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Archetypes of Faith: How Americans See, and Believe in Their Constitution

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ARCHETYPES OF FAITH: HOW AMERICANS SEE, AND BELIEVE IN, THEIR CONSTITUTION

Aliza Plener Cover*

*In this Article, I offer a new framework to illuminate how American faith in the Constitution is sustained over time. I build upon the evocative Passover story of the Four Sons—one of whom is wise, one wicked, one simple, and one who does not know how to ask—and argue that these archetypes resonate deeply in the constitutional context. I identify the “wise sons” of the American constitutional community—the legal elites who maintain the vitality of the constitutional faith through a fastidious, intergenerational, yet somewhat detached analysis of the intricacies of law; the “simple sons”—the People writ large, who relate to the Constitution through deep yet nontechnical faith in its overarching principles and symbolic significance; the “wicked sons”—those who have been historically excluded from the constitutional community and those whose faith is tempered by doubt; and the “sons who do not know how to ask”—the young and those marginalized into silence. Although its primary function is explanatory rather than predictive, this Four Sons framework reveals new insights into why and how the Constitution has retained its symbolic significance as Higher Law. And while most judicial opinions will not—and need not—consciously engage with these multiple constitutional audiences, this framework illuminates why certain opinions such as *Brown v. Board of Education* attain canonical status by deliberately and successfully speaking to each of the Four Sons.*

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INTRODUCTION: A CONSTITUTIONAL FAITH¹

At the same time as it bans the “establishment of religion,”² America’s Constitution brings a new faith into being—a faith in the Constitution itself. The Constitution is not merely a charter of government, ratified by an elite minority in the 1700s and amended at various intervals across the nation’s history. The Constitution has come to symbolize something much greater: it has become the sacred text of an American community of faith.³

“Veneration” of the Constitution has become a central, even if sometimes challenged, aspect of the American political tradition. . . . “The flag, the Declaration, the Constitution—these . . . constitute the holy trinity of what Tocqueville called the American ‘civil religion.’” These formal symbols—and the historical experiences they condense—evoke, for some, what the late Alexander Bickel once termed “the secular religion of the American republic,” in which “we find our visions of good and evil.”⁴

The Constitution is accurately called Higher Law⁵—and not only out of respect for the Supremacy Clause.⁶ It is the source to which Americans turn when their countrymen fail them; it is the promise of redemption in a currently imperfect political system.⁷ It is a document that binds a pluralistic and often internally incompatible population into a unified people.⁸ While some scholars would prefer to characterize this “faith” in the fallible, man-made Constitution

1. I borrow this term both from Justice Hugo Black and from Professor Sanford Levinson. HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* (1968); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

2. U.S. CONST. amend. I.

3. See LEVINSON, *supra* note 1, at 96 (“The United States is, from [one] perspective, a distinct ‘faith community,’ with the Constitution as . . . its central sacred text.”).

4. *Id.* at 11.

5. See, for example, Bruce Ackerman’s attention to “higher lawmaking.” BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

6. U.S. CONST. art. VI, cl. 2.

7. See JACK M. BALKIN, *LIVING ORIGINALISM* 75 (2011); Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 *TULSA L. REV.* 553, 560 (2003).

8. As Levinson points out, however, the religiosity of constitutional interpretation also leads to strife where interpretive disconnects arise. See LEVINSON, *supra* note 1, at 17.

and its accoutrements as a form of idolatry,⁹ I pass no judgment on this front. For my purposes, I only note that the devotion inherent in both forms of worship is similar. An idolater's god may be false, but he reveres it nonetheless. In characterizing the American Constitution as an article of faith, I mean only to capture its deep appeal to emotion—rather than its surface reliance upon rationality; I mean to emphasize its core, constitutive role in Americans' self-understanding—rather than its detached existence as formal law.

American constitutional faith is an intergenerational enterprise—as it must be, in order to sustain itself over time. The Constitution's invocation by a timeless “We the People” has invited intergenerational slippage in authorship and ownership,¹⁰ and retained the document's symbolic potency even as the founding moment recedes into distant history. This endurance of American faith across the generations is, at some level, surprising. Like all faith-based communities, America faces the challenge of maintaining the vitality and viability of its collective faith over time—not through blunt violence,¹¹ but through a pedagogy that is responsive to the multiplicity of viewpoints, individual experiences, and ways of understanding reflected in the community. Indeed, America faces added challenges of tremendous demographic diversity and substantial inequality. Under such conditions of disunity, how is constitutional faith sustained both vertically—across generations—and horizontally—across contemporaneous populations with vastly different lived experiences of the Constitution's promise?

In the hopes of beginning to answer this question, I draw a comparison to another faith-based legal system: Judaism. I pick Judaism as my point of comparison not only because it is the faith with which I am most familiar, but also because of the special relationship between law and faith in Judaism that makes it well-suited to constitutional comparison. Neither Judaism nor American constitutionalism is wholly faith-based, nor wholly law-based. Each is a blend—which makes Judaism a particularly useful analog for analyzing

9. Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583, 587-88 (1993) (“[M]odern constitutional interpretation . . . is a religious enterprise in the sense that it is dependent upon the (usually tacit) assumption of transcendent authority. More precisely, inasmuch as the transcendent authority upon which these theories implicitly rely is illusory, legal interpretation can most accurately be understood as a species of ‘idolatry.’ Moreover, the leading temple devoted to this idolatrous practice is not the so-called ‘civil religion’ of Constitution-worship attributed to popular culture, but rather the legal academy itself.”).

10. See Note, *The Faith to Change: Reconciling the Oath to Uphold with the Power to Amend*, 109 HARV. L. REV. 1747, 1754 (1996).

11. I do not suggest that American constitutionalism operates independently of violence, for, of course, American faith in the Constitution is situated within a violent system of law. See *infra* Part IV.B. Ultimately, however, I do not believe that violence is a full explanation for most Americans' adherence to their Constitution, and I argue that a freestanding faith is at least as important. Violence, perhaps, explains why the Constitution is *law*; faith explains why the Constitution is *higher law*. Given that distinction, we would do well to understand how that faith functions to create a sustainable *community* over time.

constitutional faith, despite the fact that Christianity has borne a more obvious impact upon the structure of the constitutional order. Judaism, in comparison to Christianity, places greater emphasis on *action* than *faith*. Faith in God, of course, runs through the entire project of Judaism, but individuals are judged on their conduct, not on their belief. Likewise, American constitutionalism emphasizes *obedience* more than *faith*. We must seek out the role of faith in the constitutional order; it is not always readily apparent. To understand a Jewish or a constitutional faith, one must look to the interaction between fidelity to law and faith in law's principles—to the way that laws and principles are supported by a community over time.

Within Judaism, there is both a conscious attention to the project of intergenerational faith, as well as a recognition of the heterogeneity within a faith community that complicates and informs this project. A striking meditation on these themes is offered by the famous pedagogical tale of the Four Sons, which explores how a father should relate to different types of children in recounting the story of Passover. This Article develops an extended analogy to the Four Sons story. Without accepting the judgmental connotations of their names, this Article considers whom we might identify as the “Four Sons” of the American constitutional faith, and how the pedagogical insights of the Jewish tale transfer to the constitutional context. I explore these archetypes from a distinctly *cultural* lens—seeking to illuminate, rather than reform, our national commitments, so that we might better understand ourselves.¹²

Through the literary vehicle of the Four Sons, I offer a new theoretical framework for understanding the way in which a complex nation—not bound by any shared God, ethnic history, or intellectual disposition—nonetheless keeps faith with a single document. This framework is at its core relational. Americans interact not only with the text or symbol of the Constitution, but also co-exist within a polity composed of people who interact with the Constitution in markedly dissimilar ways. The success of the constitutional project depends on the ability of these constitutional actors to communicate with one other.

The Article proceeds in six parts. In Part I, I describe the Jewish Four Sons—one wise, one wicked, one simple, and one who does not know how to ask—and contextualize their situation within the self-consciously intergenerational holiday of Passover. I then consider each son in turn. In Part II, I begin with the “wise sons” of the American constitutional community—the legal elites who maintain the vitality of the constitutional faith through a

12. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 30 (1999) (“We must first bring the legal world to light, by raising to self-conscious examination the social and psychological meanings of a world understood as the rule of law. Who are we and what does our world look like when we find ourselves in this culture of law’s rule? Both the mainstream and the radical scholar are too much of this world to ask this question. We need a form of scholarship that gives up the project of reform, not because it is satisfied with things as they are, but because it wants better to understand who and what we are.”).

fastidious, intergenerational, yet somewhat detached analysis of the intricacies of law. In Part III, I next turn to the American “simple sons”—the People writ large, who relate to the Constitution through deep yet nontechnical faith in its overarching principles and symbolic significance. Part IV identifies the so-called “wicked sons” of our constitutional community—those who have been historically excluded from its protections and those whose faith is tempered by doubt—and considers the challenges posed by inequity, marginalization, and dissent to the cohesiveness of the constitutional community. Part V discusses the “son who does not know how to ask”—the young and the apathetic—and the call to reach out and engage these members of the constitutional community. Part VI argues that the Four Sons analogy helps us to understand how *Brown v. Board of Education*—which successfully spoke to each of these four sons—was a kind of “pedagogical moment” that itself became a canonical article of constitutional faith.

I. THE FOUR SONS AND THE INTERGENERATIONAL FESTIVAL OF PASSOVER

The story of the Four Sons is one of the most famous and oft-debated anecdotes recounted at the Passover *seder*. In full, the story reads:

With reference to four sons the Torah speaks: one wise, one wicked, one simple and one who does not know to ask.

The wise son—what does he say? “What is the meaning of the testimonies and statutes and ordinances which the Lord our God commanded you?” Therefore explain to him according to the customs of Passover. That after the final taste of the Paschal offering, one may not have dessert.

The wicked one—what does he say? “What is this service of yours?”—‘yours,’ not his! Because he has excluded himself from the group, he has repudiated the foundation. Therefore set his teeth on edge and say to him: “It is because of what the Lord did for me when I came out of Egypt”—for me, and not for him. If he had been there he would not have been redeemed.

The simple one—what does he say? “What is this?” And you shall say to him: “By strength of hand the Lord brought us out of Egypt, from the house of bondage.”

As for him who does not know to ask—you begin for him. It is said, “You shall tell your son in that day, saying, ‘It is because of what the Lord did for me when I came out of Egypt’.”¹³

The story of the Four Sons has been interpreted to mean many things by scholars, rabbis, and *seder* participants across the ages. The story itself is a rabbinical gloss on biblical text.

Four biblical verses (Deuteronomy 6:20; Exodus 12:26, 13:14, 13:8) merely mention children asking or being told about the Exodus. From these disparate verses the Rabbis created a framework for personalized pedagogic instruction.

13. Translation adapted from that in Fred O. Francis, *The Baraita of the Four Sons*, 42 J. AM. ACAD. RELIGION 280, 281-83 (1974), using the author’s knowledge of Hebrew and by comparing the Hebrew text to multiple English translations in other *haggadot*.

They predicated dissimilar dispositions and varying degrees of maturity, and counseled that the story of the Exodus should be geared to the attitude and age of the questioner. “The parent should teach each child on the level of the child’s understanding.”¹⁴

But who are these Four Sons, and what do we learn from the rabbis’ pedagogical paradigm? Perhaps most commonly, the sons are understood to stand for four personality types—one engaged with tradition, one rebelling against it, one with little understanding or knowledge of the tradition, and one who is too young to know much of anything. In other words, the sons represent different innate capacities or desires for faith and for learning. Another common interpretation is that the sons represent different stages of maturity: the wise son is the eldest, the wicked is the rebellious teenager, the simple is a young child, and the one who does not know how to ask is an infant. According to a more modern rendition, the Four Sons represent different generations of Jews in a secularizing world, at different levels of attachment to their tradition. In this light, the story tracks the trials and tribulations of modernity, and the growing distance from text and faith with each passing generation.¹⁵ In a slightly different interpretation, the Four Sons exist within one generation, but represent the diverging attachments that modern Jews have to their faith, relative to their involvement in the secular world. Finally, the Four Sons are often considered to be four archetypes—four aspects of personality that every person has in some measure, but that may emerge at the forefront at different times in their lives. In this sense, we do well to remember that while the labels given the sons are judgmental (there is no apparent ambiguity in the terms wise and wicked), we need not fully condemn nor embrace any one of the sons. And, of course, in the time-honored tradition of challenging and reinterpreting conventional wisdom across the generations, we are also at liberty to question why a father should respond as indicated to the questions posed. We can freely ask—is the wise son really wise? Is the wicked son really wicked?

