

## RESPONSE TO THE RIDDLE OF HIRAM REVELS

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Responding to Richard Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680 (2006).

What makes an issue *constitutional* rather than one merely of policy choice? According to Professor Richard Primus, “its substantively important place in American government.”<sup>1</sup> Even though this definition plays no significant role on the surface of Professor Primus’s analysis of the Senate debate on the constitutionality of seating Senator Hiram Revels, I do not think it is a throwaway line. Beneath the surface, the importance of the definitional issues implicated in the debate plays quite a large role. That can be seen by unpacking the indifference the Senate majority had for what Professor Primus describes as the merely legalistic defenses of seating Senator Revels.<sup>2</sup> As I interpret Professor Primus’s arguments, and the Senate majority’s, the legalistic arguments were fundamentally misplaced because they showed only that the Senate *could* have seated Senator Revels had it chosen to do so. For the Senate majority, though, seating Senator Revels was not optional at all; it was constitutionally mandatory. And the mandate arose from the constitutional transformation memorialized by, but not fully inscribed in, the Fourteenth Amendment. It was that transformation that defined the substantive importance of the issues raised by the debate, and therefore their constitutional dimension, and therefore the irrelevance of legalistic arguments predicated on the Constitution’s language.

Seen in this way, Professor Primus offers a conceptualization of constitutional issues that is located somewhere between Professor Bruce Ackerman’s idea of constitutional transformation that occurs without the sanction of the Article V amendment process<sup>3</sup> and Professor Cass Sunstein’s idea that some statutes reflect what he calls constitutive commitments.<sup>4</sup> In this Response, I first sketch some of the implications of these related but distinct ideas of a constitution for the American people that is not embodied in the Constitution of the United States by asking whether the nation’s commitment to income

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<sup>1</sup> Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1700 (2006).

<sup>2</sup> *Id.* at 1698 (observing that “these attempts at lawyerly solutions attracted almost no support”).

<sup>3</sup> See 1 BRUCE ACKERMAN, *We the People: Foundations* 3–33 (1991); 2 Bruce Ackerman, *We the People: Transformations* 3–23 (1998) [hereinafter Ackerman, *Transformations*].

<sup>4</sup> CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* 61–65 (2004).

security and environmental protection have a sufficiently “substantively important place in American government” to make them constitutional issues. I then consider what exactly follows from the elevation of these commitments to constitutional status, focusing with respect to judicial interpretation on the extent to which such constitutional issues can be converted into judicially administrable doctrine, and with respect to congressional action on the extent to which Congress has incentives to address such issues. I close with a few remarks about the relationship between Professor Primus’s account and those of Professors Ackerman and Sunstein.

Obviously, commitments to income security and environmental protection are not located in any constitutional text, unless we engage in rather robust exercises of constitutional interpretation.<sup>5</sup> They are expressed in a range of statutes enacted over an extended period, with essentially no backsliding.<sup>6</sup> From (or before) the adoption of the Social Security Act, through the expansion of public assistance to the poor in Medicare and Medicaid, to ERISA (a statute with the term “income security” in its title), to the recently enacted prescription drug benefit, Congress has repeatedly acted in ways that indicate a deep belief that there is some national duty to provide income security for all.<sup>7</sup> Similarly, the Environmental Protection Act, the Endangered Species Act, the Clean Water Act, Superfund — the list goes on — reflect a similar belief about environmental protection.

These commitments make it politically difficult to alter existing guarantees either by statutory amendment or by administrative interpretation. Indeed, there is something of a ratchet effect: Proposed reductions in the existing statutory protections for income security or the environment can survive only if their proponents make a substantial (not merely a credible) case that the proposed alterations are only apparent reductions and will actually *improve* income security or environmental protection, and there is a strong presumption against altering the rules for the express reason of *weakening* income security or

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<sup>5</sup> Sunstein argues that the Supreme Court was on the verge of interpreting the Constitution to require income security in the late 1960s, and might well have done so had Hubert Humphrey rather than Richard Nixon won the 1968 election. See SUNSTEIN, *supra* note 4, at 153–54. I take it, though, that *anything* can be a constitutional issue if the Constitution is interpreted robustly enough. To say something interesting about the relationship between substantive importance and constitutionalization, then, we have to set aside the possibility of such robust interpretation.

