreement has frequently been halting, with resistance widespread and outright disobedience quite common, but this opposition has generally dammed over time and often been transformed into sustained support. The decision that has probably elicited the most lasting opposition has been *Roe*, but the Court’s ruling has now survived for 35 years, and the indications are that it will do so for considerably longer.

In other words, the Constitution’s purpose in providing for judicial review has turned out to be the creation of a government institution whose role is to anticipate developing trends in our conception of law or rights or governance and intervene, in opposition to the other governmental institutions, to accelerate that trend or bring it to fruition. The contours of our constitutional doctrine are established by cases that fulfill that role, and these cases are now regarded as the Court’s successes. When the Court
attempts to forestall a developing trend, it generally fails, even if its decision is important at
the time. The decisions that represent this attempt are repudiated, which means that they
are not incorporated into doctrine. Instead, they are regarded as mistakes, and pose a
problem for any observer who tries to analyze their error in isolation from the historical
trends whose continuation led to their demise.

This observation can be regarded as a moderate description of constitutional
evolution. Many theories of an evolving constitution attempt to discern a more complex or
theory-grounded pattern in the doctrinal changes that the courts have instituted.54 The
result is akin to what biologists call punctuated evolution; doctrine moves from one stage
to another, with each stage having its own rationale. Theories of this sort derive a sense of
direction, or forward motion over time, from the relationships between the content of each
stage and its predecessors or successors. Other theories of constitutional change move in
the opposite direction, depicting the Court as one actor in a political struggle that addresses
the dominant issues of the day. In these accounts, the Court is part of an ebb and flow of
events that can move in varying directions depending on the politics and predilections of
its members and the positions taken by other political actors.55 The argument here is that
the constitutional change occurs as part of a few rather simple and sustained larger trends;
it is not sustained by a strongly developed theory of government or judicial role, but it is
not a totally untheorized response to the politics of the moment either.

54 See, e.g., Bruce Ackerman, We the People, vol 1: Foundations (1993); vol 2: Foundations (2000); Paul Kahn, Legitimacy
and History: Self-Government in American Constitutional Theory (1992)(focusing primarily on theories of constitutional law);
Tribe, supra note[ ].
55 See, e.g., Jack Balkin and Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045 (2001);
Robert Dahl, How Democratic is the American Constitution? 159-78 (2nd ed. 2003); Keith Wittington, Constitutional
There is obviously a major element of teleology in this characterization of our judicial history. One widely-noted problem with teleological explanations is that they lead toward the naturalistic fallacy that normative claims can be derived from historical patterns. At this point, however, the only assertion being advanced is empirical, not normative. It seems hard to argue that American constitutional law has not been moving in toward national power, toward increased equality, and toward human rights-based limitations on governmental action. No claim is being made about whether this movement is objectively right or good, according to some critical morality, nor is there any empirical assertion about whether it is historically inevitable. It is simply the pattern of our history up to the present time, and a separate inquiry is needed to determine what we think of it.

As an empirical observation, teleological accounts may be accused of what Herbert Butterfield described as the Whig interpretation of history, that is, the use of a contemporary political consensus to organize and understand the past.56 The trends that are being cited, and the success or failure of Court decisions in relation to them, are not historical judgments, however; they are behaviors of the actors themselves. It is the contemporary political branches and populace who characterize the Court’s decisions as radical or retrograde. It is the Court that determines which decisions have been ensconced in the constitutional pantheon and which have been banished to the nether regions. These judgments must themselves be interpreted by the observer, of course, but any imposition of personal or anachronistic views is constrained by the fact that the participants, and particularly the Court, speak so consciously and so voluminously on their own behalf.

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56 Herbert Butterfield, The Whig Interpretation of History (1965). He writes, at 27: It matters very much how we start upon our labours – whether, for example, we take the Protestants of the 16th century as men who were fighting to bring about the modern world, while Catholics were struggling to keep the mediaeval, or whether we take the whole present as child of the whole past and see rather the modern world as emerging from the clash of both Catholic and Protestant.
IV. A Theoretical Account of Our Constitutional History

Even if it does not rest upon a naturalistic fallacy or fall victim to the countermajoritarian difficulty, the teleological account of constitutional doctrine proposed in the preceding section is far from satisfying. Constitutional law is supposed to have a justification, to be something other than an act of will by the judiciary. The fact that judicial willfulness fits a particular pattern does not rescue it from normative obloquy, of course; as even St. Thomas recognized, sin can be as highly structured as virtue. 57 The appeal of the Ulysses-pigeons theory is that is not only predicts the pattern that judicial decisions will display, but also provides a theory for that pattern – the idea that the Constitution is designed to preserve rational decision making in times of crisis. Unfortunately, the pattern that the theory predicts has not been manifest in our constitutional history, and the theory does not apply to constitutional decision making. In the previous section, a more accurate pattern for our leading cases was proposed. The question in this section is whether a theoretical account – one that actually applies to the constitutional process-- can be provided for that pattern.