14. THE RABBINICAL ASSEMBLY, PASSOVER HAGGADAH: THE FEAST OF FREEDOM 38 (Rachel Anne Rabinowicz ed., 1982).

15. MARTIN SICKER, A PASSOVER SEDER COMPANION AND ANALYTIC INTRODUCTION TO THE HAGGADAH 63-64 (2004) (“Israel Lau has suggested that the ‘four sons’ section of the Haggadah may also be understood as a homily characterizing the attitudes of four very different successive generations. The ‘wise’ son represents the generation that continues to value Jewish tradition and learning, notwithstanding exposure to secular education, and therefore is able to pose an informed question. The ‘wicked’ son represents the typical offspring of the ‘wise’ generation, someone thoroughly imbued with secular culture who views the Seder as an annual ordeal that he attends out of regard for his still traditional parents. His attitude is reflected in the dismissive character of his question. The ‘simple’ son reflects the generation of the children of the ‘wicked’ sons, who have virtually no appreciation of the Seder traditions because they have not been exposed to them at home. This son asks a legitimate albeit uninformed question about what the rite is all about. When the ‘simple’ sons raise their own children, and their grandparents and great grandparents are not longer readily accessible to them, the Passover and its rituals are so alien to them that they do not know where to begin to try to understand what they see. In this case, the Haggadah makes clear, it is the leader’s obligation to take the initiative in helping them learn and understand the significance and value of the tradition.”).

Having thus begun to parse the symbolism behind each of the sons, let us think more broadly why their story appears in the Passover *seder*, and why it has garnered such interest and prominence over the centuries. The festival of Passover celebrates the Exodus from slavery in Egypt and with it, the founding of the Jewish people *as a people* (rather than an enslaved group of individuals). The story of the Exodus is tightly linked to the revelation of the Torah at Mount Sinai, which would solidify the Jewish people's collective identity.¹⁶ It is not surprising, then, that this holiday, of all holidays, is most concerned with the *preservation of Jewish peoplehood*—a task that necessarily implicates the challenges of intergenerational continuity and adherence to a historical covenant.¹⁷

Fittingly, the story of the Four Sons centers on the intergenerational transmission of community knowledge. It is an instance of meta-storytelling—it tells a story about how to tell stories. The anecdote invites its readers to grapple with how different types of individuals relate to “their” tradition and to identify ways of responding to those varied psychological stances. Thus, the tale of the Four Sons reflects the holiday's primary focus and command: the intergenerational act of storytelling, of history telling.¹⁸ This trope is prevalent throughout the *seder*. The core piece of the *seder* is called *magid*¹⁹—which means “narrative” or “telling”—in which the full story of the Exodus (with commentary) is recited and discussed. The act of storytelling highlights two distinct intergenerational dynamics permeating the celebration of Passover:

16. Note that the festival of *Shavuot* (not Passover) actually celebrates the giving of the Torah. However, the two holidays bookend (and are connected by) forty days of counting the *Omer*. Thus the full story of redemption is begun on Passover.

17. American constitutionalism shares these preoccupations with intergenerational continuity and covenant. Both traditions trace their system of belief back to a moment of consent, of collective ratification of a specific way of life. For Americans, the ratification of the Constitution of 1787 and its subsequent amendments constitute moments of collective agreement to live by certain fundamental principles. The Jewish people look back to the Covenant with God at Mount Sinai—to the acceptance of the Torah and, with it, the obligation to live by God's commandments. For both Jews and Americans, belief in the system as a whole necessitates a relationship with that historical covenant and, through that covenant, with an historical version of themselves. See, e.g., LEVINSON, *supra* note 1, at 11 (1988) (citing ANNE NORTON, *ALTERNATIVE AMERICAS: A READING OF ANTEBELLUM POLITICAL CULTURE* 25 (1986) (describing “America . . . as ‘bound up in a continuous history that stretched from Abraham to the Constitution in a concatenation of covenants’”). A modern person cannot form a full understanding of the Torah or Constitution without transposing herself upon the founding generation—without understanding herself as part of an intergenerational project.

18. The following passage is recited during the *seder*: “Even if we were all men of wisdom, understanding, experience, and knowledge of the Torah, it would still be an obligation upon us to tell about the Exodus from Egypt. The more one tells about the Exodus, the more he is praiseworthy.” SHALOM MEIR WALLACH, *THE PESACH HAGGADAH* 29-31 (1989).

19. The word *haggadah* comes from the same root (H-G-D). The *haggadah* is the book read at the *seder* to guide participants through its various rituals, songs, and teachings.

first, reaching back to remember the experiences of those who came before, and second, looking forward to tell the story to the future generations.

One the one hand, the festival is rich with reenactments that connect modern Jews *backward* to their ancestors.²⁰ For instance, Jews eat *matza* (the bread of affliction) for the full eight days of Passover, to emulate their forefathers who left Egypt in haste, without time to let their bread rise.²¹ Such reenactments are designed to make concrete a symbolic intergenerational unity of experience—as expressed in the words, “In every generation it is one’s duty to regard himself as though he personally had gone out of Egypt”²²

While Jews work to connect to their ancestors on Passover, they simultaneously pay heightened attention to their duty to connect with future generations. Hence, the rituals of Passover place deep emphasis on children—on the obligation to teach children and, through them, to preserve the intergenerational continuity of the Jewish people. After the first communal song in *magid*, translated above, the youngest person at the *seder* asks the Four Questions.²³ The *seder* moves, then, between past and future to introduce the storytelling of the *seder*. All of the reenactment and discussion to come is posited as a response to the youngest generation’s search for knowledge. Unlike many Jewish services in which the leader must be an adult—one who has reached the age of *bar mitzvah*—Passover is led by the inquisitiveness of the child.

Shortly after the recitation of the Four Questions, the *haggadah* turns its attention to the Four Sons. I turn now to the same story—but this time, by considering the “Four Sons” of the American constitutional faith. Passover places the struggle for intergenerational continuity in stark relief; though it has no comparable holiday, America’s constitutional system likewise depends on a continuity of faith from a Founding generation to the current one, and forward into the future. In thinking of the American people through the lens of the Four

20. Other Jewish holidays likewise involve reenactment to maintain continuity with the Jewish forefathers. Take *sukkot*, in which modern Jews dine in huts for eight days to symbolize how their ancestors wandered in the desert in temporary dwellings.

21. The traditions of the *seder* also recreate aspects of the Passover story. Bitter herbs and salt water represent the suffering and tears of slaves. *Haroset*, a delicious brick-red mash of apples, nuts, cinnamon, and wine, symbolizes the bricks that Jewish slaves made for their Egyptian masters. At the same time as the *seder* symbolically reenacts slavery, it also recreates the experience of redemption. *Seder* participants recline on pillows to represent the luxury and comfort of freedom.

22. WALLACH, *supra* note 18, at 103. In this vein, the storytelling portion of the *seder—magid*—begins by connecting the rituals of the *seder* to the experiences of the past. Uncovering and raising the *matza*, all guests at the *seder* sing: “*This* is the bread of affliction that our fathers ate in the land of Egypt. Whoever is hungry—let him come and eat! Whoever is needy—let him come and celebrate Pesach! Now, we are here; next year may we be in the Land of Israel! Now, we are slaves; next year may we be free men!” *Id.* at 25 (emphasis added).

23. Interestingly, the existence of pre-written questions helps to alleviate the confusion of the son who does not know how to ask—tradition has created questions for him that he can simply recite.

Sons, I attempt to capture an image of how vastly diverse Americans identify with their faith across generations; and explore the challenges of speaking of that faith in a universal voice to a multidimensional community.

II. THE WISE SON

The wise son—what does he say? “What are the testimonies and statutes and ordinances [ha-eidot v’hachukim v’hamishpatim] which the Lord our God commanded you?” Therefore explain to him according to the customs of Passover. That after the final taste of the Paschal offering, one may not have dessert.

The wise son comes from a place of familiarity with Jewish tradition and fluidity in its language; we can assume that he already knows the broad principles behind Passover and how Passover fits into the larger Jewish tradition. He knows, in fact, that there are three different types of commandments (*mitzvot*)—*eidot*, *chukim*, and *mishpatim*. From that solid theoretical background, he speaks of technicalities—and his father responds in keeping. Instead of explaining the significance of redemption, the father notes when dessert may be eaten at the *seder*—an important piece of the ritualized holiday, but by no means the most significant part of the Passover festival as a whole.²⁴ Some would argue that son and father have missed the meaning and spirit of Passover in this preoccupation with minutia. Others—following the more traditional Jewish perspective—would argue that these details only matter to the wise son because he has an underlying faith in and fear of God: his concern with technicalities is evidence not that he misses the forest for the trees, but rather that he appreciates each tree as a part of a beautiful and awesome forest.

If we compare the Four Sons to archetypes within the American constitutional order, the wise son finds his clearest analog in the legal elite—judges, lawyers, and academics who keep faith with the Constitution through legalistic, technical methods. The legal elite perpetuate the relevance of the Constitution by arguing over its most minute details in law journals and by applying it, in every possible permutation, to real world scenarios in the courts. Major constitutional principles evolve over time through an intergenerational discussion of the *details*. How should Congress’s powers under the Fourteenth Amendment correspond to the Court’s? What level of scrutiny should judges apply to a particular instance of alleged discrimination? What are the contours of standing and federal jurisdiction?

Over the next pages, by considering the textual description and larger significance of the “wise son” in Jewish tradition, I will explore what this

24. Note that in the actual Bible passage from which this story was derived, the wise son’s question received a much more detailed response that spoke more directly to the redemptive Passover storyline. See *Deuteronomy* 6:20-24.

analogy—wise son as legal elite—can teach us about the role of the legal elite in the perpetuation of constitutional faith.

A. *The Keepers of Intergenerational Faith*

To understand the classic Jewish extolment of the wise son, it is helpful to have in mind a sketch of Jewish history—and to understand that rabbis kept their religion alive throughout generations of exile and persecution by studying the details of Jewish law. After the destruction of the Second Temple in 70 A.D. and the Jews' exile from the Land of Israel, the center of Jewish religious life shifted from sacrifice-based worship, led by priests in the Temple, to study- and prayer-based worship, led by rabbis at centers of learning in the Diaspora. Over generations of exile, rabbis slowly wrote and compiled the Talmud, or Oral Torah—a voluminous collection of commentaries on biblical text that attained equal significance to the Written Torah itself. Throughout the writing of the Talmud and long after its completion, rabbis and learned men maintained the relevance of Jewish law by continuing to ponder and interpret each sentence, each word, of their holy texts, and by passing their knowledge and their passion for Torah to their communities and to the generations that followed them. In this way, rabbinic Judaism must be understood as a decidedly intergenerational enterprise, sustained by the devoted practices of study, conversation, and dispute.²⁵

Likewise, immersed in the seemingly endless project of deciphering the Constitution's most intricate details, judges are a paradigmatic intergenerational community. When citing precedent, the Supreme Court states “we held”—even when the prior decision is 150 years old. Of course, this interconnectedness is partially due to the power vested in the judiciary as an institution. Supreme Court justices interpret with authority, not simply with faith. Under the right circumstances, their predecessors' statements and assertions are binding law in the present day—not simply the utterances of individuals long gone. But judges' connectedness to the past goes beyond mere compulsion. Certainly, as its frequent doctrinal about-faces demonstrate, the Supreme Court does not owe blind allegiance to past mandates, notwithstanding the doctrine of *stare decisis*. The relationship of current justices to their antecedents is more complex, more nuanced. Judges see themselves as part of a tradition—not merely as heirs to power, hoping to legitimize their inheritance. They appear to *converse* with generations before them about the details and technicalities of constitutional law. This dialogic aspect of the intergenerational community of judges is, perhaps, most evident in the way that judges pick up on important—but nonbinding—dissents from previous generations in order to locate themselves within a line of judicial continuity. Take, for instance, Justice Thomas's recent attempts to place

25. We should note, however, that Jewish tradition strongly emphasizes the education of all its (male) children, not only those who will become rabbis.

himself in the company of Justice Harlan's famous dissent in *Plessy v. Ferguson* (and, through Justice Harlan, in the company of the litigators of *Brown*):

But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." And my view was the rallying cry for the lawyers who litigated *Brown*. . . . ("Marshall had a 'Bible' to which he turned during his most depressed moments. The 'Bible' would be known in the legal community as the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson*. I do not know of any opinion which buoyed Marshall more in his pre-*Brown* days . . .").²⁶

Judges, then, are a self-consciously intergenerational community—bound by power but also by tradition and faith.²⁷ What is more, the work that judges do to transmit and preserve technical details across generations is essential to the continuity of the entire constitutional project. If judges (and lawyers and legal scholars) did not scrutinize the details of the Constitution, those details would cease to matter—and the Constitution would lose substantial power over time. Numerous scholars have pointed out an analogy between priests and judges, as keepers and ultimate arbiters of the constitutional faith.²⁸ The analogy works at least as well for rabbis, whose legalistic—yet faith-based—arguments over biblical text fill the pages of the Talmud and continue to reinforce the connections between modern Jews and the practices of generations past.

