

ROUGE ET NOIR REREAD: A POPULAR CONSTITUTIONAL HISTORY OF THE ANGELO HERNDON CASE

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I. INTRODUCTION

If the ruling and the oppressed elements in a population, if those who wish to maintain the status quo and those concerned to make changes, had, when they became articulate, the same philosophy, one might well be skeptical of its intellectual integrity.

John Dewey¹

In 1932, Eugene Angelo Braxton Herndon, a young Afro-American² member of the Communist Party, U.S.A., was arrested in Atlanta and charged with an attempt to incite insurrection against that state's

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1. JOHN DEWEY, *PHILOSOPHY AND CIVILIZATION* 9 (2d ed. 1968). The book was originally published in 1931.

2. This Article uses the terms "Afro-American," "African-American," and "black American" interchangeably. In recent years, the question of racial designation in law review articles has come to require a footnote (usually at the beginning of a piece) explaining the author's particular usage. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (using "African-American" and "Black" and explaining the capitalization of the latter term on the ground that "Blacks . . . constitute a specific cultural group and, as such, require denotation as a proper noun"); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1745 n.2 (1989) (employing the term "white" in conformity with "implicit understandings of racial identity" in the United States, and using a panoply of other terms—some racial, some ethnic, some cultural—to designate "non-whites"); and Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 n.4 (1987). For representative press accounts and opinions on one recent chapter in the long history of American debate regarding the practice of racial naming, see Jesse Jackson, *Negro, Black and African-American*, N.Y. TIMES, Dec. 22, 1988, at A22; Flora Lewis, *Jackson as*

lawful authority. Some five years later, in *Herndon v. Lowry*,³ Herndon filed a writ of habeas corpus asking the U.S. Supreme Court to consider the constitutionality of the Georgia statute under which he had been convicted. Two weeks before his twenty-fourth birthday, the Court, voting 5-4, declared the use of the Georgia political-crimes statute against him unconstitutional on the grounds that it deprived Herndon of his rights to freedom of speech and assembly and because the statute failed to furnish a reasonably ascertainable standard of guilt.⁴

African-American, N.Y. TIMES, Jan. 11, 1989, at A23; Isabel Wilkerson, *'African-American' Favored by Many of America's Blacks*, N.Y. TIMES, Jan. 31, 1989, at A1.

The cluster of issues joined in this debate are both difficult and delicate. To take them up fully here would be impossible. I do, however, want to comment briefly on the particularly puzzling argument developed in Flora Lewis' article, primarily because it is an exemplary instance of the muddled thinking that abounds in public debate about the ideology of race in contemporary America. Lewis uses the word "disturbing" to criticize Jesse Jackson's attempt to call American blacks African-Americans because, she says, the term "seems to emphasize separateness and division, just the opposite of the goal of integrating society and reducing the importance of ethnic and racial origin." *Id.* In a curious example, she compares Jackson's proposal with practices in the Soviet Union, where "a distinction is made between *citizenship* (Soviet) and *nationality*, which may be Russian, Ukrainian, Jewish [sic], Armenian or Uzbek, for instance." *Id.* (emphasis added). As Lewis sees it, the Soviet practice "could bring [the nation's] undoing." *Id.* Nowhere in her piece does Lewis take issue with the long-standing and perfectly uncontroversial convention of identifying individuals as, for instance, Italian-American, Jewish-American, Cuban-American, Irish-American, Mexican-American, Greek-American, Anglo-American, and so forth. Similarly, she simply notes without comment the fact (which Jackson remarked on) that during recent presidential campaigns, "TV profiles . . . traced . . . [the candidates] back to the village of their forebears—Ronald Reagan's in Ireland, George Bush's in England, Michael Dukakis's in Greece." *Id.* One may fairly infer from her silence that Lewis does not view these practices as impeding "the goal of integrating society and reducing the importance of ethnic and racial origin." In the face of these examples, we might expect Lewis to explain the difference (if any) between these instances of racial, ethnic, and cultural naming and the Jackson proposal. But at no point in her piece does Lewis say specifically why the recommendation by a "black" American (a linguistic sign—like "white"—in search of an empirical referent) that Americans of African descent start to identify themselves in terms of ancestral culture instead of "color" should be viewed as a threat to our national existence rather than a testament to our national diversity. What precisely is it about the name "African-American" that makes it such a dangerous sign of "division" and "separateness"? One might well wonder whether something more (or other) is at stake here than the simple question of the name. I suspect that the real roots of Lewis' opposition to Jackson's appellative proposal lie less in its connotative than in its performative implications. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975). Might it be that what Lewis finds "[p]ersonally . . . disturbing" is not the question of the name as such but rather the assertion by African-Americans of an inalienable, indivisible right to take this (or any) name to, for, and by themselves? This Article may be read as an extended meditation on what I believe is the real issue at stake in the racial nomenclature debate: namely, the relationship, in the terms of my analysis here, between linguistic and political self-determination.

3. 301 U.S. 242 (1937).

4. *Id.* at 259-62.

Herndon v. Lowry is generally acknowledged as one of the great civil liberties decisions of the 1930s, one of the notable "success stories"⁵ of the Supreme Court's First Amendment jurisprudence. It marked the first time the Supreme Court had mentioned the Holmes-Brandeis "clear and present danger" formula in the ten years since its decision in *Whitney v. California*.⁶ It was also the first case in which the Supreme Court used the test to uphold the civil liberties claims of an individual against censorial state action,⁷ the first time the Supreme Court reviewed a sedition conviction from the South, and the first political-crimes conviction reviewed by the Court that involved an African-American defendant.⁸

One of the first critical commentaries on the case appeared in the 1941 edition of *Free Speech in the United States*, Zechariah Chafee, Jr.'s classic study of First Amendment case law.⁹ In an essay entitled *Rouge et Noir*, Professor Chafee noted that in *Herndon v. Lowry* "the Supreme Court was faced for the first time with the possibility that American citizens might be hanged or electrocuted for nothing except expressing objectionable opinions or owning objectionable books."¹⁰ Chafee approached the arrest, trial, and conviction of Angelo Herndon as a case study in American political justice. Herndon's real crime, argued Chafee, was that he sought "to put the Fifteenth Amendment into wider effect."¹¹ Those in power in Georgia, Chafee ironically observed, were "afraid, not that the United States Constitution would be overthrown, but that it might be enforced."¹²

5. The phrase is Vincent Blasi's. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 509 (1985).

6. 274 U.S. 357, 374 (1957). See MARTIN SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 58 (1966).

7. PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969*, at 181-82 (1972).

8. The second Afro-American defendant to appeal a political-crimes conviction to the Supreme Court was Benjamin Davis. Davis, who represented Angelo Herndon during the initial stages of the case, secretly joined the Communist Party while acting as defense counsel for Herndon. He was one of a number of CPUSA members whose convictions under the Smith Act were reviewed in *Dennis v. United States*, 341 U.S. 494 (1951). The Court upheld the convictions. For an autobiographical account of his political career, see BENJAMIN DAVIS, *COMMUNIST COUNCILMAN FROM HARLEM: AUTOBIOGRAPHICAL NOTES WRITTEN IN A FEDERAL PENITENTIARY* (1969).

9. ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941). An earlier version of *Free Speech in the United States* was cited by the lawyers who wrote the first Supreme Court brief on Herndon's behalf. See Brief for Appellant at 20, *Herndon v. Georgia*, 295 U.S. 441 (1935) (No. 665).

10. CHAFEE, *supra* note 9, at 393.

11. *Id.* at 392. The Fifteenth Amendment states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

12. CHAFEE, *supra* note 9, at 392.

For Chafee, two features of *Herndon v. Lowry* were especially significant. First, the opinion stressed "the importance of the procedure in a sedition prosecution."¹³ Second, the case had forced the Court to take notice (albeit implicitly) of the political use to which southern states could put their criminal justice systems, crushing not only radical political activity but moderate dissent and protest as well.¹⁴

Curiously, Professor Chafee attached little significance to the fact that the 1937 decision marked the third time in as many years that the Supreme Court had been called upon to decide whether the conviction of Angelo Herndon violated the First Amendment. *Free Speech in the United States* merely points out—in a footnote and without comment—that "the Supreme Court at first refused to consider the case at all."¹⁵ Chafee does not discuss the Supreme Court's 1935 decision not to take appellate jurisdiction on the ground that the federal questions raised on appeal had not been "properly presented";¹⁶ nor does he mention the Court's decision later that year refusing (without a written explanation) to grant Herndon's petition for rehearing.¹⁷

An interesting and revealing separation and categorization of the Supreme Court's three dispositions of the Angelo Herndon case has followed in the legal literature. On the one hand, the favorable opinion in *Herndon v. Lowry* has been included and discussed in any number of casebooks on constitutional law¹⁸ and political and civil rights.¹⁹ Discussion of the first adverse decision, *Herndon v. Georgia*, on the other hand, has been confined for the most part to casebooks on federal court jurisdiction and procedure.²⁰ The Court's decision to reject Herndon's petition for rehearing has been ignored altogether. Thus, what is essentially one case has been doctrinally dissected by scholars as though it were made up of three severable, marginally related or even unrelated parts.

13. *Id.* at 393.

14. *Id.* at 397.

15. *Id.* at 390 n.45.

16. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).

17. *Herndon v. Georgia*, 296 U.S. 661 (1935).

18. See, e.g., PAUL A. FREUND ET AL., CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1158-62 (4th ed. 1977); GERALD GUNTHER, CONSTITUTIONAL LAW 1013-15 (11th ed. 1985); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 966-68 (1986).

19. See, e.g., NORMAN DORSEN ET AL., POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1976).

20. See, e.g., PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988).

This conceptual dismemberment of the Angelo Herndon case has handicapped serious historical examination of one of its central themes: the intersection of race, culture, and politics in American constitutional law.

I do not mean to deny the validity of an orthodox doctrinal treatment of the Angelo Herndon case; but I am persuaded that this procedure does not, indeed cannot, allow for more than a partial account of its larger historical meaning. Without a cultural anatomy of the Angelo Herndon case, one cannot hope to attain more than a skeletal picture of its significance as an episode in the history of American constitutionalism during the interwar years.

This Article, then, offers a "remembrance"²¹ of the case in the form of a cultural history of the political events that led to the Court's first response to the case. I believe that the concept of a "popular memory" can offer us great insight into constitutional history, both as object and as method, and I have made the concept central to this Article, not simply at the level of accent and emphasis but in terms of epistemology and interpretation.²²

21. As my title suggests, I have framed my historical "remembrance" of the Angelo Herndon case as a "rereading." This designation is meant to underscore that my historical project is first and primarily interpretive rather than archival. Although I do rely at crucial points in my argument on archival material, the majority of the texts cited have long been part of an extant and readily accessible record. Nonetheless, for reasons I set forth in the body of this Article, these documents, and their significance, have been ignored in the legal literature. The interpretive thrust of my undertaking may well disappoint those readers for whom original historical scholarship is synonymous with (and only with) archival excavation. I cannot share this perspective, which I believe is a symptom of an affliction most acutely described by H. Stuart Hughes: "Historians in this country seem to have forgotten—if they ever properly learned—the simple truth that what one may call progress in their endeavors comes not merely through the discovery of new materials but at least as much through a *new reading* of materials already available." H. Stuart Hughes, *Contemporary Historiography: Progress, Paradigms, and the Regression Toward Positivism*, in *PROGRESS AND ITS DISCONTENTS* 245 (Gabriel A. Almond et al. eds., 1982). For a similar critique of the precritical privilege accorded to the "documentary model" of historical knowledge, see DOMINICK LACAPRA, *HISTORY & CRITICISM* 20-21 (1985) (discussing the "recurrent temptations of making a fetish of archival research, attempting to discover some 'unjustly neglected' fact, figure, or phenomenon, and dreaming of a 'thesis' to which his or her proper name may be attached").

22. Three methodological models inform my analysis of the specific events, issues, and implications of the Herndon case. They are (1) the historiographical literature on the subject of "popular memory" discussed in this section; (2) recent theoretical work on the intersection of culture and politics; and (3) the critical analysis, straddling a number of disciplines, of rhetorical discourse (its figural elements, organization, operations, and effects). My chief interest in this theoretical work lies in its value to the interpretive task I have set for myself in this Article: a critical rereading of the texts that make up the historical record of *Herndon v. Georgia*. Accordingly, my explication of the approaches suggested by each of these fields is, for the most part, interwoven with an analysis of the Angelo Herndon case itself; in short, the appropriated theory is meant to serve the practice of a critical historical reading.

W.E.B. Du Bois once prefaced a collection of documents on the history of blacks in America with an angry but insightful indictment of the history profession. Historians, wrote Du Bois, had for too long studied and written about the past solely through the eyes of those with power and position. "We have the records of kings and gentleman ad nauseam and in stupid detail."²³ Blinded by the view from the lofty heights of professional history, practitioners had left untold the story of the nation's powerless and poor. "[O]f the common run of human beings, and particularly of the half or wholly submerged working group, the world has saved all too little of authentic record and tried to forget or ignore even the little saved."²⁴ Du Bois called for the close, careful study of American history "from below";²⁵ indeed, his own work may be taken as an exemplary intervention against the majestic myopia of historiography "from above."²⁶

In the years since Du Bois wrote, we have witnessed the rise both here and abroad of a historical literature devoted to the retrieval of "popular memory."²⁷ This diverse body of work is impressive in depth and

23. HERBERT APTHEKER, *AFRO-AMERICAN HISTORY: THE MODERN ERA* 51 (1971) (quoting W.E.B. Du Bois).

24. *Id.*

25. The first use of the notion of a "history from below" is generally attributed to the French historian Georges Lefebvre. See GEORGE RUDE, *Georges Lefebvre as Historian of Popular Urban Protest in the French Revolution, in THE FACE OF THE CROWD: SELECTED ESSAYS OF GEORGE RUDE* 107 (Harvey J. Kaye ed., 1988).

26. See, e.g., W.E.B. DU BOIS, *JOHN BROWN* (1909); and W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880* (1935).

27. The phrase "popular memory" appears to have originated with the French philosopher-historian Michel Foucault. Michel Foucault, *Film and Popular Memory*, in *FOUCAULT LIVE* 89 (Sylvère Lotringer ed. & John Johnston trans., 1989).

There's a real fight going on. Over what? Over what we can roughly describe as popular memory. It's an actual fact that people—I'm talking about those who are barred from writing, from producing their books themselves, from drawing up their own historical accounts—that these people nevertheless do have a way of recording history, or remembering it, of keeping it fresh and using it . . . Since memory is actually a very important factor in struggle (really, in fact, struggles develop in a kind of conscious moving forward of history), if one controls people's memory, one controls their dynamism. And one also controls their experience, their knowledge of previous struggles.

Id. at 91-92.

Foucault's restriction of the sources of popular memory to those who are "barred from writing" or unable to produce their own published accounts betrays a much narrower understanding of the raw materials of popular memory than I would urge here. One of the sources on which I shall rely is *Let Me Live*, the autobiography of Angelo Herndon, which was published by Random House. ANGELO HERNDON, *LET ME LIVE* (1937). Although *Let Me Live* does in fact recount the experiences of people who themselves were barred from "drawing up their own historical accounts," my interest in Herndon's memoirs is not limited to the traces it contains of the lives of others. Working

scope.²⁸ Its value lies not only in its concrete study of the history of

from a more expansive understanding of the concept, I shall take Herndon's account of his own experience itself as an instance of a popular historical record.

The term under which popular history in America is most often subsumed is (the new) "social" history, which has been applied to diverse and divergent tendencies in contemporary historical research and writing. One sign of its increasing influence can be seen in the anxious debate recently summarized and joined by Carl Degler. Carl Degler, *Is the New Social History Threatening Clio?*, 16 OAH NEWSL. (Org. Am. Historians, Bloomington, Ind.), 1988, at 4. "The breadth of historical study today, as symbolized by the predominance of social history, ought neither to depress us nor frighten us. It is after all, a response to the constantly shifting definition of what history is, how it can be used, and who we are." *Id.* at 5.

28. Works on "popular memory" from which I have learned a great deal in the preparation of this Article are MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1979) (a study of popular perceptions and representations of crime and criminality in prerevolutionary France); RANAJIT GUHA, *ELEMENTARY ASPECTS OF PEASANT INSURGENCY IN COLONIAL INDIA* (1983) (a study of Indian peasant resistance to British rule); DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975) (historical studies on the relationship among law, politics, and crime in 18th-century England); *HISTORY FROM BELOW: STUDIES IN POPULAR PROTEST AND POPULAR IDEOLOGY IN HONOUR OF GEORGE RUDE* (Frederick Krantz ed., 1988) (essays in the "grass-roots" history of England, France, Spain, and the Caribbean); E.J. HOBSBAWM, *PRIMITIVE REBELS* (1959) (a study of popular political consciousness and action in Spain, Italy, and Latin America); E.J. HOBSBAWM & GEORGE RUDE, *CAPTAIN SWING* (1969) (a study of the 1830 revolt of English agricultural workers); LYNN AVERY HUNT, *POLITICS, CULTURE AND CLASS IN THE FRENCH REVOLUTION* (1984) (a study of the symbolic politics of revolutionary France); I, PIERRE RIVIÈRE, *HAVING SLAUGHTERED MY MOTHER, MY SISTER, AND MY BROTHER . . . A CASE OF PARRICIDE IN THE 19TH CENTURY* (Michel Foucault ed. & Frank Jellinek trans., 1975) (dossier and interpretive essays); CYRIL LIONEL ROBERT JAMES, *THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION* (a study of the 18th- and 19th-century slave rebellion against France in what is now Haiti); GARETH STEDMAN JONES, *LANGUAGES OF CLASS: STUDIES IN ENGLISH WORKING CLASS HISTORY, 1832-1932* (1983) (a collection of essays on class, culture, and political consciousness among the English working class); LEON F. LITWACK, *BEEN IN THE STORM SO LONG* (1979) (a study of the culture and consciousness of newly freed Afro-American slaves during the post-Civil War period); *MAKING HISTORIES: STUDIES IN HISTORY WRITING AND POLITICS* (Richard Johnson et al. eds., 1982) (a collection of methodological and historical essays in British popular memory); ALETTA BIENSACK, *THE NEW CULTURAL HISTORY: ESSAYS BY ALETTA BIENSACK* (Lynn Avery Hunt ed., 1989) (a collection of methodological and historical essays); *PEOPLE'S HISTORY AND SOCIALIST THEORY* (Raphael Samuel ed., 1981) (a collection of theoretical and historical essays on popular memory from an international, interdisciplinary perspective); GEORGE RUDE, *THE CROWD IN HISTORY, 1730-1848* (1981) (a study of popular politics in France and England); GEORGE RUDE, *IDEOLOGY AND POPULAR PROTEST* (1980) (an exploration of the rise of "popular ideology" and its attendant politics); Ranajit Guha, *On Some Aspects of the Historiography of Colonial India*, in I SUBALTERN STUDIES: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY I (1982) [hereinafter Guha, *Some Aspects of Historiography*] (a theoretical-polemical essay arguing for a distinction between "elitist" and "subaltern" accounts of opposition to the British colonialist project in India); Ranajit Guha, *The Prose of Counter-Insurgency*, II SUBALTERN STUDIES: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY I (1983) [hereinafter Guha, *The Prose of Counter-Insurgency*] (a semiotic analysis of the textual politics of historical writings on Indian peasant rebellion); E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1963) (a study of the rise and development of English working class consciousness during the late-18th and early-19th centuries); *AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* (John

"subaltern" classes and communities²⁹ but also in the powerful analytical terms and procedures it deploys to articulate a "popular"³⁰ historical record, or "countermemory." What has emerged is a way of thinking and writing about the historical process that challenges not only the premises but also the overall project of much mainstream historiography.³¹

American constitutional history remains one of the few disciplines in which the call for the rigorous reconstruction of our national past from the bottom up has for the most part been ignored.³² The historical treatment of constitutional law and politics in America is, in short, still largely an institutional history. We have yet to move beyond magisterial accounts of "great" advocates arguing "great" cases involving "great" issues decided by "great" judges sitting on "great" courts.³³ I believe

Brewer & John Styles eds., 1980) [hereinafter AN UNGOVERNABLE PEOPLE] (historical essays on popular understandings of law and the state).

29. The concept of the "subaltern" used here originates with Antonio Gramsci. Gramsci distinguishes between "dominant" and "subaltern" groups. See Antonio Gramsci, *History of the Subaltern Classes: Methodological Criteria*, in SELECTIONS FROM THE PRISON NOTEBOOKS 52 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

30. Raphael Samuel and Stuart Hall (among others) have alerted us to the difficulties inherent in the notion of "popular history," the most obvious of which has to do with its overlapping and often opposite meanings. Stuart Hall, *Deconstructing the Popular*, in PEOPLE'S HISTORY AND SOCIALIST THEORY, *supra* note 28, at 227. Two additional problems with the concept bear observing here. First, the term "popular history" denotes neither a fixed nor an easily discoverable object of study. The people whose history its practitioners seek to recover can be (and have been) defined differently in the light of considerations of, for example, nationality, class and caste, race and ethnicity, gender, literacy and linguistic community, region, and period. Raphael Samuel, *People's History*, in PEOPLE'S HISTORY AND SOCIALIST THEORY, *supra* note 28, at xiv, xxi. Second, popular history is not simply an object of study; it is also in a very real sense a form of political practice. The methods used to research and write popular history are "shaped in the crucible of politics, and penetrated by the influence of ideology on all sides." *Id.* at xx. In some of its "conservative" versions, popular history is presented as a history "with the politics left out." *Id.* at xxi. The conservative repudiation of politics, of course, reflects an oblique ideological choice. In radical historiography, the political register is often more explicit. See, e.g., THOMPSON, *supra* note 28. The crucial point to note here is "that there is no popular memory to be retrieved in its virginity." Michael Bommers & Patrick Wright, *Charms of Residence: The Public and the Past*, in MAKING HISTORIES, *supra* note 28, at 254, 256.

31. For a discussion of historiography, see *infra* notes 170-76, 179-83 and accompanying text.

32. There are, of course, a few notable exceptions. See, e.g., DAN T. CARTER, SCOTTSBORO (rev. ed. 1987); RICHARD KLUGER, SIMPLE JUSTICE (1976); PETER H. IRONS, THE COURAGE OF THEIR CONVICTIONS (1988). In the English context, see HAY ET AL., *supra* note 28; E.P. THOMPSON, WHIGS AND HUNTERS (1975). See generally William Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767; William Forbath et al., *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759; Hendrik Hartog, *Pigs And Positivism*, 1985 WIS. L. REV. 899; Martha Minow, "Forming Underneath Everything That Grows": Toward a History of Family Law, 1985 WIS. L. REV. 819.

33. For work in this mode that covers the period in question, see, e.g., SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT (1951); David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504 (1987); and David P. Currie,

that American legal scholarship has paid insufficient attention to the cultural history of constitutionalism in America. The chief task of a cultural history of American constitutionalism is to identify and interpret the records left by those who have experienced the American constitutional order from its underside. A cultural history of constitutionalism from below diverges from institutional history both in its object of study and in its method and procedures. Its project thus differs from the institutionalist enterprise in at least two respects.³⁴ First, a cultural history of constitutionalism from the bottom up recognizes the right of "un- or misrepresented human groups to speak for and represent themselves in domains defined, politically and intellectually, as normally excluding them, usurping their signifying and representing functions, overriding their historical reality."³⁵

More is at stake, however, than "adding one part of a population, that which has been neglected, to another, that which has provided the traditional information base."³⁶ Constitutional history from the bottom up also seeks to challenge the conceptual order or hierarchy that subtends the exclusion of the common run of human beings and their concerns from the historical study of constitutional law. This project, then, is not directed simply at reversing the long-standing bias against the record of the subaltern in American constitutional history. It also represents an effort "to broaden the basis of history, to enlarge its subject matter, make use of new raw materials and offer new maps of knowledge."³⁷

One might anticipate that a popular memory of American constitutionalism will force us to rethink the very terms of constitutional history. The rereading offered here of the Angelo Herndon case³⁸ should be taken

The Constitution in the Supreme Court: Civil Rights and Liberties, 1930-1941, 1987 DUKE L.J. 800 [hereinafter Currie, *Civil Rights*]. Paul Mishkin has argued that "referring to the Court by the Name of the Chief Justice [has] a significant tendency to affect our thinking" about the jurisprudence of the Supreme Court. He suggests that the analytical presuppositions at work in this practice are not at work in the similar "practice of captioning cases by individual's names." Paul J. Mishkin, *Equality*, 43 LAW & CONTEMP. PROBS. 51 (1980). I disagree. See *infra* note 38.

34. One can envisage an institutionalized cultural history of American constitutionalism. This is in part the project, for example, of the Supreme Court Historical Society.

35. Edward W. Said, *Orientalism Reconsidered*, in LITERATURE, POLITICS AND THEORY 210, 212 (Francis Barker et al. eds., 1986).

36. Michael Brown, *History and History's Problem*, 16 SOC. TEXT 136 (1986-87).

37. Samuel, *supra* note 30, at xvi.

38. The reader will have noticed my reference in several places to the "Angelo Herndon case." In an earlier footnote, I cited Paul Mishkin's assertion that the analytical presuppositions at work in the practice of referring to the Supreme Court by the name of its Chief Justice are not at work in the similar "practice of captioning cases by individual's names." Mishkin, *supra* note 33. However, I

as an illustration of the type of contribution that the quest for the recovery of a popular memory can make. It offers a case study of a period in our constitutional history of which we have important, but finally inadequate, institutional accounts: the turbulent decade of the 1930s, which has come to be known, significantly, as the "years of protest."³⁹ As we shall see, even a cursory review of historical work on the Angelo Herndon case reveals the limitations of the notion—explicit or implicit in much of the literature—that the institutional "great case" model permits us to fully grasp the complex, contradictory logic of the story of American constitutionalism. Constitutional history in the institutional mode is hostile at all points to the type of thinking about historical research and interpretation suggested by work in popular memory. Perhaps the most significant threat that popular historical method represents for the dominant tradition of great-case historiography is its critical posture toward the notion that American constitutionalism is a story of the protracted but almost preordained emergence and progressive elaboration of the rules and principles that make up our fundamental law. In short, it challenges the conventional theoretical framework within which American constitutional history is viewed as a tale of "conflict within consensus."⁴⁰

believe that interpretive premises do lurk behind this practice, although their existence and effects are likely to elude anyone who is thoroughly socialized by certain professionalist habits of mind. Edward Said has noted that the proponent of the notion that "nothing, not even a simple descriptive label, is beyond or outside the realm of interpretation, is almost certain to find an opponent saying that science and learning are designed to transcend the vagaries of interpretation, and that objective truth is in fact attainable." Said, *supra* note 35, at 214. Insofar as the unreflective use of a case name cuts off avenues of analysis and inquiry, the practice is far from innocent: It inscribes or smuggles an institutionalist perspective into a project whose aim is precisely to challenge the analytical and ideological limits of institutional method. One might restate the point by recalling the etymological family to which the word "caption" belongs: The case name caption is the sign of a conceptual seizure or capture by which institutionalist method holds alternative interpretations hostage within its restricted horizon. The practice assumes without argument that the decision in *Herndon v. Georgia* was a judicial response to a controversy raised by and involving only (or primarily) the two named parties—an individual and a state. In my view, this institutional perspective on the case does not exhaust the case's constitutional significance. The citation form actively hampers exploration of the larger sociocultural conflicts that are inscribed in the case and in the opinion itself.

Thus, while I use the conventional caption form at various points in this Article, I also refer simply to the "Angelo Herndon case" as a way to discursively mark and provisionally overcome the interpretive privilege traditionally accorded to "official" legal materials and "professionalist" ways of naming and knowing.

39. This is the title of a collection of writings from the period edited by Jack Salzman. *See YEARS OF PROTEST* (Jack Salzman ed., 1967).

40. *See* MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986). Kammen's subtitle suggests that this study was intended to be read as a cultural history of American constitutionalism. However, Kammen's epistemological bias short-circuits the more critical perspective that I believe a cultural historical analysis of American constitutionalism dictates. This bias is reflected in Kammen's central interpretive thesis: "I would describe the basic pattern of American constitutionalism as one of *conflict within consensus*." *Id.* at

The perspective of popular historical method permits us to see the extent to which the history of constitutionalism in America, viewed from its underside, can be plotted as a story of a body of law born of sustained struggle, the outcome of painful, passionate political and ideological contests between subordinate groups and dominant institutions.⁴¹ This is a story that the optic of institutional historiography is by definition unable to see, much less view empathetically. In my alternative account and interpretation of the Angelo Herndon case, I hope to show that it is only through the lens of popular memory that we can begin to reach a critical understanding of this and other chapters in the history of American constitutionalism. The method of popular constitutional history does not just re-create a legal case; it recalls a larger, largely forgotten political culture. It permits us to see Angelo Herndon not simply as an issue or problem for constitutional discourse but as a conscious agent in shaping

29. Curiously, Kammen steps back from this claim at a number of points in the text. See *id.* at 30 (stating that "[t]he volume of evidence is overwhelming that our constitutional conflicts have been consequential, and considerably more revealing than the consensual framework within which they operate"); *id.* at 46 (arguing against the view that a constitutional consensus emerged soon after 1789); *id.* at 51 (arguing that "[o]ne cannot say that a consensus existed about serious matters of constitutional interpretation"); *id.* at 185 (stating that he is "skeptical" of the "generalization" that "the 19th century did achieve a comparatively well-accepted consensus about the Constitution and the Supreme Court"—what Robert G. McCloskey called a 'kind of synthesis in American constitutionalism' that only began to fall apart in the twentieth century") (citations omitted); *id.* at 186 (stating that "[p]erhaps the most to be said for 'consensus' is that people of diverse persuasions shared a commitment that might be described as elitist, resistant to change, and exceedingly anxious about concentrations of governmental authority in any single branch or level of the constitutional system"); *id.* at 399 (stating that "constitutionalism embodies a set of values, a range of options, and a means of resolving conflicts within a framework of consensus").

Although the consensus framework within which Kammen works has been rigorously (some would argue persuasively) deconstructed, he proceeds as though it had never occurred. There is not a single reference in the book to the literature that critically examines the "cult of consensus." See, e.g., John Higham, *The Cult of the "American Consensus": Homogenizing Our History*, 27 COMMENTARY 93 (1959); John Higham, *Beyond Consensus: The Historian as a Moral Critic*, 67 AM. HIST. REV. 609 (1962). Michael Kammen cites the latter article in his introduction to a collection of papers on contemporary historical writing in the United States. Michael Kammen, *The Historian's Vocation and the State of the Discipline in the United States*, in *THE PAST BEFORE US* 19, 23 n.8 (Michael Kammen ed., 1980). For a capsule history of the debate among professional historians, see Robert F. Berkhofer, Jr., *Clio and the Culture Concept: Some Impressions of a Changing Relationship in American Historiography*, in *THE IDEA OF CULTURE AND THE SOCIAL SCIENCES* 77 (Louis Schneider & Charles M. Bonjean eds., 1973).

41. In this respect, this Article goes further than the program urged in a recent article by Randall Kennedy, who calls for a revisionist constitutional history aimed at "creating and preserving a memory of [the] suffering" inflicted on subordinate groups. Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1661 (1986). In my view, this project is crucial but in itself incomplete. An equally if not more urgent task is to tell the story of how the intended victims, here of racial and class injustice, fought back and resisted oppression.

this discourse.⁴² In short, popular constitutional historiography refuses to view constitutionalism in American culture as the exclusive preserve of elites and institutions.

