

BRUCE ACKERMAN

## De-Schooling Constitutional Law

For more than two centuries, constitutional law has been created by a dialogue between generations. As newcomers displace their predecessors, they begin to challenge parts of the legacy they have inherited while cherishing other elements of their tradition. The dynamic of challenge-and-preservation leads to an ongoing effort at synthesis—leaving the next generation with a legacy that, once again, provokes another cycle of critique and transformation as parents and grandparents leave the constitutional stage.

This Symposium begins a new round of reappraisal: Now that the civil rights generation is passing from the scene, how will the twenty-first century remember its predecessors' achievements? How did the Second Reconstruction of the twentieth century compare to the First Reconstruction of the nineteenth?

These questions won't be resolved anytime soon. But the energy and insight of the Symposiasts testify to a continuing devotion to the project of popular self-government initiated at the Founding. To be sure, all participants are very privileged members of the academy. If popular sovereignty is to survive, it will require more than the commitment of an elite corps of legal scholars. But it is very important for each of us to look beyond our special insights and contribute to a larger dialogue that reaches beyond the academy to our fellow Americans.

So what more can I contribute at this stage?

On reading the essays, I see that I have at least one comparative advantage. This arises from the very long time—more than thirty years!—it has taken me to carry out my project. As a consequence, I encountered a special difficulty in writing this book.<sup>1</sup> On the one hand, lots of people are very interested in the civil rights revolution, and I wanted to make my presentation reader-friendly.

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1. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

It would have been a real turn-off to announce that people should go back and study volumes one and two – along with other books<sup>2</sup> – before plowing into my analysis of the civil rights era. But on the other hand, there really are many deep relationships between this book and its predecessors. So I tried to suggest the linkages only when they were absolutely essential.

I have failed. For perfectly sound reasons, my commentators have focused on *this* book, not the entire series. And since they have probed far deeper than the ordinary reader, I failed to provide sufficient leads to relevant arguments presented in earlier volumes. This was inevitable: You can't write one book and three books at the same time. Call it the multivolume problem. Nevertheless, I can help remedy this deficiency by elaborating the links between *The Civil Rights Revolution* and earlier arguments.

My larger aim, though, is to build bridges between interpretive schools that generally don't have much to say to one another – textualism, on the one hand; common law constitutionalism, on the other hand; popular constitutionalism, on the third hand; critical constitutionalism, on the fourth; and there are even more hands clapping to different beats in other juristic circles. One of the things the Constitution constitutes is an interpretive community – enabling Americans with profoundly different beliefs to talk to one another, rather than past one another, as they hammer out collective solutions to their common problems. I want to suggest how my framework can help bridge the yawning chasms that increasingly separate different “schools” of constitutional law.

And finally, I will address some of the big substantive questions provoked by my interpretation of the civil rights legacy.

But let's start with a search for common ground.

## I. COMMON GROUND?

### A. Originalism

Like Professor Barnett, I begin with the text's opening words, “We the People,” and struggle to grasp the original understanding of its meaning.<sup>3</sup> But we part company at this point. I not only disagree with his interpretations, but believe that they are self-defeating within their own terms.

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2. In particular, BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* (2005), as well as BRUCE ACKERMAN & DAVID GOLOVE, *IS NAFTA CONSTITUTIONAL?* (1995).
  3. Randy E. Barnett, *We the People: Each and Every One*, 123 *YALE L.J.* 2576 (2014).

Professor Barnett builds his radically individualistic view of popular sovereignty on *Chisholm v. Georgia*.<sup>4</sup> In his view, the opinions of Justices Jay and Wilson suggest that rule by the People is a “fiction[,]” even when a constitutional decision has gained the broad support of a mobilized and decisive majority of Americans.<sup>5</sup> So long as there is a single dissenter, the myth of popular sovereignty conceals the fact of majoritarian oppression. Since real-world people are never unanimous on anything important, Professor Barnett would focus the constitutional conversation on thinkers, like John Locke, who try to specify the terms of the social contract that “each and every” one of us would sign in one or another hypothetical state of nature.<sup>6</sup>

There is only one problem: Professor Barnett’s appeal to *Chisholm* is flatly inconsistent with his originalist commitment to textualism. However inspiring he may find the opinions of Jay and Wilson, Americans of the Founding era emphatically disagreed. It took them only one year to mobilize in Congress and the states to enact the Eleventh Amendment, which repudiated *Chisholm* and propelled the Constitution in a different direction.

There are only two other times in American history when a Supreme Court judgment has been self-consciously repudiated by formal amendment: the Fourteenth rejected *Dred Scott*;<sup>7</sup> the Sixteenth, the *Income Tax Cases*.<sup>8</sup> Interpreting popular sovereignty on the basis of *Chisholm* is like interpreting citizenship on the basis of *Dred Scott*. Professor Barnett must choose: either he is a textual originalist *or* he is an advocate of social contract theory. But not both.