B. *The Problem of Formalism*

Ongoing arguments over details can thus breathe life into old texts. However, the way in which these details are discussed can fundamentally shape the character of the faith community. Here, the wise son's question indicates a particularly *formalist* approach to faith. While his "wicked" and "simple" brothers speak of *meaning*, the wise son asks only about what the law *is*, not what it should be.

Legal formalism is "[t]he theory that law is a set of rules and principles independent of other political and social institutions."²⁹ Legal formalists do not entangle themselves in a normative inquiry into the desirability of those rules; rather, if the rules were established through a legitimate process, the role of judges is to faithfully interpret—not question or rewrite—those laws. Under a formalist vision, "the realms of the ethical, the political, and of value in general

26. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772-73 (2007) (Thomas, J., concurring) (citations omitted).

27. Ronald Dworkin would understand them as co-authors of one enormous "chain novel." See RONALD DWORKIN, *LAW'S EMPIRE* 228-32 (1986).

28. See *infra* note 45.

29. *Legal formalism*, BLACK'S LAW DICTIONARY (10th ed. 2014).

are the threats to the law's integrity."³⁰ Law, in other words, should be autonomous from interpretation—because interpretation is malleable, too easily manipulated by individuals with authority to serve their own purposes. Formalism relies upon a baseline of faith in law, since it relinquishes the act of interpretation that might otherwise redeem it; and indeed, formalism is a common way of keeping faith with an old and venerated tradition that may frequently conflict with modernity.

The religious equivalent to the formalist is the fundamentalist.³¹ Fundamentalists espouse that humans should strictly adhere to God's word, without amending it through new (and mere mortal) conceptions of "morality"—a similar position to formalism, likewise grounded upon faith in the closed universe of existing law. Taking this approach, the wise son—alone of all the sons—affirms his belief in God's role as promulgator of the Jewish legal system: "What are the testimonies and statutes and ordinances *which the Lord our God commanded you?*" The wise son assumes the legitimacy of the rules; they were given by God. Within that coherent set of laws, the question of *meaning*, of normative inquiry, is unnecessary. Indeed, the wise son asks nothing of the justness, or even the significance, of the laws of Passover. It is a believer's role to decipher what the law is, and to follow that law. The justification for the law is, quite simply, that it comes from God.

We can gain a more nuanced portrait of traditional Jewish understanding of formalism by emphasizing the difference between *keva* and *kavana*. *Keva* is mechanical repetition—it is praying three times a day, following the letter of the laws of *kashrut*, and so forth. *Kavana* is spiritual enlightenment that sometimes breaks through these mechanics—the transcendence that only emerges through practice. The wise son is well versed in this distinction; we see him striving to master *keva* before he expects to find *kavana*. In a similar vein, there is a famous *midrash* (Rabbinic story) that God offered the Torah to the Jewish people only after offering it to all the other nations. Each nation noted amendments it wanted to make, or refused to agree to its terms. The Jewish people, however, consented freely with the words, "*Na'aseh v'nishmah*—We will do, and we will hear."³² This promise to fulfill the obligations before even *hearing* what they were, let alone understanding them fully or agreeing with them on a personal level, is a central tenet of Jewish faith—and similarly characterizes the faith of the wise son.

30. Stanley Fish, *The Law Wishes to Have a Formal Existence*, in CLOSURE OR CRITIQUE: NEW DIRECTIONS IN LEGAL THEORY 157, 159 (Alan Norrie ed., 1993).

31. The *Oxford English Dictionary* defines "fundamentalism" as "[a] religious movement . . . based on strict adherence to certain tenets (e.g. the literal inerrancy of Scripture) held to be fundamental to the Christian faith" and "[i]n other religions, esp. Islam, a similarly strict adherence to ancient or fundamental doctrines, with no concessions to modern developments in thought or customs." *Fundamentalism*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/75498> (last visited June 7, 2015).

32. *Deuteronomy* 5:27 (author's translation).

Of course, many Jewish scholars—like many constitutional scholars—object to a purely formalist reading of Jewish law.³³ As strong as the tradition of obedience to the letter of the law, Judaism contains an equally strong tradition of challenging the meaning of the laws and even God himself.³⁴ I will delve deeper into the critiques of formalism in both Judaism and constitutionalism in Part IV.B, *infra*, discussing the wicked son. For now, I will only stress that the wise son shows how faith and formalism easily go hand in hand; how a system of faith-based law can lead in the direction of fundamentalism. We have witnessed precisely that movement in constitutional law, with the Rehnquist Revolution and the rise in influence of Justice Scalia. Formalism may present concerns even for true believers, who may fear that misdirected attention to the letter of the law can take attention away from—or even pervert—its spirit or broader meaning. Formalism may be even more problematic in a *diverse* faith-based community—where not everyone believes, and where people are as likely to call constitutional faith “idolatry” as “religion.”

C. *The Detachment of the Elite*

I described above the faith-reinforcing role of the wise sons in both Judaism and American constitutionalism. But to what extent is their faith—particularly when expressed in such formalist terms—merely passed on within an *elite sub-community*, hopelessly detached from the People? Note how differently the father answers his wise son than the rest of his children. The other three children are reminded of the Exodus from Egypt—of the Jewish people’s freedom, writ large. In answering the wise son, however, the father discusses not freedom but technicalities. Has the wise son moved beyond his need to be reminded of the big picture, or has he forgotten it in his preoccupation with the details? If the latter is true, can the wise son effectively converse with the rest of his community, who approach their faith in markedly different terms?

Indeed, one may readily ask whether the wise son—like the wicked son—shows detachment from his community as he poses his question. The father sharply rebukes the wicked son for “excluding” himself from his community by asking, “What is this service *to you?*” Yet the wise son’s question similarly situates him as an outsider: “What are the testimonies and statutes and ordinances which the Lord our God commanded *you?*” Both children ask for information about a practice they have indicated is strange to them. Some

33. See, e.g., DAVID HARTMAN, A LIVING COVENANT: THE INNOVATIVE SPIRIT IN TRADITIONAL JUDAISM 1 (1985) (noting that “Judaism has been accused of ‘legalism,’ meaning a concern with externals and lack of inward passion. It has been identified with formalism and soulless regimentation” and the setting forth an alternative vision).

34. See *infra* Part IV.B.

haggadot, discomfited by the wise son's terminology, actually change the language of his question in order to reflect a more inclusive attitude.³⁵

However, two factors make the wise son's question less offensive to the father. First, the wise son does not fully exclude himself from the community as the wicked son does. He characterizes Jewish law as commanded by "our God," thus locating himself at a starting point of belief in God and, by extension, in the Jewish people as a community of faith.³⁶ Second, because his question is posed in intellectual terms, the wise son's resemblance of the wicked son goes unnoticed. The wicked son's question can be read as a challenge, as a rebuff to Judaism as a whole; the wise son's question emerges from a place of intellectual curiosity. But might this not, too, be a signal of detachment—of a legalistic mindset interfering with the wise son's emotional ties to his community?

In my reading of the wise son, then, his question simultaneously indicates faith and detachment. His fundamental faith is strong: he believes in God, in the Jewish project as a whole. Yet he maintains a curious distance from the community—a distance for which his father does not chastise him, so preoccupied is he with answering the technical question his son asks.

Again we see a similarity between the legal elite and the wise son. Just as the answer to the wise son's question is markedly different than the responses to the other three, there is a substantial disconnect between the legal elite and the People—both in terms of the questions that matter to them and the kinds of answers that speak to them. Lawyers may be concerned about the scope of the Commerce Clause; the People are simply concerned about the scope of freedom, unfiltered through any technical lens. Moreover, judges and academics—like the wise son—demonstrate simultaneous faith in and detachment from their community. Both judges and academics are independent—isolated from the political community, even as they are the guardians of constitutional faith. The project of law, many argue, affirmatively requires detachment. Gretchen Craft, for instance, argues that law should be distant so as to serve the human need for order over chaos.³⁷ Others disagree with her perspective—including scholars, such as Patricia Williams, who have tried to reintroduce narrative and emotion to legal scholarship and practice.³⁸ Whatever may be normatively desirable, however, few would disagree that

35. RABBINICAL ASSEMBLY, *supra* note 14, at 39 ("While the biblical verse reads *etkhem*, 'you,' this Haggadah follows the Jerusalem Talmud, and some texts of the *Mekhilta*, in its use of the word *otanu*, 'us.' This clarifies the difference between the wise child and the wicked child, for then the wise child explicitly includes himself in the community, while the wicked child conspicuously excludes himself.").

36. ISRAEL STEIN, *THE GEDOLEI YISROEL HAGGADAH* 44 (1995) ("*Keren Yeshuah* points out that the wise son's question contains a hidden declaration of faith in Hashem . . .").

37. Gretchen Craft, *The Persistence of Dread in Law and Literature*, 102 *YALE L.J.* 521 (1992).

38. See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991).

judges and scholars are, to a large degree, detached from the “common man” in America—which may be particularly ironic given judges’ proclivity to pronounce national values.

Given this disconnect, can judges effectively preserve a *faith* in the Constitution—not only within a small circle of elites bound tightly across generations, but also within an intergenerational, national community? At the very least, judges need to understand that the majority of Americans will be “simple sons”—that they will evaluate their Constitution by the straightforward question, “What is this?” To more effectively preserve a broader community of faith, judges should justify their actions by attempting to speak to the *whole community*, and not only to their fellow wise sons.

How does Jewish tradition counter the detachment of the elite? By celebrating and, more, *obligating* teaching—by emphasizing public reading of the Torah, participation, and learning. In other words, by trying to bring the People closer to the wise sons. In America, this may seem like an unlikely solution, given the problems of our public education system. But I am certainly not the first to maintain that education leads to a sense of citizenship, participation, and commitment.³⁹ Rabbi Auerbach—without, perhaps, adequately acknowledging the detachment of Judaism’s “wise sons” from their communities—contrasts the detachment of the legal elite with the participatory ethic of Judaism.⁴⁰ Preserving the Jewish focus on education has become a much more difficult struggle in modern times, as assimilation and secularism are on the rise. Today, the Jewish community faces the same struggle as the American community—how to retain the expertise of the “wise sons” without alienating the rest of the community, which experiences competing moral

39. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (Marshall, J. dissenting); see also STEVE FARKAS ET AL., NATIONAL CONSTITUTION CENTER, KNOWING IT BY HEART: AMERICANS CONSIDER THE CONSTITUTION AND ITS MEANING 39 (2002), available at http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/asset_upload_file173_2678.pdf.

40. JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION 45-46 (1990) (“The principle of communal responsibility is reinforced by the understanding that the Torah is not only law but instruction as well. It conveyed the obligation to teach its principles so that future generations, ‘who have not known anything,’ would learn. . . . The law was not only a written text, but a continuing source of communal instruction. To this day the reading of the Torah, at the core of every Sabbath and holy day observance, affirms a communal obligation to hear, to learn, and to do. Each generation of Jews can thereby return to the covenantal moment and reexperience it. The Constitution, by contrast, remains far more distant, even inaccessible. It speaks almost exclusively to governing institutions, rather than the community. It long ago became the virtually exclusive preserve of legal specialists, who continue to monopolize the debate over its meaning. Their interpretive mastery makes it much less accessible to ordinary citizens except during relatively rare moments of focused public debate over a controversial issue. A public reading of the Constitution can hardly be imagined . . .”).

imperatives aside from their religious beliefs, and insufficient time, resources, or interest to devote themselves to learning.⁴¹

III. THE SIMPLE SON

The simple son—what does he say? “What is this?” And you shall say to him: “By strength of hand the Lord brought us out of Egypt, from the house of bondage.”

The simple son’s question is—unsurprisingly—straightforward. He has neither the wise son’s complexity to understand details, nor the wicked son’s temerity to challenge meaning. However, commentators have frequently paired the simple son with the wise son: “[B]oth the wise son and the simple son ask questions, each at his level of understanding. Their questions reveal their desire to understand how [God] expects them to observe Pesach.”⁴²

The model answer to the simple son focuses on unity and on freedom. It is the only one of the four responses that uses the plural first person voice: “the Lord brought *us* out of Egypt”—*us* and not *me*. The father thus comforts the simple son by reinforcing his sense that he is part of a community. Knowing that this son will not grasp the technicalities that absorb the wise son, the father also speaks in broad terms about the *purpose* of the festival: it is to celebrate the redemption from slavery—to celebrate freedom.

