

## Constitutional Eras for “We the People”<sup>1</sup>

by Robert P. Moses



Almost 55 years ago, in August of 1960, nine months before the Freedom Riders<sup>2</sup> made the route infamous, Ella Baker and Jane Stenbridge of SNCC<sup>3</sup> put me on a Greyhound bus in Atlanta, headed to Mississippi. Representing the sit-in movement, but more deeply aware of my ride, I slid to the back of the bus as it approached Anniston Alabama, where the state trooper climbed onboard to take a look. A newly minted SNCC scout, little did I know that I was riding into history and an insurgency grounded in the Mississippi Amzie Moore NAACP World.

Amzie, home from WWII, turned himself into a tree for Delta blacks to transform themselves, in spite of whomever and whatever, from second to first class citizenship. A first-class insurgency, that’s what Amzie had in his mind and managed to layer, in all due time, into mine.

In all due time, two and one-half years later, in the early darkness of a winter evening in February 1963, Jimmy Travis slips behind the wheel and Randolph Blackwell crowds me into the front seat of a SNCC Chevy as we leave the Greenwood Voter Registration Office. We were to drive from Greenwood to Greenville on U.S. 82 straight across the Mississippi Delta. Jimmy zigzagged out of town to escape an unmarked car that had been circling the office, but as we headed west on 82, the car spots us, trails us, and sweeps past near the turn off for Valley State, firing a hailstorm of bullets. Jimmy cries out, slumps over; I reach over, grab the wheel, fumble for the brakes; we glide off the icy highway, snuggle into the ditch—a bullet-tattooed

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<sup>1</sup> A keynote address written and delivered by Bob Moses at Emory University, Atlanta, GA. January 20, 2015.

<sup>2</sup> A series of bus trips through the American South to protest segregation in interstate bus terminals, begun in 1961 by African-American and white civil rights activists.

<sup>3</sup> Student Non-Violent Coordinating Committee of the Southern Freedom Movement.

Chevy, windows blown away, a hole in Jimmy's neck. 1963, the year that began with a grease gun terrorist highway attack, ended with the assassination of a President. First-class black insurgents were not the only ones paying dues.

This is a talk about an abstract American idea, the American concept of a Constitutional Person—a talk to help make that invisible abstraction visible. America's Constitutional people need outfits, clothes, so they can be seen in the stories we Americans carry in our heads about who we are, where we are, and where we are headed: This, therefore, is a talk about the American Lived Constitution.

The concept of Constitutional People is everywhere in America's ongoing story. Over 156 years ago, on June 16, 1858, in front of 1,000 delegates to the Republican State Convention in Springfield Illinois, a candidate to be Senator of Illinois opened his talk with these words: "Mr. President and Gentlemen of the Convention: If we could first know where we are, and whither we are tending, we could then better judge what to do, and how to do it" (Lincoln 1858)

But flash forward for a moment to the words of another citizen and president. In 1988, when Kingman Brewster died,<sup>4</sup> it fell to Sam Chauncey<sup>5</sup> to say how Kingman should be remembered and to plan a memorable space in the Grove street cemetery where all presidents of Yale rest. Sam designed a low black marble wall to enclose Kingman's grave. On it he etched two sentences that encapsulate the interface between constitutional and common law; two sentences to illuminate how, on planet Earth, the ocean of lore humans inherit ought to instruct and inform the constitutional law humans create: "The presumption of innocence is not just a legal concept. In common sense terms it rests on that generosity of spirit which assumes the best, not the worst, of the stranger"<sup>6</sup> (Carter, 1999, p. 292).

Now lurch backward in time. In 1749, A West African boy, nine years old and captured, sailed the middle passage to Virginia and survived. In August of that year, a Scottish born merchant slave trader peered into the pluck of that nine year old and bought him. Up and coming Charles Stewart bought Somerset of West Africa to be his personal slave (Blumrosen 2005).

Twenty years pass, it's 1769. Stewart is 44; and Somerset, 29, accompanies him to London to help care for Stewart's sister's family when her husband

<sup>4</sup> Diplomat, Harvard law professor, and President of Yale University, 1963–1977.