Part II of this Article begins with a reading of Angelo Herndon's political autobiography, *Let Me Live*.⁴³ After placing *Let Me Live* within the popular tradition of Afro-American resistance literature, I use it and other contemporaneous texts to offer an alternative account of the Angelo Herndon case from the bottom up. I shall, of course, take up the specific legal issues that were raised, argued, and decided during the course of the case; thus, much of what I have to say will necessarily be cast in the familiar terms of orthodox constitutional history. However, in my reading of these texts of 1930s institutional legal consciousness, I search for traces of popular memory: My central focus is on discovering what the official statements of constitutional doctrine in the Angelo Herndon case tell us about insurgent political consciousness among African-Americans at one key moment in our national past. My purpose in this part, as in the rest of this Article, is most emphatically not to offer a revisionist "doctrinal" history of the Angelo Herndon case.⁴⁴ Rather, my main interest is in the larger lessons that this episode in our constitutional history conveys about a people's search for political literacy and

42. This is an appropriate point at which to emphasize that this Article is not an exercise in "black" or "Afro-American" historical studies. Stated bluntly, I reject the notion that such a compartmentalization, such an exile to a subdisciplinary ghetto, is either possible or desirable. I believe the late C.L.R. James was right when he remarked on the limitations of black studies as such:

[To] talk to me about black studies as if it's something that concerned [only] black people is an utter denial. This is the history of Western Civilization. I can't see it otherwise. . . . I only know the struggle of people against tyranny and oppression in a certain social and political setting, and, particularly, during the last two hundred years, it's impossible to me to separate black studies from white studies in any theoretical point of view.

C.L.R. JAMES, *AT THE RENDEZVOUS OF VICTORY* 194, 201 (1984). This Article should be read as an attempt to move the African-American constitutional experience from the margins to the center of American constitutional history.

43. HERNDON, *supra* note 27.

44. Proponents of doctrinal analysis as a core activity of legal scholarship (if not *the* core of legal scholarship) might think that my criticism of compartmentalization is misplaced. Any case is one unit (so their argument might run); doctrinal dissection of a case is justified because its subunits present distinguishable legal issues that merit separate consideration. However, I think that this line of reasoning overlooks two crucial points, both of which pose unsettling questions about the adequacy of orthodox doctrinal method as a framework for a critical or historical understanding of legal thought.

The first point bears on the active role that professional legal consciousness plays in creating and constructing (as opposed to merely discovering) the doctrinal categories that it takes as the object of its analysis. The neat compartments into which doctrinal analysis places various aspects of a particular case are not a given, but are continually made and remade. This is so even when the doctrinal analysis purports simply to track the organization of the opinion or opinions on which it focuses; the legal critic's submission to the stated doctrinal horizon of a given opinion is not a question of necessity, but of conscious or unconscious choice. Indeed, there may well be instances in

the obstacles thrown in their way. This lesson is a broad one, of which the doctrinal dimensions of the case are merely one component.

The analysis of the events that brought Angelo Herndon before the U.S. Supreme Court paves the way for Part III of this Article, which

which the substantive logic of a particular opinion can be charted only if one actively questions the doctrinal formulations in which that logic is expressed.

A second point goes to the disabling consequences of pure doctrinalism on the understanding of law as a historical phenomenon (as opposed, for example, to the instrumental aims of the genre of legal scholarship whose primary purpose is to "contribute" to the reform or refinement of a given area of law). In its dominant mode, doctrinal taxonomy tends to abstract legal issues from their larger social context, implicitly or expressly denying the constitutive relationship between legal ideas and the concrete historical conditions of their emergence. One consequence of the doctrinalist approach, then, is that it perpetuates an ahistorical conception of legal thought and practice. Robert Gordon employs the term "legal rationalism" to describe the basically ahistorical orientation of what I call "doctrinalism"; Gordon contrasts legal rationalism and historicism. Robert Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 n.1 (1981). Although Gordon's distinction is useful, I believe that it is potentially misleading, because it implies that legal rationalism or doctrinalism altogether eliminates the question of time in legal analysis. I do not think this characterization is altogether correct. One of the more vexing aspects of doctrinalist method is that its fundamentally ahistorical drift is sometimes difficult to detect; this is so because (as Gordon himself notes) it often coexists (albeit uneasily) with an express acknowledgment and analysis of the temporal dimension of legal ideas. *Id.* at 1028-36 (discussing the "adaptationist" response of legal rationalism to the "historicist" challenge). Here the decisive gesture of doctrinalism is not so much rejectionist as reductionist: The doctrinalist strategy does not seek to avoid the chronic dimension of law; rather, it absorbs the question of time within a theoretical framework that remains essentially ahistorical. To put the point another way, we might describe doctrinalism as the substitution of a limited, relatively unproblematic *temporality* for a broader, more consequential *historicity*. This metalepsis signals an important shift in emphasis, accent, and scope. It permits doctrinalism to represent itself as historical while retaining the opposition between the "legal" and the "social" whose epistemological interrogation is one of the chief tasks of historicist method. For a discussion of similar problems in anthropological study, see JOHANNES FABIAN, *TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT* (1983).

By way of conclusion, two disclaimers are in order. First, none of what I have said should be taken as an assertion that doctrinalism cannot usefully analyze some aspects of legal thought and practice within its restricted ambit. Nor am I suggesting that the results of doctrinalist analysis have no value. Second, my remarks regarding the limits of doctrinalist method should most emphatically *not* be confused with the quite different claim that doctrinalist analysis or argument can never be of service to scholars who are committed to fundamental change in the legal and political status quo. To my way of thinking, any such essentialist claim is as ahistorical as the doctrinal method it attacks. Paraphrasing a line of argument developed by Fredric Jameson in another setting, we might say that such a global claim about the sociopolitical dimensions of doctrinalism can be sustained only if one isolates "the form of thought (or its equivalent, the form of discourse) from that practical context in which alone its results can be measured." The political aims and effects of doctrinal discourse "can . . . never be evaluated independently of their function in a given historical situation." FREDRIC JAMESON, *The Ideology of the Text*, in FREDRIC JAMESON, *IDEOLOGIES OF THEORY: ESSAYS 1971-1986*, at 62 (1989). I am not making a political argument that doctrinal discourse is inherently conservative. Indeed, it is not difficult to adduce cases in which doctrinalism has provided the terms for radical political and legal argument. *See, e.g.,* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 n.2 (1984) (citing CHRISTOPHER HILL, *PURITANISM AND REVOLUTION: STUDIES IN INTERPRETATION OF THE ENGLISH REVOLUTION OF THE 17TH CENTURY* 58 (1958)); John Brewer, *The Wilkites and the Law, 1763-74: A Study of Radical Notions of Governance*,

offers a critical review of three mainstream historical treatments of the Angelo Herndon case and places the case in the broader history of First Amendment law and politics. My goal in this part is to specify how (and to suggest why) these professional constitutional histories work to obscure, ignore, and overlook some of the most important—and unsettling—lessons of the case. Focusing on the logic and the language of these three contributions to the Angelo Herndon case historiography, I argue that significant interpretive and ideological consequences flow from the way each represents to itself (and to the reader) its un- or undertheorized relationship to the elements of the case it seeks (or refuses) to study, as well as to the textual and narrative structures in which those elements are situated.

Part IV offers a revisionist reading of the text of the Supreme Court's opinions in the Angelo Herndon case. I begin with a critical discussion of a contemporaneous commentary on the case by Felix Frankfurter and Henry Hart, setting their treatment within the larger intellectual currents, both inside and outside the legal scholarship, of which it was a part. I then examine the complex relation between reasoning and rhetoric in the text of the Court's opinion in *Herndon v. Georgia*. Borrowing critical terms from recent theoretical work on the politics of rhetorical discourse, I challenge the standard view that *Herndon v. Georgia* addresses itself only to the procedural forms of constitutional adjudication. A rhetorical reading of *Herndon v. Georgia* suggests that in this instance, the line between form and substance in constitutional law cannot be so cleanly and categorically drawn.

II. THE STRUGGLE FOR AN EFFECTIVE POLITICAL LANGUAGE

[A]nd carmade Hall next he read a piece in The Atlanta Georgian that they was 6,000 dollars raze for the unployed releaf after the Demestrahun at the Cort house on Thirday morning

Anonymous, Handwritten "Minutes" of July 1, 1932,

in AN UNGOVERNABLE PEOPLE, *supra* note 28, at 128 (discussing the oppositional political uses of the common law discourse and actions by John Wilkes and his followers in 18th-century England).

Consequently, my observations should be strictly construed. They aim to illuminate the inhibiting epistemological and historiographical tendencies of doctrinalism. These tendencies may be at work in any given instance of doctrinal discourse, regardless of the political ideology that underwrites it and independently of its political consequences in the particular case. This is not, of course, to say that one cannot speak meaningfully of a politics of doctrinal discourse in the Angelo Herndon case. It is to suggest that any claim one makes about the specific political force of doctrinal rhetoric in *Herndon v. Georgia* must derive from the particular features of that case and not from any general global view about the politics of doctrinal discourse as such.

Meeting of the Ford and Foster Clubs⁴⁵

A. POPULAR CULTURE AND POLITICAL CONSCIOUSNESS

The Angelo Herndon case powerfully underscores the extent to which the history of the struggle of Afro-American people against an oppressive cultural (social, political, and economic) order has also always been the history of a struggle against an oppressive discursive or symbolic order. Lucius Outlaw describes this struggle as a collective effort

. . . to embrace where available, to construct where unavailable, those productions and expressions of meaning which serve to reflect the self-affirmations of black people, our views of the world, in concepts and forms which we have projected for these purposes.

. . . [G]iven the history of enslavement, subjugation, subordination, discrimination, oppressions . . . which have been (and are) directed against us, [the struggle for cultural and political integrity] involves . . . "a counter-movement away from subordination to independence, from alienation through refutation, to self-affirmation," via a process of "reflection" which . . . "creates a different (and *opposing*) constellation of symbols and assumptions."⁴⁶

One decisive dimension of the African-American struggle for political self-determination has been the practice of symbolic reversal. This term designates a process "whereby one moves on the level of symbolic meaning (and, it is hoped), the level of existence, from imposed determination of one's (a people's) existence to those generated [by] oneself (by the people themselves) in the process of living as affirmations of that existence in its authenticity."⁴⁷ Although one may question the adequacy of the larger framework in which it is embedded, Outlaw's basic point is surely

45. Transcript of Record at 76, *Herndon v. State*, 174 S.E. 597 (Ga. 1934) [hereinafter Transcript]. James W. Ford, a trade unionist, was a leading black member of the Communist Party and its vice presidential candidate during the national election of 1932. See HARVEY KLEHR, *THE HEDYDAY OF AMERICAN COMMUNISM: THE DEPRESSION DECADE* 330-31 (1984). William Z. Foster, of Irish-immigrant background, was for many years the best-known American Communist and the party's perennial presidential candidate. See *id.* at 19-20. While one might assume that the name Ford and Foster Clubs was used to conceal the fact that the persons mentioned in the minutes were attending a meeting of the Communist Party, it should be noted that in 1932 several prominent nonradical blacks (among them the poet Countee Cullen and the intellectual Kelley Miller) were recruited as members of the Ford-Foster Committee for Equal Negro Rights, led by William Jones, the managing editor of the *Baltimore Afro-American*. See *id.* at 469 n.16.

46. Lucius Outlaw, *Language and Consciousness: Toward a Hermeneutic of Black Culture*, 1 *CULTURAL HERMENEUTICS* 403 (1974) (emphasis added) (quoting James Turner, *The Sociology of Black Nationalism*, in 1 *THE BLACK SCHOLAR* 18 (1969)).

47. Outlaw, *supra* note 46.

correct: The strategic manipulation and reversal of the dominant culture's political symbols is, and has long been, a central feature of African-American resistance movements, in both their reformist and their radical incarnations.⁴⁸

To paraphrase Justice Holmes,⁴⁹ African-Americans have lived by and fought through symbols: We cannot hope to comprehend the history of their collective encounter with the ideology and institutions of American constitutionalism unless we carefully attend to its symbolic aspects, conceived as both an arena and an arsenal of struggle.⁵⁰ This is to

48. An in-depth discussion of Outlaw's argument is beyond the scope of this Article, but I do want to note two features of his analysis that seem to me to be at odds with the emancipatory project Outlaw proposes. First, Outlaw introduces what I view as an unfounded opposition between "the level of symbolic meaning" (consciousness) and "the level of existence" (lived experience or real life). As Outlaw himself concedes, the "linguistic productions" of black people are central to what he calls their "life world." *Id.* at 411. Put another way, the symbolic meanings produced by African-Americans (or, for that matter, by any group) are a "complex of material-social practices" that inform and are informed by their concrete conditions of existence. The two cannot legitimately be separated. To put the point aphoristically, we can say that cultural symbols *matter*. For a critical discussion of the similar separation of culture and material life in the Marxian corpus, see JOHN BRENNKMAN, *CULTURE AND DOMINATION* 59-101 (1987).

Second, while I agree with Outlaw that the practice of symbolic reversal is the indispensable inaugural gesture in an African-American cultural politics (as theory and practice), I would argue that such a gesture, without more, is incomplete. If one accepts the proposition that the study of constitutional history informs the practice of constitutional law and politics today (a proposition too plain to be contested), it is not enough simply to reverse the terms with which the past and present experience of African-Americans under American constitutionalism are described. We must go further and displace the entire analytic and ideological system that underwrites that experience. Readers familiar with poststructuralist thought will recognize in my insistence on a twofold critical strategy the influence of the deconstructionist Jacques Derrida. What Derrida writes of his interpretive practice suggests the need here to extend the analytical program (which is also a political program) that Outlaw sketches. What is required is a

double gesture, a double science, a double writing [that permits] an *overturning* of the [oppressive symbolic] oppositions [and] a general *displacement* of the [semantic] system [on which they rest]. It is only on this condition that [a critical theory of race and law] will provide the means with which to *intervene* in [and thus transform] the field of [oppressive] oppositions that it criticizes.

JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* 329 (Alan Bass trans., 1982). I have elsewhere described the critical procedure proposed here as a strategy of rigorous "double crossing." Kendall Thomas, *A House Divided Against Itself: A Comment on "Mastery, Slavery, And Emancipation,"* 10 CARDOZO L. REV. 1481, 1501 (1989).

49. OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 270 (1920).

50. Of course, we should not overlook the fact that throughout the nation's history, cultural representations have been marshaled to legitimize as well as to oppose the condition of blacks (and other people of color) in the American constitutional order. That is, there is nothing inherently subversive about the political uses of culture. Indeed, one of my aims in this Article is to suggest that appeal to the cultural meanings of race, law, and politics was a central feature of discourse on both sides of the Angelo Herndon case.

acknowledge the centrality of culture as the site in which African-Americans have historically sought to make sense of, and respond to, their experience in the United States.⁵¹

By culture, I mean a broad range of practices, rituals, attitudes, beliefs, doctrines, images, and ideas that traverse or "saturate"⁵² the entire social formation.⁵³ From this perspective, culture does not "stand above or apart from the many other activities and relationships that make up a society, including the socially organized forms of domination, exploitation, and power pervasive in our own society and its history."⁵⁴ To note the significance of cultural practices in the history of American constitutionalism is to view culture as formed by, contributing to, and embedded in law and politics.⁵⁵

51. For a valuable historical discussion of African-American cultural consciousness from slavery through the early years of the 20th century, see V.P. FRANKLIN, *BLACK SELF-DETERMINATION* (1984). Franklin identifies four core components of the African-American "cultural value system": self-determination, resistance, education, and freedom. *Id.* at 4-5. Recent history suggests that African-American cultural forms carry a resonance even for those who share a different history of oppression. Indeed, the political uses of African-American culture now extend far beyond American borders. For example, one of the more powerful moments in the media coverage of the November 1989 events in Berlin was the footage of Germans gathered near the Brandenburg Gate singing *We Shall Overcome*.

52. See EDWARD W. SAID, *THE WORLD, THE TEXT, AND THE CRITIC* 9 (1983).

53. "Culture," as Raymond Williams has noted, "is one of the two or three most complicated words in the English language." RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 87 (1983). As I use it here, the term should be understood in its broad social science sense rather than in its narrower (currently dominant but relatively recent) sense of artistic processes and their artifacts. Culture, then, denotes a "way of life" of which aesthetic activities and institutions are but one component. For discussion from a number of disciplinary perspectives of this more inclusive conception of the culture concept, see *THE IDEA OF CULTURE IN THE SOCIAL SCIENCES*, *supra* note 40.

54. BRENNKMAN, *supra* note 48, at vii. In *A Dialectical Approach to Culture*, the Guinean leader and political theorist Sekou Touré sets forth a definition of culture for continental Africa that parallels the conception of culture central to an understanding of political practice among the people of the African diaspora in the United States:

[Culture embraces] all the material and immaterial works of art and science, plus knowledge, manners, education, a mode of thought, behavior and attitudes accumulated by the people both through and by virtue of their struggle from the hold and domination of nature . . . [Culture also] stands revealed as both an exclusive creation of the people and a source of creation, as an instrument of socioeconomic liberation and as one of domination. Culture implies our struggle—it is our struggle.

Sekou Touré, *A Dialectical Approach to Culture*, in *CONTEMPORARY BLACK THOUGHT* 5 (Robert Chrisman & Nathan Hare eds., 1973). For a discussion of the importance of cultural practice for critical race theory, see Arif Dirlik, *Culturalism as Hegemonic Ideology and Liberating Practice*, 6 *CULTURAL CRITIQUE* 13 (1987).

55. My point is most emphatically *not* that culture and power politics are identical. What I do mean to suggest is that cultural products and practices, including legal culture, are part of a "large intellectual endeavor—systems and currents of thought connected in complex ways to doing things, to accomplishing certain things, to force, to social class and economic production, to diffusing ideas, values and world pictures." SAID, *supra* note 52, at 170.

It is with this view of the relation between constitutional struggle and cultural contestation that I want to introduce my account of the events for which *Herndon v. Georgia* became a site of intersection. In my view, Angelo Herndon's autobiography, *Let Me Live*, offers a discursive enactment of the strategies of symbolic reversal and displacement to which a critical history of the subaltern in American constitutional law and politics must attend. *Let Me Live* illustrates the dynamic interaction during the Depression decade between cultural and political practices.⁵⁶ The book reveals as well the way culture and politics provided an ideological context in which one African-American reached a critical understanding of, and response to, the American constitutional order.

Shortly before the Supreme Court rendered its decision in *Herndon v. Lowry*, Random House published *Let Me Live*.⁵⁷ *Let Me Live* articulates the cultural foundations of the political struggles waged by African-Americans during the Depression. On one level, Herndon's book is an extended meditation in autobiographical form on the relationships between language and power and between cultural and political consciousness.

The cultural tradition within which Herndon comes to grasp the nature of politics is the religion of the black Christian church. Early on in *Let Me Live*, Herndon describes his childhood religious conversion by an old uncle at a revival meeting.⁵⁸ As Herndon tells it, this experience shaped and at the same time circumscribed his perception of the problem of race relations in America.⁵⁹

Years after the event, he compares and contrasts the emancipatory potential of religious belief with that of political radicalism after he is introduced to the work of the Unemployed Councils, a national organization for jobless workers of all colors that had formed in the winter of

56. Some of the most important explorations in American legal scholarship of the relations among law, politics, and culture were made during this decade. See THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Edward S. Corwin, *The Constitution as Instrument as Symbol*, 30 AM. POL. SCI. REV. 1071 (1936); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937). A reading of these four texts suggests that this Article's cultural analysis of American constitutional law and politics is not anachronistically imposed upon the historical record but rather inheres in it.

British historians have already produced a rich literature addressing the role of culture in English political life during the 1930s. Three especially useful works are RAYMOND WILLIAMS, *CULTURE AND SOCIETY, 1780-1950* (1983); *CULTURE AND CRISIS IN BRITAIN IN THE THIRTIES* (Jon Clark et al. eds., 1979); and *CLASS, CULTURE AND SOCIAL CHANGE: A NEW VIEW OF THE 1930S* (Frank Gloversmith ed., 1980).

57. HERNDON, *supra* note 27.

58. *Id.* at 20-25.

59. *Id.* at 88-89.

1929-30.⁶⁰ At his first meeting, the unemployed black teenager listens to an old black steelworker explain why he has joined the Unemployed Council.⁶¹ By the end of the meeting, Herndon decides to become one of the "reds," whom the black church had taught him were "wicked people blaspheming against God."⁶² In a passage that evokes the tradition of spiritual autobiography, Herndon describes his entry into radical politics and consciousness as a second conversion experience:

Strange, only once before had I walked up to a speaker who had moved me so deeply and been converted. That was the time when my Uncle Jeremiah preached his first sermon The emotional motivation in both cases was identical, but what a difference in their nature and in their aim! The change of my viewpoint was almost fabulous, emerging from the urge to escape the cruelties of life in religious abstractions into a healthy, vigorous and realistic recognition that life on earth, which was so full of struggle and tears for the poor, could be changed by the intelligent and organized will of the workers.⁶³

For the first time, writes Herndon, he comes to see the promise and necessity for the political program of the CPUSA, which aimed to forge class alliances across the color line. This recognition entails nothing less than a complete reworking of Herndon's world view:

That night when I went to bed, I couldn't fall asleep. My mind was too excited by the events of the evening to calm down. Something very important had happened to me, I knew, and I lay with wide open eyes staring into the darkness of my room and thinking that it was at last necessary for me to revise my attitude toward white people. I had discovered at last the truth that not all white people were enemies and exploiters of the Negro people. In fact, the same vicious interests that were oppressing Negro workers were doing the same thing to white workers, that both black and white workers could solve their problems

60. The Communist Party's Unemployed Council (which Herndon refers to as the Unemployment Council in *Let Me Live*) successfully forced important concessions from local relief authorities and landlords, through both advocacy on behalf of the unemployed and direct action—such as eviction protests and demonstrations at relief offices, city halls, and state capitals. The council was particularly effective during the early years of the Depression, when local relief programs were singularly incompetent in dealing with mass unemployment. According to historians of the period, the Unemployed Council played an important role in the "breaking down of barriers" that had frustrated the political coalition between poor whites and blacks, particularly in the South. Roy Rosenzweig, *"Organizing The Unemployed": The Early Years of the Depression*, 10 *RADICAL AM.* 37, 42 (1976). The CPUSA has maintained that the council was the "tactical key" to its work during the 1930s. *Id.* at 40. For a history and analysis of the rise and fall of this movement, see FRANCES FOX PIVENS & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 41-95 (1977).

61. HERNDON, *supra* note 27, at 77-78.

62. *Id.* at 80.

63. *Id.* at 78.

only by a united effort against the common enemy: the rich white people, they who owned the mines, the mills, the factories, the banks.⁶⁴

Herndon's initiation into a new political language—Marxism—brings him to consciousness of the power of language itself. He writes:

My education, as I have made clear in this narrative, was practically nil. Throughout all my struggles and vicissitudes I hungered for learning But a new force now entered into my life. It created a revolution in it. The education I longed for in the world I had expected to find it [sic], I surprisingly began to receive in my new Communist circles. To the everlasting glory of the Communist movement may it be said that wherever it is active, it brings enlightenment and culture. . . . Every meeting of the Unemployment [sic] Council became a classroom for me. I never left one of them without bearing away with me the discovery of [a] new idea. Of course, I did not always understand everything that I heard or read, but what of it? It was enough that I understood that they were on the right track.⁶⁵

Throughout *Let Me Live*, Herndon stresses the centrality of education to his political development. At one point, he notes the "painful concentration" with which he read a copy of the Communist Manifesto that a white worker gave him.⁶⁶ To test his understanding of Marx and Engels, Herndon writes a "simple account"⁶⁷ of the text "in my own words".⁶⁸

The worker has no power. All he possesses is the power of his hands and his brains. It is his ability to produce things. It is only natural, therefore, that he should try and get as much as he can for his labor. To make his demands more effective he is obliged to band together with other workers into powerful labor organizations, for there is strength in numbers. The capitalists, on the other hand, own all the factories, the mines and the government. Their only interest is to make as much profit as they can. They are not concerned with the well-being of those who work for them. We see, therefore, that the interests of the capitalists and the workers are not the same. In fact, they are opposed to each other. What happens? A desperate fight takes place between the two. This is known as the class struggle.⁶⁹

64. *Id.* at 79-80.

65. *Id.* at 87-88.

66. *Id.* at 81.

67. *Id.* at 82.

68. *Id.*

69. *Id.*

"The idea," says Herndon, "seemed so self-evident that I scolded myself for having been so stupid as not to have recognized it before."⁷⁰ In this moment, Herndon appropriates the grammar and categories of Marxist theory for use as a discursive means and an analytic tool with which to explain his condition and that of people like him. His effort to rewrite the Communist Manifesto in his own language is an attempt to rewrite his own life experience. Herndon's discovery of the language of class is the beginning of a decisive transformation of his thoughts and feelings about race in America.⁷¹

The chief theoretical interest of these passages from *Let Me Live*, from the perspective of popular constitutional history, lies less in the substance of Herndon's Marxist politics than in what they indicate about the cultural process and forms through which Herndon's political consciousness was fashioned. Despite its flaws (and there were many),⁷² the political culture of American Marxism enabled Angelo Herndon to acquire what so many young African-American men in our time find in the institution of the American prison: a political education providing a basic set of terms—a language—with which to interpret their place in society and try to change it.

70. *Id.* at 82.

71. To be sure, Herndon's attempt to understand the state of African-Americans in the 1930s never moves beyond the horizons of orthodox Marxism. Indeed, one of the blind spots of *Let Me Live* lies in Herndon's unwillingness or inability to acknowledge the autonomy of racial and cultural identity. Instead, he uncritically collapses the two into the category of class in a way that ignores their specificity. Because *Let Me Live* was meant to enhance the development of a distinctly black socialist consciousness in America, its reduction of racial and cultural struggles to class struggles alone is unfortunate.

72. The Communist Party line on the "Negro question" was based on an analysis by Soviet Communists that African-Americans were an oppressed nation whose only hope lay in the creation of a sovereign state in the southern "Black Belt." The historical record clearly shows that the theoreticians in Moscow completely misread the aspirations of black people in the United States. The Soviet elite was unable to understand that African-Americans were less interested in being separate from American society than in being fully part of it. Further, the Soviet Union attempted to fit the historical experience of black Americans into the conceptual framework of its policy toward its own ethnic and racial minorities, refusing to acknowledge the particularity of black Americans' experience. Nevertheless, the fact remains that during the 1930s, the CPUSA was the *only* political party in the United States seriously committed to the struggle for racial equality in America (and committed in a sustained way) and the *only* political party in which African-Americans had a leadership role. See generally HARVEY KLEHR, *supra* note 45; MARK NAISON, *COMMUNISTS IN HARLEM DURING THE DEPRESSION* (1983). For a discussion of the specific question of black American self-determination, see HARRY HAYWOOD, *BLACK BOLSHEVIK* (1978). For an interesting contemporary debate on the "black nation" thesis and the CPUSA program to establish an independent, black-controlled political entity in the southern Black Belt, see LEON TROTSKY ON BLACK NATIONALISM AND SELF-DETERMINATION (George Breitman ed., 1978).

It is easy to say in hindsight that Herndon and his black contemporaries were unwitting pawns in a cynical political game waged by the Soviet Union against the United States (and locally by the American Communist Party against the NAACP).⁷³ It is equally easy to show that, as a theoretical and practical matter, the CPUSA was unwilling or unable to acknowledge that race and culture in American politics could not be subsumed under the language of class struggle.⁷⁴ There is some truth in both these claims. In a sense, however, these criticisms are beside the point. We are still left with the task of explaining why blacks like Angelo Herndon chose to join and stay in the CPUSA and why, given all its theoretical and practical shortcomings, an organization like the CPUSA was still able to become such an "important force within the black community during the first years of the depression."⁷⁵ More fundamentally, these interpretations run the risk of refusing to see Angelo Herndon and those like him as historical actors in their own right and not merely objects or "instruments of some other will."⁷⁶ Nothing could be more elitist than to blithely dismiss Herndon's narrative of his trial and conviction, whether the dismissal takes the form of a weak claim that *Let Me Live* is a layman's legal history with which we need not be concerned, or whether it rests instead on a stronger assertion that the book is merely a piece of audacious Communist Party propaganda.⁷⁷

73. The most vocal proponent of this line of argument is Wilson Record. See WILSON RECORD, *THE NEGRO AND THE COMMUNIST PARTY* (1951); WILSON RECORD, *RACE AND RADICALISM: THE NAACP AND THE COMMUNIST PARTY IN CONFLICT* (1964). Harold Cruse, whose perspective is sympathetic to black nationalism, reaches similar conclusions. HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1967). Of the two, Cruse offers the more thoughtful analysis, perhaps because he is less evidently committed to the ideology of the Cold War. See also ROBERT L. ALLEN, *RELUCTANT REFORMERS* 233 (1974) (arguing that the CPUSA's practices "reduced black people to the role of passive objects to be manipulated in accordance with priorities that had little or nothing to do with the economic or political objectives of black workers themselves").

74. HAROLD CRUSE, *REBELLION ON REVOLUTION* 229 (1968) (criticizing the inability of Marxists "to set the Negro off and see him in terms of his own national minority group existence and identity, inclusive of his class, caste, and ideological stratifications"). Phyllis Jacobson extends the arguments of Cruse and Allen, see *supra* note 73, criticizing the orthodoxy of the CPUSA with respect to the whole of American society. Phyllis Jacobson, *The "Americanization" of the Communist Party*, 1 NEW POL. 152, 161 (1986).

75. FRASER M. OTTANELLI, *THE COMMUNIST PARTY OF THE UNITED STATES: FROM THE DEPRESSION TO WORLD WAR II* 42 (1991).

76. Guha, *The Prose of Counter-Insurgency*, *supra* note 28, at 38.

77. None of this is to deny the manifest orthodoxy of Herndon's analysis or its lack of sophistication on the intersections of race, nationalism, and class. One could not and perhaps should not place *Let Me Live* in the same class as the work produced at roughly the same time by leftist African, Afro-American, and Afro-Caribbean writers, such as George Padmore, C.L.R. James, Eric Williams, Jomo Kenyatta, and W.E.B. Du Bois. These men were by temperament and training critical intellectuals. They shared a deep commitment to antiracist and anticolonialist politics in Asia and Africa (as well as Great Britain, France, and the United States). They were never willing to accept

The belief that Herndon's purported ignorance makes *Let Me Live* irrelevant, or that his perceived insolence makes it unreliable, derives from premises that are more ideological than intellectual.⁷⁸

Perhaps the historical literature is indifferent to *Let Me Live* not because it has made a considered judgment of the text, but rather because it adheres to the questionable notion that *Let Me Live* is presumptively disqualified as a serious source for the historical understanding of legal issues because of Herndon's insistent emphasis on the social, cultural, and political meanings and background of his case. I reject this view. *Let Me Live* demands attention precisely *because* of the challenges it poses to orthodox assumptions and understandings of the nature and uses of law. First, *Let Me Live* challenges the priority that the institutional history of American constitutionalism uncritically accords the official language and forms of law. Second, it suggests that no adequate historical account of the legal controversy presented by the Angelo Herndon case can ignore the larger "struggle over the historical and cultural record"⁷⁹ of which that legal contest was a part.