Who is the simple son in American constitutionalism? The clearest answer is the American people, writ large. I should take care to note, however, that under this analogy “simple” does not mean stupid, but rather refers to those who possess less complex, less technical knowledge of the Constitution—those who do not know the nooks and crannies of our constitutional order. Despite this apparent simplicity, Americans do seem to have a firm and deeply ingrained sense of the importance of the Constitution and the significance of its basic precepts—such as liberty, free speech, and equality. According to a study conducted by the National Constitution Center,

Several previous research studies on the Constitution have made two things clear: Most Americans prize their Constitution and most often don’t even know the basic facts about it. . . . But what became abundantly clear in focus group after focus group is that Americans, as if by second nature, are actually quite comfortable with the values and principles embodied in the Constitution. Beneath a surface ignorance of what each Amendment says typically lies an internalized understanding of the rights and principles it guarantees.⁴³

In this sense, the average American certainly interacts with the Constitution *differently* than does the wise son, but that difference does not

41. See *infra* Part III.B for further discussion of the relationship between the People and the wise son.

42. STEIN, *supra* note 36, at 45.

43. FARKAS, *supra* note 39, at 14.

predicate a diminished faith. The American simple son, like his Jewish analog, shares the wise son's commitment to the constitutional project as a whole.

Also, just as the father responds to the simple son by using the inclusive first person plural, Americans as a whole do not seem to struggle either with their sense of belonging or with their allegiance to what they consider a fundamentally decent and free constitutional society. As the National Constitution Center's study noted, "Historians and constitutional scholars sometimes remind us of the limitations of the original document—especially its compromise on slavery—but according to typical Americans 'We the People' refers to all Americans, regardless of race, gender or creed."⁴⁴

The simple son, then, is a reminder of the baseline of faith in America: a non-technical, non-disruptive, but nonetheless genuinely-held and powerful faith in the overarching principles of the American Constitution.

A. *The Constitution as Symbol*

A key element of simple faith is symbolism. And indeed, the poetry of the verse of Torah used in response to the simple son is particularly captivating. Compare this verse—"By strength of hand the Lord brought us out of Egypt, from the house of bondage"—with the verse used to respond to the wicked son—"It is because of what the Lord did for me when I came out of Egypt." In responding to the simple son, the father is a more artful storyteller, using evocative language and imagery to reach the son. He sets up a world of symbols and meaning to express the broad import of freedom and of community. There is a national narrative here—something to capture the minds of non-legalistic (but also non-rebellious) people. In short, it's the kind of redemptive story you'd hear in civics class.

Like the simple son, the American people relate to their nation through symbols and through tropes of community (patriotism) and freedom (the land of liberty). Dramatically, after September 11, 2001, freedom and unity emerged as key themes preoccupying the American people. And Americans have long held special reverence for symbols of the nation. Supreme Court justices, as guardians of the Constitution, have frequently been cast in a symbolic, priest-like light⁴⁵—an aura that they somehow have retained despite frequent blows

44. *Id.* at 9.

45. See, e.g., LEVINSON, *supra* note 1, at 16-17 ("There is more than one theorist who views the Supreme Court as the authoritative 'church' built upon the 'rock' of the Constitution, and the Court's pronouncements therefore as 'the keys to the kingdom' of the heavenly status of a country ruled 'by law' instead of people.") (footnotes omitted); John B. Attanasio, *Everyman's Constitutional Law: A Theory of the Power of Judicial Review*, 72 GEO. L.J. 1665, 1701 (1984) ("[I]n the fashion of a secular church, the Court fulfills the fundamental need for moral certitude in American society."); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1312 (1937) ("[W]e transfer our sense of the definitive and timeless character of the Constitution to the judges who expound it. . . . The judges become, thus, not ordinary men, subject to ordinary passions, but 'discoverers' of final truth, priests in the service of a godhead.").

to their image of semi-divinity (or even basic legitimacy).⁴⁶ The flag, too, is an enduring symbol: Chief Justice Rehnquist, dissenting in *Texas v. Johnson*, wrote that

[t]he American flag . . . throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. . . . The flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an *almost mystical reverence* regardless of what sort of social, political, or philosophical beliefs they may have.⁴⁷

The Pledge of Allegiance encapsulates the prominence of symbolism, unity, and liberty in the American psyche. Repeated daily in schools across the country—in one of the few public pronouncements of faith akin to public readings of the Torah—the Pledge emphasizes *symbolism* (the flag), *unity* (“one nation . . . indivisible”), and *freedom* (“with liberty and justice for all”).

Overshadowing both flag and Court, the Constitution itself is the central symbol of the American people’s faith. Certainly, the simple son’s lack of *detailed knowledge* about the Constitution has not led to its decreasing *importance* in popular discourse. Rather, a primary function of symbols is to stand in for expertise, and the Constitution-as-symbol is strong as ever within popular American culture. It is a central article of American faith—appealing to emotion and values, not merely rationality—and it therefore takes up a primary place in people’s identities as Americans and as humans. Holding belief in the Constitution, Americans want it to fit into their broader world viewpoint, and more, want their viewpoints to fit into the Constitution. To understand the central symbolic role of the Constitution in popular discourse, we need only look to the culture wars of our time. Americans load their ethical commitments onto the text of the Constitution; despite the pushes in recent memory for a Federal Marriage Amendment or an Anti-Flag Burning Amendment, most Americans want to locate their moral imperatives *within* the Constitution, rather than to amend it. Everyone wants a piece of the sacred constitutional text; everyone wants to locate her side on “God’s side.”⁴⁸ Politics has become constitutionalized where deep matters of conscience or conviction are implicated. Indeed, throughout American history, the Constitution has emerged as a particularly potent symbol and rallying cry when culture clashes have been

46. The conflict between Court and President during the New Deal era posed perhaps the greatest threat to the Court’s legitimacy and, indeed, almost destroyed it. Max Lerner, writing in the height of that drama, provides a fascinating glimpse into a contemporary understanding of the danger to the Court’s symbolic place in the American constitutional order. See Lerner, *supra* note 45, at 1314-15. Yet for all Lerner’s predictions of decline, the Court has retained its symbolic significance (despite a simultaneous recognition of politicking on the bench) and even more, has steadily increased its power.

47. *Texas v. Johnson*, 491 U.S. 397, 429 (1989) (Rehnquist, C.J., dissenting) (emphasis added).

48. See Jack M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1704 (1997); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 *U. PA. L. REV.* 297, 322-26 (2001).

most divisive—and, perhaps, least reconcilable by a straightforward reading of preexisting text.⁴⁹

Given the People's scant knowledge of the *words* of the Constitution, compounded by their strong feeling of its *significance*, the Constitution can be an accordion-like instrument that may be stretched and compressed in order to cohere with the People's larger sensibilities. This flexibility is particularly alluring for ordinary citizens because they are not trying to accomplish the Herculean task of fitting one line of doctrine, or one line of text, into a doctrinal whole. For the simple son, details fade into the background, while substantive imperatives and the utility the Constitution as a political tool sharpen into focus.

When faith is thus built around symbols that evoke fidelity to broad principles but clarify few concrete details, it is unsurprising that much of the Constitutional text, itself, will often be lost or misinterpreted. The simple son of American constitutionalism has faith in the Constitution as a whole without a complete understanding of what the Constitution actually says. This combination of deep faith and relatively unschooled knowledge allows people to make claims about the Constitution that have important political consequences, without being fully bound by precedent or text. Ordinary Americans often fill in these gaps in knowledge of text through their own understanding of their nation and its values, or through their own sense of right and wrong, rather than through a detailed historical inquiry. They follow the emotional trajectory of symbols, rather than the logic of text. This can lead to broad—and sometimes inaccurate—expectations of what the Constitution means. For instance, a FindLaw.com survey found that

many Americans identified certain rights as being explicitly granted by the Constitution and its amendments when, in fact, they are not. For example, 78 percent of Americans believe that the right to vote is guaranteed by the Constitution Sixty-eight percent of Americans believe the pursuit of happiness is a constitutionally protected right Similarly, 28 percent of Americans believe there is a right to public education in the Constitution, while 12 percent believe there is a constitutional right to housing and a right to health care.⁵⁰

I should note, however, that while the simple son has misconceptions about text; these misconceptions are not necessarily arbitrary. The People have

49. Max Lerner describes pre-Civil War constitutional fidelity in these terms: "But in the thickest of the battle, the Constitution itself went unquestioned. In fact, the more hotly the diverse interpretations of it were contested, the more unwaveringly did both sides pay homage to it." This steadfast constitutional devotion represented an "attempt to solve national problems through constitutional symbols; and the attempt was a failure." Lerner, *supra* note 45, at 1301. In other words, the band-aid fix of unifying faith in the Constitution ultimately could not cover the deep divisions over *how* this Constitution was being interpreted; and Civil War ensued.

50. Press Release, FindLaw.com, Are Americans Right About Their Constitutional Rights? (Sept. 18, 2006), *available at* <http://company.findlaw.com/pr/2006/091806.constitution.html>.

the most intimate understanding of what America actually means—and of what the Constitution’s promise *should* mean. Those rights that are deeply rooted in the nation’s history—such as public education and the ballot—may not be enshrined in the text of the Constitution, but they are fundamental parts of the American culture of democracy; it is not surprising that ordinary Americans would understand them to be constitutionally protected. Indeed, with time, many of the rights that Americans *assume* they already have do, in fact, become constitutionalized. I turn now to introduce this process of popular influence on authoritative constitutional doctrine.

B. *The People’s Constitution*

As mentioned above, we can understand the simple son and the wise son as allied in the project of constitutional faith. Both sons ponder, essentially, the same question: what is the law? Both have a relatively unquestioning belief in the validity of the constitutional project and the relevance of law to their own lives. While their *underlying faith* is thus similar, the *outward expression* of that faith is quite different. The faith of the legal elite is mediated through the rhetoric of text and rationality, while the simple son understands overarching principles. The simple son asks, “*What is this?*”—he thinks of the constitutional project holistically, without considering textual details that might obscure substantive meaning.

The difference between the preoccupations of wise and simple son is, perhaps, most dramatically displayed in the abortion context. The abortion controversy has produced tremendous popular mobilization around the Constitution by actors on both sides of the debate who are not constitutional experts, as well as decisions of enormous legal consequence by the judiciary and prolific commentary by the legal academy. The academy is largely concerned with *technical* flaws in *Roe v. Wade* and its progeny that minimize judicial legitimacy, and mediate substantive concerns about the outcome of abortion cases through the language of methodological principle. Popular abortion movements have capitalized on some of these expert arguments—criticizing, for instance, judicial overreaching—but their focus remains directed toward the *substance* of the rights and wrongs of abortion. “Although law professors may care deeply about professional questions of judicial technique, citizens who have mobilized against *Roe* care chiefly about matters of substance.”⁵¹

51. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007); see also *id.* at 410-11 (“Although it is commonly asserted that *Roe* rage was a response to judicial overreaching, a number of historians have demonstrated that political mobilization against the liberalization of abortion began well before *Roe* and challenged all efforts, both legislative and adjudicative, to reform criminal abortion laws. Americans who entered politics to oppose *Roe* were concerned primarily about the substantive law of abortion, not about questions of judicial technique or even about the proper role of courts in a democracy.”).

The constitutional project depends on the expression of both types of faith—wise and simple, technical and substantive. While the authority to pronounce the law and the expertise to make complex textual claims about the Constitution rests firmly in the hands of the elite, the Constitution is also a *popular* document—a Covenant with the People—and its persisting significance requires both the fidelity and the substantive contributions of the People. As such, the simple son, despite his lack of sophistication, manages to influence and converse with the savvier wise son. Earlier, I asserted that the wise son stands in danger of being too detached from the common people.⁵² He speaks a technocratic language that his simple brother cannot fully access. But this gap is not a hermetic seal; neither son can fully ignore the other. And the simple son has tools to place pressure on the wise son's aloofness.