<sup>5</sup> Administrator for Brewster, and son of Henry Chauncey, founder of Educational Testing Service.

<sup>6</sup> Tombstone inscription are words from Brewster's writings.

dies. London is awash with Africans from the British Empire. Slaves and runaways, beggars and workers, sea-goers and artisans, and Somerset, running errands everywhere for his master, meeting blacks on the streets, in the stores, along the docks, makes a plan. He arranges a baptism, acquires English Godparents and flows, on October 1, 1771, into London's stream of Insurgent Runaway Slaves (Blumrosen, p. 10).

Charles Stewart, feeling "betrayed and publicly insulted," posted notices to get Somerset back. And on November 2, slave catchers deliver Somerset to a ship bound for Jamaica. Seven days later, Somerset's Godmother, Elisabeth Cade pays to petition the Court of Kings Bench for a writ of Habeas Corpus to release him (p. 10).

Lord Mansfield, the Chief Justice, issues a writ requiring Captain Knowles to explain the reason for detaining Somerset on the Anne & Mary vessel. Six days later, Somerset appears before the King's Bench with Captain Knowles, who declares: "Charles Stewart, a colonial from America, delivered his slave, Somerset, to be sold in Jamaica" (p. 7). But Lord Mansfield releases Somerset pending a hearing, suggesting he be set free. West Indian planters, however, want a decision upholding slavery in Britain to keep prices stable in the commodities markets.

Lord Mansfield cautions them that if they think the question of great commercial concern is the only method of settling the point in the future, they should prepare an application to Parliament. But Parliament, content to let the matter rest at the Kings Bench refused the merchants a hearing.

On June 22, 1772, while the clerk called the case of "James Somerset, a Negro on Habeas Corpus," Lord Mansfield, bewigged, the chief justice of the oldest and highest court in England, mounted the bench to deliver his judgment:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political. . . . It's so odious, that nothing can be suffered to support it but constitutional law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged (p. 24).

So why did Slave Owner Stewart feel "betrayed and publicly humiliated?" Almost 200 years pass, and the matter at the heart of that matter resurfaces in a provocative letter that novelist James Baldwin wrote in 1962 in a letter to his brother's son, James:

The crime of which I accuse my country and my countrymen . . . that they have destroyed and are destroying hundreds of thousands of lives and do not know it and do not want to know it. One can be . . . tough and philosophical concerning destruction and death . . . But it is not permissible that

the authors of devastation should also be innocent. It is the innocence which constitutes the crime (Baldwin pp. 5–6).

It was then in 1772 as in 1963, a question of innocence. After all, saturated with the lore humans inherit, Stewart’s generosity of spirit saw the “best” not the “worst” in a nine year old “personable” African stranger. But Stewart who could not clothe his personal property with English Common Law and imagine Somerset into a Constitutional Person, instead imagined himself, a slave owner, an innocent, a victim, “betrayed and publicly humiliated” by an abstraction.

Flash forward in history again. In 1960, after Jimmy caught that bullet in his neck, Snick<sup>7</sup> regrouped to converge on Greenwood, and black sharecroppers lined up at the Court House to demand their right to vote. When Snick field secretaries were arrested, Burke Marshall, the Assistant Attorney General for Civil Rights under Robert Kennedy, removed our cases to the Federal District Court in Greenville and sent John Doar to be our lawyer. From the witness stand I looked out at a courtroom packed with black sharecroppers from Greenwood, hushed along its walls, packed onto its benches, and attended to the question put by Federal District Judge Clayton: “Why are you taking illiterates down to register to vote?” (Moses, 2010)

Wrong question Judge: These delta blacks are dressed up in their new outfits: constitutional clothes. Can you see them and incorporate them in the story you carry in your head about who they are, where they are, and where they are headed?

This conundrum of constitutional outfits, the ongoing dilemma about who gets to wear what constitutional clothes, surfaced at the 1787 Constitutional Convention, and resurfaces time and again: In Lincoln’s House Divided speech; in Judge Clayton’s question; in Ferguson; in the nation’s theory of “undocumented “people””; in the national education conundrum of constitutional, but naked school children, sent to school, with no constitutional clothes.