The pattern described above is that the cases that contribute most to the formation of our constitutional doctrine are those that anticipate and catalyze a developing trend in our system of law and governance. In contrast, cases that attempt to halt a developing trend, while they can certainly have a significant impact at the time, tend to be regarded as

57 2 St. Thomas Aquinas, Summa Theologica 897-990, 1000 (Fathers of the English Dominican Province, trans., 1981) (I-II, Q’s 71-89; I-II, Q 91, Art. 6)
wrong turns and doctrinal outliers. While the brute existence of a trend does not, by itself, possess normative force, it can imply a normative process if the initial inclination and the subsequent developments are normatively justified.

Tribe recognizes this feature of American constitutionalism in the third edition of his treatise. Conceding the limitations of his pigeons experiment analogy, he says that the Constitution “does not take our preferences as given; to the extent that its provisions are given effect, those preferences – both of politicians and the people generally – may be expected to change.” But leaves the question of constitutional purpose unanswered; it seems unlikely that the document is endorsing change for its own sake. One way to understand the pattern of our leading cases is to view them as part of a process by which we actualize our aspirations. Our nation was formed with certain principles in mind --- a strong national government, equality, and human rights -- but the meaning of those principles was uncertain at the time, and the circumstances to which they would apply were unrealized and, in many cases, unimagined. Thus, the content and meaning of these principles has been revealed to us only by the passage of time and with the assistance of constitutional adjudication.

The other reasons that Tribe gives in his brief discussion questioning the pigeon experiment analogy are less convincing. First, he says that the analogy “equates the Constitution with a utility-maximizing device and thereby ignores its role in establishing and enforcing norms and principles.” This seems wrong, however, except in the somewhat trivial sense that pigeons themselves cannot have norms; the analogy applies to any case where the actor yields to short-term temptations that it will ultimately regret, including temptations to abandon its principles. He next says that the analogy “overlooks the Constitution’s role in affirmatively constituting the institutions that would thereafter enact the constitutional plan.” But all constitutions do that, by definition; there is no doubt that the Constitution constituted the Supreme Court, but the question is what the Supreme Court is supposed to do. Finally he makes the point that all the Framers of the Constitution are dead, and most of us are not even related to them. But that is true for all legal enactments, and is answered by the basic need for legal continuity in an ordered society. As Tribe recognizes in a footnote, since we accept the normative justification for the Constitution, which he describes as popular sovereignty, and thus can treat its provisions as living law.

Tribe's most interesting reason for questioning the analogy is that the pigeons, in forgoing the short-term temptation, "relied upon a due ex machina not of their own creation. Human intervention – intervention from outside the pigeon community – was essential in rewiring the chamber in which the pigeons pecked their variously-colored keys." Id. at 23. That is true, the pigeons did not write a constitution. Viewed as an analogy, however, the human intervention does not play the role of an external authority, but of nature or history; that is, it establishes the conditions under which resisting a short term temptation at t2 produces results that are preferable to the actor at t1 and t3. It is the pigeons alone who must then make the t1 decision. To be sure, their reward is only food, not the preservation of their norms in times of stress, but that is because they are pigeons.
Stating a principle, as the original Constitution, the Bills of Rights and the Civil War Amendments do, is an act of considerable importance, one that often requires a good deal of courage. But, by itself, it does not produce many actual effects on people’s lives. It is only when the principle is applied to the political issues of the day that it can fulfill its promise. This is often more difficult, and requires more courage, because the application of the principle will almost always conflict with settled interests. The content of the principle, therefore, lies not only in the aspirations it fulfills, but in the sacrifices it requires. Sometimes these sacrifices are material, as in the cases of Gibbons, McCullough and Baker; sometimes they are conceptual, as in Roe; and sometimes they are social, as in Brown. In whatever form they appear, they tend to make the principle appear impractical and naïve. The content of a constitutional principle, therefore, lies in our willingness to apply it despite these reservations, and in violation of these interests.

Beyond the process of giving content to our principles lies the deeper reality that the principle’s core meaning is only revealed over time. It is not only the obstacles that are difficult to imagine when the principle is first articulated, but also the possibilities that the principle embodies. Phenomenology teaches us that being in a particular place, either in space or time, is a reality that powerfully affects our thoughts as well as our sentiments. The belief that we can anticipate the way we will think, feel and react is in many cases an illusion; once we are in the situation, once a there has become our here, and a then has become our now, as Husserl says, we inevitably think in different terms. This is, in some

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sense, the opposite of the Ulysses-pigeons theory. Rather than constitutional provisions being a process of commitments at $t_1$ that the actor decides to follow at $t_2$, they are continually evolving themes, linked by the historical memory of the society, but changing with each successive era.