The evolution of constitutional law tracks a precarious balance between the wise son's textual exegeses and the simple son's sense of right and wrong. This balance is also evident in the abortion context, in which popular resistance to *Roe v. Wade* has undeniably impacted abortion doctrine,⁵³ even as the Court has clung to *stare decisis*, the most self-referential tool at its disposal.⁵⁴ For Robert Post and Reva Siegel, this back-and-forth between court and citizenry—between wise son and simple son—retains the democratic legitimacy of the constitutional project as a whole. They call this balance between the wise son's technocratic role and the simple son's popular role “democratic constitutionalism”:

Democratic constitutionalism affirms the role of representative government and mobilized citizens in enforcing the Constitution at the same time as it affirms the role of courts in using professional legal reason to interpret the Constitution. Unlike popular constitutionalism, democratic constitutionalism does not seek to take the Constitution away from courts. Democratic constitutionalism recognizes the essential role of judicially enforced constitutional rights in the American polity. Unlike a juricentric focus on courts, democratic constitutionalism appreciates the essential role that public engagement plays in guiding and legitimating the institutions and practices of judicial review. Constitutional judgments based on professional legal reason can acquire democratic legitimacy only if professional reason is rooted in popular values and ideals. Democratic constitutionalism observes that adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning.⁵⁵

In other words, the wise son *needs* the simple son's investment in the constitutional values in order to retain the relevance of his own technical work. The simple son, moreover, is the constant reminder to the wise son that pure formalism is insufficient. The father must be able to answer the simple son—

52. See *supra* Part II.C.

53. See *Gonzales v. Carhart*, 550 U.S. 124 (2007).

54. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

55. Post & Siegel, *supra* note 51, at 379.

the status of law cannot be so technical and so unreachable that it cannot be condensed and understood by the common man. Post and Siegel advocate increasing the points of connection between wise and simple son, to facilitate these productive interchanges and enhance the democratic legitimacy and viability of the Constitution.⁵⁶

Recent scholarship on popular constitutionalism has advocated a more extreme recalibration of the power dynamics between wise and simple son, highlighting the importance of public participation in defining the meaning of the Constitution, at the expense of judicial supremacy. Popular constitutionalists seek not only to make law more *legitimate*, but also to free law from the technical—and anachronistic—obsessions of the legal elite. In arguing against judicial supremacy, Jeremy Waldron notes his dissatisfaction with the wise son, who must sacrifice attention to substance so as to preserve his ability to speak authoritatively about text:

[C]ourts will tend to be distracted in their arguments about rights by side arguments about how a text like the Bill of Rights is best approached by judges. American experience bears this out: The proportion of argument about theories of interpretation to direct argument about the moral issues is skewed in most judicial opinions in a way that no one who thinks the issues themselves are important can possibly regard as satisfactory. This is partly because the legitimacy of judicial review is itself so problematic. Because judges (like the rest of us) are concerned about the legitimacy of a process that permits them to decide these issues, they cling to their authorizing texts and debate their interpretation rather than venturing out to discuss moral reasons directly.⁵⁷

Likewise, Larry Kramer advocates that the People should reclaim their rightful ownership over the Constitution. As he sees it, the legal elites have succeeded in usurping the Constitution, at least in part because they have clothed the Constitution in technicalities that make it appear inaccessible to the common man.

[T]o control the Supreme Court, we must first lay claim to the Constitution ourselves. That means . . . refusing to be deflected by arguments that constitutional law is too complex or difficult for ordinary citizens. Constitutional law is indeed complex, for legitimating judicial authority has offered an excuse to emphasize technical requirements of precedent and legal argument that necessarily complicated matters. But this complexity was created by the Court for the Court and is itself a product of judicializing constitutional law. In reclaiming the Constitution, we reclaim the Constitution's legacy as, in Franklin D. Roosevelt [sic] words, "a layman's

56. *Id.* at 380-81 ("More persistent and nuanced forms of exchange are required to maintain the authority of those who enforce constitutional law in situations of aggravated dispute. Democratic constitutionalism examines the many practices that facilitate an ongoing and continuous communication between courts and the public. These practices must be robust enough to prevent constitutional alienation and to maintain solidarity in a normatively heterogeneous community.").

57. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1381 (2006).

instrument of government” and not “a lawyer’s contract.” Above all, it means insisting that the Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse. The Supreme Court is not the highest authority in the land on constitutional law. We are.⁵⁸

Of course, other scholars staunchly oppose this revival of popular constitutionalism. For instance, L. A. Powe, Jr., offers a strong critique of Kramer’s vision.⁵⁹ Detailing a history of popular constitutional mobilization in the Twentieth Century—including resistance to the Court’s decisions on segregation, school prayer, busing, and abortion—Powe challenges Kramer’s conclusion that popular constitutionalism is currently being undermined. Moreover, given the character of the instances of popular constitutionalism he identifies, Powe questions the desirability of popular resistance to Supreme Court. “It may be, contrary to Kramer’s position, both that we still have popular constitutionalism and that we would be better off without it.”⁶⁰

Scholars may argue interminably about the ideal power dynamic between expertise and democracy, between judicial supremacy and popular constitutionalism, between wise son and simple son. Indeed, this is a debate that has been ongoing in constitutional law since *Marbury v. Madison*.⁶¹ For now, I simply note that the average American, unversed in constitutional law, but invested in the constitutional project, offers a measure of counterbalance to the professional legal elite; and that sometimes, whether through mobilized political pressure, Senate confirmation hearings, or the power of norm evolution over time, the simple son succeeds in undermining the exclusive authority of the Court or, even more, swaying the elite toward his principled conception of law.

IV. THE WICKED SON

The wicked one—what does he say? “What is this service to you?”—“to you, not to him! Because he has excluded himself from the group, he has repudiated the foundation. Therefore set his teeth on edge and say to him: “It is because of what the Lord did for me when I came out of Egypt”—for me, and not for him. If he had been there he would not have been redeemed.

If the simple son is the foil to the wise son’s punctiliousness, the wicked son is the foil to the wise son’s placidity. While the wise son speaks in technicalities, the wicked son is traditionally understood to speak in offensive

58. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 247-48 (2004).

59. L. A. Powe, Jr., *Are “the People” Missing in Action (and Should Anyone Care)?*, 83 *TEX. L. REV.* 855 (2005) (reviewing KRAMER, *supra* note 58).

60. *Id.* at 857.

61. 5 U.S. (1 Cranch) 137 (1803).

and dismissive generalities. He rebelliously challenges his father to justify his belief, rather than seeking to understand the practices of his tradition. And, as the text emphasizes, the wicked son's greatest sin is to exclude himself from his community. The father responds to his son's detachment not by encouraging him to come back toward the community he has rejected, but by "set[ting] his teeth on edge"—by cementing his son's exclusion through fear and anger, by retroactively barring him from redemption. In modern times, some have found the father's attitude toward his "wicked" child to be rather unjust, and have suggested new ways of understanding this son. After all, the words that are construed as a rejection of his community are little different than those spoken by the wise son—why is it that *this son* is rebuked so sharply? And, perhaps more importantly, his question may be less a rebellion than a search for *meaning*; he is delving beneath his religion's surface practices and easy answers; he is struggling with his faith and seeking to understand how others in his community sustain theirs. Certainly, some commentators have interpreted the wicked son's "question" as a confrontation, not a true inquiry.⁶² But in a modern, secularizing world, efforts to seek or simply to challenge meaning seem entirely natural and even laudable.

The archetypal wicked son provides insight into two different problems faced by our constitutional faith community: exclusion and disbelief. America is a diverse nation, encompassing people with divergent viewpoints on and experiences of the Constitution. If the American legal system rests on an underpinning of faith, how does the nonbeliever fit into the scheme? The more the nation's constitutive commitments rest on faith, the more alienating the polity becomes for those who don't believe. Even more problematically, what happens to those who have been subjugated by the very system we revere? Need they profess faith that may be undeserved, or risk being self-ostracized even as they have been excluded in the past? Once offered a modicum of equality, must the downtrodden erase the memory of their own humiliation and assimilate to the majority in order to one day become a part of the polity?

I thus identify and explore two distinct—though related—American "wicked sons": first, those who have been *excluded* from the promise of the American constitutional order, and second, those who, whether due to their own exclusion or due to a sense of the system's larger injustice, reject its worth and legitimacy. "Wicked sons" may react to these experiences of exclusion and injustice in a range of ways, but I identify two significant and predictable responses. The first is to recognize a core, *redeemable* set of values within the constitutional order that makes the project of constitutional reform a worthwhile one—that sees injustice as an *aberration from* core constitutional

62. STEIN, *supra* note 36, at 45 ("The wicked son . . . has no desire to ask or to understand. On the contrary, his whole purpose is to contradict and criticize, and he phrases his 'question' in the form of a confrontation. . . . When it comes to the wicked son . . . the Torah does not say that he *asks* you but rather that he *tells* you, as it says, 'It shall be when your sons say to you, 'What is this service to you?''").

principles rather than a *product of* those principles. The second is to see the constitutional order as so corrupted and tainted that the Constitution is no longer a project worth fighting for and the American polity a community not worth belonging to.

C. *The Problem of Exclusion*

The story of Passover is one of communal exodus from slavery to freedom. Modern Jews trying to identify with this story of redemption face a temporal gap: they must connect with long-ago ancestors who were freed from bondage and supposedly covenanted with God to obey the Torah. In response, legend has served to incorporate future generations into the founding act of consent. According to a well-known *midrash*:

All Jews, those living at the time and those as yet unborn, are assumed to have stood at Sinai to receive the Torah. The giving of the law not only created the nation at a particular moment in time, but bound Jews in perpetuity to that covenantal experience. That conception of command and compliance, embracing all future generations, helps to explain how law could continue to define Jewish life within a communal setting long after the foundations of national sovereignty had been destroyed.⁶³

Bending the limits of time and space, this *midrash* of intergenerational unity at Mount Sinai serves to make all Jews witnesses; to bind all generations not only by obligation but also by consent.

While Jews thus face, and have attempted to overcome, a generation gap, the problem of *intra*-generational disconnect is far less salient than in the history of the American Constitution. This is not to say that there are no tropes of exclusion within the Jewish faith. Women have different obligations (and, consequently, different options) than do men in orthodox Judaism. Indeed, the very story of the Four Sons is gendered and excludes the experience of women and girls.⁶⁴ Jewish feminists have responded to such exclusion by, for instance, adding traditions to the *seder*—such as emphasizing Miriam’s role in the Exodus and placing an orange on the *seder* plate⁶⁵—to remind *seder* participants of voices too often silenced within the Jewish community. However, there is no *intra*-generational exclusion polluting the story of the Founding itself. When the Children of Israel (including unborn generations) are said to have “consented” to God’s offer of the Torah, they are said to have spoken as one to accept the obligations of God’s law. There were no dissenting voices, nor people who were excluded from participation but nonetheless bound by the Covenant. The Jews are an insular people; as such, they are

63. AUERBACH, *supra* note 40, at 45.

64. It is worth considering how the pedagogical tale might be different if it centered around a mother speaking to her daughters.

65. The orange is “a symbol of inclusion of gays and lesbians and others who are marginalized within the Jewish community.” Tamara Cohen, *Orange on the Seder Plate*, RITUALWELL, <http://www.ritualwell.org/ritual/orange-seder-plate> (last visited June 9, 2015).

spared many of the problems of inclusion and exclusion faced by a multicultural community. The divisions that plague the Jewish community today—between Hasidic and reform, secular and religious, Israeli and American—do not derive from a fractured beginning, but rather from a fragmented trajectory.

Thus in the Jewish tradition, what makes the wicked son so “wicked” is that his isolation from the community is self-imposed. He is seated at the *seder* table; he is—at least formally—part of the community. By virtue of his ancestry, he *would have been redeemed* if he had been in Egypt; only his self-exile would have jeopardized his redemption.

By contrast, in the American context, minorities excluded from the original “We the People” do not need reminding that they would not have been redeemed at the Founding. Like modern Jews, all modern Americans face a temporal gap from the Founders; and, as in Judaism, an explanatory legend tries to overcome the intergenerational disconnect to preserve the viability of covenant. In the American constitutional tradition, the phrase “We the People” has itself reached mythological stature: its universal terms would seduce us into believing that *we all consented*—past, present, and future.