A constitutional history of the Angelo Herndon case that proceeds from the bottom up begins and ends with a recognition that the legal, cultural, and political dimensions of the case are indivisible parts of an integrated whole. None of this is to suggest that a historical analysis of the Herndon case should proceed as though no conceptual distinctions can be made among legal, political, and cultural practices. Rather, it is

the primacy that orthodox Marxism assigns to economic factors and class struggle. Accordingly, their work and writings reflect an analytical rigor and independence of mind that is absent from *Let Me Live*. Unlike Herndon, and unlike the majority of black radicals influenced by Communism, these men did not hesitate to criticize openly Soviet and Communist Party complicity with Mussolini during the Italian-Ethiopian War (the Soviet Union sold war materials to the Fascists); to attack the Third International's opportunistic dissolution of the International Trade Union of Negro Workers (a decision taken to win acceptance in the West); or to ridicule the Comintern's call for the establishment of a "Black Republic" in the United States. See RON RAMDIN, *THE MAKING OF THE BLACK WORKING CLASS IN BRITAIN* (1987) (for a discussion of James and Padmore); CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983) (for a discussion of James and Du Bois).

78. During the course of my research on the Angelo Herndon case, I have encountered more than one legal historian who has expressed some doubt about whether Herndon actually wrote *Let Me Live*. A review of the surviving correspondence between Angelo Herndon and his editors at Random House has left me with little cause to question Herndon's authorship. Letter from Angelo Herndon to Bennett Cerf (Feb. 2, 1937) (on file in the Rare Book and Manuscript Collection, Columbia University); letter from Angelo Herndon to Robert K. Haas (Dec. 12, 1936) (on file in the Rare Book and Manuscript Collection, Columbia University); letter from Robert K. Haas to Angelo Herndon (Dec. 16, 1936) (on file in the Rare Book and Manuscript Collection, Columbia University); letter from Angelo Herndon to Robert K. Haas, (Dec. 24, 1936) (on file in the Rare Book and Manuscript Collection, Columbia University).

79. BARBARA HARLOW, *RESISTANCE LITERATURE* 7 (1987).

to insist that these analytical distinctions may not fully comport with empirical realities: Legal, cultural, and political practices can be and are encapsulated or "articulated"⁸⁰ in the same historical moment. Thus, in *Let Me Live*, the fusion of legal, political, and cultural practices in Herndon's experience transforms the meaning of each; this inscription of law, culture, and politics in a common epistemic or discursive field requires a change in our conceptual framework.

For the popular constitutional historian, one of the most interesting aspects of *Let Me Live* is that it offers an exemplary instance of the way law, politics, and culture articulate at the level of individual consciousness and sensibility. At one point in *Let Me Live*, Herndon acknowledges that "[s]ome people may, perhaps, accuse me of preaching or making unnecessary propaganda for the Communist cause. After all, they might say, this is only the story of my life and does not call for evangelical outbursts."⁸¹ Herndon offers the following response:

To this I will answer in all earnestness that the story of my life without my reactions to my own problems and to the problems of the world with the Communistic viewpoint as its key and guide, without my fervors and indignations, without my hatreds and without my loves, would remain an untrue and distorted narrative, without blood and entrails.⁸²

These words provide a concrete illustration of the more abstract points I have made concerning the relationship among law, culture, and politics. Consider the cultural content and connotations of the expressive form in which Herndon defends his reliance on the political language of Marxism. Herndon's references to his "fervors and indignations," his "hatreds" and "loves," disclose a distinctive "structure of feeling"—a set of "meanings and values as they are actually lived or felt" as opposed to

80. A number of theorists working in the poststructuralist tradition have used the term "articulation" to describe and critically analyze social objects whose components are not isolable. For our purposes, the primary value of the concept lies in its recognition that when discrete phenomena are combined, their characters change. For a discussion of articulation in contemporary political theory, see ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY* 105 (1985) ("[We] will call *articulation* any practice establishing a relation among elements such that their identity is modified as a result of the articulatory practice."). An example of its use in post-structuralist literary theory may be found in PIERRE MACHEREY, *A THEORY OF LITERARY PRODUCTION* 90 (Geoffrey Wall trans., 1978). A recent effort to develop an analysis of articulation in sociocultural history is JEAN COMAROFF, *BODY OF POWER SPIRIT OF RESISTANCE* 153 (1985) (explaining that the concept of articulation "permits us to view the joining of distinct systems, themselves dynamic orders of practice and meaning, into a unitary formation, the novel product of particular historical circumstances").

81. HERNDON, *supra* note 27, at 89.

82. *Id.*

formal ideologies or worldviews.⁸³ As Herndon tells it, he cannot *not* make use of the “enlightenment and culture”⁸⁴ he has acquired through his involvement with the CPUSA, because they have been woven into his very sensibility. It is only through the template of his cultural and political encounter with Marxism that Herndon can give meaning to his personal experiences in the courtrooms and jail houses of Georgia.⁸⁵ The passage above registers the degree to which Herndon’s grasp of legal ideology and institutions emerged from and was embedded in practices and perspectives that were at the same time cultural and political.

Let Me Live resists the disciplinary and discursive encroachments of an institutionalist constitutional orientation. The story it tells is an episode in our constitutional history whose symbolic significance cannot be captured by the instrumental language of law. While an interpretation concerned solely with the legal “issues,” “questions,” “rules,” “holdings,” and “principles” raised by the Angelo Herndon case is important, it cannot begin to address the case’s deeper cultural and political foundations. Of course, to say that the account of the Angelo Herndon case offered in *Let Me Live* eludes the language of conventional constitutional history does not mean that it cannot be told at all. The story of the role black political insurgency has played in American constitutionalism—the story of which the Herndon case is a part—can indeed be told, so long as we give due regard to the cultural sources from which that insurgent consciousness emerged, and to the cultural forms through which it was expressed. Herndon’s account of what his experience with the law meant to him in political and cultural terms is a story that a constitutional history of the case from the bottom up holds itself bound to

83. RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 132 (1977). Analysis of the structures of feeling inscribed in a text—be it an autobiography like *Let Me Live* or the Supreme Court’s opinion in *Herndon v. Georgia*—concerns itself with the “elements of impulse, restraint, and tone; specifically affective elements of consciousness and relationships” and the like. *Id.* Although the emphasis on a structure of feeling might suggest an opposition to structures of thought, the concept embraces both. As an interpretive construct, the idea of a structure of feeling aims to capture the constitutive relation between thought and feeling. Taken together, feeling and thought produce a distinctive sensibility in which the two elements are combined. In Williams’ words, we are not talking about “feeling against thought, but thought as felt and feeling *as* thought.” *Id.* (emphasis added).

84. HERNDON, *supra* note 27, at 87.

85. This sensibility is reflected in Herndon’s editorial work with the novelist Ralph Ellison during the 1940s on *The Negro Quarterly*, founded by the Communist-sponsored Negro Publication Society of America. *The Negro Quarterly* published poems, essays, and articles by a diverse group of independent writers, including Sterling A. Brown, Langston Hughes, L.D. Reddick, Owen Dodson, Stanley Edgar Hyman, and J. Saunders Redding. Moreover, it took editorial positions on racial politics that were often at odds with the official Communist Party line. Significantly, *The Negro Quarterly* was subtitled *A Review of Negro Life and Culture*.

respect. By using *Let Me Live* as the starting point for my discussion of *Herndon v. Georgia*, I aim to enact at the level of method something similar to the symbolic reversal that Lucius Outlaw has identified as a defining characteristic of African-American political history,⁸⁶ and thus to bring the cultural dimensions of the Angelo Herndon case from the margins to the interpretive center of our historical concerns.

B. "A SCRAP OF PAPER": THE TRIALS OF ANGELO HERNDON

Let Me Live is a textual record of the inextricable links among law, politics, and culture in the history of Afro-American insurgency. What E.P. Thompson has observed of the literary record left by eighteenth-century English Puritans is equally true of *Let Me Live*. Herndon's account may be read as a "sign of how men felt and hoped, loved and hated, and of how they preserved certain values in the very texture of their language."⁸⁷ *Let Me Live* may be interpreted as a product of, and a meditation on, one of the central themes in the history of African people in America: the struggle of a people *for* political literacy and *against* the political resistance mobilized to frustrate that collective endeavor. Seen in this light, the Angelo Herndon case is an important episode in the historical effort of African-Americans to find a political language with which to understand their past aspirations and to articulate their future aspirations. Against this thematic backdrop, I turn to an account of the "discursive events"⁸⁸ that brought Angelo Herndon before the bar of the U.S. Supreme Court.

86. See discussion *supra* note 48 and accompanying text.

87. THOMPSON, *supra* note 32, at 49.

88. "Discursive event" is meant to capture the actional emphasis of the theory of discourse developed in the work of Michel Foucault. I will not try in this brief space to give a detailed account of Foucault's discursive analysis but will rather rehearse some of his key claims. Generally speaking, for Foucault, "discourse" refers to the practice of language; it is not limited to the study of the semantic or syntactical properties of verbal or written texts. For Foucault, analysis of discursive formations is possible only if we are alert to their performative dimensions. Foucault thus shifts his focus from a static model of the text as *object* to a dynamic model of the text as *event*: This in turn implicates such issues as the status of the speaker or writer, the circumstances in which the speaker or writer speaks or writes, and the social sites from which the speaker or writer launches the text.

The crucial distinction between Foucault's project and other recent explorations of linguistic performance to which it has often been compared, most notably the "speech-act" theory of J.L. Austin and John Searle, see AUSTIN, *supra* note 2, lies in its sustained attention to the connections between discourse and power. Foucault develops a conception of discursive practice as an empirical phenomenon that is underwritten by and embedded in a complex field of social forces. Thus, he argues that "in every society the production of discourse is at once controlled, selected, organized and redistributed by a certain number of procedures." MICHEL FOUCAULT, L'ORDRE DU DISCOURS 10-11 (1971) [hereinafter FOUCAULT, L'ORDRE DU DISCOURS] (my translation). One obvious instance of such a procedural constraint on discourse is the prohibition (*l'interdit*, which may be literally translated as "the interdict"): "[We] know very well that we do not have the right to say

everything, that we can not speak of anything in any circumstance, that not just anyone, in a word, can speak of anything." *Id.* The combined prohibitive force of what Foucault calls the "taboo [regarding] the object [of discourse], the ritual of the circumstance [of discursive performance], [and] the privileged or exclusive right of the subject who speaks" operates to police the boundaries of discourse, restricting admission and conditioning effective participation in the "society of discourse" to those who adhere to the religious, political, or philosophical "doctrines" that make a particular discourse a "discipline" or body of knowledge. *Id.* at 11, 41-45.

An example from our own "discipline" might make these claims concrete. The dominant view of legal principles and propositions is that they are tools with which to analyze, anticipate, avoid, or adjudicate competing claims of right and duty. In the dominant view, the cognitive content of a legal proposition in no way turns on whether the site of its use is a court, a conference room, or a lecture hall. Consider the following sentence: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The dominant view holds that as a legal proposition, this rule retains its epistemological status no matter where it is and no matter who reads or says it: whether a judge reads it in a brief, a legislative counsel puts it in a memorandum, a student memorizes it for an examination or recites it during a mock trial, or a maintenance worker finds it typed on a scrap of paper in the law library wastebasket. Proponents of this view would readily concede that the meaning and application of this proposition can be contested or, indeed, changed over time. They would agree that the different settings in which, and purposes for which, the rule is read or spoken do make a difference. But they think that the rule remains *essentially* the same as an ontological matter no matter what the social or institutional context in which it appears. One implication of this view is that the meaning of a text can be productively (if not exhaustively) discussed and analyzed apart from its context.

Foucault suggests another way to think about legal propositions and the "discipline" to which they belong. (Here we might note the epistemological and institutional resonance of this notion of "discipline.") His point of departure is the line that separates text and context. In broad terms, he distinguishes sentences from statements, syntactic form from signifying force. For Foucault, attention to a context reveals that the sentence used by a judge in a courtroom is not the same statement when it is used by an actor playing the role of a judge in a courtroom. One cannot unilaterally decide that one's utterance of the words of the First Amendment will carry the force of a judicial pronouncement; one cannot publish a commentary on the First Amendment in a homeowners-association newsletter and expect the fact of publication in itself to grant the status that the same words would have in a scholarly journal. We all know that there are practices of exclusion and inclusion external to the text that determine how much recognition a particular legal utterance will be accorded; indeed, this process of propositional accreditation is often the site of fierce ideological contestation.

I can think of two such instances of struggle in recent American legal scholarship. One is the debate over the proper role (if any) of critical legal studies in American legal education. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226-27 (1984) (arguing that proponents of such a "nihilist" perspective toward law ought not to teach in law schools); Peter W. Martin, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985) (presenting responses and counterresponses to Carrington's article by Peter Martin, Robert Gordon, Paul Carrington, Paul Brest, Phillip Johnson, Louis Schwartz, William Van Alstyne, Guido Calabresi, and Owen Fiss). A second is the controversy over Randall Kennedy's article *Racial Critiques of Legal Academia*. Kennedy, *supra* note 2, at 1747 (attacking the view that "the value of intellectual work marked by the racial background of minority scholars is frequently either unrecognized or underappreciated by white scholars blinded by the limitations of their own racially defined experience or prejudiced by the imperatives of their own racial interests"). For a response to this article by one of the scholars of color to whom Kennedy directs his critique, see Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990). For treatments of this debate in the popular press, see Charles Rothfeld, *Minority Critic Stirs Debate on Minority Writing*,

1. *Writing and Resistance*

An anonymous letter set the events in motion.⁸⁹ On the night of June 29, 1932, hundreds of copies of a leaflet were distributed in the poor white and black neighborhoods of Atlanta. It read:

N.Y. TIMES, Jan. 5, 1990, at B6; Jon Weiner, *Law Profs Fight the Power*, NATION, Sept. 4, 1989, at 246.

These are obvious points, so obvious that their ramifications for an understanding of legal discourse are often ignored. What they suggest is that the context of an utterance is not a contingent feature of discourse but a fundamental condition of both its possibility and its actual existence. Because the powers immanent in the discursive situation and in the relative status of its participants elude a text-bound theory of discourse, we must always ask, as Foucault puts it:

Who is speaking? Who, among the totality of speaking individuals, is accorded the right to use this sort of language [in what settings and with what effects]? Who derives from it his own special quality, his prestige, and from whom, in return, does he receive if not the assurance, at least the presumption that what he says is true? What is the status of the individuals who—alone—have the right, sanctioned law or tradition, juridically defined or spontaneously accepted, to proffer such a discourse?

MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 50-51 (A.M. Sheridan Smith trans., 1972).

As Edward Said has observed, Foucault's work permits a deeper understanding of the way "the will to exercise dominant control" in society has historically clothed itself in the language of rationality, utility, objectivity, and neutrality. SAID, *supra* note 52, at 216. Discourse is both the dressing room and the dress uniform, as it were, in which the will to dominate disguises itself. Clothed in the rarefied rhetorical robes of the "knowledge" that is its public enemy and its secret ally, "power" naturalizes, rationalizes, normalizes, and authorizes itself in the name of, and as a form of, the discourse of truth. One might conclude from this representation of power that Foucault sees little or no possibility that anyone could resist the will to dominate. As a number of commentators have demonstrated, there is some support in Foucault's texts for this view. See, e.g., MICHEL FOUCAULT, *A CRITICAL READER* (Dennis Couzens Hoy ed., 1986). However, it would be wrong to suggest that Foucault altogether ignores the ways discourse can be and has been mobilized to fight the dominant powers. The rules that determine the who, where, how, and when of effective discursive practice are inscribed in an intricate network of active, mobile power relations. Therefore, discourse "is not simply that which translates struggles or systems of domination, but that for which, that by which one fights, [discourse is] the power which one tries to seize." FOUCAULT, *L'ORDRE DU DISCOURS*, *supra*, at 12 (my translation).

What I find most valuable in Foucault's analysis is the set of terms it provides for grasping the contestatory core of the Angelo Herndon case. I draw heavily on Foucault in the following pages to develop the thesis that discursivity is the linchpin on which a deep understanding of the Herndon case hangs: The case is most productively analyzed as a struggle in, over, and about *speech*, which itself must be understood as a powerful instrument of, and impediment to, social, political, and constitutional change.

For other treatments of Foucault's thought, see MARK COUSINS & ATHAN HUSSAIN, MICHEL FOUCAULT (1984); HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS (2d ed. 1982); CHARLES C. LEMERT & GARTH GILLAN, MICHEL FOUCAULT: SOCIAL THEORY AND TRANSGRESSION (1982); KARLIS RACEVSKIS, MICHEL FOUCAULT AND THE SUBVERSION OF THE INTELLECT (1983); ALAN SHERIDAN, MICHEL FOUCAULT: THE WILL TO TRUTH (1980). Two excellent studies exploring the relevance of Foucault's work for legal scholarship are PETER GOODRICH, *LEGAL DISCOURSE* (1987) and GILLIAN ROSE, *DIALECTIC OF NIHILISM: STRUCTURALISM AND LAW* (1984).

89. This epistolary intervention in politics belongs to a long literary tradition. For an interpretive study of the politics of anonymous letter writing in 18-century England, see E.P. Thompson,

WORKERS OF ATLANTA! EMPLOYED
AND UNEMPLOYED—NEGRO AND WHITE—
ATTENTION!
MEN AND WOMEN OF ATLANTA

Thousands of us, together with our families, are at this time facing starvation and misery and are about to be thrown out of our houses because the miserable charity hand-out that some of us were getting has been stopped! Hundreds of thousands of dollars have been collected from workers in this city for relief for the unemployed, and most of it has been squandered in high salaries for the heads of these relief agencies. Mr. T.K. Glenn, president of the Community Chest, is reported to be getting a salary of \$10,000 a year. Mr. Frank Neely, executive director of the Community Chest, told the County Commission Saturday that he gets \$6,500 a year, while at the same time no worker, no matter how big his family, gets more than two dollars and a half to live on. If we count the salaries paid the secretaries and the investigators working in the thirty-eight relief stations in this city, it should not surprise us that the money for relief was used up and there is no more left to keep us from starvation. If we allow ourselves to starve while these fakers grow fat off our misery, it will be our own fault.

The bosses want us to starve peacefully and by this method save the money they have accumulated off our sweat and blood. We must force them to continue our relief and give more help. We must not allow them to stall us any longer with fake promises. The city and county authorities from the money they have already collected from us in taxes, and by taking the incomes of the bankers and other rich capitalists, can take care of every unemployed family in Atlanta. We must make them do it.

The Crime of Anonymity, in HAY ET AL., *supra* note 28, at 255. Robert McElvaine notes that during the Depression, "both the volume of mail reaching the White House and the high percentage of it coming from the poor" reached an unprecedented level. *DOWN AND OUT IN THE GREAT DEPRESSION: LETTERS FROM THE FORGOTTEN MAN* 5 (Robert S. McElvaine ed., 1983). After Franklin D. Roosevelt was elected President, a significant number of the letters sent to the White House in particular and to national officials in general came from poor, often barely literate African-Americans. *Id.* at 81. More often than not, blacks focused not so much on the inadequacy of relief programs as on the racially discriminatory manner in which they were run. *Id.* Like many whites, black letter writers often wrote anonymously or asked to have their identities kept secret. Unlike white letter writers, however, black letter writers were motivated less by the shame of petitioning for help than by the fear that they would be jailed, beaten, lynched, or otherwise terrorized if their names were revealed. *Id.* Nonetheless, "in spite of the requests for confidentiality, many of the letters blacks addressed to the Roosevelts [and other federal figures] were referred to local relief agencies: to precisely the people against whom the allegations of discrimination had been made." *Id.*

At a meeting of the County Commissioners last Saturday, it was proposed by Walter S. McNeal, Jr., to have the police round up all unemployed workers and their families and ship them back to the farms and make them work for just board and no wages, while just a few months ago these hypocrites were talking about forced labor in Soviet Russia, a county where there is no starvation and where the workers rule! Are we going to let them force us into slavery?

At this meeting Mr. Hendrix said that there were no starving families in Atlanta, that if there is he has not seen any. Let's all of us, white and Negroes, together, with our women folk and children, go to his office in the country court house on Pryor and Hunter streets Thursday morning at 10:00 o'clock and show this faker that there is plenty of suffering in the city of Atlanta and demand that he give us immediate relief! Organize and fight for unemployment insurance at the expense of the government and the bosses! Demand immediate payment of the bonus to the ex-servicemen. Don't forget Thursday morning at the county court house.

Issued by the

UNEMPLOYMENT COMMITTEE OF ATLANTA

P.O. Box 339.⁹⁰

The following morning Angelo Herndon, a 19-year-old black organizer for the Communist Party USA in Atlanta, was among the leaders of a peaceful march to the Fulton County court building.⁹¹ More than a thousand people, black and white, participated in the protest.⁹² The march was reportedly the largest biracial demonstration in the South in decades.⁹³ County officials called in a group of white marchers to discuss their concerns but refused altogether to talk to any of the black demonstrators.⁹⁴ The day after the rally, the Fulton County Commission approved a \$6000 emergency appropriation to buy food for the 23,000 people who had been solely or largely supported by the relief system.⁹⁵

The importance of this demonstration lies in the fact that it served both an instrumental and an expressive function: The gathering at the Fulton County courthouse was simultaneously a political and cultural event. Using forms of popular protest, these hungry and homeless men

90. Transcript, *supra* note 45, at 123-24. The pamphlet is the first of several texts in the documentary dossier at the end of *Let Me Live*. I give it pride of place in my narrative in the belief that its insurgent consciousness will enhance our epistemic point of view.

91. CHARLES H. MARTIN, *THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE* 6 (1976).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

and women were able to force material concessions from government officials who had ignored their plight. Equally significant, however, was the symbolic challenge this collective action posed to the racial status quo. In refusing to respect the racial boundaries that had separated them for so long, the poor blacks and whites who participated in the demonstration had taken tentative steps toward the creation of a new political and cultural community. For a brief moment, class consciousness trumped color consciousness, creating the possibility of an effective political coalition, and collective self-identification, across the color line. This extraordinary fact was not lost on the organizers of the gathering. In a leaflet announcing the government's concession, the Unemployed Council boasted of having "crammed the lie down the throat" of the commissioner who had denied that starving people existed in Atlanta, and it encouraged participants in the rally to help the council "force these fak-ers" to give more and regular support to the unemployed.⁹⁶

The circular also pointed out that the county commissioners had attempted to divide the demonstrators along racial lines, warning that "[if] we allow the bosses to divide us they will keep us both starving." The pamphlet urged black and white workers to "stick together because that is the only way we can win. The bosses know this: that is why they work so hard to separate us. The privilege of starving separately don't mean anything to any sensible worker these days."⁹⁷ The leaflet called on the unemployed to resist any attempt by landlords to try to evict people in their neighborhoods, and it urged "the workers of every neighborhood to get together, organize your committees and see that no worker is evicted because he can't pay the rent."⁹⁸ The leaflet ended with a threat that was also a rallying cry: "We *refuse* to starve!"⁹⁹

The Atlanta Police Department immediately assigned a squad of detectives to shadow the suspected leaders of the Unemployed Council.¹⁰⁰ The department instructed detectives to put the city's post office under special surveillance, because both leaflets had listed a post office box there as the Unemployed Council's mailing address.¹⁰¹

On the evening of July 11, 1932, two Atlanta policemen arrested Angelo Herndon as he was taking mail from post office box number

96. Transcript, *supra* note 45, at 124-25.

97. *Id.* at 125.

98. *Id.*

99. *Id.* at 126.

100. MARTIN, *supra* note 91, at 7.

101. *Id.*

339.¹⁰² Herndon was taken to his apartment, where the policemen seized all of his books as well as bundles of pamphlets published by the CPUSA. Herndon was then taken to the Fulton County jail, where he was held for eleven days without bail "on suspicion."¹⁰³ On July 21, a local white lawyer and two black lawyers filed a petition seeking the release of Herndon, who still had not been formally charged with any crime.¹⁰⁴ A judge for the Fulton County Superior Court denied the request, but he did order the Fulton County Solicitor General's Office to secure an indictment within twenty-four hours or let Herndon go.¹⁰⁵

The next day, the Fulton County grand jury issued a formal indictment against Herndon.

[S]aid accused, in the County of Fulton and State of Georgia, on the 16th day of July, 1932 [a date on which Herndon was in the custody of the Atlanta police], with force and arms, did make an attempt to join in combined resistance to the lawful authority of the State of Georgia with intent to the denial of the lawful authority of the State of Georgia and with intent to defeat and overthrow the lawful authority of the State of Georgia by violent means and unlawful acts . . .¹⁰⁶

To support these charges, the indictment recited a long list of criminal acts that Herndon had allegedly committed. The indictment reads like a register of forbidden speech and transgressive discourse, an index of all the ideas that Georgia authorities feared a disaffected citizen of any class or color might think, hear, utter, read, or write. Herndon, the indictment charged, had called "public assemblies and mass meetings in the homes of various persons names and addresses are to the Grand Jurors unknown and did make speeches to various persons to the Grand Jurors unknown,"¹⁰⁷ allegedly to establish a group of persons "white and colored" under the banner of the courts and to provoke "combined opposition and resistance" to the state.¹⁰⁸

The indictment further accused Herndon of soliciting persons "whose names are to the Grand Jurors unknown" to join the Communist Party and the Young Communist League.¹⁰⁹ Despite the fact that the

102. In *Let Me Live*, Herndon writes that when he demanded to know why he was being arrested, he was told that it was because of "those threatening and scurrilous letters that you have been passing around." HERNDON, *supra* note 27, at 193.

103. MARTIN, *supra* note 91, at 7.

104. *Id.*

105. *Id.*

106. Transcript, *supra* note 45, at 5.

107. *Id.* at 9.

108. *Id.* at 8.

109. *Id.*

CPUSA and its subsidiary organizations had not been banned by law in Georgia, the indictment stated that Herndon's organizing work was animated by a criminal purpose to create "by acts of violence, by unlawful means and by revolution" a new government "known as the United Soviets Soviet Russia (sic)," sometimes called and known as the "the dictatorship of the Propertyless People."¹¹⁰ The indictment also charged Herndon with circulating a number of books and pamphlets that called for insurrection, riots, and armed uprisings against the state. The writings cited included *The Life and Struggles of Negro Toilers*, which stated that in "no other so-called civilized country in the world are human beings treated as badly as these 15 million Negroes. They live under perpetual regime of white terror, which expressed itself in lynchings, peonage, racial segregation and other pronounced forms of white chauvinism"¹¹¹ Other writings listed in the indictment included a book called *Communism and Christianity*, which exhorted its readers to "[b]anish the Gods from the Skies and Capitalists from the Earth and Make the World Safe for Industrial Communism,"¹¹² and the *Southern Worker* and *The Daily Worker*, both CPUSA publications.¹¹³

Given the language and history of the statute that formed the basis of the indictment, the Herndon case would likely have been politicized even if the defendant had not been a Communist Party member. Angelo Herndon was indicted under section 56 of the Georgia Penal Code, which read: "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."¹¹⁴ Anyone who reads this provision in the context of its long and infamous history is able to see the fear of racial unrest and radical politics that is reflected in every word.

During the 1830s a number of southern state legislatures, shaken by the Nat Turner rebellion and frightened by the increasingly militant posture of the abolitionist movement, enacted criminal laws against insurrection. The purpose of these laws was to guarantee that the full coercive power of the state would suppress not only attempted or actual slave revolts but any public opposition whatsoever to the institution of slavery and its ideology.¹¹⁵ The Georgia legislature revised its criminal calendar

110. *Id.* at 6.

111. *Id.* at 7.

112. *Id.*

113. *Id.*

114. *Id.*

115. MARTIN, *supra* note 91, at 20.

in 1833 to read: "Exciting an insurrection or revolt of slaves, or *any attempt by writing, speaking, or otherwise*, to excite an insurrection or revolt of slaves, shall be punished with death."¹¹⁶ The next section of the penal code, which was intended to stop the flow of abolitionist literature into the South, made into a capital offense the introduction or circulation within the state of any written text aimed at inciting resistance, revolt, or insurrection among slaves or free blacks.¹¹⁷

After the Civil War, the southern states were forced to revise their statutes to acknowledge the new status of their former slave population. Accordingly, in 1866 the Georgia legislature redrafted many of its laws, including the slave revolt provisions. Specific references to slaves were deleted from the text of these laws, but the concept of insurrection remained central. Insurrection was defined as combined resistance to the lawful authority of the state. The Georgia Penal Code was then amended to read that any "attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State, shall constitute an attempt to incite insurrection."¹¹⁸ Unless a jury recommended mercy, the statutory punishment for insurrection or attempted insurrection was death.¹¹⁹ The revised statute set no specific punishment for an attempt to incite insurrection (the crime of which Angelo Herndon was accused many years later); presumably, the legislature thought that an attempt to incite insurrection would fall within the language of the amended code. The state legislature also changed the accompanying section of the code dealing with insurrectionary texts, substituting a five- to twenty-year prison term for capital punishment.¹²⁰

There were two recorded prosecutions under the Georgia insurrection laws between 1866 and 1932. The first took place in 1868. John T. Gibson, described in the record as a preacher and a "free person of color,"¹²¹ was charged with inciting 100 blacks to break into a Georgia jail to rescue a local black man being held there. Under Gibson's alleged direction, armed blacks attempted to enter the jail but retreated after a guard fired a shot into the crowd. No other violence followed. Gibson was sentenced to death following his conviction for attempting to incite insurrection.¹²²

116. *Id.* (emphasis added).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 21.

122. *Id.*

In 1869, Gibson's attorneys appealed his conviction to the Georgia Supreme Court. They argued that the state's penal code failed to expressly include attempts to incite insurrection, as distinguished from insurrection itself and attempted insurrection.¹²³ The court found for the defense and ordered Gibson's release, reasoning that the rule that required strict construction of penal statutes rendered the Gibson conviction void because the statute had not specifically included attempts to incite insurrection.¹²⁴ The opinion called the attention of the legislature to the omission and expressed a hope that this defect would be cured.¹²⁵ The Georgia legislature obliged in 1871, making an attempt to incite insurrection a capital crime. The statute remained unused for nearly sixty years, until Fulton County authorities turned to it in the early 1930s.

The second recorded use of Georgia's insurrection laws came in the case of the "Atlanta Six." The Atlanta Six were four men and two women, all members of the CPUSA, who were accused of attempting to incite insurrection and circulating insurrectionary literature.¹²⁶ It was clear from the beginning that the prosecution of the Atlanta Six was based on the group's political ideology and not on any alleged criminal acts.¹²⁷ Through the efforts of Walter Wilson, a member of the ACLU, several state newspapers published a statement during the summer of 1930, signed by sixty-one prominent Georgians, condemning the political prosecution of the Atlanta Six.¹²⁸ Although the statement did not go so far as to endorse Communism, it did argue that members of the CPUSA, like all Americans, should be protected in their constitutional rights of free speech and assembly.¹²⁹

2. *War of Words*

William L. Patterson, the black secretary of the International Labor Defense (the CPUSA's equivalent of today's NAACP Legal Defense and Education Fund), arrived in Atlanta shortly after Herndon's arrest to

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 22.

127. *Id.*

128. *Id.* at 22-24. Among the group of white Southerners who were briefly involved in this effort was C. Vann Woodward. Woodward, then a young English instructor at Georgia Tech, would pay for his activity: He was one of a number of professors subsequently terminated by Georgia Tech in an alleged austerity move. *Id.* at 78 n.45.