<sup>6</sup> In saying this, I mean to take seriously the claim that the 1996 welfare reforms were designed to end welfare as we know it, but that the goal was to provide a framework for guaranteeing income security more reliably than welfare rather than to reject the national commitment to income security.

<sup>7</sup> Or, as the constitutions of some nations put it, income security within the state’s “available resources,” S. AFR. CONST. ch. 2, § 27(2) (1996) — a constraint that seems more serious in a nation like South Africa than in the United States.

environmental protection. Should this political difficulty be sufficient to transform the issue into a constitutional one?

We can approach that question by asking what the consequences would be of calling the issue a constitutional one. The court-centeredness of most constitutional scholarship suggests that we should think first about the adjudication-related implications of doing so. The most obvious implication is that courts should approach the interpretation of income security and environmental protection statutes “generously,” that is, interpret the statutes to promote those now-constitutional goals even if doing so might impede the accomplishment of other goals, such as deficit reduction or encouragement of private investment, which are not (yet) sufficiently important to be treated as constitutional. Relatedly, the full force of other canons of construction might be weakened when courts interpret these statutes. Compare, for example, *Jones v. United States*<sup>8</sup> with *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*,<sup>9</sup> both of which invoked a federalism-based canon of construction. *Jones* construed the federal criminal arson statute narrowly so as to ensure that the national government not intrude unnecessarily on areas of criminal law enforcement traditionally occupied by state governments.<sup>10</sup> *SWANCC* construed the federal wetlands statutes narrowly for parallel reasons.<sup>11</sup> On the account examined here of what makes issues constitutional, the invocation of the federalism-based canon of construction in *SWANCC* was mistaken, but its invocation in *Jones* was not: the constitutional nature of environmental protection statutes offsets the federalism interest, and so the statute in *SWANCC* should have been interpreted without invoking any canon of construction,<sup>12</sup> whereas the federal arson statute served no constitutional interest, and so the application of the canon was appropriate.

Finally, and most important, treating income security and environmental protection statutes as reflecting constitutional values in a strong sense does not imply that legislatures cannot repeal such statutes and replace them with something else. Courts would have to allow Congress to “tinker” with existing statutes so that Congress could achieve the statutes’ constitutionally rooted goals more effectively. Since distinguishing between tinkering and repudiating would be inordinately difficult, courts would, I think, have to treat modifications of

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<sup>8</sup> 529 U.S. 848 (2000).

<sup>9</sup> 531 U.S. 159 (2001).

<sup>10</sup> See *Jones*, 529 U.S. at 857–859.

<sup>11</sup> See *SWANCC*, 531 U.S. at 172–174.

<sup>12</sup> This is not to say that the *result* in *SWANCC* was erroneous; that would depend on what ordinary techniques of statutory interpretation would yield if the federalism-based canon of construction were taken out of the picture.

income security and environmental protection statutes as constitutional if rational — which is pretty much the situation today.

Perhaps then, from the judicial perspective, issues that are constitutional in nature because of their substantive importance in American governance are only modestly distinguishable from what Professors William Eskridge and John Ferejohn call “super-statutes.”<sup>13</sup> For Professor Primus, as well as Professors Eskridge and Ferejohn, the primary implications for courts of identifying something as a constitutional issue or a super-statute are about statutory interpretation. The only difference — and here Professor Primus’s account might have the advantage — is that Professor Primus’s account allows us to identify something as a constitutional issue by examining an accumulation of statutes enacted at different times, even where not all of those statutes could fairly be characterized as super-statutes under the Eskridge-Ferejohn criteria.