Yet for many, this idealized account rings false. It is a commonplace within legal scholarship that, in reality, the universally-phrased “We the People” was but a small minority of the American people of 1787—white, landowning men. The American people as a whole did not ratify or even consent to the Constitution; and the consequences for America’s outsiders have been severe. Slavery found explicit protection in the Constitution, continued for nearly one hundred years after its ratification, and was abolished only after a bloody civil war. Even after the passage of the Reconstruction Amendments, Jim Crow flourished in the South, and black southerners were subjected to a legal system of racial disenfranchisement, segregation, and discrimination. It took the struggles of the Civil Rights Movement for formal equality to take hold, and even after that point, racial inequities remain prevalent in our society. Today’s war on drugs has led to the physical exclusion from the polity of massive and disproportionate numbers of black men through incarceration, and their subsequent political exclusion through felon disenfranchisement laws. The racial disparities in modern mass incarceration have led some scholars and advocates to decry the rise of the “New Jim Crow.”⁶⁶

Nor have America’s outsiders been limited to African Americans. Women had no right to vote until the Nineteenth Amendment in 1920.⁶⁷ Chinese immigrants were banned entirely from 1882 to 1943.⁶⁸ Homosexuals could be

66. *E.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

67. U.S. CONST. amend. XIX.

68. Chinese Exclusion Act of 1882, Pub. L. No. 47-71, ch. 126, 22 Stat. 58, *repealed* by Magnuson Act, Pub. L. No. 78-199, ch. 344, § 1, 57 Stat. 600 (1943).

criminalized for consensual sex until 2003.⁶⁹ And the list goes on. According to the father, the wicked son retroactively excludes himself from his people's redemption; but many Americans would need a revisionist history in order to understand themselves as *included* at the nation's birth.

Angela Harris writes powerfully about the fiction of a unified We the People. She critiques James Boyd White's description of the "unified and universal" voice of We the People, which is able to speak

for an entire and united nation and to do so directly and personally, not in the third person or by merely delegated authority. . . . The instrument . . . appears to issue from a single imaginary author, consisting of all the people of the United States, including the reader, merged into a single identity in this act of self-constitution.⁷⁰

Harris responds to this characterization by pointing out the voices silenced by this show of unity:

Despite its claims . . . this voice does not speak for everyone, but for a political faction trying to constitute itself as a unit of many disparate voices; its power lasts only as long as the contradictory voices remain silenced. In a sense, the "I of Funes, who knows only particulars, and the "we" of "We the People," who know only generalities, are the same. Both voices are monologues; both depend on the silence of others. The difference is only that the first voice knows of no others, while the second has silenced them.⁷¹

Moreover, for black women and other minorities within minorities, experiences of marginalization in the culture at large have—perhaps even more painfully—been echoed by further marginalization within the very reform movements crying out against the first injustice:

In feminist legal theory . . . 'We the People' seems in danger of being replaced by "We the Women." And in feminist legal theory, as in the dominant culture, it is mostly white, straight, and socioeconomically privileged people who claim to speak for all of us. Not surprisingly, the story they tell about "women," despite its claim to universality, seems to black women to be peculiar to women who are white, straight, and socioeconomically privileged . . .⁷²

In this context of essentialism and exclusion, the choice before many black women is not whether to *exclude themselves* from the community of faith—as the wicked son purportedly does—but rather whether to *reject pieces of themselves* in order to somehow fit into dominant narratives of the larger "community." Harris writes, "[A]s long as feminists, like theorists in the dominant culture, continue to search for gender and racial essences, black women will never be anything more than a crossroads between two kinds of

69. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

70. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 582 (1990) (quoting JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 240 (1984)).

71. *Id.* at 582-83.

72. *Id.* at 588.

domination, or at the bottom of a hierarchy of oppressions; we will always be required to choose pieces of ourselves to present as wholeness.”⁷³

Given this marginalization, two points are particularly striking. First—that in fact, many Americans who were excluded from the original We the People do not join in the wicked son’s taunts but rather look to the Constitution with reverence and with hope. Unlike the wicked son—a full member of his community who excluded himself—numerous Americans who *were not redeemed* at the Founding have worked retroactively to *incorporate* their own meanings and experiences onto the Constitution, rather than reject the document that first rejected them. According to a study conducted in 2002, “[T]he overwhelming majority of African Americans (77%) has faith in the Constitution and believes its main purpose is to protect and serve all people—in spite of its imperfect beginnings.”⁷⁴ Even black radicals and harbingers of social change have frequently—and, perhaps, “astonishing[ly]”⁷⁵—placed their faith in the Constitution though America (and its laws) shunned them:

Having been treated as outsiders all along, blacks confront the Constitution with an unavoidable option of accepting or rejecting it. Surprisingly, many prominent black thinkers—even the most radical ones—not only have failed to reject the Constitution but have made it a highlight of their advocacy. Black activists from Martin Luther King, Jr. to the Black Panthers have framed their demands in terms of constitutional rights. While King peacefully insisted that segregation violated the Constitution, Huey Newton claimed his constitutional right to bear arms.⁷⁶

Within this persisting faith, however, lies a challenge, not a blind adherence to the status quo. The faith of the descendants of slaves is a demand that America live up to the ideals of the Constitution, not a celebration of its historical application. Dorothy Roberts writes:

Blacks . . . are not faithful to the Constitution because the Constitution deserves their allegiance, for it deserves their cynicism, if not their contempt. They are faithful to the Constitution because black people deserve to be included in the Constitution’s protections and promises. Blacks’ fidelity to the Constitution is not a duty, it is a demand—a demand to be counted as full members of the political community.⁷⁷

Thus the question posed by the excluded minority is not so different, after all, from that of the “wicked son.” *If there are universal principles that animate your belief, what does this unjust reality mean to you?* The American wicked son subverts the current state of affairs, but does not reject his faith—the father misinterprets him and, threatened by his challenges, seeks to cast his son out from the tradition itself. But this rejection is a mistake, a symptom of fear of

73. *Id.* at 589.

74. FARKAS, *supra* note 39, at 11.

75. Dorothy E. Roberts, *The Meaning of Blacks’ Fidelity to the Constitution*, 65 *FORDHAM L. REV.* 1761, 1761 (1997).

76. *Id.*

77. *Id.* at 1762.

counter-narratives, of blindness to the fact that complexity and self-criticism ultimately make the community stronger, and not weaker.

The Constitution has been used in this way, as an article of faith in the possible, throughout its history.⁷⁸ Famously (and aspirationally), Frederick Douglass argued that slavery violated the Constitution, at a time when the document's compromises clearly protected it.⁷⁹ Other social movements, including the women's suffrage movement, have sought to bring excluded groups into the community through constitutional rhetoric.⁸⁰ These constitutional reformers, in some sense "wicked sons," have in truth *retained* their faith but contested the constitutional status quo and, through that contestation, invigorated the Constitution's relevance and vitality.⁸¹

The second point worth emphasizing in this context of exclusion is the striking and rapid manner in which histories of subjugation of minority groups are forgotten by the dominant majority. When those who have been oppressed neither erase their own memory of oppression by assimilating to the majority, nor use the language of faith in the Constitution to push forward their agendas for social change, they are treated as *self-segregating* by the wider population. These individuals—those who take experiences of racial injustice and reformulate them as black community pride, who take words of hatred and reclaim them as names they give themselves—are viewed as the "wicked son."

78. Balkin, *supra* note 48, at 1704 ("[W]e will tend to see the Constitution as standing for whatever we believe is just, whether it does or not, and whether it ever will be so. In this way the 'true' Constitution can be separated from any evils of the existing political system. This is a matter of conforming the Constitution to our ideas of justice, and so we might call it interpretive conformation.") (emphasis added).

79. LEVINSON, *supra* note 1, at 31 ("One of the most remarkable evocations of a textual Constitution is that of Frederick Douglass, the former slave who became a leading abolitionist. Douglass freely conceded that many of the framers supported slavery and, indeed, probably intended to 'secure certain advantages in [the Constitution] for slavery.' . . . Yet he 'den[ie]d' that the Constitution guarantees the right to hold property in man' and proposed to his audience an approach to the Constitution that would vindicate his otherwise startling assertion.").

80. Reva Siegel writes extensively about how social movements change our understanding of the Constitution through public pronouncements about and contestations over its meaning. She writes,

As groups make claims that the Constitution, as foundational law, speaks to various controversies, they elaborate the Constitution's meaning with respect to different institutions and practices and so continually refresh the text's normative ambit. Thus, the abolitionist movement tied the Guarantee Clause to slavery, while the women's movement tied it to voting. The Thirteenth Amendment's prohibition on slavery has been the focal point of protests about work, segregation, and marriage. Over the life of the republic, groups have sought constitutional amendments that would nationalize family law in order to restrict divorce, outlaw child labor, or prohibit same-sex marriages. The groups that organized for and against the woman's suffrage and equal rights amendments also struggled over the ideal forms of family life Through such understandings and practices, all manner of social conflicts are channeled into struggles over the Constitution's meaning, and the Constitution comes to serve as a discursive medium through which individuals and groups engage in disputes about the ideal forms of collective life.

Siegel, *supra* note 48, at 324-26.

81. See BALKIN, *supra* note 7, at 75.

In this fashion, Malcolm X is the paradigmatic “wicked son,” for he responded to endemic white racism not by turning the other cheek, but by asserting that “We’re not Americans, we’re Africans who happen to be in America. We were kidnapped and brought here against our will from Africa. We didn’t land on Plymouth Rock—that rock landed on us.”⁸²

Years before the “Birther Movement” questioned the very heart of the first black president’s American-ness, Barack Obama was embroiled in a controversy over his association with another “wicked son”—Obama’s former pastor, the Reverend Jeremiah Wright. Rev. Wright’s statements present a prime example of a “wicked son” who, once excluded from the majority community, embraced that segregation with zeal—to the condemnation of the community that excluded him in the first place. Perhaps the most vitriolic statement publicized from among Rev. Wright’s sermons is the following: “‘God bless America.’ No, no, no, God damn America, that’s in the Bible for killing innocent people . . . God damn America for treating our citizens as less than human. God damn America for as long as she acts like she is God and she is supreme.”⁸³ America—like the father of the Four Sons—responds to this bitter denunciation by condemning and rejecting Rev. Wright all over again—and, moreover, by threatening to reject President Obama, as well, for his connection to this wicked son.

In an interview on Fox News’s *Hannity & Colmes*, the conservative Sean Hannity impliedly accused Rev. Wright of being racist, un-American, and separatist for asserting a black-centered theology. At one point in the colloquy, Hannity recited the missions of Rev. Wright’s Trinity United Church of Christ, as delineated on its website:

[HANNITY:] Commitment to the black community, commitment to the black family, adherence to the black work ethic . . . strengthening and supporting black institutions, pledging allegiance to all black leadership who have embraced the black value system, personal commitment to the embracement of the black value system. Now, Reverend, if every time we said black, if there was a church and those words were white, wouldn’t we call that church racist?

WRIGHT: No, we would call it Christianity. We’ve been saying that since there was a white Christianity; we’ve been saying that ever since white Christians took part in the slave trade; we’ve been saying that ever since they had churches in slave castles. We don’t have to say the word “white.” We just have to live in white America, the United States of white America.⁸⁴

Hannity accused Rev. Wright of self-segregation and—by insinuation—of black supremacy; Rev. Wright responded by recounting a history of white

82. PETER GOLDMAN, *THE DEATH AND LIFE OF MALCOLM X* 157 (1979) (quoting Malcolm X, speaking in Harlem).

83. Abdon M. Pallasch, *Obama Denounces Rhetoric but Stands Behind His Pastor*, CHI. SUN-TIMES (Mar. 16, 2008), <http://www.suntimes.com/news/politics/obama/844447,CST-NWS-wright15.article>.

84. Interview by Sean Hannity, Fox News, with Rev. Jeremiah Wright (Mar. 1, 2007), available at <http://www.foxnews.com/story/0,2933,256078,00.html>.

oppression. In Hannity's challenge, we see the majority's tendency to classify as "wicked"—or racist, or extremist—those who, through centuries of alienation, have come to identify more with their sub-community than with the national community. Rev. Wright, in turn, located this "self-exclusion" in a historical context, reminding Hannity that they do *not* share a common foundation, and why.

Malcolm X and Rev. Jeremiah Wright—in their apparent rejection of the dream of an integrated national community—are sharper analogs to the wicked son than figures such as Frederick Douglass and Susan B. Anthony, who subverted the dominant American discourse through aspirational visions of the Constitution and challenges to its meaning as perpetuated by the status quo. But the metaphor of the wicked son brings out important aspects of each. A narrative of faith and obedience will almost always suppress narratives of exclusion and injustice. A constitutional utopia of common belief and common roots can always be countered by those brave enough, or marginalized enough, to disrupt hegemony—by those seen as wicked for subverting a pleasing image of faith and unity.

D. *The Problem of Doubt*

One need not be enslaved or marginalized, however, to lose faith in a system. One need not even lose faith entirely to question the precepts of one's organizing institutions. As much as the parable of the wicked son speaks to exclusion, it also speaks to the ubiquity—and the problems—of questioning and challenging one's faith.