129. The charges against the Atlanta Six were dropped in 1939, two years after the U.S. Supreme Court found Angelo Herndon's conviction unconstitutional. *Id.* at 212.

organize Herndon's legal defense. Patterson promptly denounced the case as a "frame-up" and charged that almost "every bit of [the] so-called 'Red' literature found in [Herndon's] room after this arrest may be found in books, magazines and pamphlets at the public library. Why not arrest the librarian?"¹³⁰ John H. Hudson, the prosecutor who later argued the state's case against Herndon, had already made Fulton County's position toward the young black radical, and others like him, emphatically clear. "You well know that this country cannot survive if people are allowed to go from one end to another of this country preaching, teaching, and working for its destruction," Hudson warned. "The Communists must be put down or civilization will fail."¹³¹

These remarks were the opening shots in a rhetorical battle that was to escalate rapidly in the months before Herndon's trial, in early January 1933. Viewed in the context in which it was fought, this war of words for control over the political interpretation of the Angelo Herndon case was not at all surprising. At the time, there were mounting racial tensions in Atlanta; growing discontent among the city's unemployed in the worst year of the longest, deepest economic depression in modern American history; a perceived need among those in power to crush any and all signs of political insurgency among poor white and black communities; and a single-minded determination on the part of the CPUSA and the International Labor Defense to make the Angelo Herndon case a symbol of racial injustice in America. All this, together with the fact that the arrest and conviction of Angelo Herndon followed closely upon the success of the Unemployment Council's June 1932 demonstration, made for a classic "political" trial.¹³²

A publication from the period shows the degree to which the intertwined issues of race, radical politics, and political repression had come to occupy an important place in mainstream political discourse in America. *The Crisis*, a publication of the NAACP, "ask[ed] fourteen editors of leading black newspapers their opinion of Communism"¹³³ and printed their responses in its April and May issues. The editor of a Maryland newspaper, *The Afro-American*, wrote, "The Communists

130. MARTIN, *supra* note 91, at 11 (quoting DAILY WORKER, Aug. 3, 1932).

131. *Id.* at 26 (quoting ATLANTA DAILY WORLD, Mar. 23, 1932).

132. For notable attempts at a theory of the concept of "political" trials, see THEODORE BECKER, *POLITICAL TRIALS* (1971); OTTO KIRCHHEIMER, *POLITICAL JUSTICE* (1961). Although I have found both works to be illuminating explorations of the political uses of law, neither explicitly takes up the question of the discursive politics that is the focus of my analysis here.

133. HERBERT APTHEKER, *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES* 700 (1973).

appear to be the only party going our way. They are as radical as the N.A.A.C.P. were [sic] twenty years ago. Since the abolitionists passed off the scene, no white group of national prominence has openly advocated the economic, political and social equality of the black folks."¹³⁴

Although the editor of Virginia's *Norfolk Journal and Guide* did not think Communism offered "the way out for the Negro which shall be most beneficial and lasting in the long run," he predicted that the CPUSA would continue to gain adherents in the black community because "traditional American conditions with their race prejudice, economic semi-enslavement, lack of equal opportunity, and discrimination of all sorts have made the Negro susceptible to any doctrine which promises a brighter future, where race and color will not be a penalty."¹³⁵ The editor of the New York *Amsterdam News* noted that "[s]ince America's twelve million Negro population is so largely identified with the working class, the wonder is not that the Negro is beginning, at least, to think along Communistic lines, but that he did not embrace that doctrine en masse long ago."¹³⁶ The editor of the *Philadelphia Tribune* argued that while

[t]houghtful Negroes may reason that the philosophy and economic theories of Communism are unsound and will not obtain for them a more equitable distribution of the products of their labor, or a larger degree of justice . . . a drowning man will grab at a straw. When it is considered that equality is the theory of Communism, and that inequality is the result of the present system, it is amazing that millions of Negroes have not joined the followers of the red flag, instead of a few thousands.¹³⁷

The editor of the *Atlanta World* argued that "the Negro as a whole fears Communism—probably because white America has not accepted it. Some frankly believe Red promises would be forgotten were they in power, for aren't they white men too?"¹³⁸ The editor did admit, however, that if "enough of us would go Red," 12 million black Communists "would be too big a group to deal with by force."¹³⁹ Ten years before, such openly positive views on the Communist Party from leading figures in the black establishment press would have been unthinkable.¹⁴⁰

134. *Id.*

135. *Id.* at 701.

136. *Id.* at 702.

137. *Id.* at 703.

138. *Id.* at 706.

139. *Id.* at 706-07.

140. Black Americans' widely held sympathy for the American left was a cause of official concern on the national as well as the local level. For a history of congressional investigations into the

The year 1932 also saw the publication of *Georgia Nigger*, a thinly fictionalized account of life in a Georgia prison camp, written by a white journalist named John Spivak.¹⁴¹ Spivak had been given permission from the state prison commissioner to tour the Georgia convict camps in preparation for a "study" of the state's penal system. Spivak's study turned out to be a scathing exposé of the state's brutal prison system, complete with powerful documentary photographs. Although Spivak took care to note that "Georgia does not stand alone as a state lost to fundamental justice and humanity,"¹⁴² this did little to mollify state officials when they learned that a resolution had been introduced in the U.S. Senate calling for an immediate and thorough investigation of the charges Spivak had made.¹⁴³ Although *Georgia Nigger* never directly addressed the political ramifications of a penal system dominated by a largely black population, the CPUSA and the International Labor Defense took full advantage of the propaganda value of Spivak's book and used its image of racial injustice to bring the Angelo Herndon case into the national political consciousness.¹⁴⁴

influence of Communists on the African-American community during this period, see Delacy Wendell Sanford, Jr., *Congressional Investigation of Black Communism* (1973) (unpublished Ph.D. dissertation, State University of New York (Stony Brook)).

141. JOHN SPIVAK, *GEORGIA NIGGER* (1932). For a discussion of Spivak's work in the context of the larger documentary movement of which it was a part, see WILLIAM STOTT, *DOCUMENTARY EXPRESSION AND THIRTIES AMERICA* (1973).

142. SPIVAK, *supra* note 141, at ii.

143. *Id.*

144. One of the most popular films released that year was Warner Brothers' *I AM A FUGITIVE FROM A CHAIN GANG*. (Warner Brothers 1932.) The film, which starred Paul Muni, was based on white author Robert E. Burns' national best-seller. ROBERT E. BURNS, *I AM A FUGITIVE FROM A GEORGIA CHAIN GANG!* (1932). Some years before, Burns had been sentenced to 6-10 years' labor on a chain gang for his participation in a grocery store holdup. Like Burns, the hero of the film is a veteran of the Great War who, seeking freedom from the regimentation of factory life, ends up on a chain gang. He escapes to Chicago, where under an assumed name he establishes a reputation as a civil engineer and becomes "one of the city's most respected citizens." When he threatens to leave a marriage into which he has been blackmailed by a woman who has discovered his past, he is betrayed and returns (voluntarily) to the state in which he had been imprisoned, on the condition that he will be pardoned after 90 days. However, because he has caused a scandal by exposing the brutalities of life on the chain gang, the State reneges on its promise, and he is condemned to serve out his sentence. He escapes a second time, and at the end of the film he disappears into the night after a brief rendezvous with the only woman he has ever loved. Among the episodes in the film most relevant to us are a scene from the hero's first stint on the chain gang, during which a white convict sees a black convict bust rock and exclaims to the hero, "Look at that big buck swing that sledge! He never misses. You lay down a nickel and they'd knock the buffalo's right eye out of it. They like his work so much they're gonna keep him here the rest of his life"; a scene in which the woman for whom he longs replies to his question about whether she's free for the evening with the words, "I'm free, white, and 21"; and a montage toward the end of the film, after the hero has returned to the prison camp, in which the soundtrack plays the strains of black men singing work songs on the chain gang. Predictably, there is only one black character with a speaking role in this

3. *Race, Radicalism, and Rights*

Such was the complex political backdrop against which the trial of Angelo Herndon took place. Although the trial lasted a mere three days, during its course issues were raised and argued that went far beyond the technical legal question of whether Herndon was guilty beyond a reasonable doubt of attempting to incite insurrection. These issues opened onto the whole history of the black experience in the American South: the exclusion of blacks from petit and grand juries in Georgia; the treatment of black prisoners in Georgia jails; the long-standing taboo against black lawyers arguing cases as politically charged as Herndon's; the ideology of southern law and order (laid bare when death threats were made against Herndon, his attorneys, and anyone else who was bold enough to publicly support or participate in the effort to build a defense movement around the case); the myth of white supremacy, which trumpeted the racial superiority of even the poorest, most illiterate white worker and demonized the class-color alliance of the Unemployed Council as an offense against God and nature; and the meaning of the Marxist theory of revolution generally and the theoretical platform of the CPUSA in particular. By the time the case reached the U.S. Supreme Court, these explosive issues of race, class, and radicalism would be submerged from view. At the trial stage, however, each of these issues provided a site of fierce ideological contestation.

It was the issue of race, though, that served as the most potent conductor for white Georgians' fear of Angelo Herndon and what they took him to represent. Two characteristic passages from the trial record provide an index of the centrality of racial ideology in the Herndon case.

One hotly contested question had to do with how Herndon's race would be referred to during the trial proceedings. At one point, T.J. Stephens, an assistant in the Fulton County Solicitor General's Office and the prosecution's main witness, referred to Herndon as "this darkey." The following exchange ensued between Lee B. Wyatt, the trial court judge, and Ben Davis, the black lawyer and recent Harvard Law School graduate who represented Herndon:

Attorney Davis: Mr. Stephens refers to the defendant as "darkey." Your Honor, we wish to remind the prosecution if they insist on using such opprobrious terms to the defendant, we will have to ask for a mistrial, because it is prejudicial to our case.

otherwise hard-hitting cinematic exposé of a system that bore down disproportionately on the African-Americans it ensnared. In contrast, it is interesting to note that the *Georgia Nigger* photographs Spivak took during his tour of the state's prison camps are exclusively of black convicts.

The Court: I don't know whether it is or not; but suppose you refer to him as the defendant.

Witness: Your honor, I wish to state that "negro" is the name this man referred to his race *by* in his conversation with me—these are captious objections.

Attorney Davis: But he says "darkey."

The Court: Well, refer to him as the defendant then.

Witness: I will refer to him as "negro" which is better; he gave the name of Alonzo Herndon—Angelo Herndon; he is the darkey with the glasses on. . . .¹⁴⁵

A second heated exchange took place during the prosecution's cross-examination of T.J. Corley, an assistant professor of economics at Emory University whom the defense sought to have qualified as an expert witness on the Marxist theory of the state.¹⁴⁶ The subject under exploration was the "Black Belt" doctrine of the CPUSA, which called for black self-determination and political control over areas of the South in which African-Americans constituted a majority.¹⁴⁷ After trying unsuccessfully to paint the witness as a Communist sympathizer, if not an outright member of the CPUSA,¹⁴⁸ the prosecution introduced a motif that it was to play upon throughout the trial.

Q. "Equal rights for the negroes; self-determination in the black belt"; you're able to tell us what that means, aren't you, Doctor?

A. No sir. I did not testify that I understand the planks in the communist platform, I said I was familiar with the party platform. As to whether I will now swear that I understand it, the question which you raise, I should say, is a question of opinion and not of fact, there are some questions of opinion, I could give you my opinion of what it means. As to whether it takes an opinion to tell the court and jury the ordinary Decatur Street meaning of self-determination, I think it is a matter of opinion, there are several techniques by which self-determination might be expressed, for instance, there might be a plebiscite vote, or there might be an election for representatives to a body—there are a number of ways in which self-determination would assert itself, and I think it is a matter of opinion. I have not read this little pamphlet entitled *The Communist Position on the Negro Question*. I would

145. Transcript, *supra* note 45, at 60-61.

146. *Id.*

147. On the "Black Belt" thesis, see JAMES FORMAN, SELF-DETERMINATION: AN EXAMINATION OF THE QUESTION AND ITS APPLICATION TO THE AFRICAN-AMERICAN PEOPLE (1984); HARRY HAYWOOD, NEGRO LIBERATION (1948); NELSON PERRY, THE NEGRO NATIONAL COLONIAL QUESTION (1972); LEON TROTSKY ON BLACK NATIONALISM AND SELF-DETERMINATION, *supra* note 72.

148. Transcript, *supra* note 45, at 34.

be glad to give the court and jury my understanding of the expression "Equal Rights for Negroes," the meaning of the phrase, as I see it, it is these: These rights are equal rights, are equal rights under the law.

Q. You understand that to mean the right of a colored boy to marry your daughter, if you have one?

Attorney Davis: We object to that question on the ground that it is irrelevant and immaterial and calls for a conclusion of the witness.

The Court: He has him on cross-examination and that's a part of the language in the platform.

Attorney Davis: There is nothing whatever in the platform about intermarriage.

The Court: The same quotation he is reading there is in the platform, as I understand.

Attorney Davis: You overrule my objection, Your Honor?

The Court: I overrule the objection; go ahead.

A. A negro doesn't happen to have the right to marry my daughter, under the laws of this State. I don't know how many States there are in the Union where they do have that right.

Q. Did you know there are twenty States in the United States where the two races can intermarry?

A. No, I didn't know that, I knew there was a number, I didn't know how many.

Attorney Davis: I don't see what that has to do with this particular case, Your Honor, we object to it as irrelevant and immaterial.

The Court: He has the witness on cross-examination, and he has testified that he knows what that phrase means, and he has a right to determine how much he knows about it, on cross-examination—it isn't his witness.¹⁴⁹

From our contemporary perspective, it is tempting to laugh at these dialogues, which seem at times to parody themselves. But a proper historical reading of the trial record must remain mindful of the fact that these comic exchanges might well have had a tragic, deadly denouement: Herndon's life hung in the balance. If we viewed *Herndon v. Georgia* through the optic of an institutionally oriented constitutional history, we might well be tempted to discount these portions of the trial record on the ground that they have no bearing on the way the procedural and substantive issues raised by the case were discussed before the Supreme Court. As I shall argue presently, however, when viewed through the lens of popular memory, these apparently marginal moments from the Herndon trial record present cultural images and arguments the impact of which was decisive to the outcome of the Herndon prosecution.

149. *Id.* at 80-81.

My interest at this juncture is in the content of these interrogative exchanges. These questions and answers, and the ensuing verbal volleys between the prosecution and defense counsel, carry a twofold significance. First and most obviously, they indicate that the legal issues raised in the Herndon prosecution were immediately translated into questions of race and cultural power. The cultural meanings attached to the fact that Herndon was black quickly and definitively eclipsed the issues of free speech and radical politics raised by the case, quite literally coloring each and every aspect of the trial proceeding. A second and more complicated issue is the degree to which the Herndon case was invested with a sexual dimension. The intersected histories of race and sex in America tell an unseemly story beyond the scope of the present discussion. Nonetheless, some attention to the ideology of "sexual racism"¹⁵⁰ is indispensable in order to understand the precise cultural inflections of the Angelo Herndon case. This is so because "at the core of the heart of the race problem is the sex problem."¹⁵¹

One prominent and recurrent theme in the black American experience is whites' defensive resort to sexual mythology as a source of ideological resistance to demands for racial justice. The ideology of white supremacy has rarely failed to find a dark and dangerous sexual motive behind the assertion of black political and civil rights. This almost reflexive ascription of sexual meanings to black political militancy is surely one of the most constant and curious features of our national history. In this respect, the Herndon trial record provides a historical case study of the effects of sexual racism on the administration of law generally and the

150. I take this term from CHARLES HERBERT STEMBER, *SEXUAL RACISM* (1976).

151. *Id.* at ix (quoting James Weldon Johnson). Joel Kovel has described the psychosexual roots of white racism in the following terms:

In the classic South—and, as the fantasies generated there were diffused, throughout America—the sex fantasy has been incorporated into the white assumption of superiority and the demand for black submission. Whenever a black man bowed and scraped, whenever a white man called a black man "boy," or in other ways infantilized him, just below the surface of the white man's consciousness, a sexual fantasy would be found yoked to the symbol of power and status. These sex fantasies erupted whenever the power relationships were threatened. In the colonies, the slightest rumor of a slave revolt was accompanied by wild stories of blacks wreaking their ultimate revenge in wholesale rape of white women. Nor should anyone think that, below the surface of reasonable concern, the fears aroused in whites by the current black rebellion are different. The specter of omnipotent black sexuality has obsessed whites from their first glimpse of an African until this very day.

JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 68 (1970). For another overview of this history, see CALVIN C. HERNTON, *SEX AND RACISM IN AMERICA* (1965). The most publicized recent chapter in the history of the vexed relationship between sexuality and race in American political culture is the Senate Judiciary Committee hearings on the charges of sexual harassment leveled at Clarence Thomas. For a treatment of these issues, see Kendall Thomas, *Strange Fruit, in RACE-ING JUSTICE, EN-GENDERING POWER* 364 (Toni Morrison ed., 1992).

protection of black political speech in particular.¹⁵² From the outset, the legal and political issues raised by the Herndon case were distorted by the sexual fears and fantasies projected onto Herndon by a cultural mentality in which power and dominance were shot through with passion and desire. For the men who controlled the government of Fulton County, the most effective way to control, if not crush, the emerging political discontent that Herndon and the local CPUSA had successfully tapped was to evoke the racist mythologies of rapacious black male sexuality.

The language I have quoted from the Herndon trial record thus provides a vivid textual instance of how deeply the cultural norms, practices, and protocols of the racially stratified society in which Herndon lived were inscribed in the workings of the law. At base, the legal question of Herndon's guilt or innocence could not be separated from either the cultural meanings attached to the idea of race or from the political relations of white supremacy and black subordination of which those cultural meanings were both a cause and consequence. Once drawn, the connection between race and radicalism meant that contested notions of cultural identity and ideology would constitute the chief terms in which the legal questions raised in the Herndon case would be described, discussed, debated, and decided during the trial proceedings. No one doubted that the outcome of the case would thus depend as much, if not more, on who Herndon was as on what he had done.

Prosecutor Hudson sought to make the perceived threat that Herndon posed to the local racial order *the* pivotal issue in the case. He made every effort during the trial to ensure that the racial implications of the events leading up to Herndon's arrest would be brought to the attention of the all-white jury. As the passages from the trial record indicate, the prosecution lost no opportunity to exploit the symbolism of Herndon's race. During the course of the proceedings, the language of race was used both to degrade Herndon (as in the dispute about what to call him) and to demonize him (as in the exchanges about the CPUSA position on interracial marriage). Given the prosecution's mobilization of racial meanings and metaphor, Herndon's lawyer had to choose between two equally untenable options. Benjamin Davis could either

152. For an example from the modern civil rights period, see DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 94 (1986). During the trial of several whites who had been accused of bombings during the Montgomery bus boycott, Martin Luther King, Jr., the leader of the Montgomery Improvement Association, was asked, among other things, whether he had ever been sexually intimate with a white woman.

admit that Herndon's race was in fact a central issue in the case and respond directly to the prosecution's race baiting, or he could downplay the racial aspects of the case and address the issue only when the racist tactics of the prosecution forced him to do so. He took the latter, defensive posture.

Davis' defense of Angelo Herndon had two components. First, Davis tried to establish the technical insufficiency of the evidence introduced by the prosecution. During his cross-examination of Stephens, the assistant solicitor general, Davis successfully pressed the prosecution's key witness to admit that he had no personal knowledge of "any of the acts that have been alleged to be committed in the indictment by the defendant."¹⁵³ In addition to Professor T.J. Corley, whose cross-examination allowed the prosecution to raise the specter of interracial marriage, Davis called Mercer G. Evans, a professor of economics at Emory University. Although Judge Wyatt refused to qualify Evans as an expert witness,¹⁵⁴ Davis did use Evans' testimony to show that the same Marxist literature found in Herndon's possession could be read at the Emory University library.¹⁵⁵

The second component of Herndon's defense was more straightforwardly political. The prosecution had sought to shape the meaning of the events leading to Herndon's arrest by resorting to racial rhetoric. Davis sought to transcend the issue of race by depicting the charges against Herndon as a campaign against the working class. This counter-strategy became clear when Angelo Herndon took the stand in his own behalf. Under Georgia criminal procedure, a defendant could make only an unsworn statement. This statement was not subject to questions by either prosecution or defense lawyers; it was a direct address from the defendant to a jury made up of his peers (in this case, Herndon's "peers" were all white).¹⁵⁶ Herndon began by describing the closing of Fulton County relief agencies in June 1932 and explained the purpose behind the public rally that was organized by the Unemployed Council a few days after the termination of relief was announced.¹⁵⁷ He stressed the power and potential of a class coalition such as that symbolized by the biracial demonstration at the Fulton County courthouse, ending his statement with a prediction that the alliance between poor whites and blacks forged

153. Transcript, *supra* note 45, at 64.

154. MARTIN, *supra* note 91, at 50.

155. Transcript, *supra* note 45, at 24.

156. *Id.* at 25.

157. *Id.* at 25-26.

by the Unemployed Council would not be destroyed by silencing its leaders.

The capitalist class teaches race hatred to Negro and white workers and keeps it going all the time, tit for tat, the white worker running after the Negro worker and the Negro worker running after the white worker, and the capitalist becomes the exploiter and robber of them both. . . . It is in the interest of the capitalist to play one race against the other, so greater profits can be realized from the working people of all races. . . . [A]t the present time there are millions of workers in the United States without work, and the capitalist class, the state government, city government and all other governments, have taken no steps to provide relief for those unemployed. And it seems that this question is left up to the Negro and white workers to solve, and they will solve it by organizing and demanding the right to live, a right that they are entitled to some of the things that they have produced. Not only are they entitled to such things, but it is their right to demand them. When the State of Georgia and the City of Atlanta raised the question of inciting to insurrection and attempting to incite insurrection, or attempting to overthrow the government, all I can say is, that no matter what you do with the Angelo Herndons in the future, this question of unemployment, the question of unity between Negro and white workers cannot be solved with hands that are stained with the blood of an innocent individual.

You may send me to my death, as far as I know. I expect you to do that anyway, so that's beside the point. But no one can deny these facts.¹⁵⁸

One student of the case has suggested that Herndon's "undiplomatic and inexpedient speech, with its simplistic Marxist interpretations, did little to aid his cause."¹⁵⁹ As one reporter who covered the case wrote, Herndon had "really talked himself into jail. It seemed to me that he wanted to make a martyr of himself, and he did."¹⁶⁰ These observations are undoubtedly true. The position Herndon took in his courtroom address to "the unseen jury of the working class the world over"¹⁶¹ provides ample evidence of his willingness to be enlisted as a "sacrificial

158. *Id.* at 76-78.

159. MARTIN, *supra* note 91, at 53-54.

160. *Id.* at 54 (quoting JAMES H. STREET, LOOK AWAY!: A DIXIE NOTEBOOK 149 (1936)).

161. ELIZABETH LAWSON, TWENTY YEARS ON THE CHAIN GANG? 8 (1935).

goat" (to use the words of W.E.B. Du Bois)¹⁶² on the altar of international Communism. The immediate goal, however, was clear: Herndon hoped to awaken the class consciousness of the jurors.

The closing statements continued the strategies that the prosecution and defense had followed throughout the trial. The prosecutor predictably played on the jurors' racial solidarity, arguing that they were duty bound as white men to crush Herndon's plan to "attack homes, take our property, rape our women, and murder our children."¹⁶³ The final words of Herndon's attorney to the jury were that anything short of Herndon's acquittal would be "making a scrap of paper out of the Bill of Rights, the Constitution of the United States and the State of Georgia."¹⁶⁴ Taking Herndon's lead, however, he spent the greater portion of his summary of the evidence trying to discredit Hudson's use of the race card as a cynical diversion from the real issues in the case. Davis accused the prosecution of seeking to "conjure up" the "basest passion of race prejudice"¹⁶⁵ in the jury. He appealed to the jurors not to let the prosecution's racist tactics blind them to the class interests that they shared with Herndon:

Gentlemen of the Jury, just as starvation, want and suffering knows [sic] no color or race line, neither does injustice and exploitation. What happens to Herndon today as you ponder his fate in the jury room is going to determine what is going to happen to you when the sharp pains of hunger tug at the helpless emaciated forms of your loved ones tomorrow.¹⁶⁶

By the time the case went to the jury, the ideological battle lines between defense and prosecution could not have been more starkly drawn: At base, the choice between the two competing characterizations of Herndon's political activities would turn on the jurors' choice between competing claims of class and color.

Although Judge Wyatt had not hidden his hostility toward Herndon during the trial, his instructions to the jury were remarkably restrained and, from Herndon's perspective, generally favorable. Wyatt's charge to the jury was based on a much more generous interpretation of section 56 than the interpretation placed on it when the case was appealed to the

162. W.E.B. DU BOIS, W.E.B. DU BOIS 92 (William M. Tuttle ed., 1972), *quoted in* Bernard Boxill, *The Race-Class Questions*, in *PHILOSOPHY BORN OF STRUGGLE* 107 (Leonard Harris ed., 1983).

163. MARTIN, *supra* note 91, at 60.

164. HERNDON, *supra* note 27, at 354.

165. *Id.* at 353.

166. *Id.*

Georgia Supreme Court. After reminding the jury that Herndon was entitled to a legal presumption of innocence until proven guilty beyond a reasonable doubt,¹⁶⁷ Judge Wyatt went on to read the indictment. He noted that mere advocacy of insurrection, "however reprehensible morally,"¹⁶⁸ would not warrant a guilty verdict unless the State had met its burden of proving that the advocacy was intended to be acted upon immediately: "In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated."¹⁶⁹ Judge Wyatt added that "the mere possession of radical literature . . . alone is not sufficient to constitute the crime of attempting to incite insurrection."¹⁷⁰ After admonishing the jury that the "object of all legal investigations is the discovery of the truth,"¹⁷¹ the judge sent the twelve white men off to decide the fate of Angelo Herndon.

After deliberating just two hours, the jury returned to announce its verdict. It found Angelo Herndon guilty of attempting to incite insurrection but also "recommended" that the state grant him "mercy," as the jury had the power statutorily to do.¹⁷² This meant that instead of being sentenced to die, Angelo Herndon would be condemned to eighteen to twenty years¹⁷³ of what John Spivak had described in *Georgia Nigger* as the living death of a chain gang.

A review of the record leaves little doubt that the prosecution of Angelo Herndon was a classic political trial. Politics figured in the Herndon case in at least two discrete senses. First, the Herndon trial can be called political because of the nature of the formal charges against him. As the language of the Georgia Penal Code and the indictment made clear, the attempt to incite insurrection was deemed a political crime against the "lawful authority of the State of Georgia."¹⁷⁴

However, the Herndon prosecution discloses a second political aspect that is best understood in cultural rather than legal terms. Attention to the language used at Herndon's trial indicates the degree to which the courtroom struggle over the legality of Herndon's political activities

167. MARTIN, *supra* note 91, at 60.

168. Transcript, *supra* note 45, at 133.

169. *Id.*

170. *Id.*

171. *Id.* at 135.

172. *Id.* at 6.

173. *Id.*

174. See *supra* note 106 and accompanying text.

took place within a larger field of cultural contestation over racial meanings. It is not simply that the ideological disputes over race and culture that took place during the Herndon trial were intimately linked to ideological arguments about the legal control of political dissent. Rather, the legal debates at the Herndon trial about the competing claims of state power and individual rights were at the same time debates about the cultural politics—and the political culture—of white racism. To state the point in slightly different terms, it was in the language of race that the courtroom clashes about the proper legal interpretation of Herndon's CPUSA activities found their most potent "cultural signifiers," to use a term of G. Edward White.¹⁷⁵ Racial rhetoric inscribed itself alongside and within legal argument. The language of race served as an instrument and a symbol of cultural contention over radical politics and state power.¹⁷⁶

When the U.S. Supreme Court was asked to review the constitutional issues raised by the Angelo Herndon case, its response betrayed no sign that this had been what one contemporary observer termed "one of the most spectacular trials in the annals of Fulton Superior Court."¹⁷⁷ By that time, the heated disputes over race, culture, and power that had figured so prominently at the trial had apparently disappeared without a trace. With the passage of time and the change of judicial venue, the political passions and prejudices that had led to the trial and conviction

175. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 4 (1988) (arguing that cultural signifiers are "words intended to convey a bundle of associations and thereby to invoke an appeal to values perceived to be of great importance in the culture").

176. My discussion thus far has consistently connected race and culture. Implicit in this connection is a view that I have until now declined to make explicit. I understand and use the term "race" here to refer to a cultural category, not a biological fact. To put the point in slightly different terms, the concept of race "is an ideological construct and thus, above all, a historical product." Barbara J. Fields, *Ideology and Race in American History, in REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD* 150 (J. Morgan Kousser & James M. McPherson eds., 1982). In emphasizing the ideological and historical character of race, however, I by no means intend to suggest that this cultural category is not real. This is not merely because racial ideology is "the embodiment in thought of real social relations," *id.* at 151; racial ideology is real also because it has a material location and a weight. The reality of race can be detected in the ways this ideology inscribes itself on bodies, carves up space, and allocates and sustains social power. An adequate account of the Angelo Herndon case is impossible if we do not attend to the culture of race, because racial motives and meanings were an independent determinate force in the case from its inception. The cultural and ideological significance ascribed to Herndon because of the color of his skin is no less fundamental to an explanation of the case than the character of his politics. I do not believe that the First Amendment issues in the case exhaust its constitutional significance. Herndon's arrest, indictment, prosecution, and conviction—and, more crucially, the language by which the State's response to Herndon was both justified and challenged—simply cannot be understood apart from the cultural and constitutional politics of race during the 1930s.

177. MARTIN, *supra* note 91, at 61.

of Angelo Herndon were obscured, though not utterly erased, by the cool logic and language of the law.

I shall discuss presently how the restricted rhetorical range of the Court's opinion in *Herndon v. Georgia* allowed it to ignore the concrete political and cultural context of the constitutional issues presented by the case and thus to read race right out of the Herndon record. Before I do so, however, I want to show how a similar textual strategy has governed interpretation of the Herndon case in the courts of constitutional history.

III. THE COURT OF HISTORY: *HERNDON* AND THE CONSTITUTIONAL HISTORIANS

A rationale of history is the first step whereby the dispossessed repossess the world.

Kenneth Burke¹⁷⁸

A. *HERNDON* AND THE ESCAPE FROM HISTORY¹⁷⁹

This section considers the fate of the Angelo Herndon case in American constitutional historiography. My intention in what follows is not to offer an exhaustive descriptive account and analysis of mainstream American legal scholarship on the case. Rather, my goals are decidedly selective and critical. I want to review three typical historical views of the Angelo Herndon case, developed in the work of Wallace Mendelson,¹⁸⁰ Paul Murphy,¹⁸¹ and David Currie.¹⁸² More precisely, I want to advance an argument about the rhetorical forms in which these interpretations are cast. I begin with a brief description of the main outlines of what each of these authors has to say about the Angelo Herndon case.

178. KENNETH BURKE, *ATTITUDES TOWARD HISTORY* 315 (1937).

179. I play here on Lawrence Friedman's claim that before 1950, legal history "was history that tried to escape from history." Lawrence Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563, 564 (1984).