In all due time, we have circled back, in our story, to Abraham Lincoln, that 1858 Republican Senate candidate, who went on to invoke a House Divided: “A house divided against itself cannot stand. I believe this government cannot endure, permanently half slave and half free. I do not expect the Union to be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided. It will become all one thing or all the other” (Lincoln, 1858).

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<sup>7</sup> Student Non-violent Coordinating Committee (SNCC)

Don't be fooled, the conundrum of Lincoln's House Divided speech was not the Nation, the Union, nor the "it" in "It will become all one thing or the other." Not even close: SNCC was on the witness stand a century later precisely because the country had figured a way around that "it." No, Lincoln's conundrum was that other two letter word, "We." At the 1787 Constitutional Convention, James Madison rose to clarify the background that paved a path into Lincoln's conundrum. It seems now to be pretty well understood that the real difference of interests lay, not between the northern and southern states. The institution of slavery and its consequences formed the line of demarcation.

Move forward in time to April 1952. President Harry Truman, in the middle of the Korean war, declared that an impending steel strike "would immediately jeopardize and impair our national defense" and ordered the secretary of commerce "to take possession of all or such of the plants, facilities, and other property of the steel companies" (Truman 1952) as he may deem necessary in the interest of national defense (Corwin 1953; Loftus 1952).

The Steel Seizure case, which followed Truman's declaration, culminated in a Supreme Court injunction prohibiting the secretary from obeying the president's order. Six justices explained their reasons, separately, for deciding the order was unconstitutional. But the opinion of Justice Robert H. Jackson has most clearly withstood subsequent legal scrutiny:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government (Clayton 2002 p. 69).

In advance of any practice, the founding fathers at the Constitutional Convention of 1787, who contemplated the actual art of governing when the institution of slavery and its consequences formed the line of discrimination, faced a conundrum. While the 1787 Constitution contemplated a class of Constitutional People in its "We The People" Pre Amble, and diffused power, the better to secure their liberty, it also contemplated a class of Constitutional Property, outfits for Somerset's constitutional clothing designed as Article IV, Section 2, Paragraph 3: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor is due" (Constitution). Thus, "We the People" does not include slaves.

The Somerset clause contemplated a Constitution that diffused power—the better to secure slavery—because as James Madison understood only too

well, slavery was the indispensable practice required to integrate the dispersed powers into a workable government. Without slavery as its economic engine, the nation and the government were not “workable.”

America, the land of democracy and freedom, is also a crime scene, the crime of which I accuse my country and my countrymen. . . . We have the wolf of terrorism by the ear, and we can neither hold on to it, nor can we let it go; but it is not permissible that the authors of destruction should also be innocent. Weapons of mass destruction! *It is the innocence which constitutes the crime.*

For three quarters of a century, the Government of Constitutional People and Constitutional Property tried workability all the while, a Young People’s Project, Africans, central actors in the Constitutional Drama, acting out, coming of age insurgencies, invisible, mutating viruses, popping up here and there, infecting the Constitutional Scene. Until, inevitably, in the persona of Dred Scott, the central character in the 1857 decision by Roger B. Taney, Chief Justice of the Supreme Court, their project metastasizes into a catalyst of mass destruction that divides Lincoln’s House, sets into motion the War of the Constitutional People over Constitutional Property, and drops the curtain on America’s first Constitutional era. The Era lurched to an end, but its conundrum refused to expire: Who were we, if “we” was still the problem?

## Constitutional Era 2

The moon was quite young when the bell tolled, the young black men rushed into the chapel to get their guns and Margaret Caldwell, left home, her face hid, stepped over a body lying in the street near a store, before going back home where her husband’s brother’s wife and three children cowered with her against the sound of the white mob roaming the streets. There Margaret stayed until her minister came to bring the news that both husbands were dead, and he carried two bodies upstairs. Margaret’s husband’s body had to be tied together and the minister laid both bodies out to prepare for burial. Late that night the train from Vicksburg to Jackson stopped in Clinton and Modocs, traveling confederates imagining themselves into a tribe of wild Indians marched into the Caldwell house, threw open the windows, sang, danced, cursed, and challenged the two dead men to get up and meet them. It was a Thursday evening during the Christmas season in Clinton Mississippi; it was 1875. The second Constitutional Era was getting underway.