I turn now from the courts to Congress.<sup>14</sup> Perhaps the most obvious conclusion that might flow from identifying an issue as constitutional in Professor Primus’s sense is one at which I have already hinted: Congress has a constitutional *duty* to address constitutional issues, not merely the power to do so. Of what, though, might this duty consist?

On the most mundane level, perhaps Congress must create committees charged with paying regular attention to the constitutional issue. Of course, to the extent that an issue’s substantive importance is reflected in the public’s views, members of Congress will have incentives to create such committees. That simply demonstrates the connection between the notion of duty and the political structures created by the Constitution.<sup>15</sup>

Second, perhaps Congress’s duty is to periodically update the statutes that implement the constitutional issue. As I have suggested, this cannot mean that Congress must re-enact the statutes without modification, or must always “expand” their coverage in some simple sense. Suppose that the initial Superfund statute turns out to be a bad way of protecting the environment. It seems obvious that Congress should be able to repeal the statute and rely on pre-existing law to protect the environment. Or suppose we learn that Superfund is modestly effective in protecting the environment, but there are technologies of legis-

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<sup>13</sup> William N. Eskridge and John Ferejohn, *Super-statutes*, 50 DUKE L.J. 1215, 1215 (2001).

<sup>14</sup> Some issues that are constitutional in Professor Primus’s sense might be addressed by state legislatures or other lawmaking bodies. My intuition is that the analysis I develop as to Congress would carry over to those institutions as well, but I confess that I have not given the question especially careful thought.

<sup>15</sup> And, perhaps, the dissolution of such committees — I have in mind the committees during Reconstruction that examined conditions in the South — signals that a previously constitutional issue has lost that character.

lation that hold out the promise of even more effective protection. It seems obvious that Congress should be able to replace Superfund with something better.

Combine these two suggestions — about committees and updating — and perhaps we can generalize a bit: Congress has a duty to engage in reasonably sustained deliberation about constitutional issues. Of course Congress does not have to think about those issues all the time; nonconstitutional issues will often have higher priority than constitutional ones. My suggestion is that Congress breaches its duty if it allows a constitutional issue to fall off the radar screen for too long.<sup>16</sup>

I conclude by situating Professor Primus's idea of constitutional issues in relation to the similar ideas of Professors Ackerman and Sunstein. Professor Ackerman identifies nontextual constitutional amendments by means of formal considerations: the various stages through which "proposals" must pass before they become nontextual amendments.<sup>17</sup> In principle, formality is important precisely because we are dealing with nontextual amendments. Textual amendments are embodied in, well, texts, so we know when such an amendment has been adopted. Process-type formalities, etc. give us similar assurance.<sup>18</sup> In contrast, Professor Sunstein identifies constitutive commitments by means of an interpretive construction of important events in U.S. history.<sup>19</sup> Professor Primus's approach is essentially identical to that.<sup>20</sup> And, precisely because interpretive construction is involved, both approaches raise serious questions about identifying constitutive commitments or constitutional issues: why income security but not encouragement of private investment, as embodied for example in the federal tax code and the monetary policies of the Federal Reserve System?<sup>21</sup>

Professor Primus's approach resembles Professor Sunstein's in other ways as well. Professor Sunstein argues that constitutive commitments should assert a gravitational pull on statutory interpretation, inducing courts to interpret statutes dealing directly with such commitments, and those in their general area, so as to advance those

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<sup>16</sup> Subject to the possibility, noted above, that a constitutional issue may gradually become less important and therefore nonconstitutional — and that congressional inattention to the issue might be one indication that it has lost its constitutional importance.

<sup>17</sup> Ackerman, *Transformations*, *supra* note 3, at 17–23.

<sup>18</sup> At least they would were Professor Ackerman less profligate in generating different formalities that can support nontextual amendments.

<sup>19</sup> *See, e.g.*, SUNSTEIN, *supra* note 4, at 61–65.

<sup>20</sup> *See* Primus, *supra* note 1, at 1699–1700.