180. Wallace Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952).

181. MURPHY, *supra* note 7.

182. Currie, *Civil Rights*, *supra* note 33.

1. Herndon and the History of an Ideal

In an article entitled *Clear and Present Danger—From Schenck to Dennis*,¹⁸³ Wallace Mendelson traces the evolution of the clear and present danger doctrine from its initial use by Justice Holmes.¹⁸⁴ Although Mendelson concedes that the doctrine “has embodied a deeply democratic instinct favoring the free expression of ideas,”¹⁸⁵ he suggests that it “has been more significant as a pervasive atmospheric pressure, than as a reliable standard for the decision of a specific case or as a rationale for a line of cases.”¹⁸⁶ The burden of the article is to show how and why clear and present danger has remained more of a “great ideal” than an effective “guide to decision.”¹⁸⁷

Mendelson’s main reference to the Angelo Herndon case appears in a brief discussion of the use of the clear and present danger doctrine between 1930 and 1940. According to Mendelson, the “decade of the thirties far surpasses all prior decades in the number of Supreme Court decisions vindicating civil liberties.”¹⁸⁸ And yet, he observes, “[t]he danger rule . . . was mentioned only twice—once as an oblique underpinning for the Court’s position and once in a dissent by Mr. Justice Cardozo.”¹⁸⁹ Both references (we find in Mendelson’s footnotes) involve judgments by the Court on the issues raised in the Angelo Herndon case.¹⁹⁰

In charting the fortunes of the clear and present danger test during the 1930s, Mendelson aims to paint a picture in which the Hughes Court, unlike its predecessors, courageously assumed the role of guardian and protector against efforts by state and federal authorities to make inroads on the freedom of expression guaranteed under the First Amendment. “The chief justiceship of Mr. Hughes,” writes Mendelson, “clearly marks a new dispensation.”¹⁹¹ He concludes that the primary contribution of

183. Mendelson, *supra* note 180.

184. *Schenck v. United States*, 249 U.S. 47, 50 (1919).

185. Mendelson, *supra* note 180, at 313.

186. *Id.*

187. *Id.* at 333.

188. *Id.* at 317.

189. *Id.* (citations omitted).

190. *Id.* at 317 & nn.20 (citing *Herndon v. Lowry*, 301 U.S. 242 (1937)), 21 (citing *Herndon v. Georgia*, 295 U.S. 441 (1935)). Note that Mendelson gives citational pride of place to *Herndon v. Lowry*, even though it followed the adverse decision in *Herndon v. Georgia* by some two years. Note too that Mendelson does no more than cite the two decisions, even though they marked the only instances during the entire tenure of the Hughes Court in which the doctrine that is his subject figured in the Court’s First Amendment jurisprudence.

191. *Id.* at 317.

the Hughes Court is that it kept Holmes' "great ideal"¹⁹² alive (albeit "obliquely") until it could be "revived by a virtually unanimous Court"¹⁹³ in the next decade.

2. Herndon and the History of an Agenda

Another discussion of the history of the Herndon case is found in Paul Murphy's *The Constitution in Crisis Times, 1918-1969*.¹⁹⁴ For Murphy, the *Herndon* case is most profitably understood as a product of a decisive ideological shift on the Supreme Court. Under Murphy's interpretation, the social and economic dislocation of the Depression engendered a corresponding crisis in predominant conceptions of the nature of the judicial function in particular and the relationship of law to society in general.¹⁹⁵

For Murphy, *Herndon* must be set against the backdrop of this fundamental ideological transformation. Murphy thinks of the First Amendment decisions of the Hughes Court as part of "a new judicial campaign that sought to undermine irresponsible state or state-sanctioned action."¹⁹⁶ These decisions reflected the Supreme Court's acceptance of the increasingly influential idea advanced by the legal realists that government "had an obligation to eliminate legal strictures that prevented the constructive use of personal liberty."¹⁹⁷ In Murphy's reading, however, the *Herndon* case also demonstrated that the Court's new commitment to the protection of individual freedom did not represent a complete break with old understandings. For Murphy, the clearest evidence of this underlying continuity is the fact that the Court did not rush to judgment in the *Herndon* case:

The Court, on the other hand, clearly had no intention of upholding every vague challenge to local authority simply because local citizens felt that their rights were in one way or another being abrogated. It rejected, in 1935, the plea of a Negro Communist organizer in Georgia that an ancient insurrection statute under which he had been arrested deprived him of his constitutional rights. Its denial was based on the fact that he failed to specify which rights were being violated. Only when, in subsequent appeal, specific charges of free speech violation were leveled did the justices consider the issue. Then, speaking

192. *Id.* at 333.

193. *Id.* at 332.

194. MURPHY, *supra* note 7.

195. *Id.* at 99-101, 107-08.

196. *Id.* at 121.

197. *Id.* at 119.

through Justice Roberts, they held that the statute as construed and applied was repugnant to the Fourteenth Amendment in that it furnished no sufficiently ascertainable standard of guilt and that it interfered unduly with speech and assembly not demonstrably creating a clear and present danger of the use of force against the state.¹⁹⁸

In Murphy's account, the Court's refusal to disregard its procedural requirements was an attempt to reconcile its respect for established principles of constitutional federalism with its increased receptivity to First Amendment claims against the states.

3. *Herndon and the History of an Institution*

A third and more recent historical treatment of the Herndon case appears in David Currie's *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930-1941*.¹⁹⁹ Like Mendelson and Murphy, Currie characterizes the 1930s as a period in which the decisions of the Court evidenced its increasing inclination "toward stricter scrutiny of punishment for allegedly subversive expression."²⁰⁰

Of the Court's three considerations of the Herndon case, Currie mentions only *Herndon v. Lowry*.²⁰¹ *Herndon v. Lowry* stands out because it is the "least revolutionary"²⁰² of the Court's three main decisions regarding the federal constitutional protection against state invasions of civil liberties.²⁰³ In Currie's analysis, the constitutional significance of *Herndon v. Lowry* lies in the fact that it evinced the Court's willingness to examine and assess the nature of the evidence on which a challenged conviction for subversive speech was based. For Currie, the Court's "new spirit of aggressiveness in reviewing . . . judicial findings affecting expression"²⁰⁴ in *Herndon v. Lowry* was a sign that a majority of the Court had come to accept the orientation toward First Amendment analysis that Justices Holmes and Brandeis had staked out in earlier decades.

198. *Id.* at 122.

199. Currie, *Civil Rights*, *supra* note 33.

200. *Id.* at 811.

201. 301 U.S. 242 (1937).

202. Currie, *Civil Rights*, *supra* note 33, at 811.

203. The other two were *De Jonge v. Oregon*, 299 U.S. 353 (1937), and *Stromberg v. California*, 283 U.S. 359 (1931).

204. Currie, *Civil Rights*, *supra* note 33, at 813.

B. HISTORY, THEORY, INTERESTS, AND INTERPRETATION: A
RELATION RESISTED

We may begin by noting what is perhaps the chief characteristic common to the three texts I have just reviewed: their resolute refusal to identify or defend the theoretical premises and program (if any) that frame their historical interpretations of the Angelo Herndon case. Anyone familiar with the history of the discipline of legal history knows that this silence is not at all uncommon. In this context, however, such silence calls for investigation. This is so because it is precisely the common failure of these historical treatments of the Herndon case to make explicit the intellectual assumptions from which they proceed that permit Currie, Murphy, and Mendelson to interpret the case, and the Court's disposition of it, as a free speech victory.

One useful measure of the difficulties that attend our way may be taken from a recent reflection on the subject of history and theory²⁰⁵ by one of the nation's preeminent legal historians. "Anglo-American legal history," writes Morton Horwitz, "has been persistently untheoretical."²⁰⁶ This is a claim that would no doubt find many adherents both in and out of the field. The most significant aspect of this statement for our purposes is the way Horwitz frames the relationship between "history" and "theory" in legal historiography: "History and theory" evokes an image of a discipline that fences off historical inquiry and interpretation in a conceptual field where theory fears to tread.

One of the lessons I take from my reading of these three historical treatments of the Angelo Herndon case is that the relationship between theory and history in the work of Anglo-American legal historians is in fact considerably more complex than Horwitz' formulation would seem to allow. In suggesting that the line Horwitz draws between the two concepts is more apparent than real, I do not mean to dispute his observation that legal history has traditionally exhibited a powerful and persistent indifference to the claims of theory.²⁰⁷ Rather, I want to make two

205. Morton Horwitz, *History and Theory*, 96 YALE L.J. 1825 (1987).

206. *Id.*

207. There are two further points of disagreement between Horwitz' intervention in *History and Theory* and the argument I pursue here. My first point goes to Horwitz' views about the role of theory in the practice of legal history. Horwitz immediately undercuts his initial formulation regarding the persistently untheoretical nature of Anglo-American historiography with a second and significantly more cautious claim: "Many of the great legal historians never explicitly addressed the theoretical issues to which their work was linked." *Id.* Horwitz is surely correct in saying that much work in Anglo-American legal history fails to specify clearly the theoretical foundations on which it rests; but unlike Horwitz' initial characterization, this second, more subtle one suggests that

very different claims. My first claim is that the evidence probably warrants a much more critical argument than Horwitz proffers about the predominant attitude toward theory among Anglo-American legal historians. It may well be that the persistent absence of explicit attention to theory in legal history is less a matter of benign untheoretical neglect than active antitheoretical aversion.

A second, more crucial point is that whatever its precise form, we should not uncritically interpret the prevailing silence of legal historians regarding the role of theory in their scholarship as an indication that their work has no theoretical foundation or carries no theoretical implications. Stated bluntly, what legal historians say (or fail to say) about the role that theory plays (or does not play) in their work by no means settles the matter. It is possible to argue—indeed, it is impossible to deny—that a historical work can ignore, but not annul, its debts to theory. Put another way, we might say that all scholarship in legal history necessarily offers explicit or implicit answers to theoretical questions

the earlier description of legal history as “persistently untheoretical” is imprecise, if not altogether incorrect. At the end of his article, Horwitz argues that “all legal structures *inevitably* embody normative positions.” *Id.* at 1834 (emphasis added). I believe that what Horwitz maintains here about legal thought generally is equally true of legal historiography in particular: It is obvious that the persistent silence of legal historians about the theoretical dimensions of their work does not mean that they have no theory. I suspect, then, that Horwitz would agree with me that if a legal historian’s theoretical premises and purposes are not explicit, it is the task of the critical reader to make them so. That is the main burden of my discussion in the following pages.

A second problem with Horwitz’ analysis is that he fails to make clear that he uses “theory” to refer to two very different sets of relationships. The two distinct points of convergence between history and theory that Horwitz wants to explicate (which his title, and the article itself, unnecessarily elide) are between legal history and political and legal theory on the one hand, and between legal history and the theory of history on the other. The first identifies the connections between “controversies over political and legal theory” and debates within the discipline of legal history. *Id.* at 1835. It is this relation to which Horwitz devotes the body of his article, which sets out to demonstrate “the way in which arguments in legal history serve as proxies for more general controversies in legal and political theory.” *Id.* at 1827. A second intersection between “theory” and “history” informs the debate about what Horwitz calls “interpretive issues” in legal history: “whether there is a pattern of conflict versus consensus, continuity versus discontinuity, and whether the way things are is the way they had to be.” *Id.* at 1825. Horwitz is right to note that these problems in interpretive theory “raise questions similar to those in legal and political theory,” *id.*; he may also be correct in his claim that consideration of these questions by Anglo-American legal historians can be traced to lines of influence outside the discipline. What Horwitz does not say, however, and what I would stress, is this: Although one may discern a historical correlation between debates in legal historiography “over how we arrived at the present and whether there are ‘lessons’ to be learned from the past,” *id.* at 1825, and similar disputes in political and legal theory, there is certainly no necessary connection between the two. Whatever their genealogy, basic epistemological questions of the kind that Horwitz raises about the complex transactions between theory and history ought to engage the attention of those interested in the historiography of legal thought and institutions, regardless of their presence or absence as a concern in other fields. As I have already suggested, it should be clear by their very terms that these questions stand at the heart of the historiographic enterprise.

about the nature of historical knowledge and its object, the historical process. Consequently, we must be careful not to overlook the way even the most flatly empirical historical interpretation includes an account (albeit covertly) of its theoretical interests and allegiances. We need to pay close attention to the theoretical infrastructure of historical research and writing not only for its own sake, but also because this level of the historical work may well be the silent site of an author's ideological commitments. With this in mind, we are now in a position to identify the ways in which the historical treatments of the case by Mendelson, Murphy, and Currie silently signify their theoretical, and ultimately their ideological, investments.

These three interpretations of the Angelo Herndon case share a core conception about the nature of American constitutional history generally and, more specifically, about the history of First Amendment jurisprudence. Each author sets out to make the case for the 1930s as a period of exceptionalism in constitutional law that can be set off from the decades that bracket it. The chief lesson we are to take from each of these accounts is that the Depression years represent a period of evolutionary progress in constitutional law, especially in First Amendment jurisprudence. Thus, Currie describes the 1930s as the moment when the Supreme Court "quietly began to work on the agenda of the future."²⁰⁸ Similarly, Murphy frames his discussion of the case within a vision of an ideologically transformed Supreme Court, which, unlike its predecessors, was "determin[ed]" to take "early and resounding" action to use the Due Process Clause of the Fourteenth Amendment "as a device for guaranteeing personal liberty by striking down laws infringing upon that liberty."²⁰⁹

It is Mendelson, however, who makes the most forceful claims for a progressivist interpretation of First Amendment jurisprudence in the 1930s. Recall the terms in which Mendelson introduces his discussion of the Court's First Amendment decisions during the years that Charles Evan Hughes served as Chief Justice: "The chief justiceship of Mr. Hughes clearly marks a *new dispensation*."²¹⁰ The theological resonance

208. Currie, *Civil Rights*, *supra* note 33, at 800.

209. MURPHY, *supra* note 7, at 119.

210. Mendelson, *supra* note 180, at 317 (emphasis added). This position contains the seeds of its own deconstruction. The very language of "New Dispensation" connotes a radical rupture, which in much of this literature is denied by the claim that the Court's jurisprudence in the 1930s was immanent in the logic and language of decisions from the "forgotten" era. See, e.g., David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

of the metaphor of the "new dispensation" is difficult to ignore.²¹¹ The deployment of this metaphor to characterize the Hughes Court's role in the development of the clear and present danger doctrine is the figural fulcrum on which Mendelson's reading of *Herndon* turns. It warrants some detailed discussion.

To unpack Mendelson's interpretive and ideological premises, we may draw on recent theoretical writing about the nature of historiography, the process and product of historical research, analysis, and writing. In this connection, the analysis of Barry Hindess and Paul Hirst regarding the object of historical research and writing is penetrating. Hindess and Hirst note that "despite all the elaborations, equivocations and qualifications of historians,"²¹² historiography reduces to the study of the past. The historian, however, faces an immediate and insoluble problem: "[B]y definition, all that is past does not exist."²¹³ For Hindess and Hirst, this obvious fact about the subject matter of history thus requires us to qualify our understanding of the historical project. In their view, it would be more correct to say that "history" is made of "whatever is represented as having hitherto existed."²¹⁴ This is an important modification of the historical project, because it suggests that the historian can never hope fully to satisfy the Rankean injunction to discover *wie es eigentlich gewesen ist*, that is, to show "how essentially things happened."²¹⁵ The constitutive antinomy between the past and historians' discourse about the past derives from the fact that "[h]istory's object, the hitherto existing, does not exist except in the modality of its current

211. The term "dispensation" was used in Christian theology to designate "the divine ordering of the affairs of the world," "an appointment, arrangement, or favor, as by God," or "a divinely appointed order or age." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 414 (2d ed. 1967). It might be argued that we ought not to make too much of this figural language, that it is a stylistic device that has no bearing on Mendelson's substantive position. I reject the notion that nothing of theoretical consequence flows from the terms Mendelson uses to characterize the First Amendment jurisprudence of the Hughes Court. Recent work in the theory of discourse has thoroughly discredited the assumption that language can be segregated from thought in a clear and convincing way. To my mind, style matters very much. The "ideological imagery" through which Mendelson's analysis proceeds is inseparable from the substantive argument it advances. For a discussion of the notion of ideological imagery in legal texts, see Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 373, 374 (David Kairys ed., 1990).

212. BARRY HINDESS & PAUL Q. HIRST, *PRE-CAPITALIST MODES OF PRODUCTION* 309 (1975).

213. *Id.*

214. *Id.*

215. LEOPOLD VON RANKE, *THE THEORY AND PRACTICE OF HISTORY* (Georg G. Iggers & Konrad Von Moltke eds., Wilma A. Iggers & Konrad Von Moltke trans., 1973).

existence, as *representations*,"²¹⁶ in the form of surviving records, documents, and the like. Since these records from the past do not speak for themselves, the process by which representations or traces of an unrecoverable past are fashioned into a narrative and interpretive account necessarily reflect the historian's own epistemological and ideological commitments regarding the nature of history and of historical knowledge:

What the past *is* is determined by the content of the various ideological forms which operate within the parameters of historical knowledge. The content of the past, its nature, its periods and problems is determined by the character of a particular ideological form. The particular modes of writing history invest this or that body of representations with the status of a record. Artefacts [sic], washing lists, court rolls, kitchen middens, memoirs are converted into *texts*—representations through which the real may be read. The text, constituted as a text by its reading, is at the mercy of this reading. Far from working on the *past*, the ostensible object of history, historical knowledge works on a body of *texts*. These texts are a product of historical knowledge. The writing of history is the production of texts which interpret these texts.²¹⁷

Two fundamental conceptions about the nature of historiography emerge from this analysis. First of all, Hindess and Hirst invite us to see that history writing is essentially and unavoidably the production of text about other texts: The historian begins and ends his or her work with language, or, more precisely, with forms of signification. This is not to say that because it is available to us only in and through its text, history itself, understood as a process, can or should be reduced to or equated with its textualization. Fredric Jameson rightly points out that history in this sense is most emphatically *not* a "text, not a narrative, master or otherwise,"²¹⁸ but rather an absent cause: It is "absent"²¹⁹ because the past by definition is never present. History is finally "inaccessible except in textual form."²²⁰

To point out the ways in which historiography is the production of a text about texts—or, more broadly, of figural language about figural language—is to call attention to the unavoidable but often unacknowledged rhetorical character of historical discourse. Because the constitution,

216. HINDESS & HIRST, *supra* note 212, at 308-09 (emphasis added).

217. *Id.* at 311.

218. Fredric Jameson, *Marxism and Historicism*, 11 NEW LITERARY HIST. 41, 42 (1979).

219. *Id.*

220. *Id.*

selection, interpretation, and communication of historical facts takes place in a textual domain that is not identical to the actual historical past, any historiographical perspective must perforce be partial.²²¹

In the context of the Angelo Herndon case, these theoretical understandings of the figural foundations of historical writing help us focus on the importance of the underlying textual strategies through which Mendelson develops his account of the rise, fall, and renaissance of the clear and present danger rule. As I have already indicated, Mendelson invites us to view the Supreme Court's decisions in the Angelo Herndon case as part of a New Dispensation.²²² This perspective is embodied in rhetorical and stylistic forms that give his historical interpretation of the case from the actual events it aims to represent. One instance of the tension

221. In his classic work, *The Savage Mind*, Claude Levi-Strauss describes this unavoidable partiality as follows (in the chapter "History and Dialectic"):

As historical knowledge is claimed to be privileged, I feel entitled . . . to make the point that there is a twofold antinomy in the very notion of a historical fact. For, *ex hypothesi*, a historical fact is what really took place, but where did anything take place? Each episode in a revolution or a war resolved itself into a multitude of individual psychic movements. Each of these movements is the translation of unconscious development Consequently, historical facts are no more *given* than any other. It is the historian, or the agent of history, who constitutes them by abstraction and as though under the threat of an infinite regress.

What is true of the constitution of historical facts is no less so of their selection. From this point of view, the historian and the agent of history choose, sever and carve them up, for a truly total history would confront them with chaos. Every corner of space conceals a multitude of individuals each of whom totalizes the trend of history in a manner which cannot be compared to the others; for any one of these individuals, each moment of time is inexhaustibly rich in physical and psychical incidents which all play their part in his totalization. Even history which claims to be universal is still only a juxtaposition of a few local histories within which (and between which) very much more is left out than is put in . . . In so far as history aspires to *meaning*, it is doomed to select regions, periods, groups of men and individuals in these groups to make them stand out, as discontinuous figures, against a continuity barely good enough to be used as a backdrop. A truly total history would cancel itself out—its product would be nought. What makes history possible is that a subset of events is found, for a given period, to have approximately the same significance for a contingent of individuals who have not necessarily experienced the events and may even consider them at an interval of several centuries. History is therefore never history [of], but history for. It is partial in the sense of being biased even when it claims not to be, for it inevitably remains partial—that is, incomplete—and this is itself a form of partiality.

CLAUDE LEVI-STRAUSS, *THE SAVAGE MIND* 257-58 (1966).

More recently, Agnes Heller has argued that plural interpretations of the same historical event are likely even in societies structured by a basic consensus:

[E]ven one world-view which is shared by a group of people can be interpreted in different ways by them, and this accounts for individual selections . . . [on] the readiness for *exclusive* messages and the hierarchism of different kind[s] of knowledges. Every historian is ready to read certain messages and refuse to read others. Every historian *assesses* the messages by labelling them as "important," "unimportant," "decisive," "indecisive," "primary," "secondary." Even a decision regarding the authenticity of historical sources is—inside a given framework—dependent on the world-view of the historian. What is "primary" or "decisive" for one world-view can be "indecisive" or "secondary" for the other—indeed, it may not even merit a mention.

AGNES HELLER, *A THEORY OF HISTORY* 104-05 (1982).

222. See *supra* notes 210-13 and accompanying text.

between Mendelson's interpretation and what actually happened to Angelo Herndon is his use of the footnote. Although *Herndon v. Lowry* and *Herndon v. Georgia* were the only two cases in which the clear and present danger test figured in the Hughes Court's First Amendment jurisprudence, Mendelson consigns both to footnotes, literally relegating the two opinions to the margins of his analysis.²²³ Mendelson provides no information about the nature of the constitutional claims pressed in the two *Herndon* cases and gives us not the slightest clue as to the results the Court reached.²²⁴ Ultimately, Mendelson's characterization of the Hughes Court's First Amendment jurisprudence as a New Dispensation rests on nothing more than the force of his figural language and on the rhetorical strategy—the muted murmur of the footnotes; the utter silence about the issues presented, the decisions reached, and their articulated rationale—allowing him to enlist *Herndon v. Georgia* and *Herndon v. Lowry* for evidentiary duty and at the same time avoid any real discussion of precisely why and how they bear out his thesis. Like Murphy and Currie, Mendelson makes it difficult to break the textual codes²²⁵ in

223. The same may be said of Zechariah Chafee's discussion in *Free Speech in the United States*. See *supra* notes 9-17 and accompanying text. As I have noted, David Currie altogether ignores the *Herndon v. Georgia* decision. See *supra* notes 201-04 and accompanying text. A similar silence regarding *Herndon v. Georgia* characterizes David Rabban's discussion of *Herndon v. Lowry*. See David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1347 (1983). As we have seen, Paul Murphy does mention *Herndon v. Georgia* but does not view it as qualifying in any way his characterization of the Hughes Court's commitment to civil liberties. See *supra* notes 194-98 and accompanying text.

224. This cursory treatment of the Angelo Herndon case differs radically from Mendelson's discussion of decisions rendered both before and after the chief justiceship of Charles Evan Hughes. See, e.g., Mendelson, *supra* note 180, at 314-15 (discussing *Schenck v. United States*, 249 U.S. 47 (1919)); *id.* at 316 (discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923)); *id.* at 317-18 (discussing *Thornhill v. Alabama*, 310 U.S. 88 (1940)).

225. One could describe the discursive problem of historical research and writing as involving three distinct conceptual operations. I conceptualize this tripartite division around the terms "coding," "decoding," and "recoding." (My scheme here is heuristic. Its divisions should not be hardened into an absolute—these three stages are probably not so cleanly separable in practice.) First, the historian "codes" certain representations of the past (court records, for example), selecting and labeling them as properly "historical" objects for his or her examination. Obviously, the first move—a process of selection and rejection, of inclusion and exclusion—is critical for what follows. It is what Hindees and Hirst call the historical "investment": Part of a body of representations is cut off and isolated from its larger context according to a subjective notion of its importance; then it is "constituted" (*made to function*) as a historical "text." HINDEES & HIRST, *supra* note 212, at 311. This initial coding, acknowledged or not, determines the range of the historian's analysis and precludes the historian's later claim that he or she simply tried to discover and describe "what really happened." To conclude that some records are important and citable (like the Supreme Court's opinion in *Herndon v. Lowry*) and that others are not (like the Supreme Court's opinion in *Herndon v. Georgia*) is to stop describing and start judging.

The second move of the historian is to "decode" the materials that she or he has selected as the proper objects of historical analysis: Quite simply, this is a reading of the representation or, more

which his references to the Angelo Herndon case are cast, primarily because the reader is not provided with even the most minimal means for testing his interpretations in light of the cited decisions.

But it is not only the textual strategy of Mendelson's account that betrays its incompleteness. Mendelson's investment in a particular perspective toward the case is also revealed in his choice of narrative form. To appreciate the role that narrative structure plays in Mendelson's argument, it is necessary to understand historiography as a species of literary genre. The claim that history is a kind of writing—that its textual representations are not identical to the lived historical reality of which they purport to give an account—raises important questions about the status of the narrative tradition in historiography. Most notably, it challenges the notion that the historical text is or can be a faithful retelling of what “actually” took place in the past. Students of the discipline have increasingly come to understand historical discourse as a narrative literature that has much more in common with other types of storytelling than historians have been willing to concede.

The most influential recent proponent of this view is historian Hayden White.²²⁶ White starts from the proposition that the textuality of historical discourse means that “historical discourse should be viewed as

probably, of the complex of representations that the historian will eventually use to fashion a textual narrative, usually in linear form, of a particular event or set of events. This recoding, or reading, is circumscribed by the initial coding to which the representations have already been subjected. The language of the coding is determined, moreover, by the concrete temporal and cultural context in which the historian is situated, and by the historian's ideological vision of a particular period and its representations. This is what Hindess and Hirst mean when they say that the historical text is constituted as a text by its *reading* and is finally “at the mercy” of its reader. *Id.* Thus, a decision to reconstruct the Angelo Herndon case solely on the basis of *Herndon v. Lowry* and to ignore the rawer, less “literate” Unemployed Council minutes in the transcript of record, or even the earlier dispositions of the case in 1935, is necessarily to foreclose, indeed to *repress*, certain readings of *Herndon v. Lowry* itself in favor of others. Thus, the decoding of the historical text is never an innocent—that is to say, objective—elucidation of meaning or significance. Following Colin Sumner's definition of “reading” as a complex practice whereby a reader recognizes, misrecognizes, or fails to recognize levels of meaning and significance in a social text, we might go so far as to say that the historical decoding is always in part a misreading: Better yet, it is an active rewriting. COLIN SUMNER, *READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW* 63 (1979).

The decoding of the historical text is controlled by the intellectual and ideological biases that inform its initial coding; the decoding limits in turn the scope of the historian's third and final move, which is to (textually) “recode” the historical representation in an organized historiographical narrative. No historical writing can escape the effects of its constitutive coding and recoding; for, as we have seen, these prior practices limit the terms of the historical discourse and determine what the recoding can and cannot say, as well as what goes without saying. Something must be minimized, ignored, or left unexamined under the censorship imposed by the mediatory effects that are nested in the very texture of the historian's language.

226. HAYDEN WHITE, *TROPICS OF DISCOURSE* (1978).

a sign system" and not as a "mirror image of the set of events that it claims simply to describe."²²⁷ White argues that the historical "sign system" simultaneously points in two very different directions: "toward the set of events it purports to describe" and "toward the generic story form to which it tacitly likens the set in order to disclose its formal coherence considered as a structure or a process."²²⁸ Viewed as a type of literary form, then, history writing may be defined as the "fiction of factual representations."²²⁹ Thus, the historical work is often plotted, or "thematized," in terms of the kinds of figurations and categories used to describe plays, poems, and novels—the texts we think of as "literature." The historian might characterize her or his work as a study of the "epic" of Manifest Destiny, the "tragedy" of the Civil War, or the "romance" of the American Revolution.

What these narrative forms obscure, however, is the possibility that the same event or set of events might be viewed in radically different ways. For example, from the vantage point of the vanquished rather than of the victor, the "epic" of Manifest Destiny might be the "tragedy" of the extermination of the Indian nations. The point to be emphasized here is that the narrative form in which a historical account is modeled is not neutral or innocent. The narrative theme *qua* theme has a content, and the content of the narrative theme around which a historical interpretation crystallizes may reflect a profoundly teleological or metaphysical attitude toward historical process. Insofar as the historiographical representation of an event or set of events in terms of a single theme presupposes that the past possesses a unitary logic or rationality, it imposes an order on its object that is more fictive than real. Historical discourse offers a "picture of the past [that] is . . . in every detail an imaginary picture."²³⁰

In Mendelson's article, the imagery of a New Dispensation mobilizes "the theological motif par excellence."²³¹ The characterization of the 1930s as a New Dispensation not only reflects a choice of metaphor but invests Mendelson's account with and evokes a distinct narrative form. What Mendelson offers is a narrative account in the form of constitutional history of the Grand March of Progress. Mendelson tells of a prophetic Supreme Court whose mission was to keep the memory of the clear and present danger test alive until its inevitable resurrection in the

227. *Id.* at 106.

228. *Id.* at 121.

229. Mendelson, *supra* note 180, at 317.

230. R.G. COLLINGWOOD, *THE IDEA OF HISTORY* 282, 245 (1946).

231. JACQUES DERRIDA, *POSITIONS* 64 (Alan Bass trans., 1981).

next decade. In narrative terms, the metaphor of the New Dispensation allows Mendelson to assert without argument that an enlightened Court cautiously but consistently interpreted the Constitution to grant increasingly expansive constitutional protection to unpopular speech.

Mendelson's figure of the New Dispensation, with its suggestion that there was an underlying logic and forward-looking purpose behind the decisions of the 1930s, is at best historically problematic. His progressivist characterization of the case law clashes with a competing historical view argued most powerfully by Klaus Heberle.²³² Heberle has argued that the First Amendment decisions are more profitably understood as what he calls "absent-minded incrementalism"²³³—the product, in other words, of an irrational rationality, not of a mythic ordered purposiveness. He argues that the First Amendment cases of the 1930s only *appear* to have marked a decisive shift toward the nationalization of the Bill of Rights. Noting that this was a "step that the Court had repeatedly refused to take in the past out of deference to the federal character of American government,"²³⁴ Heberle contends that the Court in fact "did not at any point in the process address itself to the problem of the relation between the federal courts and state government, did not discuss it, and did not evince any particular awareness that the problem was involved."²³⁵ In short, Heberle's study demonstrates that the self-conscious doctrinal innovation Mendelson finds in the Hughes Court simply is not borne out by the historical record.²³⁶

232. Klaus Heberle, *From Gitlow to Near: Judicial "Amendment" by Absent-minded Incrementalism*, 34 J. POL. 458 (1972).

233. *Id.*

234. *Id.* at 460.

235. *Id.*

236. The claim that the Supreme Court's First Amendment jurisprudence is most productively understood as the product of "absent-minded incrementalism" applies to the federal government as a whole. As Robert Goldstein has demonstrated, the federal government's record of respect for political dissent in the 1930s was checkered at best. Although the government was generally favorable toward the exercise of political liberties from 1933 to 1938, these years were bracketed by waves of political repression that the federal government not only tolerated but actively participated in. For example, the Hoover Administration responded with massive brutality to the Bonus Marchers, a group of unemployed veterans who set up camp in Washington for two months in the spring of 1932, demanding immediate payment of their World War I bonuses. On Hoover's orders, Army Chief of Staff General Douglas MacArthur led 600 Army troops "armed with sabers, bayonets, tanks, machine guns and tear gas bombs" against the jobless veterans. More than 1,000 people were tear-gassed, and more than 50 were treated for injuries. See ROBERT J. GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT* 198-200 (1978).