Thus, constitutional adjudication can be seen as playing an important role in a great political adventure. The traditional view of principles is that they are static and complete; one can almost imagine them as solid templates that imprint themselves on each successive period. But as suggested here, perhaps principles are better viewed as generative nodes that propagate themselves through time as branching networks. Constitutional adjudication plays an important facilitative role in this dynamic process by accelerating growth and removing impediments. In addition, it can add an element of clarity and self-realization to the process because of the requirement that judges state their reason for decision. It cannot change the direction in which the principles develop, and it certainly cannot arrest that development. But as a facilitative mechanism, it is tremendously important.

While this view of constitutional adjudication may seem overly abstract and perhaps a bit mystical, it possesses a certain hard-headed practicality. There is no textualist or simple intentionalist account that will justify the Court's decision in most of the leading cases. It is simply insincere to assert that the results in Brown v. Board, Baker v. Carr, Brandenburg v. Ohio or Lemon v. Kurtzman, particularly as they apply to the states, can be reached on the basis of the constitutional text alone, or that they were consciously in the minds of the Framers when they drafted either the original Constitution or its Fourteenth Amendment.

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Amendment. Unless we are willing to relinquish the results in these cases, and so many others besides, we must have some theory of constitutional change. That theory, in order to be honest, must not only justify the results, but also the principle of change itself. The idea of gradually revealed content and meaning satisfies that requirement.

This approach, moreover, does not require that we abandon the attractive features of intentionalism; in fact, it provides a more plausible account of what intentionalism might mean. The ordinary notion of intent that we apply to daily activities is that a particular result must be present in the actor’s mind, or at least readily available once the actor focuses on the issue. But in the sentence “what did Madison with respect to the constitutionality of abortion?,” there is, after all, a nonsense word, and that nonsense word is “Madison.” For “Madison” to confront this issue, which was not on the agenda in his own day, he would have to have lived to be 250 years old, or be magically transported from his own time to ours. But we do not know how a 250-year-old person thinks, or how someone thinks when he is transported into the future. We can substitute “all the Framers” for Madison, or “all the Framers plus the people who voted for the Constitution in the states” and the problem will remain the same.

The idea that constitutional principles would reveal their content and their meaning gradually, with the progression of time, not only provides an escape from this conundrum, but may reflect the actual intention of the Framers more accurately than any more specific interpretation of the constitutional language. As H. Jefferson Powell has pointed out, the Framers knew perfectly well that they were drafting the document for an unknown future, whose features they themselves could not predict.63 This sense of an unfolding future that

would usher in a new and better world was a standard Enlightenment perspective. A few years after the Constitution was drafted, Condorcet, while in hiding from the Terror, wrote his encomium to human progress. In the future, he predicted, equality between nations and within nations will increase, women will achieve equality with men, slavery will be abolished, and human rights will be secure. Aspirations of this sort were thus conceptually available at the time. The Framers knew that they were venturing upon uncharted seas, that no one had ever written a constitution for a large, diverse nation like the United States. There is no reason to think that they, as children of the Enlightenment, were incapable of thinking in similar terms, and harboring similar hopes for the regime they were creating.

From this perspective, the free speech cases of the Vietnam era, and more importantly, the recent cases that opposed the Bush Administration’s anti-terrorism strategy, are illustrations of revealed meaning, not exceptions to it. While these cases are certainly consistent with the Ulysses-pigeons theory, their recent appearance suggests that this theory is not an explicit feature of the Constitution, but rather an implication of it that could only be revealed over time. People were certainly aware that the First Amendment and the habeas corpus clause were relevant to war time restrictions on individual rights. But it took nearly two centuries, and many unfortunate experiences, before the meaning of these protections, and others akin to them, were revealed to the Court. The two century long trend toward the identification and expansion of human rights, fueled by our basic commitments and facilitated by the judiciary, finally reached the point where it could be used against panic-driven oppression in a time of crisis.