Margaret’s husband, Charles Caldwell had commanded the Negro militia company that marched in formation from Jackson to Edwards on October 9, 1875, carrying armaments for the militia company there. But Ohio’s state

elections were scheduled for October 13, and Ohio Republicans sent a delegation to Ulysses Grant, informing the President that if he sent troops to Mississippi, Ohio, "which had voted by a wide margin against ratification of the Fifteenth Amendment,<sup>8</sup> the state would fall to the Democrats. Grant sent no troops, but later told Lynch, the black senator from Mississippi, that "I made a grave mistake."

Republicans blinked: In 1875, President Grant yielding to the request of the Republican delegation, put into motion a practice that integrated America's dispersed powers into a workable government, the better to secure Jim Crow, slavery by another name (Blackmon 2008).

Democrats winked: In 1875, Redeemed, Democrats overthrew the Mississippi Government by terror, violence, and murder, and contemplated a written Constitution that diffused power the better to secure white supremacy, a practice which integrated dispersed powers into a workable government, the better for white people to secure freedom.

On a Thursday evening during the Christmas season of 1875, when the moon was quite young and the bells tolled, Margaret Caldwell, her face hid, stepped over the body of her husband Charles (Lemann 2006)

For the Presidential race of 1876, Rutherford Hayes, saved by Grant and reelected governor of Ohio, ran against Samuel Tilden, Democratic governor of New York. Terror and murder rampaged against black men across Louisiana, Mississippi, South Carolina and Florida, and when the election ended in a stalemate at the electoral college, a deal was cut: The Compromise of 1877: The nation got a workable government: Hayes and the Republicans got the Presidency, federal troops were withdrawn from the South, and white southerners established a political confederacy. The Nation finally knew who we were and whither we were tending and, therefore, better judged what to do and how to do it.

And the clarity of the "what and how" of those judgements sharply resonate when listening to Billy Holiday sing "Strange Fruit." Her ironic juxtaposition of words such as "southern breezes, gallant South, and sweetness of magnolias" alongside the words that spoke to the lynching horrors resulting in "bulging eyes, twisted mouths, and burning flesh" (Margolick 2000 p. 25) dramatically captured the contradictions of the perverted betrayals of Black people, sanctioned by corrupted government policies, both southern and national.

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<sup>8</sup>The 15th Amendment: "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."

On Wednesday May 14, 1919, an article appeared on the front page of the *Vicksburg Evening Post*. It read in bold letters, "NEGRO ATTEMPTS RAPE OF YOUNG WORKING GIRL." The name of the 22 year old alleged, attempted rapist was Lloyd Clay, a young black man who worked as a day laborer. The young working girl, it later turned out, had a secret older white man as her lover, who ran from the room she rented when discovered by the landlord. He fled to his black chauffeur whom he hired to take his lover on midnight drives. Confronted later, the chauffeur, and two other black men hauled into the Jackson jail, told the entire story to the authorities. All three men were released and told to leave the state (Clay 1919).

*The crime of which I accuse my country and my countrymen.*

Sheriff Frank Scott, W. M. Hudson and Deputy Charley Gantt used bloodhounds to track down the would-be rapist. The dogs initially led them to a white man, but a second attempt brought them to the A and V Railroad Station where they arrested Lloyd Clay.

*That they have destroyed and are destroying hundreds of thousands of lives*

After the white townsfolk heard that an arrest had been made, white men and boys began to gather at the Warren County jailhouse. Immediately after Clay was arrested, Mattie Hudson's father took her into town to pick out her assailant from a lineup of several black men. As Hudson stood before the lineup, she stated assuredly that none of the men there had attacked her and none had entered her room (1919).

*And do not know it and do not want to know it.*

Around 8:00 p.m. a mob used blow torches and a 16 foot piece of railroad iron to break down the jailhouse doors and bend open the iron jail cell bars. About 40 men made their way past Sheriff Scott and twelve of his deputies as they took Clay from his cell. The mob tied Clay up, placed him in a truck, drove him a short distance from where Mattie Hudson boarded, and demanded that Hudson identify Clay as her assailant. On the third day she did (1919).