Suppose he abandons originalism, and insists on the teachings of John Locke, say, to define the fundamental rights guaranteed by “We the People.” If Professor Barnett goes down this path, he cannot base his preference for Locke on the ground that the *Second Treatise* influenced some leading Founders.<sup>9</sup> He

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4. 2 U.S. (2 Dall.) 419 (1793).

5. See Barnett, *supra* note 3, at 2592.

6. *Id.* at 2600-01.

7. *Scott v. Sandford*, 60 U.S. 393 (1856).

8. *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895); *Hyde v. Continental Trust Co.*, 157 U.S. 654 (1895).

9. Since John Pocock published his great *Machiavellian Moment*, challenging Locke’s centrality to the American Founding, many intellectual historians have tended to downplay Locke in favor of republican writers like Harrington. See JOHN G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 424 (1975). But given Professor Barnett’s rejection of originalism, there is no need to rehearse the ongoing debate on this issue.

also must be prepared to defend Locke against John Rawls, the greatest contractualist of the twentieth century.<sup>10</sup> Rawls famously places each and every person behind a “veil of ignorance” – arguing that we would all unanimously choose to maximize the position of the worst-off class.<sup>11</sup> If Rawls is right, Professor Barnett took the wrong side in the Obamacare case.<sup>12</sup> He should have tried to persuade the Supreme Court that the Affordable Care Act was constitutionally required, not prohibited, by America’s social contract.

Now I happen to think that Rawls is wrong. Yet Professor Barnett won’t find much help from my arguments in *Social Justice in the Liberal State*,<sup>13</sup> since they also support massive redistribution of wealth to the poor. Perhaps he will find Robert Nozick’s *Anarchy, State, and Utopia* more to his taste, since Nozick rejects redistributionism. But alas, Nozick rejects contractarianism.<sup>14</sup> If Professor Barnett wants to reinvigorate a libertarian Lockeanism, he will have to do it himself, confronting the formidable objections that have deterred many thoughtful philosophers from this project.<sup>15</sup>

But it’s one thing to try to convince the philosophical world that Locke is right after all. It’s quite another to embrace an ideal of constitutional argument that would authorize the Supreme Court to declare, in the immortal lines of John Ely: “We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.”<sup>16</sup>

In any event, I do not understand *We the People* as a battering ram enabling me to incorporate the views expressed in *Social Justice in the Liberal State* into the Constitution. Once I published my entry into the philosophical sweepstakes, I refused to spend the rest of my life defending the book against its critics.<sup>17</sup> I wanted to do something different: Approach the constitutional tradition with an open mind, in search of its *distinctive* legitimating principles –

10. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

11. *Id.* at 136-42.

12. See Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES, Mar. 26, 2012, <http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html>.

13. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

14. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

15. I commend to him books like DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986), but I think it’s fair to say that there is no libertarian contract theorist who has been nearly as influential as Robert Nozick.

16. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 58 (1980).

17. But see Bruce A. Ackerman, *What is Neutral About Neutrality?*, 93 ETHICS 372 (1983) (responding to Benjamin Barber, Brian Barry, Jim Fishkin, Richard Flathman, and Bernard Williams).

even if these have turned out to be fundamentally different from those I set out in my earlier work in political philosophy.

I urge Professor Barnett to take the same path. Our philosophical disagreements won't disappear anytime soon. Nevertheless, perhaps our constitutional views converge sufficiently to reach a common understanding of the Constitution's origins and historical development?

After all, both of us begin our interpretive efforts at the same place—with the thought of the popular leaders of the Founding era. Only I begin before John Jay and James Wilson came to the Court and began handing down opinions. I focus instead on the principles they advanced a few years earlier when both were leaders in the ratification campaign to gain the assent of *We the People* to the Constitution: John Jay, together with Madison and Hamilton, made a canonical contribution to the original understanding in the *Federalist Papers*; James Wilson's speeches at the Pennsylvania ratifying convention were also very influential at the time (even if not as familiar today).<sup>18</sup> I urge Professor Barnett to accept the verdict of the Eleventh Amendment and follow me back to these originating sources.

My reading of the *Federalist Papers* strips away ancestor worship and recovers the Founders as serious revolutionaries, defying the Articles of Confederation's demand that all thirteen states consent to all amendments to its provisions. In justifying the Founders' repudiation of this explicit requirement, Publius explained

that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory, the transcendent and precious right of the people to “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.”<sup>19</sup>

James Wilson took the same position in a widely publicized speech at the Pennsylvania ratifying convention.<sup>20</sup>

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18. See *infra* note 20.