In the Jewish context, the bitterness of the father's response to the wicked son is somewhat surprising. Despite the tropes of obedience to law within Judaism, discussed *supra* in Part III.B with respect to the wise son, Jewish tradition also celebrates human capacity for reason, for struggle, and for argument with God himself. Abraham and Jacob both fought mightily with God: Abraham, in challenging God's decision to destroy the city of Sodom,⁸⁵ and Jacob, in wrestling with God's messenger (he was thereafter named Israel, or *Yisrael*, which literally means "fights with God").⁸⁶ Moreover, according to tradition, God gave the Jewish people the Torah to argue over and interpret—a human, not divine enterprise. These stories show a strong competing strain within Judaism to consider the justice of particular laws and commands, not merely to follow formalistic continuations of the status quo.

There is, nonetheless, a certain subversiveness to an inquiry into substance rather than form. "You're telling me to do all these things — but what do these rituals *mean to you?*" In this sense, the wise and wicked sons are two necessary pieces of the sustenance of constitutional faith. We have to ask both *what the rules are* and *why we bother with them*. The wicked son provides the

85. *Genesis* 18.

86. *Genesis* 32.

counterpart to the wise son's formalism. If we believe that the rules are just, this question shouldn't bother us. But if we have doubts about the justness of the rules, then that question can throw the whole project into jeopardy. The answer we get, when we look hard at ourselves, is not always a kind answer, or the answer we'd like. It can set our teeth on edge.

In this vein, another way of understanding the wise and wicked son is that the wise son is a strict constructionist or formalist; the wicked son is a living constitutionalist or, at least, a proponent of original meaning as explained by Professor Jack Balkin.⁸⁷ The former seeks literal meaning; the latter searches for overarching meaning. The wicked son asks *how a modern person can understand the rituals*. The father reminds the wicked son that such inquiries may make us stray from our forefathers. But the father, again, misunderstands the wicked son, who is trying to retain the relevance of an event long past in a modern world. He is taking up the faith that past generations had in future generations by leaving room for interpretation.

The living constitutionalist continues to search for meaning but does not fully lose faith. He simply places his faith in a different location—not in the text (as strictly or fundamentally interpreted), but in the possibility that its meaning can be redeemed. In this sense, perhaps the wicked son does stumble: if this process of redemption is to be realized, a living constitutionalist must place great faith in his community (or its future generations) to be the document's redeemers. The wicked son, by distancing himself from his community, veers away from the project of the living covenant and becomes nothing more than an outside critic, detached from the process of redemption that a quest for meaning should, aspirationally, produce.

Seen in this light, the wicked son is a cynic; he has left behind both faith in text and faith in the *promise* of text. The father's response to this disbelief is to ostracize his son, as described above. Framed differently, the father responds by mustering all the coercion at his disposal—which, admittedly, is not much. He can only assert what *would have happened in the past* if his son had had this type of attitude. But the father nonetheless “sets his [son's] teeth on edge”—he manipulates his son's fear of violence, fear of slavery, to try to keep him in line and force him to return to the community of faith.⁸⁸

And thus arises the problem of violence in a system built on faith—a problem even weightier in a system of laws. In a religious community, in the absence of faith one finds detachment. A Jew who cannot recognize herself in her community merely drifts away from that community and replaces it with other communities and practices that hold more meaning for her.⁸⁹ In religion,

87. See, e.g., BALKIN, *supra* note 7, at 3-20.

88. Some interpretations of this text suggest physical violence as well as symbolic violence. See RABBINICAL ASSEMBLY, *supra* note 14, at 39 (“The literal meaning of *hak-heh et shinav* is ‘set his teeth on edge’ (by a physical blow). But it might be more effective to meet his contemptuous challenge with a trenchant retort.”).

89. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

belief is a predicate to fear. After all, God's wrath is an empty threat if one believes that God does not exist; though of course, as in any close-knit groups, there may be other coercive pressures exercised by the community itself to enforce adherence even if belief in the ultimate project has dissipated.⁹⁰

In the American constitutional system, however, fear must exist regardless of belief in the justness of the system.⁹¹ We must remember that *law is a violent enterprise*⁹²—and that the violence of the state operates as harshly, if not more harshly, upon nonbelievers as it does upon believers. While individuals can theoretically “drift away” from the American community by moving to another country, this is neither practical for many American nonbelievers nor a real solution—after all, by leaving the American system one cannot escape coercive political systems altogether. Thus, the wicked son's disbelief places strain on the conception of faith as a legitimate underpinning of a coercive legal system, and reminds us of the persistence of violence in maintaining outward unity when faith is insufficient.

In short, the wicked son is a reminder that systems of faith—even as they unify—can create institutional pressures that exclude, that suppress doubt, and that uphold a contested status quo. I argue that the father takes the wrong approach to his wicked son's challenges; but his response is not unusual in the analog of American authority figures. The wicked son is a warning sign—that we must consider seriously the problems of marginalization and disbelief in order to create a more inclusive and adaptive community of faith.

90. In fact, the reality of religious violence over time—from the Inquisition, to the Crusades, to today's radical Islamic jihadism—makes a stronger case for why this comparison of constitutionalism to *religion* is stronger than the comparison of law to literature. The law and literature movement often has been criticized for ignoring the disanalogy of law's violence to literature's aestheticism. See, e.g., Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601-02 & n.2 (1986); Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in THE FATE OF LAW (Austin Sarat & Thomas R. Kearns eds., 1991); Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, in LAW'S VIOLENCE (Austin Sarat & Thomas R. Kearns eds., 1992). However, religious *institutions*, if not religious faith, have been sullied by violence throughout time. Religion and law are both faith-based systems that are often imposed through a regime of violence or, at the least, an appeal to a higher authority who has the power to punish (in the afterlife, if not in the world of the living). Religion has an *authority* that literature lacks. See, e.g., Thomas Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

91. See Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIG. 65 (1987) (providing a description of the difference between obligation (in a nonviolent legal system) and rights (in a coercive legal system)).

92. See, e.g., Cover, *supra* note 90, at 1601 (“Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur Neither legal interpretation nor the violence it occasions may be properly understood apart from one another. This much is obvious, though the growing literature that argues for the centrality of interpretive practices in law blithely ignores it.”).

V. THE SON WHO DOES NOT KNOW HOW TO ASK

As for the son who does not know to ask — you begin for him. It is said, “You shall tell your son in that day, saying, ‘It is because of what the Lord did for me when I came out of Egypt’.”

In the Jewish tradition, there are at least two ways to understand the son who does not know how to ask. Most commonly, he is interpreted as a very young child who hasn’t learned to speak or to ask questions. He comes to the *seder* with wide eyes and an open mind. He will one day grow to become one of the other sons—but for now his future is undetermined. Alternatively, this son may be *so* disconnected or marginalized from his culture and tradition that he has lost even the language with which to ask questions—he is, in other words, an extreme of the wicked son.⁹³

The most important part of the father’s response to this son is the instruction: “You begin for him.” Whether the child is overwhelmed by a tradition that has become strange to him or merely young, it is the father’s responsibility to guide him toward belief—and to show tremendous patience in teaching him. “*Chasam Sofer* points out that the Haggadah uses a feminine form (*at*) in telling us to initiate the discussion of the Exodus with this son. This is to indicate that we are to give him gentle and lengthy explanations, as a mother speaks to her child.”⁹⁴

Surprisingly, the actual words that the father uses in his response here are the same as those used to address the wicked son—“It is because of what the Lord did for *me* when I came out of Egypt.”⁹⁵ Why doesn’t the father include the son in his response? The similar language may be offset by the different tone of the exchange, tempered as it is by the words, “You begin for him.” Perhaps, then, the response merely indicates patience, rather than exclusion; the father gives the son time to feel comfortable within the Jewish people before attributing experiences to him that he has not personally had. In this way, the father *models* his own faith for his son. He is saying, “*I* believe. One day you too will believe.” He simply provides an opening into the full tradition—“You begin for him.”

Within American constitutionalism, there are two analogs to the son who does not know how to ask: the first, and most straightforward, is America’s youth; the second is those individuals who are so marginalized that they neither make claims on the Constitution nor see it as relevant to their experience. These are, of course, two dramatically different sets of people, and they invite markedly different analyses. As with the Jewish tale, however, there is a

93. Some read the son who doesn’t know how to ask as an apathetic son. See Russell Jay Hendel, *The Educational Pedagogy of the Four Sons*, 22 SHOFAR: AN INTERDISCIPLINARY JOURNAL OF JEWISH STUDIES 94 (2004).

94. STEIN, *supra* note 36, at 46.

95. *Exodus* 13:8 (emphasis added).

unifying theme: the importance of extending an invitation to these sons who find themselves standing outside the boundaries of the constitutional project. In a diverse society, all responsibility cannot lie with the individual to seek out and assert meaning; a sustainable community of faith requires both outreach and education.

A. *The Educational Imperative*

Let's begin by considering the youngest members of the constitutional community. Within the consciously intergenerational framework of the four sons, the son who does not know how to ask most evocatively invites a meditation on the intergenerational conveyance of knowledge—of the socialization and education of the children who will become mature members of the constitutional community. In particular, the fourth son invites a focus on the quality—and equality—of our nation's public schools, and on their success at preparing children for the challenges of modern citizenship. How well we “begin for” the sons who do not know how to ask depends on our commitment to meaningfully educate all members of the community across race, class, and geography. Unfortunately, as frequently discussed in scholarly literature and popular discourse on education adequacy and equity, we have often fallen short on meeting this commitment.⁹⁶ “[S]chools are more segregated today than they were in 1954 and the rate of resegregation is rapidly increasing.”⁹⁷ The education gap between rich and poor is growing, as well.⁹⁸ One study “found that the rich-poor gap in test scores is about 40 percent larger now than it was 30 years ago.”⁹⁹ Disparities in educational opportunities have direct economic and social consequences for underserved children, but also bear a significant and detrimental impact on *citizenship*, including civic and political engagement.¹⁰⁰ A deficient educational system impoverishes the constitutional community as a whole.

Read in this context of inequality, the father's response to the fourth son—“It is because of what the Lord did for *me* when I came out of Egypt”—takes

96. See, e.g., Sarah Jane Forman, *Ghetto Education*, 40 WASH. U. J.L. & POL'Y 67 (2012); Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1 (2007); William S. Koski & Rob Reich, *When “Adequate” Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 547 (2006); Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467 (2007).

97. Garda, *supra* note 96, at 50.

98. Sabrina Tavernise, *Education Gap Grows Between Rich and Poor, Studies Say*, N.Y. TIMES (Feb. 9, 2012), <http://www.nytimes.com/2012/02/10/education/education-gap-grows-between-rich-and-poor-studies-show.html>.

99. Sean F. Reardon, *No Rich Child Left Behind*, N.Y. TIMES (Apr. 27, 2013), <http://opinionator.blogs.nytimes.com/2013/04/27/no-rich-child-left-behind>.

100. See generally Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006).

on a sinister meaning, resonating with his identical response to the wicked son. Rather than a gentle introduction—an invitation to participate in the constitutional community—education can itself become an instrument of exclusion. Whether the father’s response is a *modeling of faith* or a *reminder of difference* depends on the quality and equality of the education we provide to the children of all. When public education is inadequate and unequal, we risk multiplying the number of excluded “wicked sons” or deeply ostracized “sons who don’t know how to ask.” A robust educational system is necessary to preserve a continuity of faith in future generations and minimize the risk of marginalization when those generations come of age.

B. *The Precipice of Silence*

This leads us to a discussion of the “other” fourth sons: those members of the constitutional community who, for reasons of exclusion, isolation, disappointment, or apathy do not participate in the constitutional project. These sons act as a foil to the wicked sons, who respond to exclusion by rebelling against or re-appropriating a discriminatory history. America does, indeed, have within it people who have experienced only the failure of the American dream; who have given up on the system and no longer feel inclined to participate in—or struggle against—its myths.

Who exists within this category? I could point to the citizen who does not vote; but to be sure, there are millions of citizens who may not cast a ballot in a particular election, but who remain invested in the constitutional project. The very nature of this group of people makes its categorization most challenging. The disconnectedness of the fourth sons has the added effect of making them more difficult to see, more difficult to account for.

The clearest way of recognizing these sons may be in identifying those who have left their ranks. The sons who do not know how to ask are not *permanently and unalterably* disengaged from American constitutional life. It is useful to envision them as wicked sons waiting in the wings. The success of some social reform movements—Cesar Chavez’s mobilization of farm workers, for one—can be usefully understood as tipping points when sons who knew not how to ask reimagined themselves as wicked sons and collectively created change.