<sup>21</sup> Income security is Professor Sunstein's example of a constitutive commitment; I do not mean to suggest that Professor Primus would treat income security as an issue of sufficient importance to be constitutional in his scheme.

commitments.<sup>22</sup> I have suggested that the same directive follows from Professor Primus's approach. In addition, because both scholars rest their conclusions on what actually happens in history, both allow for the possibility that constitutive commitments and constitutional issues can change over time. Constitutive commitments and constitutional issues can disappear, as, in Professor Sunstein's scheme, the American people gradually come to understand ourselves differently and, in Professor Primus's, issues once important become less so. The constitutional nature of the issues — that is, their substantive importance — makes them recalcitrant to change, but not unchangeable. Which is all to the good: the people must have the right to re-constitute ourselves periodically, even to repudiate deep commitments we have taken on.

Professor Ackerman, in contrast, seems to reject the possibility that nontextual amendments could be repealed.<sup>23</sup> Instead, he places responsibility for addressing large-scale constitutional change on the courts. The courts' task, after each constitutional moment, is to integrate the principles newly put in place with the principles carried over from prior constitutional moments. Professor Ackerman, however, has offered only promissory notes for this account. He sketches an argument that the recognition of expansive public power in the New Deal required a commensurate redefinition of limits on public power: Neither *Lochner*<sup>24</sup> nor the textualism of *Carolene Products*'s footnote four<sup>25</sup> would be a sufficient limitation, the former because it could not be reconciled with the New Deal's constitutional revolution and the latter because the threats an expansive government posed to individual liberty were not all captured by footnote four's categories. The result is *Griswold v. Connecticut*,<sup>26</sup> fittingly enough a judicial recognition of unenumerated constitutional rights in response to the nontextual transformation the New Deal wrought in the constitutional order.<sup>27</sup> More recently, Professor Ackerman has suggested that the Marshall Court's moderate nationalism integrated the Jeffersonian suspicion of national power with the strong nationalism of the Framers' Constitution.<sup>28</sup>

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<sup>22</sup> See SUNSTEIN, *supra* note 4, at 180–81.

<sup>23</sup> I believe that this partly accounts for his unwillingness to treat the constitutional transformation wrought by conservative Republicans in the late twentieth century as a nontextual amendment: treated as such, the transformation would have to be understood as a repeal of the nontextual New Deal amendment.

<sup>24</sup> *Lochner v. New York*, 198 U.S. 45 (1908).

<sup>25</sup> *United States v. Carolene Prods Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>26</sup> 381 U.S. 479 (1965).

<sup>27</sup> See ACKERMAN, *TRANSFORMATIONS*, *supra* note 3, at 3–23.

<sup>28</sup> BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 241 (2005).

I need not evaluate the cogency of these arguments here.<sup>29</sup> What matters for present purposes is that Professor Primus's argument that constitutional issues are those that remain substantively important for a reasonably sustained period provides an almost automatic account of the judicial role with respect to such issues. As I have suggested, to the extent that his argument has direct normative implications for the courts, it urges the courts to integrate statutes advancing constitutional interests into the corpus juris, giving such statutes some degree of interpretive priority over other statutes. More important, the very fact that constitutional issues are such because they are important over a sustained period means that courts staffed by judges appointed over a similarly sustained period will understand that the issues are indeed of constitutional dimension.

A final point is that this framework must admit one important caveat. Constitutional issues rise and fall. Imagine a Supreme Court that undergoes substantial change during a period when one might believe that a previously important issue was becoming less so, and was therefore losing its constitutional status. The judges might project the trend they observe into the future and — today — treat income security or environmental protection as no longer of constitutional dimension.<sup>30</sup> If they are right, the system will re-equilibrate without difficulty. But, if they are wrong, constitutional crisis ensues.

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<sup>29</sup> Professor Ackerman's accounts are too sketchy to support strong judgments about their cogency. For what it is worth, I find his account of *Griswold* intriguing, but his account of the Marshall Court does not seem to require his apparatus.

<sup>30</sup> Perhaps this is one way of understanding the Supreme Court's decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), within Professor Primus's descriptive framework.