*It is not permissible that the authors of destruction should also be innocent.*

Clay's burnt to crisp remains were placed in a plain wooden box. Early the next morning the coroner contacted Hattie Clay, Lloyd's mother who consented to have his remains interred in a cemetery for paupers, misfits and "bad" Negroes. Neither family nor friends escorted Clay's body to his final resting place. The city paid the total cost of his funeral, 15 dollars (1919).

Between 1882 and 1930 Mississippi lynched over 700 young black men: Rounding the numbers, for a half a century, 50 years or 600 months, on average, every six months, seven black men were Mississippi lynched, or, for

50 years, on average, every year 14 black men were Mississippi lynched (Wal-drep 2005). On June 13, 2005, the U.S. Senate issued a formal apology for innocence, that it never criminalized lynching, but Trent Lott and Thad Cochran, Mississippi's Republican and Democrat Senators retained their innocence and did not sign (Lemann 2006).

*It is the innocence which constitutes the crime.*

On March 30, 1908, Green Cottenham was arrested by the sheriff of Shelby County, Alabama, and charged with "vagrancy." After three days behind bars, 22 year-old Cottenham was found guilty . . . and immediately sentenced to a 30-day term of hard labor. Unable to pay the array of fees . . . Cottenham's sentence was extended to nearly a year of hard labor. The next day, under a standing arrangement between the county . . . and U. S. Steel . . . Cottenham was sold and the sheriff turned him over to Tennessee Coal, Iron and Railroad Company, a subsidiary, for the duration of his sentence. The Company gave the county \$12 a month to pay off Cottenham's fine and fees, sent him to the Pratt Mines on the edge of Birmingham. Green Cottenham toiled under the lash with 1000 other black men in "Slope #12." Slaves in all but name, almost sixty of the men died of disease, accidents or homicide before the year was over. Green Cottenham was dead from disease after five months (Blackmon 2008 p. 1-2).

In our first Constitutional era, 1787 to 1865, young black men suffered neither prison cell nor the lynch mob. They were Constitutional Property. During our second Constitutional era, 1875 to 1954, young black men were routinely rounded up for vagrancy and imprisoned briefly for debt, before being conscripted to work in a system of involuntary servitude. They were Constitutional People turned back into Constitutional Property.

We can thank Douglas Blackmon, who grew up in Greenville Mississippi and is the former Atlanta Bureau Chief of the *Wall Street Journal*, for the book, *Slavery by Another Name: The re-enslavement of Black Americans from the Civil War to World War II*. His story of tens of thousands of black youth criminalized for walking the railroad tracks, charged with vagrancy, jailed for non-employment, conscripted to die in the coal mines should shake the conscience of the nation. In his book, Blackmon threw a searchlight on Circular 3591 issued by Attorney General Francis Biddle on Dec. 12, 1941, a directive that ruptured the illusion that slavery had ended in America. And it warned the legal community that any person or entity who violated the 13<sup>th</sup> Amendment "would be prosecuted as a criminal":

It is the purpose of these instructions to direct the attention of the United State Attorneys to the possibilities of successful prosecutions stemming from alleged peonage complaints which have heretofore been considered inadequate to invoke federal jurisdiction. It is requested that the spelling

out of peonage be deferred in favor of building the cases around the issue of involuntary servitude and slavery disregarding entirely the element of debt (Blackmon, pp 377–78).

All the Civil Rights Movements of the 20th Century took place against the background of WWI and WWII and the insurgencies of colonial peoples across the planet for political voice. African Americans, an internal colonial people during this era, mounted their own insurgencies for political voice. No wonder Japan's attack on Pearl Harbor galvanized President Franklin Roosevelt to seek an end to the conscription of black men into involuntary servitude and slavery; as soldiers he needed them ready to answer Japan's sure to come question: "Why are you, black soldiers, over here fighting us?"