The modern gay rights movement provides another intriguing example. A century ago—even a few short decades ago—the vast majority of gay, lesbian, bisexual, and transgendered Americans suppressed or hid aspects of themselves in order to fit into the constitutional community, largely without making claims about the illegitimacy of exclusion from the constitutional order. Gay Americans did not—or perhaps more accurately *dared not*—“ask” for equality. In a famous debate between H. L. A. Hart and Patrick Lord Devlin in Britain in the early 1960s about the legal regulation of morality, Devlin stated, “I do not

think there is anyone who asserts vocally that homosexuality is a good way of life.”¹⁰¹ Professor Robert Burt points out that while “[t]his is an utterly implausible proposition today,” at the time it was not.¹⁰² It is difficult to overstate the dramatic nature of the cultural, political, and constitutional transformation since that time. We have witnessed robust advocacy for constitutional recognition of the right to love a partner of one’s choosing—and dramatic and rapid success in that effort.¹⁰³ The repeal of the “Don’t Ask Don’t Tell” policy¹⁰⁴ is emblematic of the climb out of silence. Gay Americans *know how to ask*, and have made their voices heard; they have participated in and fought against the constitutional and social order—even though the “asking” has involved suffering, risk, and confrontation. The successes of the gay rights movement, moreover, demonstrate the permeability of the lines between each of the four sons. Not only have former “fourth sons” morphed into “wicked sons,” but many (though not all) “wise sons” and “simple sons” have accepted and internalized constitutional claims that, once radical, are now indisputably mainstream.¹⁰⁵

This conception of the fourth son is markedly different than that of the young child. But the communal obligation to this son is similar in an important sense: it is the obligation to “begin for him.” In one sense, the gay rights movement described above is a dramatic success story. In another sense, the recent vintage of this movement is a testament to an extraordinarily long period during which the constitutional community enforced rather than confronted the fourth son’s silence. Just as the youthful fourth son invites reflection upon our system of education, the marginalized fourth son invites consideration of spaces of silence and invisibility perpetuated by our constitutional community, and of ways in which the broader community can take affirmative steps to recognize and hear each of its members.

101. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 116 (1965).

102. Robert A. Burt, *Moral Offenses and Same Sex Relations: Revisiting The Hart-Devlin Debate* 9 (Yale Law Sch. Faculty Scholarship Series, Paper No. 711, 2004), available at http://digitalcommons.law.yale.edu/fss_papers/711.

103. See *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015) (holding that under the Fourteenth Amendment, same-sex couples may not be deprived of the fundamental right to marry).

104. This policy, in place from 1993 to 2011, permitted gay men and women to serve in the military if they publicly suppressed their sexual identities. *Chapter Five: Progress Where You Might Least Expect It: The Military’s Repeal of “Don’t Ask, Don’t Tell,”* 127 HARV. L. REV. 1791 (2014).

105. A recent NBC/Wall Street Journal poll found that “59% of Americans support allowing same-sex marriage, nearly double the 30% support reported in 2004.” Janet Hook, *Support for Gay Marriage Hits All-Time High—WSJ/NBC News Poll*, WALL ST. J. (Mar. 9, 2015, 6:31 PM), <http://blogs.wsj.com/washwire/2015/03/09/support-for-gay-marriage-hits-all-time-high-wsj-nbc-news-poll>. At the time of writing, gay marriage is legal in 37 states and the District of Columbia. Pew Research Center, *Same-Sex Marriage State-by-State*, PEW FORUM (Feb. 9, 2015), <http://www.pewforum.org/2015/02/09/same-sex-marriage-state-by-state>.

VI. *BROWN* AS PEDAGOGICAL MOMENT

Above, I have described the “Four Sons” of the American constitutional faith, providing a framework for understanding how different types of people keep faith with a single constitutional document and, together, form a constitutional community.

This framework sheds light on why certain Supreme Court opinions—most strikingly, *Brown v. Board of Education*¹⁰⁶—resonate so deeply in our collective constitutional consciousness that they become, in and of themselves, articles of constitutional faith.

Brown, of course, tackled a controversy laden with enormous political salience—and thus gave the Supreme Court a relatively rare opportunity to speak to (and be heard by) a large cross-section of the American people. Yet despite its uniqueness, we can learn something broader from Chief Justice Warren’s opinion in the case, and from its responsiveness to multiple audiences. *Brown* is an opinion that succeeded in speaking simultaneously to each of the four sons of the American constitutional faith, and in this way came to serve as a kind of “pedagogical moment,” a powerful instance of Higher Lawmaking.

Most plainly, *Brown* spoke to the wise son—to the legal elite. Whatever its larger sociopolitical function, *Brown* was first and foremost a judicial opinion, written in the language of law and legal history, and dictating the authoritative interpretation of (as the wise son would put it) the “testimonies and statutes and ordinances . . . commanded you.” The decision had to be technical enough, legalistic enough, to retain legitimacy for the critical audience of the wise son.

At the same time, however, *Brown* spoke directly to (and about) the “wicked son”—but gave the wicked son a wholly different response than the father does. As I have conceptualized the wicked son, he is the rebel who challenges the status quo of the social order, who challenges the meaning behind the rote obedience to the letter of the law. Certainly, the NAACP and the civil rights movement more broadly can be understood as the wicked son—daring white America, through peace protests and sit-ins and legal challenges to segregation, to answer seriously the question, “*What does this idea of freedom mean to you?*” The previous legal response to this question had taken its form in *Plessy v. Ferguson*,¹⁰⁷ in which the Court—like the father of the wicked son—chastised the plaintiff, asserting that if blacks felt subjugated by segregation, it was due to their own negative self-conception:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything

106. 347 U.S. 483 (1954).

107. 163 U.S. 537 (1896).

found in the act, but solely because the colored race chooses to put that construction upon it.¹⁰⁸

In *Brown*, the Court changed course and took the “wicked” son seriously—took responsibility for the problem of exclusion and sought to rectify it.¹⁰⁹ The Court wrote:

To separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.¹¹⁰

At the same time, *Brown* spoke to the simple son—the American people writ large. The decision was relatively short, relatively easy for the common man to read in full. It was a unanimous opinion, presenting a united front that the people could understand, and to which they could adhere—or against which they could protest. Both because of the importance of the issue it addressed and because the language of the decision was accessible, the decision was published in newspapers across the country for the average person to read. And, certainly, the dramatic southern resistance to *Brown*, as well as the staunch support it found elsewhere, demonstrates the public salience of *Brown*’s substantive effect, and the reality of the struggle between the People and the Court to define the Constitution’s meaning.

Finally, the opinion spoke to the children who did not know how to ask. The decision took seriously the problem of education in order to retain a community of faith in the Constitution and the principle of equality underpinning it. Chief Justice Warren wrote:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹¹¹

108. *Id.* at 551.

109. Of course, one might say that in responding to black grievances, the Court paved the way for a new rebellious son—the white southerner who would defy the Court’s order.

110. *Brown*, 347 U.S. at 494-95.

111. *Id.* at 493.

In the most practical way, *Brown* took up the challenge to “begin for” the child who did not know how to ask—it moved toward a system of education designed to teach children equally and justly. It both laid the foundation for a future generation of children to have faith in their community, and tried to avoid the problem of a group of citizens so disconnected from American society that they would not even recognize the Constitution as relevant to their lives.

Brown has retained a complex place in the hearts and minds of Americans. On the one hand, it is practically revered—it has taken on a symbolic place as significant for many as the Constitution itself.¹¹² On the other hand, it has been much criticized on its technical terms by the legal community—in other words, by the wise sons.¹¹³ I do not argue that the decision was perfect; but I will note that this intense criticism may have arisen in part because the decision was *not only written for the wise son* (though the wise son is accustomed to such exclusive attentions). The legal community has, perhaps, undervalued the ways in which *Brown* spoke to multiple sectors of the community, in an effort to be responsive to multiple expressions of faith. And it is, perhaps, *Brown*’s success in reaching these multiple “sons” of America that has secured its place in the canon of constitutional faith for the generations that followed.

Does every judicial opinion need to be like *Brown*? Of course not—not least because most decisions don’t have the potential to impact (or even interest) so many sectors of the American people. But I nevertheless look to *Brown* to show how judges (and the Constitution itself) can be, and sometimes are, responsive to the multidimensional community of faith we call America. My point is not to dictate an interpretive methodology that judges should employ to decide every case¹¹⁴—although it would, perhaps, be an interesting

112. See ACKERMAN, *supra* note 5, at 137 (“*Brown* became a symbol energizing a multiracial coalition of blacks and whites into an escalating political struggle against institutionalized racism. As the 1950s moved on, this mobilized appeal for racial justice struck deepening chords amongst broadening sectors of the citizenry—enabling the Presidency and Congress of the mid-1960s finally to transform the embattled judicial pronouncements of the mid-1950s into the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965. As a consequence, *Brown* came to possess the kind of numinous legal authority that is, I believe, uniquely associated with legal documents that express the considered judgments of We the People.”); BALKIN, *supra* note 7, at 211 (“Constitutional politics has made constructions like *Brown* and *Loving* not only easy cases, but foundational to our understanding of the equal protection clause. Yet they were not always so central; at one point they would have been highly controversial or even clearly wrong constructions . . .”).

113. See generally WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack Balkin ed., 2001).

114. I have noted briefly above that various established modes of interpretation speak more or less effectively to some sons than to others. But I do not mean to tether the wise son’s realm of expertise; and in any event, to a large extent, the subtleties of *how* courts decide cases will be lost on the simple and wicked sons, each of whom is more concerned, in his own way, with substance than with style. The People care more *whether* Obamacare was upheld, *whether* the Defense of Marriage Act was struck down, and *whether* affirmative action in higher education was maintained, than *why* the Court reached the decisions it did.

exercise to consider whether the Supreme Court's decisions in other cases of national importance¹¹⁵ might have resonated more deeply in our collective constitutional faith had the Court taken different approaches in speaking to its diverse audiences. But I do not claim that the Four Sons framework provides a predictive or normative model for determining precisely when the Supreme Court will or should engage in Higher Lawmaking.

It does, however, *begin* to answer when and why a judicial opinion might, in speaking to the different sectors of the constitutional community, play a significant role in the project of American constitutional faith and its endurance over time. And, more fundamentally, it sheds light on how different sectors of our constitutional community engage with and remain connected to our Constitution, and in this way helps us to understand the very nature of that community of faith.

CONCLUSION

Our national community is bound by something more than the force of law—though it is bound by that too. On the whole, Americans share a faith in the Constitution, a faith that goes beyond simple obedience and reaches the realm of quasi-religious belief and devotion. This faith binds Americans to a covenant ratified by a select few of their national ancestors. It binds Americans to the generations long gone who once held the same faith, and to the generations yet to come who, they hope, will one day share it. Americans understand the Constitution not only to constrain them, but also to reflect who they are, in the deepest sense. It is for this reason that the Constitution has found its place at the heart of American culture wars—when Americans believe something strongly, they want to find a reflection of that belief in the Constitution they revere.

The faiths that Americans hold, however, are as multidimensional as the nation is diverse. Americans differ not only in their substantive and methodological interpretations of the Constitution,¹¹⁶ but in their capacities for faith and the ways that they express the faith they hold. I use the analogy of the Four Sons as a framework for understanding the diverse ways in which Americans relate to and participate in the intergenerational constitutional

The popular embrace of originalism by ordinary conservatives since the Reagan era may suggest otherwise—but the mobilization of Republicans around originalism is better understood a *political*, rather than an *interpretive*, movement—one that has tapped into a substantive, activist conservative agenda. See generally Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006).

115. A few controversial and politically salient Supreme Court decisions come to mind: *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Roe v. Wade*, 410 U.S. 113 (1973); *Furman v. Georgia*, 408 U.S. 238 (1972).

116. Sanford Levinson points out that faith is as divisive as it is unifying. Faith can be (and historically, has been) a catalyst for holy wars of interpretation. See LEVINSON, *supra* note 1, at 17.

project; and I assert that an attention to this diversity is crucial. To sustain itself over time, a community of faith must be responsive to the differing capacities of its members; it must speak to the different expressions of faith, value each one, and foster its growth and development so that each individual feels that she has a stake in the Constitution itself. The constitutional project, as a whole, touches all Americans—not only through its coercive effect as law, but also through its symbolic significance as Higher Law. But more, the constitutional project *relies* on the contributions of the various segments of the population in order to function as an intergenerational project. The complexity of how Americans can and do express their constitutional commitment—interpreting, challenging, adoring, starting anew—is what sustains the Constitution's relevance and importance across time.