In the later years of the decade, after a relative hiatus, the federal government again took a number of politically repressive measures. In 1938, the House of Representatives established the Committee on Un-American Activities, whose mandate was to investigate the political activities of both left-wing and right-wing groups. A year later, Congress enacted a relief appropriation bill that

By itself, the Mendelson thesis that "the decade of the thirties far surpasses all prior decades in the number of Supreme Court decisions vindicating civil liberties" is not inaccurate. However, the metaphorical and narrative description of the work of the Hughes Court in the ideological imagery of the New Dispensation is misleading. The term suggests that the period from 1931 to 1937 marked some kind of fundamental change in the "nature" of the Supreme Court's First Amendment jurisprudence. Indeed, the very designation of the cases as "Hughes Court decisions" not only permits but actively promotes a reading which obscures the fact that these decisions were made in a political and cultural context of profound ideological conflict. Moreover, the exclusive focus on the Court's internal doctrinal development and membership changes is utterly indifferent to the dialectical relationship between legal and social change. The implication that the Hughes Court's First Amendment jurisprudence represented a radical break from what had come before overlooks the degree to which the Court proceeded piecemeal, with no discernible logic or progression. It neglects to consider that the decisions were marked by the justices' continuing debate over the Court's proper role in protecting individuals against repressive state action, a debate never fully resolved. It minimizes the fact that the same Court that vindicated freedom of expression in striking down a California law that made displaying a red flag as a symbol of political opposition a felony²³⁷ also upheld a denial of citizenship to a Canadian Baptist minister who asserted a right of private judgment on matters of military conscription.²³⁸ The ideological imagery of the New Dispensation conveniently ignores the fact that the Hughes Court's decisions did not differ radically from the decisions that came before or after them. Moreover, the progressivist vision cannot account for the fact that "no direct action by the Court has ever had any significant bearing in either *stopping* or *slowing*"²³⁹ political repression in America.

This perspective reveals the fictive relationship of Mendelson and his narrative to the historical period. Narratively, Mendelson's article

denied funds to "any person who advocates, or who is a member of an organization that advocates the overthrow of the government of the United States through force or violence." *Id.* at 245. That same year, Congress passed the Hatch Act, which barred from federal employment any individual who had "membership in any political party or organization which advocated the overthrow of our constitutional form of government in the United States." *Id.*

237. *Stromberg v. California*, 283 U.S. 359 (1931).

238. *United States v. McIntosh*, 283 U.S. 605 (1931), *overruled by* *Gironard v. United States*, 328 U.S. 61 (1946).

239. John P. Frank, *Review and Basic Liberties*, in *SUPREME COURT AND SUPREME LAW* 109, 113 (Edmond Cahn ed., 1954).

can be squarely situated within a body of historical literature that Hayden White has called a complex of "verbal fictions, the contents of which are as much invented as found."²⁴⁰

My objection to Mendelson's historical analysis of the Angelo Herndon case, or, more precisely, my objection to Mendelson's lack of analysis of the Angelo Herndon case, reduces to the following claim. Mendelson, like Murphy and Currie, offers no theoretical category to account for the extent to which the Supreme Court's First Amendment doctrine of the 1930s reveals more discontinuity than coherence, more contradiction than consistency. What we are given is a unified constitutional history of a period whose recorded remains are read "as a repository of a [secularized] eschatology of meaning."²⁴¹ For Mendelson, as for Currie and Murphy, the Herndon case marks a stage in the historical unfolding in constitutional law of an inexorable logic of progress. The singularly forward-looking character²⁴² of the interpretive models in which these readings of the Herndon case are nested is a vision of constitutional history with the history left out.

Murphy, Currie, and Mendelson's indifference to the essentially erratic character of First Amendment jurisprudence during the 1930s makes their work profoundly historicist. By historicism I mean the view that historical events obey and embody an immanent rationality or inherent order. Historicism is a perspective that ignores, denies, or attempts to minimize the errant and uneven course of social life and its historical development. Contrary to the lawlike logic of the historicist perspective, I believe that it is not possible to think and write about the history of social practices like constitutional politics and law without taking account of the constitutive role of conflict, chaos, and contradiction.

The interpretations that Murphy, Currie, and Mendelson offer of the Angelo Herndon case are hampered by an inability to apprehend, much less account for, the warring social forces at work in the First Amendment jurisprudence of the 1930s, forces that invested the period

240. WHITE, *supra* note 226, at 82.

241. Tony Bennett, *Texts in History: The Determinations of Readings and Their Texts*, in POST-STRUCTURALISM AND THE QUESTION OF HISTORY 80 (Derek Attridge et al. eds., 1987).

242. See, e.g., MURPHY, *supra* note 7, at 123 ("[I]n squaring national ideals with concrete practice in the fields of civil rights and liberties [the Court] took the first steps in a legal revolution in which black leadership would eventually mount a national campaign for full first class citizenship"); Currie, *Civil Rights*, *supra* note 33, at 830 ("By holding first amendment freedoms applicable to the states . . . [the Court under Hughes] made a significant start in dealing with [a new agenda]). See also ROBERT G. McCLOSKEY, THE AMERICAN SUPREME COURT 169, 171 (1960) (arguing that Supreme Court decisions of the 1930s reveal a "logic . . . working on behalf of civil rights [that bore] the seeds of the future").

with a strange "double reality." Bent as they are on advancing a progressivist, evolutionist view of First Amendment history, Murphy, Currie, and Mendelson assume away or simply ignore an alternative perspective on the period: that the 1930s were years of political conflict, ideological crisis, and cultural contestation. It is precisely this counterhistory that we can glimpse in cultural artifacts such as *Let Me Live*.

C. MAKING HISTORY

The indifference exhibited by Mendelson, Murphy, and Currie to other texts and other narratives—materials from which they might have derived a very different account of the Angelo Herndon case—appears to be driven by largely unacknowledged investments. I do not mean to suggest that the relationship between their interpretations and the ideological investments that inform them is indefensible. Rather, I believe that the combined force of their interpretive models and ideological affiliations forecloses lines of historical inquiry that might call their approaches and results into question. More fundamentally, what Murphy, Mendelson, and Currie have to say about the Angelo Herndon case reflects something more than mere intellectual interest. Ultimately, the belief that the case and the Court's First Amendment jurisprudence as a whole reflect "a striving for fidelity to a true line of progress"²⁴³ is just that—a belief. It is this article of faith more than any other feature of their work that forces the recognition that their accounts of *Herndon* are not disinterested scholarly analyses but rather interested interventions in a contested ideological field. In short, each of these works resonates with ideological affiliations and implications that a popular countermemory of the Herndon case aims (in the strongest sense of the term) to expose.²⁴⁴

243. ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 13 (1970).

244. My purpose in raising these questions is not simply or primarily to suggest that the ideological biases at the base of these texts lead to interpretive errors that must be corrected so that we may get to the objective truth of the matter. One of the aims of this Article is to challenge the idea that historical interpretation of constitutional law is or should be conducted outside of a whole network of interests, associations, and affiliations that are touched by and tied to relations of power. My attention to the "affiliative" bearings of the readings that Mendelson, Murphy, and Currie offer of the Angelo Herndon case is intended not so much to correct their interpretations, but rather to contest them, to make room for other, competing "truths." To be sure, the thrust of my remarks is clearly critical, but what I want to emphasize is that the burden of my argument is not so much to show that their interpretations are erroneous; I am more concerned with establishing that these interpretations are possible only because their authors have excluded equally plausible alternative accounts, and that these interpretive absences, or omissions, are caused by interests that are not exclusively, or even primarily, intellectual. It should be stressed here that my emphasis on the interested omissions that structure these texts by no means reflects an indifference on my part to basic empirical accuracy, either in my own interpretation of the Angelo Herndon case or in the work of

There is a sense that the belief "in the inexorable laws of development" driving the historical work we have examined actually reflects "a certain contempt for ordinary people," such as *Herndon*.²⁴⁵

A popular constitutional history of the *Herndon* case is skeptical of any historical practice that forces the events that led to *Herndon v. Georgia* and *Herndon v. Lowry* into the interpretive model of foreordained progress. A popular constitutional history is unwilling to impose a teleological framework on the raw material that constitutes its object of study. The source of this agnosticism is a realization that the progressivist vision of constitutional history is both an interpretive "[structure] of memory and remembering" and, at the same time, an ideological strategy of "organized forgetting".²⁴⁶ What is forgotten is the lived experience of those whose stories disrupt the ordered image that the historical narrative of constitutional progress imposes on an unruly past.

It is precisely this aspect of organized forgetting that I have aimed to identify and interrogate in my critical readings of the rhetorical and narrative dimensions of the accounts of Mendelson, Currie, and Murphy. History does not always have a happy ending. When one considers the cultural context in which *Herndon v. Georgia* arose and was adjudicated, it was at the time far from obvious that the defeat in that case would become the "success story" of *Herndon v. Lowry*. This is probably the main reason for the doctrinal and historical segregation of *Herndon v. Georgia* from *Herndon v. Lowry*. For the events leading up to the Court's decision in *Herndon v. Georgia* tell a story of repression and resistance, a story that is crucial to an understanding of the case from the bottom up. A subaltern perspective on the Angelo Herndon case discloses an alternative historical vision of the 1930s, in which First Amendment law was a contested terrain, scarred and cracked by a bleak and often bloody political past. In my view, *Let Me Live* and the decision in *Herndon v. Georgia* are important textual sources for recounting this countermemory

the historians discussed in this section. I am indebted to the writing of Edward Said for my understanding of the inescapable "affiliative" dimensions of all intellectual work. See EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* (1981); SAID, *supra* note 52.

245. CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* 220 (1991).

246. ROGER BROMLEY, *LOST NARRATIVES* 7 (1988). Bromley describes the contested terrain of history as a dialectical unity of anamnesis and amnesia in which

[f]orgetting is as important as remembering. Part of the struggle against cultural power is the challenge to forgetting posed by memory. What is "forgotten" may represent more threatening aspects of popular "memory" and have been carefully and consciously, not casually and unconsciously, omitted from the narrative economy of remembering.

Id. at 12.

of repression and resistance. As such, they should not be cordoned off in a separate historical field.

I am aware that my emphasis on the themes of political and cultural struggle may be critiqued for offering a picture of the Angelo Herndon case that is no less partial than the progressivist historical accounts I have criticized. But this objection fails to recognize that there are two different senses in which a particular historical interpretation may be considered partial. I do not claim that my account of the Angelo Herndon case offers anything like a comprehensive historical explanation of the case's constitutional meanings. In this sense, my alternative narrative cannot help but be partial. But I believe that the historical interpretations of which I have been critical are partial in a different and avoidable sense. Mendelson, Murphy, and Currie never seriously consider the concrete social grounding of the Herndon case, most notably the cultural politics of race. My earlier discussion of that context demonstrates that the culture and politics of race made up one of the central arenas in which the ideological contest between subaltern resistance and superordinate repression was fought.²⁴⁷ Mendelson, Currie, and Murphy fail to provide a space in their institutionally oriented history for the active role that Herndon played in the events that led to the Court's decisions in his case. It is precisely this absence that led me earlier to describe the stories that Mendelson, Currie, and Murphy tell about the Angelo Herndon case as history with the history left out.²⁴⁸

The heart of my argument is that the questions of race, power, and culture are no less central to *Herndon's* significance in our constitutional history than the aspects of the case around which institutional histories have revolved. I believe, with W.E.B. Du Bois, that the subaltern's view of *Herndon v. Georgia* tells a story of which constitutional history "has saved all too little of authentic record and tried to forget or ignore even the little saved."²⁴⁹ In reading the record of the case left by Herndon himself, I have attempted to highlight features of the case that seem to be outside the interpretive horizon of institutional history. The themes of resistance and repression sounded in *Let Me Live* must be accorded their rightful place, alongside the theme of progress that has so captured the institutionalist's historical imagination. A history of the Angelo Herndon case that ignores his subaltern account of its significance is a

247. See *supra* part III.B.

248. *Id.*

249. APTHEKER, *supra* note 23, at 51 (quoting W.E.B. Du Bois).

history, in Herndon's words, "without blood and entrails."²⁵⁰ Herndon's account is valuable because it provides a perspective on the case from below—from the point of view of those for whom "[h]istory is what hurts."²⁵¹

I am not endorsing a historical practice that uncritically siphons off Herndon's subaltern experience from the larger historical current of which it was a part. The two are inextricably related; their separation is neither possible nor desirable. However, I do contend that Herndon's subaltern experience (or, more precisely, the recorded remains of it) is as fundamental and significant an index of American constitutionalism as that found in official legal texts. My insistence on reckoning the constitutional meanings into the cultural record left by the historically dispossessed is not merely an effort to replace the current hegemony of institutional history with that of a hegemonic popular memory. It is an attempt rather to retrieve the "buried" and "subjugated knowledges"²⁵² bequeathed to us by Americans who lived out their lives at the bottom of our constitutional order.

My discussion has been guided by three main concerns. First, I have tried to show that the complex ebb and flow of the events that make up American constitutional history is likely to remain obscure unless the experiences of individuals like this young black coal miner are brought to its surface. Second, I have tried to indicate why, when those experiences are brought to the surface of constitutional history, they expand like a ripple in a pond. What Herndon has to say about his experience sheds light on the cultural foundations of legal ideology and institutions and thus calls our attention to the ways law and culture have intersected in American constitutional history. Third, in urging that the subaltern record of the Herndon case left in *Let Me Live* must be taken seriously, I have tried to clear the ground for a fresh reading of the text of *Herndon v. Georgia* itself. The interpretive model I have developed for reading Herndon's nonofficial account of the case also provides a framework for rereading official legal texts. The historiographical interest of such an undertaking, as I presently show, is that it permits us to see traces of subaltern political consciousness inscribed in the very terms and texture of the judicial discourse through which the Court tried to avoid both the

250. HERNDON, *supra* note 27, at 89.

251. FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS* 102 (1981).

252. Michel Foucault, *Two Lectures*, in *POWER/KNOWLEDGE* 83 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

constitutional issues raised in *Herndon v. Georgia* and the broader conflicts regarding race, culture, and power for which these issues were a site of intersection.

IV. SPEAKING LAW

[T]he fact that one ignores something by no means puts an end to its existence.

Karl Mannheim²⁵³

Felix Frankfurter and Henry M. Hart, Jr., begin their article *The Business of the Supreme Court at October Term, 1934*²⁵⁴ like this:

Events are again demonstrating that in the context of the country's history, the history of the Supreme Court is a rhythm of quiescence and liveliness pulsating with alternating periods of relative placidity and vitality in American politics. But probably at no time could Mr. Justice Holmes more truly than now have said of the Court, "We are very quiet there, but it is the quiet of a storm centre."²⁵⁵

The piece is one of a series published in the *Harvard Law Review* on the "procedure by which the Court speaks—or abstains from speaking—as the ultimate voice of the Constitution."²⁵⁶ As the first scholarly effort to address the implications of *Herndon v. Georgia* for the theory and practice of Supreme Court jurisdiction, *The Business of the Supreme Court* offers a useful contemporaneous introduction to a concept that frames my reading of the decision.

The concept is found in the difference Frankfurter and Hart posit between law and politics. In *The Business of the Supreme Court*, the opposition that Frankfurter and Hart draw between law and politics functions as a conceptual axis on which their discussion of *Herndon* (as well as the other cases decided that term) turns. But although the distinction between law and politics is central to Frankfurter and Hart's analysis, the rhetoric of their argument belies the reasoning on which this opposition stands. The authors of *The Business of the Supreme Court* attempt to resolve the "problem" of the relationship between law and politics in constitutional adjudication, which they see as the heart of the

253. KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 4 (Louis Wirth & Edward Shils trans., 1936). This line comes from the first part of an expanded version of Mannheim's treatise on the sociology of knowledge, written especially for English readers. The original German version appeared in 1929.

254. Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68 (1935).

255. *Id.*

256. Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 578 (1938).

Court's disposition of *Herndon v. Georgia*. In the final instance, however, they only restate the problem of the politics of constitutional law at another level of their text. The result is that *The Business of the Supreme Court* reenacts the very dilemma the Court faced in *Herndon v. Georgia* itself.

I read both Frankfurter and Hart's article and the Court's opinion in *Herndon v. Georgia* as meditations on the problem of power in American constitutionalism. Michel Foucault has said that one of the primary characteristics of power is that it manifests itself indirectly. At a discursive level, the operation and effects of power are often concealed in texts or statements that appear to be about something other than power.²⁵⁷ Foucault attributes this discursive displacement to the fact that "power is tolerable only on the condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms."²⁵⁸ Foucault argues that we must therefore employ strategies in our reading that catch power on the wing so that we may analyze it "in the places it both inhabits and vacates simultaneously."²⁵⁹

This perspective on the nature of power suggests a specific interpretive approach to legal discourse (a term I use here to refer both to judicial decisions and to commentary on those decisions). Legal discourse is not simply *about* relationships of power; it expresses power relations. Pierre Macherey has said that "[w]e always eventually find, at the edge of the text, the language of ideology, momentarily hidden, but eloquent by its very absence."²⁶⁰ This suggests that a legal text must be subjected to a process of double reading: a reading that both scans the text for what it says and rescans it for what it says within what it leaves unsaid. Thus, my exploration of the language of ideology in Frankfurter and Hart's discussion and in *Herndon v. Georgia* itself embraces two overlapping objects. I am interested in an ideological analysis not only of the explicit arguments that these texts make, but also of those they do not make. As we shall see, a number of the most significant ideological turns in *The Business of the Supreme Court* and in *Herndon v. Georgia* occur on the margins and between the lines of these texts, in questions that are not asked, in limiting presuppositions that remain unspoken and implicit. To make the point another way, *The Business of the Supreme Court* and

257. For a fuller discussion of Foucault's position, see *supra* note 88.

258. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 86 (Robert Hurley trans., 1980).

259. Hayden White, *Michel Foucault*, in *STRUCTURALISM AND SINCE* 109 (John Sturrock ed., 1979).

260. MACHEREY, *supra* note 80, at 60.

Herndon v. Georgia reveal a great deal in their “patterns of silence,”²⁶¹ or structured absences. Against this backdrop, I want to turn to Frankfurter and Hart’s discussion of what *Herndon v. Georgia* teaches about the way the Supreme Court “speaks—or abstains from speaking—as the ultimate voice of the Constitution.”²⁶²

A. THE BUSINESS OF THE SUPREME COURT

Frankfurter and Hart mention *Herndon v. Georgia* in a section of *The Business of the Supreme Court* that discusses the arsenal of techniques and devices the Supreme Court uses to avoid “decision on what is loosely called the merits.”²⁶³ These rules of avoidance—self-imposed, discretionary limitations on the appellate jurisdiction of the Supreme Court—“express the sensibilities of statesmen, not the formulation of technicians.”²⁶⁴ In all constitutional cases, Frankfurter and Hart contend, “whether on review from state or federal courts, jurisdictional limitations assume peculiar importance.”²⁶⁵ For Frankfurter and Hart, delicate “balances of power” in a federal system call for constant “reaffirmation of old procedural safeguards and the assertion of new ones against subtle or daring attempts at procedural blockade-running.”²⁶⁶ The Court, in this scheme, is the “umpire” of the federal system. Its “self-denying” ordinances protect it from “undue suction into the avoidable polemic of politics.”²⁶⁷

The rules of avoidance to which Frankfurter and Hart refer are neutral and transsubstantive in their application. They take on special importance in cases involving federal review of state actions, because “conflicts of jurisdiction between state and federal courts, actual or potential, are questions of *power* as between the states and the nation.”²⁶⁸ Accordingly,

261. John Ford’s ‘Young Mr. Lincoln,’ in *MOVIES AND METHODS: AN ANTHOLOGY* 496 (Bill Nichols ed., 1976). My discussion of the meaningful silences that structure the opinion in *Herndon v. Georgia* might be read as an effort to explore two questions that Maurice Merleau-Ponty has posed in a philosophical context: “But what if language speaks as much by what is between words, as by the words themselves? As much by what it does not ‘say’ as by what it ‘says?’” MAURICE MERLEAU-PONTY, *SIGNS* 45 (Richard C. McCleary trans., 1964).

262. Frankfurter & Fisher, *supra* note 256, at 578.

263. Frankfurter & Hart, *supra* note 254, at 98.

264. *Id.* at 94.

265. *Id.* at 93-94.

266. *Id.* at 91.

267. *Id.* at 90.

268. *Id.* at 91 (emphasis added).

[r]espect for ["the rightful independence of state governments" and for state court judgments] founded on large considerations of policy—refrable both to our political system and to the stricter aspects of judicial administration—appears in the Court's insistence that the determination of the federal question sought to be reviewed shall have been indispensable to the conclusion reached. The same factor underlies the congeries of rules designed to prevent the assertion of federal rights as an afterthought—after the case has been lost on state grounds. But these rules rest in part also upon the policy in the more general canon that federal questions, and particularly federal constitutional questions, will be decided only when it is necessary to decide them. *Herndon v. Georgia* discloses the application of these canons in their least sympathetic but for that reason all the more striking aspect. In that case the accused was held to be foreclosed by his failure to make timely assertion of a constitutional right of free speech, although assertion of the right would have required anticipation, on the basis of recent statements by the state supreme court, that a favorable ruling in the trial court under which the issue was not raised would later be held erroneous.²⁶⁹

Several fundamental conceptions can be drawn from this passing reference to *Herndon v. Georgia*. A few years before, Frankfurter had noted that "perhaps the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction."²⁷⁰ *The Business of the Supreme Court* can be read on one level, then, as an attempt to show how the self-imposed procedural rules that had achieved this "progressive contraction of jurisdiction" shaped and informed the day-to-day work of the Supreme Court during the 1934-35 term. Early in their article, Frankfurter and Hart indicate that one of their primary aims is to undertake what Frankfurter would later call the "scientific study"²⁷¹ of procedural practices in the Supreme Court.²⁷² Their central premise is that a court "the scope of whose activities lies as close to the more sensitive areas of politics as does that of the Supreme Court must constantly be on the alert against undue suction into the avoidable polemic of politics."²⁷³ Challenging those rule skeptics who "have not adequately experienced the serious clash of forces so often embedded in the procedural interstices of constitutional litigation, or who do not appreciate to

269. *Id.* at 93 (citations omitted).

270. FELIX FRANKFURTER & JAMES LANDES, *THE BUSINESS OF THE SUPREME COURT* 186 (1928).

271. FELIX FRANKFURTER & HARRY SCHULMAN, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* vii (1937).

272. Frankfurter & Hart, *supra* note 254, at 90.

273. *Id.*

what extent the Supreme Court's prestige has been won through its self-denying ordinances,"²⁷⁴ Frankfurter and Hart set out to show that "observance of seemingly technical rules" in fact reflects "wise statecraft".²⁷⁵

[M]uch comment, and not only by laymen, on the work of the Court is not placed in the perspective of the long process of constitutional adjudication by the Court. A just understanding of its functions, the Court's self-consciousness as to what it is doing when it is deciding, the extent to which it is confined by the very terms of the Constitution or by the streams of doctrine which it has poured into the Constitution and on which future adjudications more or less must float (how much "more" and how much "less" being the crucial intellectual problem)—on these underlying aspects of a specific controversy the Court itself can shed not a little illumination by the accent and atmosphere of speech through which it conveys a particular decision. But much must also be left to the disinterested learning of commentators on the Court's work.²⁷⁶

This language instructs us in the ideological premises of Frankfurter and Hart's study of the procedures through which the Supreme Court "manufactures"²⁷⁷ legal theory. Frankfurter and Hart aim to be strictly objective (as the metaphor of an annual report²⁷⁸ on the "business" of the Supreme Court, complete with a "balance sheet,"²⁷⁹ suggests): Their goal is to demystify the sometimes runic utterances of the Court that term. "Confidence in the Supreme Court as the ultimate arbiter of controversies to which a federalism like ours inevitably gives rise," write Frankfurter and Hart, "has never been furthered by treating constitutional opinions as opaque mystery or esoteric mysticism."²⁸⁰ The value of rigorous investigation of the Court's decisions by "disinterested"²⁸¹ commentators like Frankfurter and Hart is that such analysis situates the work of the Court within its local institutional history and, by implication, the larger history of the country. The position of the authors seems to be that the Court's opinions cannot be read adequately without attention to their broader context. This methodological focus appears to

274. *Id.* at 98.

275. *Id.* at 91.

276. *Id.* at 68.

277. THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 62 (1937).

278. Frankfurter & Hart, *supra* note 254, at 70.

279. *Id.* at 71.

280. *Id.* at 68.

281. *Id.*

derive in part from Frankfurter and Hart's belief in the possibility of a general "science" of Supreme Court jurisdiction.

From a historical perspective, the analytic model Frankfurter and Hart brought to bear on the Court's work no doubt represented an important contribution to the theory of federal court jurisdiction and procedure. Nevertheless, their discussion of *Herndon v. Georgia* shows that they have purchased these general institutional insights at the cost of a certain ideological blindness about the Court's work product. In short, in their discussion of the Angelo Herndon case, Frankfurter and Hart practice the very mystification they purport to dispel. Their disinterested critical program becomes an interested and affirmative one: It is as though they are advocates rather than analysts of the Court. To the extent that Frankfurter and Hart's overarching aim is to inspire "confidence"²⁸² in the jurisdictional practice of the Supreme Court, this lapse into mystification is not surprising. To sustain the tense relationship between criticism and consecration²⁸³ of the Supreme Court, they had to avoid some issues, not speak about some things.

As a consequence, their analysis of *Herndon v. Georgia* veers between two distinct types of discourse. The predominant rhetorical register is a kind of sober scientism. Read in context, the passage in *Herndon v. Georgia* stands out as remarkably restrained, almost "neutral," particularly compared with the authors' longer and much more heated treatments of the decisions that put the Court on a collision course with the Roosevelt Administration.²⁸⁴ In one sentence, Frankfurter and Hart manage to say as little as they can about *Herndon v.*

282. *Id.*

283. The point here is that the Frankfurter and Hart article is vulnerable to the trenchant claim leveled by Thurman Arnold about the ideological origins and effects of legal commentary: "[T]he great literature of the theology of yesterday is astonishingly like the great literature of the law today, both in style and content." THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 66 (1935). Arnold acidly elaborates the parallelism in the following passage:

[T]he conception of pleading of our present judicial system was duplicated in the church of fifty years ago. Today there is a struggle between those who favor informal pleadings in litigation and those who are sticklers for correct technical form. The same struggle raged between the Episcopalians with their liturgy and the Presbyterians with their informal prayer. Tracts were written about the correct way to present petitions to the Deity which contain most of the *legalisms* of the lawbooks of today on the correct form of petitions to a court. The eternal question as to whether or not a defect in a pleading is "jurisdictional" (that is, such a defect as makes the paper no pleading at all) was argued in discussing whether defects in prayers were mere matters of form, or whether they eliminated some element so vital that they were not prayers at all."

Id. at 68.

284. Frankfurter & Hart, *supra* note 254, at 98-103 (discussing *Perry v. United States*, 294 U.S. 330 (1935) (invalidating a joint congressional resolution that nullified "gold-clause" provisions in federal government bonds); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)

Georgia without ignoring the case altogether. In short, the passage is full of silences and gaps. These lacunae are all the more pronounced in view of the authors' emphasis at the outset on the importance of reading Supreme Court decisions against the local history of the Court and the larger history of the country. The authors do not even tell us the name of the "accused" and give us almost no information about his crime.

Moreover, for a study that addresses itself to the "procedure by which the Court speaks . . . as the ultimate voice of the Constitution,"²⁸⁵ the article is strangely silent about the specific procedural steps through which *Herndon v. Georgia* reached the Court and the precise jurisdictional defects that prevented the Court from deciding the case's substantive First Amendment issues. In his treatment of the case, Zechariah Chafee, Jr., writes that its most significant aspect is that it illustrated "the importance of the *procedure* in a sedition prosecution."²⁸⁶ Frankfurter and Hart provide only the sketchiest details about the "recent statements by the state supreme court"²⁸⁷ and the "favorable ruling in the trial court"²⁸⁸ on which Herndon relied, a reliance that cost him his right to Supreme Court review. Frankfurter and Hart do point out—in a footnote—that the decision in *Herndon v. Georgia* was not unanimous: "Mr. Justice Cardozo, dissenting, insisted that the statements relied upon [by the majority] had no proper application to the defendant's case, a view which, if accepted, makes the result doubly harsh."²⁸⁹ They do not say who wrote the opinion for the Court, or who joined Cardozo in dissent. They do not examine the specific issues of procedure and jurisdiction that split the Court. They neither describe nor evaluate the competing claims of the majority and minority positions in light of relevant past decisions, nor do they indicate whether they themselves accept or reject the jurisdictional argument Cardozo advanced in dissent.

The authors' silence on this last point is most revealing. Frankfurter and Hart note the disagreement among members of the Court over the basic issue presented in the case—which from their brief summary appears to be whether Herndon did or did not "make timely assertion of

(invalidating the National Industrial Recovery Act of 1933); *R.R. Retirement Bd. v. Alton Rwy. Co.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1934)). For a history of the Court's collision with the Roosevelt Administration, see G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 178-229 (1976).

285. Frankfurter & Fisher, *supra* note 256, at 578.

286. CHAFEE, *supra* note 9, at 393 (emphasis added).

287. Frankfurter & Hart, *supra* note 254, at 93 n.65.

288. *Id.*

289. *Id.*

a constitutional right of free speech.”²⁹⁰ The obvious next question is whether Cardozo’s dissent had any force. Was Cardozo right or wrong in insisting that the Court’s procedural requirements had in fact been met and that the Court should therefore take jurisdiction over *Herndon v. Georgia*? Frankfurter and Hart never say what they think about these conflicting jurisdictional analyses or whether the way the majority resolved the jurisdictional question could survive close scrutiny. In short, Frankfurter and Hart address the context of the opinion in only the most superficial way. The absence of a contextual analysis that probes behind the opinion’s “accent and atmosphere of speech”²⁹¹ is startling when one recalls that it is precisely the context of the Court’s “business” on which the opening sentence of the article promises its authors will focus.

These omissions are significant, particularly in light of the second rhetorical register in which Frankfurter and Hart’s discussion of the *Herndon* case is pitched. There is something hesitant, even troubled, about the language Frankfurter and Hart use to describe the result in *Herndon v. Georgia*. The authors suggest that the decision corresponds to and can be explained in terms of a rigorous “general canon”:²⁹² The Supreme Court can and will consider only those constitutional issues properly before it (“federal constitutional questions . . . will be decided only when it is necessary to decide them”²⁹³). But the *Herndon* decision, they admit, may have been less than “sympathetic.”²⁹⁴ They concede in a footnote that if Cardozo’s dissent was correct, the Court’s holding might even be “harsh.”²⁹⁵ These terms import an element of moral sentiment into the authors’ discussion that is striking in view of their otherwise rigorously sober language. These words are confusing, not the least because they are the only textual indicators of Frankfurter and Hart’s own views of the Court’s decision to decline jurisdiction in *Herndon*. Frankfurter and Hart compound this confusion when they subsequently imply that although they have cited the case, it is not really a “representative” application of the Supreme Court’s self-created rules of jurisdiction.²⁹⁶ This statement appears to lead the analysis into a contradiction. One would expect some elaboration of what in *Herndon v. Georgia* makes

290. *Id.*

291. *Id.* at 68.

292. *Id.* at 93.

293. *Id.*

294. *Id.*

295. *Id.* at 93 n.65.