In Clarksdale, as World War II got under way, black day-laborers could "go at six in the morning to the corner of Fourth and Issaquena streets . . . trucks from the plantations would appear at the corner. The drivers would get out and announce their pay scales. The Hopson place always paid at the high end of the going rate" (Lemann 1991 p. 71). In the fall of 1944 an estimated 3,000 people gathered at the Hopson plantation outside of Clarksdale to watch eight bright red machines pick forty-two acres of cotton. Richard Hopson ran the plantation office and the previous spring he had penned a letter urging all the plantation owners in the Delta to "change as rapidly as possible from sharecropping to complete mechanized farming . . . to alleviate the Negro problem" (p. 71).

Three years later, David Cohn, a literary lawyer put the following dilemma to the Nation: "Five million people will be removed from the land within the next few years. They must go somewhere. But where? They must do something. But what? They must be housed. But where is the housing?" (Lemann 1991 p. 51). In December 1946, the Chicago housing authority moved a few black families into a new housing project called Airport Homes, which was in a white neighborhood on the Southwest side. The housing authority proceeded with some care: it obtained the blessing of the mayor; it carefully screened the black families; it moved them in during working hours, when the men in the neighborhood were away. Still more than 1,000 whites gathered to 'greet' the black families. The mayor had to send in four hundred policemen to maintain order; the rioting went on and, finally, after two weeks the black families moved out, back across the housing color line (p. 51).

Ten years later, after the 1954 Supreme Court decision, "Willis wagons" maintained the school color line:

It is obvious in retrospect that the established black neighborhoods were far too small to hold all the black people coming into Chicago [leaving Mississippi's plantations] but [the Mayor's] efforts were directed at finding ways to maintain

the color line. His school superintendent [Ben Willis] was immediately faced with the problem of severe overcrowding in the black schools. Instead of integrating the adjacent and usually half-empty white schools, Willis put the black schools on double shifts, eight to noon and noon to four, and installed what blacks called "Willis Wagons"—trailers converted into temporary classrooms—in their playgrounds, thereby creating an urban equivalent of the inferior rural black school systems of the South (Lemann 1991, p. 91).

I agree with you that there is a natural aristocracy among men. The grounds of this are virtue and talents. . . . May we not even say that that form of government is the best which provides the most effectually for a pure selection of these natural aristoi into the offices of government? (Lemann 1999 p. 43)

So Thomas Jefferson wrote to John Adams in 1813. Adams sent his reply later that year: November 15, 1813:

Your distinction between natural and artificial aristocracy does not appear to me well founded . . . both artificial aristocracy, and monarchy, and civil, military, political and hierarchical despotism, have all grown out of the natural aristocracy of virtues and talents. We, to be sure, are far remote from this. Many hundred years must roll away before we shall be corrupted. Our pure, virtuous, public-spirited federative republic will last forever, govern the globe and introduce the perfection of man. . . . Your distinction between the aristoi and the pseudo aristoi will not help the matter. I would trust one as soon as the other with unlimited power (Lemann 1999 p. 46).

Flash forward: At the October 29, 1947 meeting of the College Board, the admissions deans who made up the usual attendance at College Board Meetings, were astonished to see James Bryant Conant, President of Harvard, in all his magnificence, as well as the presidents of Princeton, Cornell and Brown (p. 64). Conant had assembled all these "grandees" to persuade the deans that the old dispensation of the College Board was at an end; it was to merge with ACE, the American Council of Education and prepare for the creation of ETS, the Educational Testing Service. George Zook, head of the ACE, also headed President Truman's Commission on Higher Education. Zook submitted his report to the President less than two months later on December 11, 1947, a clarion call to expand American Higher Education:

- The number of students enrolled in institutions of higher education by 1960 should be 4.6 million—triple what it had been in 1940.
- A third of every age cohort should graduate from college.
- Government should substantially finance this expansion by paying for students' tuitions: the first two years of college should be entirely free.
- All discrimination in higher education, especially against Negroes, should be vigorously stamped out (Lemann 1999).

The deans had met two weeks earlier and voted the merger down; they just didn't understand, the deal had already been settled. The question was who would run ETS: Conant via the College Board or Zook, via ACE. Exactly one week after the Zook report was submitted, ETS was chartered with Henry Chauncey a Harvard dean, as president, and Conant as chairman of the Board. The aristocracy was still in charge.