64 Antoine Nicholas de Condorcet, Outlines of an Historical View of the Progress of the Human Mind (2009)
65 Benjamin Franklin knew Condorcet quite well, see Walter Isaacson, Benjamin Franklin: An American Life 338 (2003) and introduced John Adams to him, see David McCullough, John Adams 191(2001)
If we want to find a metaphor that can capture this development process, and serve as an alternative to the Ulysses story, we might turn to the familiar myth of Pygmalion and Galatea. Pygmalion made the statue of a woman out of ivory and fell in love with it, bringing it presents and taking it bed with him. When the festival of Venus came, he prayed to the goddess for a woman like his ivory statue, but she understood his real wishes and brought the statue itself to life. As Ovid describes the scene:

Pygmalion came
Back where the maiden lay, and lay beside her
And kissed her, and she seemed to glow, and kissed her
And stroked her breast, and felt the ivory soften
Under his fingers, as wax grows soft in sunshine,
Made pliable by handling . . .

The lips he kisses
Are real indeed, the ivory girl can feel them,
And blushes and responds, and the eyes open
At once on lover and heaven . . .

The thought is that principles, however beautiful, are lifeless until we animate them with our commitments. To wish Galatea alive, as Pygmalion does, is to accept the open-ended nature of a relationship with a human being. While she was a statue, Pygmalion was in complete control, but now that she is alive, their relationship will develop in ways that he can no longer predict. Interpretive approaches such as textualism and orginalism treat constitutional provisions as possessing a fixed meaning, and treat this immutability as an important constraint on the judiciary’s use of its authority. But ultimately it reduces judicial review to a meaningless act, like sleeping with a statue. If applied with honesty,

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66 Ovid, Metamorphoses 243 (Robert Humphries, trans., 1968). Ovid’s description may seem a bit lurid as an analogy for judicial decision-making. Ovid was well-known for this, so much so that he was banished from Rome by Augustus Caesar, who was something of a prude. It is worth noting, however, that Plato regarded passion as a necessary component of the philosophical perspective. Plato, The Republic 153-61 (Alan Bloom, trans., 1968) (473d-480a). See id. at 155: “‘one who is willing to taste every kind of learning with gusto, and who approaches learning with delight, and is insatiable, we shall justly assert to be a philosopher.”
instead of indirection, any reliance on fixed meaning will quickly align the courts with efforts to forestall or suppress developing trends in law and governance, and generate decisions that will be circumvented or repudiated. To play a role in the continuing development of our legal system, constitutional courts must participate in the trends that represent our nation’s evolving conception of government and of itself.

Venus’ role in bringing Galatea to life is a *deus ex machina* in the most literal sense. But she does not play the role of an external force in the analogy; rather she represents the effort to understand the meaning of the Constitution as it is revealed through the historical experience of the nation. It is this instinct that brings the principles embodied in that document to life. The judiciary would not merely condemn itself to long-term irrelevance, whatever its short-term effects, if it relied on literalist versions of textualism or originalism to interpret constitutional provisions. More importantly, it would be misunderstanding the Constitution itself by doing so because the Constitution’s meaning is embodied in the process that it initiated, the long-term trends that generated ever-evolving approaches to law and governance.

An alternative mythological analogy is Jason, captain of the Argo, and his sea voyage in search of the Golden Fleece. Ulysses encountered many unknown lands, but his ultimate destination is his home, a fixed and familiar place. His goal is to regain his former status, and to reverse the changes in his kingdom that have occurred during his absence; fully half this epic is devoted to his efforts to achieve this once he reaches Ithaca. All his wanderings are involuntary, and viewed by him as impediments to his true desires. Jason, in contrast, voluntarily sets off into the unknown. He has a goal, but it is a mysterious and

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67 Apollonius of Rhode, *The Voyage of the Argo* (E.V. Rieu, trans., 1959)
unfamiliar one, and his various adventures are a necessary process if he is to get what he wants. It is that sense of adventure, the sense that our history provides opportunities as well as tribulations, that defines the role of the judiciary in our constitutional system.

Finally, we might look for a classic psychology experiment to replace George Anslie’s pigeons. One that provides some insight involves children, rather than the birds; it is entitled *Pygmalion in the Classroom.* The experimenters told elementary school teachers that certain children in their class were likely to be “growth spurters” based on their scores on the Harvard Test of Inflected Acquisition. In fact, the students were randomly selected. The increased expectations that these children’s teachers had for them led to increased performance on their part – a classic self-fulfilling prophecy. This experiment does not capture the entirety of the constitutional process, but it does suggest the importance of aspiration. Pigeons do not have aspirations, even by analogy. An experiment with them can suggest the possibility that the constitution will serve as a device by which the government can be temporarily restrained at times of stress or panic. But the real role of constitutional adjudication has been to advance enterprise embodied in our Constitution and manifested in our history – the process of building an effective central government, achieving legal equality and securing individual rights. It was only through that process that the Court was able, after some 200 years of struggle, to fulfill the task that the Ulysses-pigeons theory assigns to it.

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