296. *Id.* at 93.

the decision unrepresentative. But Frankfurter and Hart offer no such discussion.

Taken together, the authors' uncomplimentary description of the case (not "sympathetic," "harsh") and their classification of it as both "representative" and apparently aberrational lead to one question. Might it be that *Herndon v. Georgia* does not receive more thorough consideration because it is a much more difficult decision than it appears to be? Frankfurter and Hart's uncertain treatment of the case only widens the gap they say the legal critic must try to bridge to gain a "just understanding"²⁹⁷ of what the Court is doing when it decides—or decides not to decide—the constitutional issues presented in a particular case. The reader is left with the feeling that *Herndon v. Georgia* does not easily fit the category in which Frankfurter and Hart place it—indeed, that the case seems to resist positive classification altogether.

We may leave to one side the question whether these silences are deliberate. My analysis is directed to issues of structural organization, not subjective intent. Focusing on structural matters, then, it is fair to say that given the nature of their project, Frankfurter and Hart's description of *Herndon v. Georgia* could not help but reproduce rhetorically many of the same omissions that traverse the text of the Court's opinion itself.

As I have noted, despite its claims to objectivity, the primary purpose of *The Business of the Supreme Court* is affirmative. Frankfurter and Hart seem especially concerned with defending the Court against the attack of critics whose commentary is not informed by a properly "disinterested" perspective. This felt necessity effectively narrows the range of questions Frankfurter and Hart seem able or willing to ask about the Court's work and limits the thoroughness with which they address even the questions they do pose. Above all, there is little if any place in their analysis for a sustained critical engagement and interrogation of the Court's decision in *Herndon v. Georgia*. However, the fact that Frankfurter and Hart neglect to address even the most abecedarian questions about *Herndon* does not mean that they fail to provide the terms for their readers to do so. That is, the validity of their analysis is only incompletely undermined by the apologetic uses to which it is put.

To establish this contention, it is helpful to imagine the multiple, and probably unintended, meanings that the metaphor of the "business"

297. *Id.* at 68.

of the Supreme Court might have held for contemporary readers of Frankfurter and Hart.

As Frankfurter and Hart use it, the business metaphor subsumes two key ideas. The first has to do with judicial administration and the value of efficient case disposition. Frankfurter and Hart place great emphasis on the speed and proficiency with which the Hughes Court cleared its docket during the 1934-35 term:

A tradition of prompt disposition of business for which Mr. Chief Justice Taft did so much to lay the foundations appears to have become fixed under his successor. . . . The volume of litigation of which the Court now disposes at a single term [and] the smoothness of the administrative mechanism by which this is accomplished . . . would startle the shades of Marshall and Taney. . . .²⁹⁸

They stress the importance of striving to "perfect the court's barriers against excessive demands made upon it"²⁹⁹ if the Court is to continue to live up to "the intellectually high and austere standards that our constitutional system exacts from nine judges."³⁰⁰

The business metaphor serves as well to provide a theoretical framework for addressing the division of labor between the state and federal courts. Recall Frankfurter and Hart's insistence that the jurisdictional principles and practices of the Supreme Court cannot be explained without reference to the structural issues of federal and state "power." In Frankfurter and Hart's analysis, the rules of Supreme Court jurisdiction reflect the limits on federal judicial review imposed by the allocation of authority between state and national courts.³⁰¹ One of the central themes of the article is that "the progressive contraction of jurisdiction"³⁰² by the Supreme Court demands the constant "reaffirmation of procedural safeguards and the assertion of new ones against subtle or daring attempts at procedural blockade-running."³⁰³ "From the beginning," they write, "the Supreme Court has laid down strict canons for protection against inroads upon the defined limits of federal power and federal judicial authority."³⁰⁴ Conventions and practices "too subtle and

298. *Id.* at 69, 107.

299. *Id.* at 76.

300. *Id.*

301. Frankfurter & Hart, *supra* note 254, at 91.

302. FRANKFURTER & LANDES, *supra* note 270, at 186.

303. Frankfurter & Hart, *supra* note 254, at 91.

304. *Id.*

too flexible to be adequately summarized into rules”³⁰⁵ guide the “every-day administration of the Court.”³⁰⁶ These rules demonstrate the “deep wisdom of the Court’s self-restraint against undue or premature intervention”³⁰⁷ and intrusion upon the day-to-day working of the federal constitutional system. Above all, the “procedural devices” that allow the Court to avoid substantive intervention “in what are ultimately political controversies”³⁰⁸ minimize the risk of “self-inflicted wounds” which can only weaken “permeating confidence in the judicial process.”³⁰⁹ Thus, from Frankfurter and Hart’s perspective, the Court’s jurisdictional and procedural requirements function not only to make the Court more efficient. They operate as well to keep the Court from deciding too much too often and thus from doing anything to impair its legitimacy as the “ultimate arbiter of controversies to which a federalism like ours inevitably gives rise.”³¹⁰ Together, these rules embody the “economy of means” by and through which the Supreme Court goes about the “business” of “manufacturing” legal theory.

Frankfurter and Hart understand the constitutionally and self-imposed jurisdictional limits that the Supreme Court applies in cases such as *Herndon* to be indispensable for preserving the symbolic capital of the federal judiciary and, to a lesser degree, of the national government as a whole. In this context, Frankfurter and Hart’s remarks about the Court’s decision in *Herndon* are informed by a distinct vision of politics or, more precisely, of the relationship between politics and constitutional law. The picture of politics drawn in *The Business of the Supreme Court* is of a process hostile at all points to law. As Frankfurter and Hart depict it, politics threatens the Court’s ability to function as the disinterested, deliberative voice of the Constitution. The “business” of the Supreme Court is, above all, to stay out of politics.

However, Frankfurter and Hart seem unable to apprehend, much less describe, a different threatened danger: that because the distinction between substance and procedure is as much contextual as categorical, the Court’s refusal to decide substantive constitutional questions on procedural grounds might involve the Court in the very power politics from which the rules of jurisdiction were designed to protect it. In short, Frankfurter and Hart seem utterly unaware of the fact that political

305. *Id.* at 94.

306. *Id.*

307. *Id.* at 107.

308. *Id.*

309. *Id.* at 105.

310. *Id.* at 68.

struggles over substantive constitutional meanings could be waged even in the passionless language of procedure. As I shall argue presently, this was precisely the result of the Court's decision in *Herndon v. Georgia* not to decide. First, however, I must briefly describe two contemporaneous rival understandings of law and politics that might have enabled Frankfurter and Hart to offer just such an account.

B. THE ROADS NOT TAKEN

1. *The Realist Challenge*

By 1935, Frankfurter and Hart's vision of a Supreme Court insulated from the dirty business of politics had come under sharp attack. Frankfurter and Hart never say who they mean when they refer to critics of the Supreme Court who have not "adequately experienced the serious clash of forces so often embedded in the procedural interstices of constitutional litigation,"³¹¹ or who do not "appreciate to what extent the Supreme Court's prestige has been won through its self-denying ordinances."³¹² They leave no doubt that, in their view, these critics lack a "just understanding"³¹³ of the concept of jurisdiction and its procedural complexities. The critics simply fail to place the Court's work "in the perspective of the long process of constitutional adjudication."³¹⁴ However, it is likely that Frankfurter and Hart's remarks were directed toward at least two different critical camps.

One group would surely have been the proponents of legal realism. The scholarship of legal realists constituted a powerful assault on the long-standing myths of reason, autonomy, objectivity, neutrality, and impartiality in American judicial law—on the very ideas that figure so centrally in *The Business of the Supreme Court*. In their work, these thinkers insistently hammered home the view that the traditional image of law in America did not comport with contemporary realities. To be sure, like Frankfurter and Hart, scholars associated with legal realism for the most part confined themselves to case law. Nonetheless, in forcing such insistent focus on the gaps between formal legal theory and its concrete application, the legal realists precipitated an intellectual crisis in legal thought whose reverberations were eventually felt in the courts. The realist project "contributed to the breakdown of formalistic, mechanistic theories of contract and property rights, which culminated in the

311. *Id.* at 98.

312. *Id.*

313. *Id.* at 68.

314. *Id.*

late 1930s and early 1940s decisions of the United States Supreme Court upholding New Deal and other Depression-era social legislation."³¹⁵

One of the chief targets of the realist approach was the idea that the law is an internally consistent system or science whose component principles ultimately transcend their own historicity and whose monastic independence from the political world is perfectly expressed in judicial decisions. In an article published the same year as *The Business of the Supreme Court*, Felix S. Cohen set out to demolish the idea that courts could or should try to distance themselves from the pressures of the social world to which their legal decisions are addressed. "The law," writes Cohen, "is not a science but a practical activity."³¹⁶ Critics like Frankfurter and Hart, who modeled their work in the image of "scientific study," were captives, in Cohen's view, of "transcendental nonsense":

[T]he language of transcendental nonsense . . . is entirely useless when we come to study, describe, predict and criticize legal phenomena. . . . [T]he traditional language of argument and opinion neither explains nor justifies court decisions. When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law³¹⁷

Similarly, five years before Frankfurter and Hart's article was published, Jerome Frank specified the relationship (or, more precisely, the nonrelationship) between abstract legal principles and concrete legal judgments by insisting on the difference between "rule" and "decision" in law:

Law is made up not of rules for decision laid down by the courts but of the decisions themselves. All such decisions are law. The fact that courts render these decisions makes them law. There is no mysterious entity apart from these decisions. If the judges in any case come to a "wrong" result and give forth a decision which is discordant with their own or any one else's rules, their decision is none the less law. The "law of a great nation" means the decisions of a handful of old gentlemen, and whatever they refuse to decide is not law. Of course those

315. MICHAEL E. TIGAR & MADELEINE R. LEVY, *LAW AND THE RISE OF CAPITALISM* 229 (1977). In a succinct formulation, Tigar and Levy argue that the realist project "is to legal ideology as Keynesianism is to political economy." *Id.*

316. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

317. *Id.* at 812.

old gentlemen in deciding cases do not follow their own whims, but derive their views from many sources. And among those sources are not only statutes, precedents, customs and the like, but the rules which other courts have announced when deciding cases. Those rules are no more law than statutes are law. For, after all, rules are merely words and those words can get into action only through decisions; it is for the courts in deciding any case to say what the rules mean, whether those rules are embodied in a statute or in the opinion of some other court. The shape in which rules are imposed on the community is those rules translated into concrete decisions.³¹⁸

The most important feature of the conceptual vocabularies forged by such scholars as Frank and Cohen is that they provide fresh critical perspectives for thinking about the social and historical situatedness of law. Especially important for our purposes is the legal realist attack on the claim that legal thought and practice reveal an immanent rationality and internal intelligibility that constrain lawyers and judges. The realist project carries unsettling intellectual implications for those like Frankfurter and Hart who have invested in an idealized vision of law as an autonomous sphere that is different from, and of a higher order than, the machinations of power politics.

2. *The Marxist Assault*

In the same year that Frankfurter and Hart published *The Business of the Supreme Court*, the legal realist attack was sharpened and deepened by the English scholar Harold Laski. Although not formally associated with the legal realists, Laski shared many of their views about the instrumental functions of law and the need to recognize its membership in the social and political community. Laski, however, pressed further than most of the realists in an article he published in 1935 that aimed to uncover the ideological infrastructure of American law.³¹⁹

The Crisis in the Theory of the State, Laski's contribution to a book celebrating the centenary of New York University School of Law, paints an unflattering picture of the "business" of the Supreme Court as seen from its underside, arguing that the primary purpose of the American legal system is to secure the political and economic interests of the elite who control it. (His argument is of course the same one that Angelo

318. FRANK, *supra* note 56, at 125.

319. Harold J. Laski, *The Crisis in the Theory of the State*, in 2 LAW: A CENTURY OF PROGRESS, 1835-1935 1 (1937).

Herndon made in *Let Me Live*, the difference being that Laski is at the top of the economic pyramid and Herndon at the bottom.)

Laski's article begins with an outline of the Marxist theory of the relation between law and the state.³²⁰ Laski finds in Marx an analytic framework that, as an "index to the problems of our age," decisively "holds the field."³²¹ Under liberal political theory, argues Laski, obedience to the state has been justified on the basis of the state's ability first to secure order; second, to provide a technique for peaceful change; and third, to enable material demands to be satisfied on the widest possible scale.³²² In Laski's view, there is no doubt that the liberal state secures order—"this is universally admitted."³²³ What the liberal state fails to do, however, is to provide a means for peaceful social and political change and to satisfy the material needs of as many of its citizens as it possibly can.³²⁴ In Laski's view, this twofold failure has resulted in the "crisis" that is his topic. Laski sees Marxist political theory as providing the best explanation of this state of affairs:

The state, it is urged, is, in fact, the supreme coercive power in any given political society; but it is, in fact, used to protect and promote in that society the interest of those who own its instruments of production. The state expresses a will to maintain a given system of class relations. It does so by the use of its supreme coercive power to that end. In the last analysis, this power consists of the defense forces of the state. These are used, in ultimate challenge, to impose the will of the owners of the instruments of production upon those excluded from such ownership. Whatever the philosophic purposes attributed to the state power, these, it is said, are the naked facts. There may be more or less coercion at any given moment, according as the economic condition of society enables more or less concessions of material well-being to be made to those excluded from the privileges of ownership. But any state in which the instruments of production are privately owned cannot [provide a technique for peaceful change and meet the demand for material satisfaction on the widest possible scale].³²⁵

The critical question for Laski is whether those who defended the classical liberal theory of the state in 1935 could show that the actual states in which they lived—and "not an ideal state which exists only in

320. *Id.* at 5-6.

321. *Id.* at 6.

322. *Id.* at 3.

323. *Id.*

324. *Id.*

325. *Id.* at 4.

their own construction—are inherently capable, granted the class relations they maintain, of fulfilling demand on the largest possible scale, and that, therefore, they have a moral claim to the allegiance of their members.”³²⁶

Laski examines the legal “balance sheets”³²⁷ of the major capitalist states, America included, and finds them wanting. “At bottom,” contends Laski, “only the Marxian interpretation of law can explain the substance of law” in American society.³²⁸

The proceedings of the American courts . . . in the use of the injunction, in the interpretation of the Fourteenth Amendment, in their reading of industrial conspiracy into the category of tort, in their attitude toward free speech and free assembly are all pervaded by the notion, often hardly conscious in the individual judge, that the purpose of the law in fact is, whatever its ideal professions, to maintain existing class relations. It represents the use of the state’s supreme coercive power for this end and for no other end. American constitutional law is, no doubt, elastic enough as a broad statement of principles. When it fails to be applied by the judges, it is, in general, permeated by a philosophy that prevents a change in class relations being introduced through the interstices of law.³²⁹

Moreover, according to Laski, this conclusion is not invalidated by the fact that, as a theoretical matter, much of the legal system is internally coherent and logical, or by the fact that many lawyers are indeed committed to the ideals of equality, fairness, and justice in law. He writes:

The lawyer’s search for consistency always seeks to build a legal system that is internally logical. . . . But the essential shape of his effort is, despite the reaction of the search for consistency upon the material, inescapably set by the relations of production in any society at any given time. Nor is it invalidated by the fact that lawyers, like most other men, search for the good of society in the rules they evolve. They search for the good of society as they see it; and they see the good, broadly speaking, in terms of an experience in which they are placed by the relations of production in which they are involved. The economic philosophy of those who made the Napoleonic Code, of Chief Justice Marshall, of Baron Bramwell and of Lord Farwell is stamped unmistakably on the whole fabric of their work. Each of them was serving the law to the best of his great ability; but each

326. *Id.* at 6.

327. Frankfurter & Hart, *supra* note 254, at 71.

328. Laski, *supra* note 319, at 9.

329. *Id.*

brought to that service a body of class prepossessions of which he was definitely the prisoner.³³⁰

These passages from *Theory of the State* set forth the three fundamental concepts in orthodox Marxist theory of the relation between law and the state. First is the determinant effect of economic structure on legal ideology and institutions; in Marx's terms, economic structure "reveals the innermost secret"³³¹ of the law in a given social formation. Second is the concept that the main benefits of the legal system in any society inure to its ruling classes, because the elites have designed the system to maintain their power and privilege. Third is the critical function of the law in maintaining the specific class relations of society and protecting the economic system from perceived or actual challenges.

In the light of more recent developments in Marxist theory, Laski's analysis seems rather quaint.³³² Nonetheless, Laski's article indicates the

330. *Id.* at 10.

331. KARL MARX, 3 CAPITAL 791 (1977).

332. Readers familiar with intellectual developments in western Marxism over the past 60 years know that Laski's analysis is vulnerable to internal criticism on several grounds. First, Laski does not place sufficient emphasis on the fact that the ruling class sometimes must recognize as law the ideas, traditions, and unofficial rules of other groups to ensure the continued existence of the economic system from which it benefits. Second, Laski's analysis comes perilously close to viewing the law as a mere epiphenomenon of the economic system on the one hand, or as the mere instrument of class struggle on the other. Both of these views reflect what has come to be pejoratively known as a "crude economism": They suggest that the superstructure of the law is always a direct, unalloyed reflection of a society's economic infrastructure. The problem with both views is that they fail to account for the ways the law must be approached as an ideological form that possesses what Marxist theorists refer to as "relative autonomy." As Colin Sumner has noted, "law is only an instrument of class rule through the mediating arenas of politics and ideology." SUMNER, *supra* note 225, at 269. The "relative autonomy" thesis holds that law is not merely an instrument of class rule, but is simultaneously an instrument of party politics, a protector of revered ideologies, and an agent for the prevention of social chaos. Further, a legal system can successfully sustain itself only on the basis of political and ideological consensus among classes (whether this consensus is spontaneous or constructed). *Id.* Moreover, it must be recognized that the laws that govern a particular society often originate outside the economic infrastructure. Law, like all ideologies, arises from an ensemble of political, cultural, and economic practices and thus reflects and expresses relations within classes as well as class relations. The ramifications of the noneconomic determination of the law militate against a conception of law as the mere reflection and expression of ruling class ideology, and ruling class ideology only. *Id.* at 267-68.

The chief limitation of Laski's analysis in *The Theory of the State* may be attributed to his failure to consider the possibility that legal institutions may be controlled by the ruling class or classes (understanding that notion in a broad sense) and yet "not always originate economic class conflict, function well for the ruling class, reflect the full range of ruling class opinion, remain immune from lawyers and bureaucrats who administer it [and whose interests are not necessarily those of a ruling class or coalition of classes], or serve economic ends." *Id.* at 255. The law is not just a weapon of the ruling class, nor is it a simple mirror of the ruling class' economic ideologies. It must never be forgotten that those who do not rule also shape the law and have legal rights—indeed, this is why any legal system, no matter how oppressive, still points to unrealized possibilities of

shape that a contemporaneous critical response to Frankfurter and Hart might have taken. Laski turns the metaphor of the business of the Supreme Court on its head, showing its hidden connection to, and dependence on, the ideological interests of those who control the capitalist economy. For Laski, ideology is not only an indispensable condition of the Court's "production" of constitutional law; the production of constitutional law is itself an ideological practice. Given the historical context in which Laski spoke, Laski's equation of law with ideology must have been nothing short of vertiginous for those who shared Frankfurter and Hart's vision of the Court.

C. UNFINISHED BUSINESS: A CRITIQUE OF FRANKFURTER AND HART

My brief review of these two alternatives to Frankfurter and Hart's model is obviously not intended to be exhaustive. I mention the work of Laski, Cohen, and Frank for the modest purpose of conveying some sense of the sharply contested character of the debate Frankfurter and Hart joined when they published their article *The Business of the Supreme Court*. Readers familiar with the positions staked out by Laski, Cohen, and Frank would have been alert to the inherent tension between analytical method and ideological affiliation in Frankfurter and Hart's account of *Herndon v. Georgia*.

The arguments elaborated by Cohen and Frank suggest that Frankfurter and Hart might have reached a deeper understanding of *Herndon v. Georgia* had they not assumed away the difference between the general "canons" of self-restraint and respect for state court judgments on one hand and the concrete applications of these canons in the particular case. Had they delved beneath the "accent and atmosphere of speech"³³³ in the Court's decision in *Herndon*, perhaps they might have been more

justice, equality, and fairness; this is what I earlier called the utopian feature of law. As E.P. Thompson has written, within a cultural Marxist framework:

It is true that in history the law can be seen to mediate and to legitimize class relations. Its forms and procedures may crystallize those relations and mask ulterior justice. But this mediation, through the forms of law, is something quite distinct from the exercise of unmediated force. The forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless.

THOMPSON, *supra* note 32, at 266.

Thompson's characterization may be adapted from its context of class to that of race to describe the experience of African-Americans, who have clung—often against all the evidence—to the belief that in spite of slavery, legally enforced segregation, and countless other indignities, the Constitution is "on our side." The belief that this is the great promise of that document has always been a central component of the black community's vision of the American Dream.

333. Frankfurter & Hart, *supra* note 254, at 68.

attentive to the gulf between the abstract principles of federal court jurisdiction and the actual practices of the federal courts. In short, they might have been forced to confront the possibility that the Court's jurisdictional and procedural "barriers" might not be able to prevent an occasional fall from high principle into low politics.

In Frank's terms, *The Business of the Supreme Court* fails to distinguish "rules" from "decision." Committed as they are to developing a unitary "scientific" theory of federal court jurisdiction and procedure, Frankfurter and Hart offer no theoretical category for the problem of contradiction in judicial discourse: for coming to terms, that is, with the difference between the asserted and actual reasons for a decision. More precisely, Frankfurter and Hart never consider whether the "unsympathetic" or "harsh" outcome in *Herndon v. Georgia* might best be explained not by the stated grounds of the Court's decision but rather, in Cohen's words, by "the [social] forces which it reflect[ed]."³³⁴ Had Frankfurter and Hart been willing to pursue an analysis along these lines, they might have been forced to engage and interrogate the distinction between law and politics, a distinction they simply take for granted. Frankfurter and Hart may have felt compelled as well to examine the concrete substantive effects of the Court's procedural defense of the result in *Herndon v. Georgia*. In a scathing critical analysis of the Sacco and Vanzetti case that he had written in 1927, Frankfurter had noted that "[g]rave injustices . . . arise even under the most civilized systems of law and despite adherence to the forms of procedure intended to safeguard against them."³³⁵ In *The Business of the Supreme Court*, Frankfurter and Hart do not seem to apprehend, much less address, the relevance of this claim to the decision in *Herndon v. Georgia*. In the final instance, the authors' asserted distinction on the line of division between law and politics, as well as between substance and procedure, enables them to ignore a number of difficult questions about *Herndon v. Georgia*.

Nevertheless, the curious reader of *The Business of the Supreme Court* wants to know more. Did the decision in *Herndon v. Georgia* actually comport with the relevant doctrine? Or, to use Frankfurter and Hart's phrase, did *Herndon* "collide" with the Court's "own statement of its functions and with its avowed criteria for their discharge"?³³⁶ Did the

334. Cohen, *supra* note 316, at 843.

335. FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN* 108 (1927). See also FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 203 (1930) (arguing that "procedural safeguards are not enough" to prevent judicial abuse of the labor injunction in industrial conflicts).

336. Frankfurter & Hart, *supra* note 254, at 98.

decision not to decide in *Herndon v. Georgia* depart from the idea of "mandatory" jurisdiction laid down so long ago by Chief Justice Marshall in *Cohens v. Virginia*?³³⁷ Did *Herndon* contradict the fundamental principle that although the Court may impose procedural and jurisdictional requirements, it must decide cases that meet those requirements?³³⁸ A summary of *Herndon* appears in the very same issue of the *Harvard Law Review* as *The Business of the Supreme Court*. The article argues that the Court's decision was clearly wrong; that although the Court's procedural rules should be strictly enforced, "this case seems to go too far."³³⁹ Is this criticism unfounded?

Alongside these narrow procedural problems lie more substantive social concerns. Recall that *Herndon v. Georgia* was the first secession case to come to the Supreme Court from the South. Moreover, it was the first civil liberties case ever to reach the Court in which an African-American dissident sought the protection of the First Amendment. Finally, this particular dissident belonged to the most radical political party in the country. The social significance of these facts was not lost on at least one student commentator. A devastating dissection of *Herndon* that appeared at about the same time as *The Business of the Supreme Court* contends that the case "destroyed the expectation" raised by the *Scottsboro Cases*³⁴⁰ that the Court would "uphold the constitutional rights of Negroes who attempt to assert them in the struggle against their miserable economic and social status."³⁴¹

The failure of the Court to avail itself of this opportunity to discourage other legal and extra-legal methods of preventing such assertion and the encouragement at the same time of the employment of criminal statutes clearly designed for other purposes to defeat the exercise of civil liberties, are to be deplored. It is conceivable that in the present period of social unrest the Court reached the result it did in order to avoid the necessity of formulating a standard according to which

337. It is most true that this Court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (emphasis added).

338. See sources cited *supra* note 18.

339. *Recent Cases*, 49 HARV. L. REV. 143, 151 (1935).

340. *Norris v. Alabama*, 294 U.S. 587 (1935); *Patterson v. Alabama*, 294 U.S. 600 (1935).

341. *Recent Decisions*, 35 COLUM. L. REV. 1129, 1147 (1935).

"sedition" legislation might be tested. This may have the factual consequence of arousing the feeling in oppressed groups that the protection of their constitutional rights lies not in the courts but in organization against the forces working for their suppression.³⁴²

Frankfurter and Hart argue that "conflicts of jurisdiction between state and federal courts" are at base "questions of *power* as between the states and the nation."³⁴³ As we have seen, the racial implications of Herndon's arrest and trial were clear. In the Scottsboro cases, the Supreme Court had placed weight on the racial dimensions of Southern political and legal culture. Were these issues irrelevant to the outcome in *Herndon v. Georgia*? What is the reader of *Herndon v. Georgia* to make of the fact that the opinion never mentions any of these aspects of the case at all?

D. THE RHETORIC OF RESISTANCE

If we insist less forcefully than Frankfurter and Hart on the difference between law and politics, we might find the terms for addressing these questions in the rhetorical discourse of *Herndon v. Georgia*.³⁴⁴ I mean to show that a rhetorical reading of *Herndon v. Georgia* might most profitably proceed by attending to the "politics of discourse" that informs the Court's analysis of when, how, and to whom it may "speak the law."³⁴⁵ Viewed in these terms, the Court's opinion reveals itself to be an instance of the very power that it claims merely to address.

I take the conception of rhetoric as the politics of discourse from Paolo Valesio.³⁴⁶ Valesio argues that "it is no more possible to speak without being rhetorical than it is to live without breathing."³⁴⁷ All communication is in this sense rhetorical. Valesio maintains that even discourses like the discourse of law, which pretend a plain, forthright opposition to rhetorical ornament, embody a subtle and deceitful form of rhetoric—what he calls the "rhetoric of anti-rhetoric."³⁴⁸ Valesio argues for a technique of "political" reading that delves beneath a discourse's

342. *Id.* at 1147.

343. Frankfurter & Hart, *supra* note 254, at 91 (emphasis added).

344. As used here, "rhetorical discourse" means the functional deployment of tropes and figures, not empty eloquence or bombast.

345. I mean here, of course, to evoke the sedimented etymological history of the concept of "jurisdiction," which fuses two Latin words—*jus* and its cognate *juris* (right or law) and *dictio* (from *dicere*, meaning to speak or declare). 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1522 (1971).

346. PAOLO VALESIO, *NOVANTIQUA* 44-45 (1980).

347. *Id.* at 60.

348. *Id.* at 44.

apparent subject matter to reveal the rhetorical structures that are its "bones and sinews," indeed its very "biological structure."³⁴⁹ Rhetoric, in this perspective, "constitutes the real politics of the text—the only kind of politics that is really relevant to its interpretation."³⁵⁰

Few would disagree that the judicial opinion can be placed squarely within the tradition of the "literature of legal persuasion"³⁵¹ and conviction. As Anthony Kronman puts it, the legal discourse represents, "in essence, the construction of a convincing or persuasive argument."³⁵² Similarly, Mark Tushnet has broadly defined judicial opinions as "structures of thought . . . [fixed in] documents designed to convince by linking specific results to general assumptions."³⁵³

What is most striking about the opinion in *Herndon v. Georgia*, however, is the degree to which the suasive work of the text relies on silence and strategic omission. The structured absences in the text of the Court's opinion can nonetheless be forced to yield up their meaning. A group of contemporaneous Supreme Court decisions (whose connections to *Herndon* seem to have eluded most students of the case) help to show that while the Court's opinion in *Herndon v. Georgia* claims to be and appears to be about radical politics, it is in fact best understood as a case about the politics of race.

The starting point for such a reading is the very first line of Justice Sutherland's opinion for the Court:

Appellant was sentenced to a term of imprisonment upon conviction by a jury in a Georgia court of first instance of an attempt to incite insurrection by endeavoring to induce others to join in combined resistance to the authority of the state to be accomplished by acts of violence, in violation of Section 56 of the Penal Code of Georgia. The supreme court of the state affirmed the judgment. . . . On this appeal, the statute is assailed as contravening the due process clause of the Fourteenth Amendment in certain designated particulars. We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the court below or passed upon by that court.³⁵⁴

349. *Id.* at 57.

350. *Id.*

351. *Id.*

352. Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 961 (1981).

353. MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 30 (1981).

354. *Herndon v. Georgia*, 295 U.S. 441, 442 (1935) (footnote omitted).

This opening passage serves a double function. One commentator has suggested that a "substantial part of legal discourse is not even particularly legal . . . but is *merely descriptive of the facts to be dealt with*."³⁵⁵ This suggests that the "mere description" of the facts in legal discourse cannot be said to be part of its ideological composition; it is, rather, a neutral statement of "what happened." To borrow a set of analytic categories developed by Roland Barthes, one might say that this understanding is underwritten by a distinction between factual "functions" and ideological "indices" of a text.³⁵⁶ Within the general rhetorical economy of the opinion, however, the ideological valence of the opening statement of the "facts" in *Herndon v. Georgia* admits of no such hard and fast distinction. Sutherland's words carry the twofold force of factual "description" and normative "judgment." It is more than a "mere" technical summary of "the facts to be dealt with." The abstraction and reduction of complex social events to the simplified language of "facts" is not, of course, unique; it does not appear only in a discourse like law, which works in general concepts, categories, and classifications—it is a feature of all language. Richard Wasserstrom has noted that the language of "law is conservative in the same way in which [all] language is conservative. It seeks to assimilate everything that happens to that which has happened."³⁵⁷ Nonetheless, factual description in law quite obviously can entail different ideological effects in different concrete contexts.

In my view, it is precisely the conservatism of this statement of the facts—what it does not say—that alerts us to the form of the discursive politics of *Herndon v. Georgia*. The opening passage provides an exemplary instance of what Valesio calls the "rhetoric of anti-rhetoric."³⁵⁸ Its substantive function is to limit the scope of the questions that the Court will address to its narrowest possible range. Note how little information is given about the "appellant" or about the substantive constitutional issues the Court is being asked to address: "We find it unnecessary to

355. SUMNER, *supra* note 225, at 273 (emphasis added). Sumner goes on to say:

This part of the discourse is difficult to evaluate when it exists in a judicial decision, for what count as "the facts of the case" are the product of the filtering mechanisms of the trial and pre-trial investigations. Facts can be constructed either by accident, by the court procedure or by lies, just as much in the legal system as in any other form of social practice. In any case, whether true, false or somewhere in between, "the facts" are a substantial part, or reference point, of legal discourse.

Id.