In the aftermath of WWII, in 1948, the nation established universal draft registration to be administered by the Selective Service System, and debated the wisdom of draft-deferment tests for college students. Then on June 25, 1950, North Korea invaded South Korea and Henry Chauncey saw the potential of a Bull Market for his company, ETS, and its products—tests. On March 19, 1951, the Selective Service System signed a contract with ETS to test up to one million college students. Chauncey insisted the test not be called an IQ test: the ability revealed by this test is more properly called “scholastic aptitude,” he asserted, the ability to do well in school or college. He devised a scoring system that would bring to mind school grades rather than mental testing: The median score would be 50 and the deferment cut-off, 70. Security at the testing sites matched the life and death matter of the tests. All test-takers were finger printed and the FBI helped to guard the sites. There was the slight issue of one low scoring demographic: Southerners: Only 42 percent made the cutoff score of 70 as against 73 percent of New Englanders. What to do? Establish affirmative action based on regional cut-off scores? Better to keep quiet and, therefore innocent, about the nation's educational line of discrimination and its life and death quota tied to cut-off scores (Lemann 1999 p. 72–76).

Zook's vision lost: the government did not turn universities into extended versions of public school—free to all, the same for all. But so did Conant's vision lose. Conant had wanted to replace a system of higher education based on upper class aristocrats with a system based on Jefferson's “natural aristocrats.” But for that to work, “It was essential that people accept this new elite as deserving, selfless, valuable, and dedicated to the public good.” To Conant “the spectacle of well-to-do college men being deferred from required military service, to the great resentment of everyone else, under a transparently trumped-up justification, was deeply disturbing.” But the testing went smoothly; two-thirds of the takers made the cut-off; the Pentagon found it useful; and soon enough so did universities. The nation set up ETS and the “project of picking just the right aristocrats” (Lemann p. 346).

In the late fifties, Conant took a close look at the nation's public high schools, and in 1961, the same year I returned to Mississippi to work for SNCC on

Amzie's voter registration program, Conant published a book, *Slums and Suburbs*, in which he made the following admission:

As I read the history of the U. S., this republic was born with a congenital defect—Negro slavery. Or, if one prefers another metaphor, we started life under a curse from which we are not yet free. After the victory of the North . . . the people of the U. S. through their duly elected representatives in Congress acquiesced for generations in the establishment of a tight caste system as a substitute for Negro slavery. As we now recognize so plainly, but so belatedly, a caste system finds its clearest manifestation in an educational system (Conant 1961 p. 8–11).

Conant recognized too little too late.

When the first Constitutional Era had lurched to a close, Stephen Douglas, not Abraham Lincoln, trumpeted "of, by and for the people" in the debate over popular sovereignty versus slavery. So, here is "We The People, one man-one vote," Douglas:

To throw the force of the Federal Government into the issue, either in favor of the free or the slave states would violate the fundamental principles of the Constitution and run the risk of civil war. The only hope of holding the country together . . . is to agree to disagree, to respect the right of each state and each territory to decide these questions for themselves (Lincoln—Douglas Debates 1858).

And here is "No one has a Right to do Wrong," Lincoln:

Any man can advocate political neutrality who does not see anything wrong in slavery, but no man can logically say it who does see a wrong in it . . . Douglas contends that whatever community wants slaves has a right to have them. So they have it if it is not a wrong. But if it is a wrong, he cannot say people have a right to do wrong" (Debates, 1858).

In 1964, SNCC had no idea how its work, with MFDP to confront the National Democratic Party and the Nation at the Democratic Convention that year in Atlantic City, was 'dead on' history's mark. In a twentieth-century version of the nineteenth century Lincoln–Douglas debate, Fannie Lou Hamer rose before the Credentials Committee to emphatically interrogate her nation: "I question America! Is this America?" (Brooks 2011 p. 43).

And there, in Atlantic City were President Johnson, Martin Luther King Jr, Walter Reuther and Bayard Rustin, talking like Stephen Douglass, trumpeting popular sovereignty: To throw the force of the National Democratic Party into the issue, either in favor of the MFDP or the Mississippi Regulars, as those four saw it, would violate fundamental principles of the Party and

run the risk of destroying it. Thinking like Douglas, they assumed that the only hope of holding the party together . . . was “to agree to disagree, to respect ‘the right of the people of each state to decide these questions for themselves.’”

Yet here are the MFDP and SNCC talking like Lincoln: Any person can advocate political neutrality who does not see anything wrong in Jim Crow Politics, slavery by another name. But no person can logically say it, who does see a wrong in it . . . They contend that whatever state wants Jim Crow Politics has a right to work it out in their state. So they have it, if it is not a wrong. But if it is a wrong, they cannot say a state has a right to do wrong.

The 1941 Attorney General Circular 3591, WWII veterans like Amzie, who came back to a purpose, the 1954 Supreme Court decision, the Montgomery bus boycott, the sit-in movement, the full blown Civil Rights Movement, all signaled an end to America’s second Constitutional Era. Certainly the Mississippi Theater of that movement rang the curtain on Mississippi’s eighty-nine year reign, 1875 to 1964 as a one party white Democratic state. Moreover, as quiet as it’s kept, that effort rang the curtain on the national political party arrangements put into play in the years 1875 to 1877 when Republicans blinked and Democrats winked.

Agriculture dominated the economic arrangements of the first Constitutional Era, 1787 to 1865, Industrial machine technology dominated the second, 1875 to 1954, and Information computer technologies dominate the third, 1965 and into the twenty-first century.

In the first era, Mississippi whites home schooled their offspring or sent them to private schools and on to Princeton and/or the University of Virginia; black slaves learned to read, if at all, on their own dime and at great risk.

In the second era, Conant opened up Harvard and elite Universities to public school students, but nothing interrupted sharecropper education. Sharecropper students, the progeny of slaves, got the education appropriate to their caste and its pre-assigned work.

In all due time, in 1970, ten years after Conant published *Slums and Suburbs*, as the nation transitioned into its third Constitutional Era, the Supreme Court required Mississippi to begin the integration of its public school system. That same year the nation began a forty year documentation of education that included data about four year college graduation. Bad news for Conant and Jefferson. Their vision of a meritocratic national education system producing America’s natural aristocrats, had gone South, unless, that is, we agree that the Universe distributes intelligence disproportionately to the wealthy: In 1970, 40 percent of students from the upper quartile of the nation’s economic

distribution got their Bachelor of Arts (BA) degree; and forty years later, by 2010, the percent had doubled to 80 percent. In 1970 just 7 percent of the bottom quartile of the nation's economic distribution got their BAs and that percent barely nudged for forty years, just 9 percent got them by 2010 (Mortenson 2013). And just this past week we learned that 51 percent of all of America's public school children live in poverty (A new majority SEF 2015).

What we might double down on is the work needed to realize ourselves as a Constitutional People clothed with Human Dignity. And while it is true that we have lurched backwards and forwards over this endeavor in, roughly, three-quarters of a century units of time, we have managed, across two and a quarter centuries, in spite of ourselves, to extend the reach of "We The People."

The class of Constitutional People that began with white male property owners has expanded to include men and women of all races and income levels with or without property. That expansion has typically required an alliance of the bottom and the top. Certainly that is how I experienced the Mississippi Theater of the Civil Rights Movement—an earned insurgency, a "We The People" force from the bottom found a few allies at the top.

The Pre Amble opens up a constitutional space: "We The People" did not mean "We the President, We the Congress, or We the Supreme Court." It couldn't since none existed at the writing of that document. Neither is it "We the Citizens," for, there was no nation in 1787 for which allegiance could be pledged. If the Pre Amble had begun, "We The Citizens of the several States," we would have a very different America. But it didn't. "We The People" invites everyone living in America, who takes it as their home, into the Constitutional Conversation.

Zook's vision to uplift and universalize into college the reach of Public School Education is the more appropriate vision for this Constitutional Era, the age of knowledge work. The Conant-Jefferson vision of a natural elite based on meritocracy lost out to the Market-based education: Get as much education as money can buy. Even so, "We the People" lies there, biding its time, waiting for its insurgents. Let's lift it up and try to feel its force. Please, say it after me:

"We the People of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The presumption of innocence is not just a legal concept. In common sense terms it depends on that generosity of spirit, which seeks the best, not the worst, in the stranger.