356. Roland Barthes, *Historical Discourse*, in INTRODUCTION TO STRUCTURALISM 145 (Michael Lane ed., 1970); see also Guha, *The Prose of Counter-Insurgency*, *supra* note 28.

357. Richard Wasserstrom, *Lawyers and Revolution*, in RULE OF LAW 31 (R. Wolff ed., 1971).

358. VALESIO, *supra* note 347, at 44.

review the points made" to support the appeal. Note, too, the passivity of the language of the final sentence of the paragraph: The problem of jurisdiction, the power of the Court to "speak law," is rhetorically framed as something that is "found" or "vested" or "conferred"—not something that is "taken." In Sutherland's view, the Court, through no fault of its own, is "without jurisdiction." This presumption of powerlessness shapes the Court's subsequent discussion and guides us toward the political core of the text.

Let us compare the passive language of Justice Sutherland with the statement of the facts in Justice Cardozo's dissent.³⁵⁹ Cardozo begins by noting that "[t]he appellant has been convicted of an attempt to incite insurrection in violation of the Penal Code of Georgia."³⁶⁰ Although the language in which Cardozo frames his statement of the facts is, like Sutherland's opinion, rigorously technical, it stands in subtle but significant contrast to Sutherland's opening lines. Cardozo approaches the facts of the case in terms of the events that led to Herndon's conviction. Sutherland, on the other hand, begins by noting that the "appellant" was "sentenced" to a prison term. By itself, Sutherland's focus on the consequences of the conviction, as opposed to the legal processes that led to the conviction, may not mean much. However, Sutherland's emphasis on punishment is resonant with political meaning, especially when one remembers just who the "appellant" was—a fact that the opinion very carefully avoids mentioning.

The exclusionary force of the bloodless factual language Sutherland uses to set up his legal analysis becomes clear when one compares it to the opening lines of Sutherland's opinion in *Powell v. Alabama*, the 1932 decision in which the Court first took up the constitutional issues presented in the *Scottsboro Cases*:

The petitioners, hereinafter referred to as defendants, are *negroes* charged with the crime of rape, committed upon the persons of *two white girls*. The crime is said to have been committed on March 25, 1931. The indictment was returned in a state court of first instance on March 31, and the record recites that on the same day the defendants were arraigned and entered pleas of not guilty . . . no counsel had been employed, and aside from a statement made by the trial judge several days later . . . the record does not disclose when . . . or who was appointed. . . . It is *perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile and excited*

359. 295 U.S. at 448 (Cardozo, J., dissenting). Of course, given their opposing arguments, one can see that the rhetorical strategies of these two opinions *should* be directly opposite.

360. *Id.* at 446 (Cardozo, J., dissenting).

public sentiment. During the entire time, the defendants were closely confined or were under military guard. The record does *not disclose their ages*, except that one of them was nineteen; but the record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as "the boys." They were *ignorant and illiterate*
³⁶¹

This passage is also a statement of the "facts" of a case; but the differences between the two texts, written by the same author, are remarkable. In *Powell*, Sutherland is keenly aware of the concrete circumstances in which the Court is intervening. His rhetoric captures the sociopolitical drama behind the legal questions to which the Court's judgment is addressed: It notes the convergence of race, gender, age, and class, and it uses the statement of facts to presage the outcome.

The stark contrast between the rhetorical politics of *Powell* and the textual strategy of *Herndon* is startling. In *Herndon*, Sutherland does not note even once that Angelo Herndon, the "appellant" (never even the "defendant"), was black, or that he was only 19 at the time of his arrest and conviction. But for the pronoun "he," the reader would have no clue even as to Herndon's gender. Nor does Sutherland discuss at all the extent to which Herndon's trial, like that of the Scottsboro defendants, took place in a "tense, hostile" atmosphere. The Court cannot have been unmindful of these omitted facts. The constitutional relevance of race in *Herndon* is underscored in the evidentiary record and in Herndon's brief, which describes Sutherland's "accused" as "a Negro."³⁶² The marked exclusion from Sutherland's opinion of the "language of race"³⁶³ is the most significant textual indication of the Court's determination to avoid the constitutional issues in *Herndon v. Georgia*, and with them the political realities in which these issues were lodged.

To make the point another way: The Court's silence on the politics of race must be read symptomatically. My choice of that term is deliberate. Sigmund Freud identified the essence of repression as "simply . . . turning something away, and keeping it at a distance, from the conscious."³⁶⁴ The Court's omission of the fact that Herndon was an African-American criminal defendant appealing a conviction from a southern court is a textualized instance of such a psychic gesture. I shall

361. *Powell v. Alabama*, 287 U.S. 45, 49-52 (1932) (emphasis added).

362. Brief for Appellant at 5, *Herndon v. Georgia*, 295 U.S. 441 (1935) (Nos. 474 & 475).

363. Charles Miller, *Constitutional Law and The Rhetoric of Race*, in *LAW IN AMERICAN HISTORY* 147 (Donald Fleming & Bernard Bailyn eds., 1971).

364. Sigmund Freud, *Repression*, in *XIV THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 141, 147 (James Strachey ed. & trans., 1957).

consider in more depth the meaning of the Court's silence on Herndon's race, because it highlights the need to pay close attention to the "political unconscious"³⁶⁵ of the judicial discourse in *Herndon*. But first I will discuss Sutherland's other rhetorical silences so that we may consider his silence on Herndon's race against this broader constellation.

We have seen that the inaugural gesture of Sutherland's opinion is one of exclusion, omission, and silence. This rhetorical strategy sets the analytic itinerary of the rest of the opinion:

It is true that there was a preliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation "of the Constitution of the United States," and that this contention was overruled. But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exceptions *pendente lite* or assigned as error in due time in the bill of exceptions, as the settled rules of the state practice require. In that situation, the state supreme court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; and this determination of the state court is conclusive here. *John v. Paulin*, 231 U.S. 583, 585; *Atlantic Coast Line R. Co. v. Mims*, 242 U.S. 532, 535; *Nevada-California-Oregon Ry. v. Burrus*, 244 U.S. 103, 105; *Brooks v. Missouri*, 124 U.S. 394, 400; *Central Union Telephone Co. v. Edwardsville*, 269 U.S. 190, 194-195; *Erie R.R. Co. v. Purdy*, 185 U.S. 148, 154; *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308.

The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. *Texas & Pacific C. Ry. Co. v. Southern Pacific Co.*, 137 U.S. 48, 54; *Loeber v. Schroeder*, 149 U.S. 580, 585; *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181; *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 117; *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 454-455, and cases cited.³⁶⁶

The conceptual infrastructure of this passage argues that a judicial decision can be justified only if it is authorized by an already-existing rule of law—that is, by "precedent."³⁶⁷ I need not enter here into a full-fledged discussion of theories of legal precedent. Rather, I want to approach the dialectical relay between assertion and appeal to authority

365. See generally Jameson, *supra* note 218.

366. *Herndon*, 295 U.S. at 442-43.

367. RICHARD WASSERSTROM, *THE JUDICIAL PROCESS* 39-83 (1961).

set up in this passage in terms of what might be called the “politics of spatialization.” As law, the thrust of the passage is clear enough: The Supreme Court cannot reach the merits of *Herndon v. Georgia* because the case’s constitutional question was not raised in the trial court and the state supreme court declined to consider it. As discourse, the passage links the past and the present in space, on the page, joining them in a conceptual and doctrinal identity. The unstated assumption behind the citations is that the Court is only doing here what it has done many times before, that this case is the same as the past cases cited in the text. The Court has no choice but to decline jurisdiction, because like cases must be treated alike. Thus, the discussion of Angelo Herndon’s unsuccessful attack on his conviction is situated in an appeal to the authority of the past. “[T]he settled rules of state practice” and a “long-established general rule” dictate the result. But this passage is no less ideological than the omission of all information that would have humanized “the accused” or brought to light the social and political circumstances of his case. This becomes clearer in the next paragraph of the opinion:

Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. *Saunders v. Shaw*, 244 U.S. 317, 320; *Ohio v. Akron Park District*, 281 U.S. 74, 79; *Missouri v. Gehner*, 281 U.S. 313, 320; *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 677-678; *American Surety Co. v. Baldwin*, 287 U.S. 156, 164; *Great Northern Ry. v. Sunburst Oil Co.*, 287 U.S. 358, 367. The whole point, therefore, is whether the ruling here assailed [that is, that of the Georgia Supreme Court] should have been anticipated.³⁶⁸

In the discussion of the trial proceedings, I note that Judge Wyatt instructed the jury that mere advocacy of insurrection, “however reprehensible morally,” would not justify a guilty verdict unless the jury found that Herndon had intended his advocacy to be acted upon immediately: “In order to convict the defendant, gentlemen, it must appear clearly by the evidence that *immediate serious violence* against the State of Georgia was to be expected or was advocated.”³⁶⁹ Although Herndon’s counsel objected to this charge, it was in fact stricter than the test they argued

368. 295 U.S. at 443-44.

369. Transcript, *supra* note 45, at 133 (emphasis added).

should be applied: the clear and present danger test. The Supreme Court had applied the clear and present danger test to statutes, like section 56 of the Georgia Penal Code, that did not criminalize specific language but merely prohibited certain acts. When the acts were verbal, the Court had held that a conviction could stand only when "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" that Congress and the state legislatures had a "right to prevent."³⁷⁰

From Herndon's point of view, then, the critical question on appeal to the Georgia Supreme Court was not whether the trial court had given an unfavorable jury charge—it had not—but whether the evidence warranted a conviction under the jury instruction the trial court had given. However, the state supreme court ruled that the trial court had been wrong in its charge: Section 56, the court said, did not require that violence should follow Herndon's words immediately, or even at all (nor, presumably, that the violent consequences be "serious" or "widespread"); rather, it "would be sufficient that [Herndon] intended [violence] to happen *at any time*, as a result of his influence, by those whom he sought to incite."³⁷¹ On that reading, the court refused to overturn Herndon's conviction. This expansive (to say the least) reading smacks of the old "bad tendency" test the Supreme Court had (apparently) rejected in favor of the clear and present danger test.³⁷² As Chafee points out in *Free Speech in the United States*, the state supreme court's test was "so wide as to be fatal to open discussion"³⁷³ or even moderate disagreement and dissent.³⁷⁴ It was this radically open-ended bad tendency interpretation that Herndon's counsel challenged for the first time on a motion for rehearing (a motion the state court rejected on the rather capricious ground that it had not literally meant at any time, but only any reasonable time).³⁷⁵ Similarly, it was this unanticipated interpretation of section 56 that was the basis of the argument made on Herndon's

370. This formulation of the test is taken, of course, from Justice Holmes' opinion for the Court in *Schenck v. United States*, 249 U.S. 47, 52 (1919).

371. *Herndon v. State*, 174 S.E. 597, 610 (Ga. Ct. App. 1934) (emphasis added).

372. GERALD GUNTHER, *CONSTITUTIONAL LAW* 1009 (12th ed. 1991).

373. CHAFEE, *supra* note 9, at 394.

374. And as Justice Owen Roberts pointed out two years after the Court's decision, in *Herndon v. Lowry*:

Within what time might one reasonably expect that an attempted organization of the Communist Party in the United States would result in violent action by that party? If a jury returned a special verdict saying twenty years or even fifty years the verdict could not be shown to be wrong.

301 U.S. 242, 263 (1937).

375. Transcript, *supra* note 45, at 195.

behalf before the Supreme Court: that Herndon's case fell within the recognized exception to the rule that the Supreme Court could not take jurisdiction of cases in which the constitutional issues the Court was being asked to decide had been raised for the first time on a motion for rehearing in the highest state court after that court had heard and decided the case upon appeal.³⁷⁶

As Sutherland analyzes the case, the "whole point" in *Herndon v. Georgia* is not that the state court rejected the trial court's jury charge but rather that Herndon's counsel should have known that the trial court's charge was wrong:

The verdict of the jury was returned on January 18, 1933, and judgment immediately followed. On July 5, 1933, the trial court overruled a motion for new trial. The original opinion was handed down and the judgment of the state supreme court entered on May 24, 1934, the case having been in that court since the preceding July.

On March 18, 1933, several months prior to the action of the trial court on the motion for new trial, the state supreme court had decided *Carr v. State*, 176 Ga. 747; 169 S. E. 201. In that case Section 56 of the Penal Code, under which it arose, was challenged as contravening the Fourteenth Amendment. The court in substance construed the statute as it did in the present case. In the course of the opinion it said (p. 750): "It [the state] cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace of imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency. . . . Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.' " The language contained in the subquotation is taken from *People v. Lloyd*, 304 Ill. 23, 35; 136 N. E. 505, and is quoted with approval by this court in *Gitlow v. New York*, 268 U.S. 652, 669.

In the present case, following the language quoted at an earlier point in this opinion to the effect that it was sufficient if the defendant intended an insurrection to follow *at any time*, etc., the court below, in its original opinion, (178 Ga. 855) added—"It was the intention of this

376. *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935).

law to arrest at its incipency any effort to overthrow the State government, where it takes the form of an actual attempt to incite insurrection.”³⁷⁷

The textual strategy of Sutherland’s argument warrants careful scrutiny. What Sutherland has to say about the language of the Georgia Supreme Court’s *Carr* decision provides the reader with a guide to how Sutherland thinks *Herndon v. Georgia* should be read. Sutherland writes:

The phrase “at any time” is not found in the foregoing excerpt from the *Carr* case, *but it is there in effect*, when the phrase is given the meaning disclosed by the context, as that meaning is pointed out by the court below in its opinion denying the motion for a rehearing (179 Ga. 600), when it said that the phrase was necessarily intended to mean within a reasonable time—“that is, within such time as one’s persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection.”

Appellant, of course, cannot plead ignorance of the ruling in the *Carr* case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction.³⁷⁸

In one breath, Sutherland concedes that *Carr* never unequivocally repudiated the clear and present danger test in favor of the bad tendency standard. In the next breath, he says that Herndon’s counsel should have acted as though *Carr* had, “in effect,” adopted the bad tendency test. Herndon’s counsel did not do this; therefore, the Supreme Court has no jurisdiction. Thus, in Sutherland’s hermeneutic model, Herndon’s counsel were expected to act on their interpretation of what the Georgia Supreme Court *did not say*.

We do not face this problem with respect to the Sutherland opinion in *Herndon v. Georgia*. Rather, the problem is that Sutherland says altogether too much. In the last pages of *Herndon*, Sutherland analyzes in detail the Georgia Supreme Court’s disposition of the appeals of the Atlanta Six, a group of white Communists who were arrested under section 56 two years before Angelo Herndon was.³⁷⁹ The apparent purpose

377. *Id.* at 444-45.

378. *Id.* at 446 (emphasis added).

379. See *supra* notes 126-29 and accompanying text. The charges against the Atlanta Six were officially dropped in 1939. See MARTIN, *supra* note 91, at 212.

of this discussion is to explain why Herndon's counsel should have anticipated the state supreme court's bad tendency construction of section 56.

Justice Sutherland's analysis is, however, irrelevant on at least two counts. Sutherland's analysis ignores the radically different context in which the state court discussed section 56 in *Carr*. Cardozo, however, devotes the greater part of his dissent to a sympathetic re-creation of what *Carr* might have looked like from the perspective of Herndon's counsel. Cardozo sets out to show that even if Herndon's attorney had been aware of *Carr*, he would still have had no inkling that the state court would review Herndon's conviction under a much looser standard than the clear and present danger test. The state supreme court issued two separate opinions in the *Carr* case. To understand Cardozo's position, we must briefly discuss them both.

The Georgia Supreme Court's first decision in the *Carr* case, *Carr v. State I*,³⁸⁰ was issued several months before Angelo Herndon's trial. This appeal came to the court on demurrer to an indictment under section 58 (not section 56) of the Georgia Penal Code. The criminal prohibition set out in section 58 applied only to the circulation of insurrectionary literature: That is, it was a statute that specifically referred to written language. Thus, according to Justice Cardozo, section 58 was like the New York criminal anarchy act in *Gitlow v. New York*.³⁸¹ It placed statutorily denied "insurrectionary" language on an "expurgatory index,"³⁸² and a conviction under the statute could be sustained without reference to the clear and present danger test.³⁸³ Cardozo notes that in *Gitlow*, the Court had drawn a sharp distinction "between statutes condemning utterances identified by a description of their meaning and statutes condemning them by reference to the results that they are likely to induce."³⁸⁴ He calls attention to language in *Gitlow* that suggests that the clear and present danger test should be applied to cases in the latter, "circumstantial," category.³⁸⁵ He then argues that this distinction undercut the *Herndon* majority's reliance on *Carr I* as a reason for refusing to reach the merits of Herndon's claim:

The conduct charged to this appellant—in substance an attempt to enlarge the membership of the Communist party in the city of Atlanta—falls, it will be assumed, within the second of these groupings

380. 166 S.E. 827 (Ga. 1932).

381. 268 U.S. 652 (1925).

382. 295 U.S. at 450.

383. *Id.*

384. *Id.* at 451.

385. *Id.*

[that is, in the category of acts rather than language], but plainly is outside the first. There is no reason to believe that the Supreme Court of Georgia, when it quoted from the opinion in *Gitlow's* case, rejected the restraints which the author of that opinion had placed upon his words. For the decision of the case before it there was no need to go so far. Circulation of documents with intent to incite to revolution had been charged in an indictment. The state had the power to punish such an act as criminal, or so the court had held. How close the nexus would have to be between the attempt and its projected consequences was matter for the trial.³⁸⁶

Thus, for Cardozo, all that the state court had held in *Carr I* was "that upon the fact of the indictment there had been a willful incitement to violence, sufficient, if proved, to constitute a crime."³⁸⁷

*Carr v. State II*³⁸⁸ was decided in March 1933, after Herndon had been convicted but before his attorney had moved for a new trial. Like *Carr I*, *Carr II* came before the Georgia Supreme Court on demurrer. Cardozo argues that the *Herndon* majority's reliance on *Carr II* was also misplaced. For him the holding in *Carr II*, as in *Carr I*, was much narrower than the majority believed: "All that the court held was that when attacked by demurrer the indictment would stand."³⁸⁹ This was clear to Cardozo from the headnote to the decision, drafted by the state court itself. Furthermore, Cardozo notes that the state court referred to the headnote in the body of its decision and then reaffirmed its holding in *Carr I*, quoting much of the same language from *Gitlow*.³⁹⁰ In Cardozo's view, the plain meaning of the language lifted from *Gitlow* left no doubt that the *Gitlow* analysis applied to statutes that denounced a particular, named doctrine and prohibited attempts to teach it. Cardozo insists that the language from *Gitlow* "gives . . . no test of the bond of union between an idea and an event."³⁹¹

Cardozo then goes on to point out that not only Herndon's counsel but even Herndon's trial judge had apparently thought that the *Carr* decisions had no bearing on Herndon's case.³⁹² He notes that at the time of Herndon's trial, the Georgia Supreme Court had not yet unequivocally rejected the clear and present danger rule; indeed, he points out, the trial court had made that rule the law of the case at Herndon's trial. To

386. *Id.*

387. *Id.* at 449.

388. 169 S.E. 201 (Ga. 1933).

389. 295 U.S. at 451.

390. *Id.*

391. *Id.* at 452.

392. *Id.* at 451-52.

have met the jurisdictional requirements imposed by the majority in *Herndon v. Georgia*, Cardozo insists, Herndon's counsel would have had to predict the Georgia Supreme Court's rejection of the clear and present danger test, even though at that point "there had been no threat of any change, still less any forecast of its form or measure."³⁹³ He would have had to ask the trial court for a far less favorable substitute charge. "It is a novel doctrine," writes Cardozo,

that a defendant who has had the benefit of all he asks, and indeed of a good deal more, must place a statement on the record that if some other court at some other time shall read the statute differently, there will be a denial of liberties that at the moment of the protest are unchallenged and intact. Defendants charged with crime are as slow as are men generally to borrow trouble of the future.³⁹⁴

Moreover, Cardozo flatly rejects the idea that Herndon's appeal to the state supreme court should have attacked the court's rejection of the clear and present danger test even though the court had not yet rejected the test. Requiring Herndon to have done this, Cardozo writes, violated Supreme Court precedent and undermined "the doctrine that must prevail if the great securities of the Constitution are not to be lost in a web of procedural entanglements."³⁹⁵

A second reason for being suspicious of Sutherland's analysis is that the issue of whether Herndon's counsel should have anticipated a broad interpretation of section 56 is a separate question from whether Herndon's appeal from that reading was timely. Sutherland treats these two distinct questions as though they are analytically inseparable. "There is no doubt," he writes, "that the federal claim was timely if the ruling of the state court could not have been anticipated *and* a petition for rehearing presented the first opportunity for raising it."³⁹⁶ Because the timeliness of Herndon's attack on the state court's interpretation depended not on the ability of his counsel to predict the interpretation but rather on the "settled rules of state practice" to which Sutherland is so deferential, Sutherland's analysis poses the wrong question: The "whole point" is whether the petition for rehearing to the state supreme

393. *Id.* at 452.

394. *Id.* at 448.

395. *Id.* at 452-53. Cardozo's opinion in *Herndon v. Georgia* is a powerful example of his description of the discourse of dissent: "Deep conviction and warm feeling are saying their last say with knowledge that the cause is lost. The voice of the majority may be that of force triumphant, content with the plaudits of the hour . . . The dissenter speaks to the future. . . ." BENJAMIN N. CARDOZO, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 354 (Margaret E. Hall ed., 1947).

396. 295 U.S. at 444 (emphasis added).

court was Herndon's first opportunity to challenge that court's interpretation of section 56 on federal constitutional grounds. Sutherland's opinion does not address this question at all. It raises the timeliness issue in passing, but it never squarely attempts to resolve it. Sutherland focuses solely on the anticipation question; the more technical and critical timeliness question literally disappears from view. Like the question of race, it becomes part of the structure of omissions around which the rhetorical politics of the opinion in *Herndon v. Georgia* revolves.

Had the *Herndon* Court been disposed to probe more deeply into local state practice, it might have discovered that under Georgia's rules of criminal procedure, the petition for rehearing before the state supreme court was in fact the first clear chance for Herndon's counsel to challenge the constitutionality of the court's interpretation of section 56. This was true even if the court's broader construction of the statute could somehow have been anticipated. As Herndon's counsel pointed out to the Supreme Court in a petition for rehearing after *Herndon v. Georgia*,³⁹⁷ a motion for a new trial after Herndon's conviction was unavailable;³⁹⁸ a motion in arrest of judgment could not be made;³⁹⁹ and under the Georgia law of criminal procedure, a constitutional question not raised in the trial court could not be argued on appeal to the state supreme court.⁴⁰⁰ In short, under the "settled rules of state practice," there was no procedural device available except the motion for rehearing to preserve Herndon's right to review in the U.S. Supreme Court. The Supreme Court, then, had refused to take jurisdiction over Herndon's case on the ground that Herndon's counsel had failed to meet what was in effect an unmeetable jurisdictional requirement.

It might be argued that it is unfair to criticize the result in *Herndon v. Georgia* on the basis of Georgia case law that, after all, was not brought to the Court's attention until after the Court decided not to reach the merits of Herndon's claim. Leaving aside the fact that the Court denied the petition that contained this information, I concede that at first consideration this objection carries some force. But it can be sustained only if one ignores the emerging constitutional understandings of

397. Angelo Herndon was represented in the Supreme Court by Whitney North Seymour, Walter Gellhorn, Carol King, and Herbert Wechsler. Wechsler discusses his work on the *Herndon* appeals in *Tape of The Reminiscences of Herbert Wechsler* (Feb. 23, 1979, & Mar. 12-13, 1982) (on file in the Columbia University Oral History Collection, New York).

398. *Hendry v. State*, 93 S.E. 413, 415 (Ga. 1917).

399. *Herron v. State*, 19 S.E. 243, 244 (Ga. 1894); *Beall v. State*, 41 S.E. 654 (Ga. 1902).

400. *State v. Henderson*, 48 S.E. 334, 336 (Ga. 1904); *Moore v. State*, 55 S.E. 327, 328 (Ga. 1906).

racial politics against which the Court's choice to forgo a decision on the merits of Herndon's claim must be read.

Earlier in my discussion, I contrasted the texture and tone of Justice Sutherland's statement of the facts in *Herndon* with his statement of the facts in *Powell v. Alabama*. In *Herndon*, Sutherland recites an antiseptic procedural account; but in *Powell*, he painstakingly situates his discussion of the constitutional issues in a concrete social and political context. What is interesting is that *Powell*, not *Herndon*, is the norm. Of the Court's decisions from this period that invalidated the convictions of African-American defendants on constitutional grounds, *all except Herndon* follow *Powell's* rhetorical strategy with respect to the politics of race.

Consider, for example, the language of the Court's opinions in *Norris v. Alabama*⁴⁰¹ and *Patterson v. Alabama*,⁴⁰² decided a bare month before *Herndon v. Georgia*. Writing for the Court in *Norris*, Chief Justice Hughes begins by noting that the "[p]etitioner, Clarence Norris, is one of nine negro boys who were indicted in March, 1931, in Jackson County Alabama, for the crime of rape."⁴⁰³ In *Patterson*, another opinion by the Chief Justice, the race of the defendant and the location of his alleged crime also introduce the Court's analysis of the relevant constitutional issues.⁴⁰⁴

A year after *Herndon*, in *Brown v. Mississippi*,⁴⁰⁵ the Court invalidated several murder convictions because they were based solely on confessions procured by physical torture. Chief Justice Hughes again wrote the opinion, quoting extensively from the Alabama Supreme Court's opinion in the case. The quoted passages refer to the defendants as "all ignorant negroes"⁴⁰⁶ and describe in meticulous detail the torture of these "helpless prisoners"⁴⁰⁷ at the hands of a white "mob."⁴⁰⁸

In each of these cases, the Court placed the brute facts of racism and power in the foreground of its constitutional analysis. The opinions in *Brown*, *Norris*, *Powell*, and *Patterson* emphasize these realities of race and region even though on the face of it none of the cases required it. Indeed, in *Patterson*, sensitivity to racial politics led the Chief Justice to address

401. 294 U.S. 587 (1935).

402. 294 U.S. 600 (1935).

403. 294 U.S. at 588.

404. 294 U.S. at 601.

405. 297 U.S. 278 (1936).

406. *Id.* at 281.

407. *Id.* at 282.

408. *Id.*

the substantive constitutional issues even though the State of Alabama claimed that the Court could not properly take jurisdiction.⁴⁰⁹ Significantly, the jurisdictional question in *Patterson* was whether the defendant had lost his right to Supreme Court review by failing to take timely action in the state courts to preserve his federal claim.⁴¹⁰ In *Herndon*, Hughes agreed with Sutherland that Angelo Herndon had forfeited his right to Supreme Court jurisdiction; but here, he had no time for too fastidious a concern for the procedural difficulties of the case, given what he describes in constitutional terms as a "serious situation."⁴¹¹

A reading of the rhetoric of *Herndon v. Georgia* against the backdrop of the Court's opinions in these other cases leaves no doubt that Sutherland's silence in *Herndon* is indeed "harsh."⁴¹² In my view, the Court's refusal to take up Herndon's substantive claim in *Herndon v. Georgia* is best understood in political rather than procedural terms.

In *Brown*, *Norris*, *Powell*, and *Patterson*, the Supreme Court acted to protect African-Americans against the most egregious uses of the criminal process as an instrument of racial domination. I believe that the Court was able to justify these interventions to the country and to itself by showing that the defendants in those cases fit contemporary cultural images of African-Americans. These defendants, as Justice Sutherland writes in *Powell*, were "ignorant and illiterate Negroes" and thus fit objects for a jurisprudence of "mercy."⁴¹³

Herndon confronted the Court with an altogether different sort of black defendant. The Angelo Herndon case marked the first occasion on which the Supreme Court was forced to come to terms so directly with the concept of political crime in a case in which the alleged criminal was a black American. If Angelo Herndon was a political criminal, what of the white southerners who, if the Court upheld his conviction, stood ready to punish him? The Court had to face harsh historical and contemporary realities that it could neither ignore nor openly acknowledge.

409. 294 U.S. at 602.

410. *Patterson* claimed that blacks had been unlawfully excluded from juries in the Alabama county in which he was indicted. *Id.* at 601.

411. While we must have proper regard [for the rulings] of the state court in relation to its appellate procedure, we cannot ignore the exceptional features of the present case. An important question under the Federal Constitution was involved It is always hazardous to apply a judicial ruling *especially in a matter of procedure*, to a serious situation which was not in contemplation when the ruling was made.

Id. at 605, 607 (emphasis added).

412. Frankfurter & Hart, *supra* note 254, at 93.

413. *Powell v. Alabama*, 287 U.S. 45, 52 (1932).

If it intervened, it would have to decisively condemn the racial and political culture that Herndon too had fought. This was a step that ideology and cultural experience did not yet allow the Court to take. Indeed, shortly before it decided *Herndon v. Georgia*, it also declared that the Texas Democratic Party's exclusion of blacks was not state action,⁴¹⁴ showing its willingness to tolerate all but the most visible, formal exclusions of black Americans from the political process.

In 1937, two years after *Herndon v. Georgia* and one year after its denial of a motion for a rehearing in the case, the Supreme Court issued its third, final, favorable judgment on Angelo Herndon's constitutional claim.⁴¹⁵ The Court's ultimate vindication of Angelo Herndon's First Amendment rights marks an important moment in the history of free speech jurisprudence. As a doctrinal matter, it can and should be viewed as a landmark First Amendment decision. What I have tried to show here, however, is that the history of the Angelo Herndon case is more than a story about the constitutional politics of the First Amendment.

There is another story behind the case, and that story is about the constitutional politics of race. Properly understood, the Herndon case must be placed at the intersection of two jurisprudential axes. The Angelo Herndon case marks the beginnings of the modern Supreme Court's hesitant and halting efforts to address the dissonance in American legal and political consciousness between two competing images of the African-American community generally and of the black male in particular: as an ignorant and helpless victim on one hand and a dangerous insurgent on the other. In the 1930s, these two contradictory images of the black American still weighed like a nightmare on the white American mind. In *Herndon v. Georgia*, the Supreme Court found itself caught between these two warring cultural images, which held decidedly different political and constitutional implications. Rather than choose between them, the Court decided not to decide.

V. CONCLUSION

David Luban has recently argued that legal discourse is "neither analytic nor empirical, but rather historical. The life of the law is not a vision of the future but a vision of the past. . . ."⁴¹⁶ Legal argument may

414. *Grove v. Townsend*, 295 U.S. 45 (1935), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944).

415. *Herndon v. Lowry*, 301 U.S. 242 (1937).

416. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2154 (1989).

thus be understood as "a struggle for the privilege of recounting the past. To the victor goes the right to infuse a constitutional clause, or a statute, or a series of prior decisions with the meaning that it will henceforth bear"⁴¹⁷

What Professor Luban says of legal argument and its outcome holds equally true for argument and interpretation in legal history. This Article has undertaken a historical rereading of the Angelo Herndon case from below. I have focused on the events leading up to the Supreme Court's decision in *Herndon v. Georgia*. I have done this not because I believe that *Herndon v. Lowry* was not an important constitutional victory, but rather because the story of the constitutional failure in *Herndon v. Georgia* is an equally important part of the historical record. As we have seen, the great weight of historical scholarship has focused on the Court's decision in *Herndon v. Lowry*. The absence of *Herndon v. Georgia* in most histories of the case suggests that some fifty years later, the Angelo Herndon story is still not a fully citable episode in our constitutional history. Revisiting that history from the bottom up, I have aimed to show that we cannot remember only one part of that story without forgetting them both.

417. *Id.* at 2152.