19. THE FEDERALIST NO. 40, at 265 (James Madison) (James Ernest Cooke ed., 1961). Note that Madison is bringing Jefferson's Declaration into the conversation at this key point. For a host of legal irregularities and Anti-Federalist constitutional objections at a variety of state ratifying conventions, see Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 514-48 (1995).

20. Wilson claimed that “the people may change the constitutions whenever and however they please.” 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 78 (1998). See also

Publius and Wilson did not claim that the Philadelphia Convention had the revolutionary authority to break with the Articles all by itself. It was only if a mobilized citizenry followed the Philadelphians' lead by ratifying the Constitution at state conventions that their centralizing initiative could claim the authority of We the People. In Madison's words, only the "supreme authority" exercised by the "people themselves" in state conventions could "blot out all [the] antecedent errors and irregularities" involved in the Founders' illegal break with the Articles.<sup>21</sup>

Can a committed originalist really dismiss Publius as a mere myth-maker? Professor Barnett cites Edmund Morgan as an authority for this position. But as he recognizes, his appeal to this great historian is problematic.<sup>22</sup> It is rather the Progressive school, led by Charles Beard, which provides the historiographic basis for Professor Barnett's cynical view of the Founders. These Progressives famously condemned the Federalist Papers as mere political propaganda, covering up the fact that the Founders were engaging in class warfare against the poor and oppressed. It is odd to see a self-described "originalist" adopt a similar view. In contrast, I base my interpretation on the work of Bernard Bailyn, Gordon Wood, John Pocock, and many others, who have taken seriously the revolutionary aspirations of the Founders.<sup>23</sup>

The key lesson to be learned from the Founding generation is that neither political elites *nor* masses-in-the-streets can by themselves earn the authority to speak in the name of the People. Our Constitution requires revolutionary leaders *and* their mobilized followers to work together to demonstrate broad popular support by winning a series of elections against opponents who had a fair chance to defeat their initiatives. It is this Founding precedent of mobilized debate and electoral victory that frames my larger inquiry: Have later generations, like the Founders, revised the system of higher lawmaking in their ongoing project to speak for the People in the course of the nineteenth and twentieth centuries?

Since Professor Barnett undertakes a different, if self-defeating, interpretation of the Founding, he does not analyze my affirmative answer in

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Wilson's remarks, *id.* at 79, at his greatly admired lectures presented in Philadelphia in 1790 to an audience including many of the leading members of the new Republic.

21. THE FEDERALIST NO. 40, at 265-66 (James Madison) (James Ernest Cooke ed., 1961).

22. See Barnett, *supra* note 3, at 2591 n.46.

23. See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); POCOCK, *supra* note 9; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969).

detail. For example, he notes that the “phrases ‘higher law’ or ‘higher lawmaking’ appear 24 times” in my new book, but finds that “none of these phrases is defined” and believes that this conceptual failure disqualifies my claims about the higher lawmaking status of the civil rights revolution.<sup>24</sup>

But Chapter 11 of *Foundations* is titled “Higher Lawmaking,” and it provides the elaborate definitions Professor Barnett demands. The Chapter develops three fundamental criteria—depth, breadth, and decisiveness—for use in interrogating *all* historical efforts to speak in the name of the People.<sup>25</sup> My new book tries to establish that, when judged by these three criteria, the Second Reconstruction of the 1960s represents a far more compelling example of popular sovereignty than the First Reconstruction of the 1860s.

In making out this case, I deploy the same techniques constitutional lawyers use to elaborate the meaning of the Reconstruction Amendments. Just as the profession focuses on the congressional speeches of a John Bingham or a Charles Sumner during the First Reconstruction, I put the spotlight on the contributions of Hubert Humphrey and Everett Dirksen during the Second; just as traditional accounts analyze the changing roles of the presidency from Lincoln through Grant, I trace the evolution of the presidency from Truman through Nixon; and so forth.

At this point, Professor Barnett encounters another multivolume problem. In dealing with the First Reconstruction and the New Deal, he says: “Unlike the Founding, when the revolutionary nature of the change was made clear by Congress’s referring the matter to conventions in the states, *this was never the claim made on behalf of these later changes at the time they were being debated.*”<sup>26</sup> But my second volume, *Transformations*, pointed to the historical facts that establish the contrary proposition: During both the first Reconstruction and the New Deal, the constitutional legitimacy of both Lincoln’s and Roosevelt’s revolutions were *repeatedly* challenged by their opponents, and the legitimacy of their new higher lawmaking procedures was *repeatedly* upheld at the ballot box.<sup>27</sup> Once Professor Barnett abandons his ahistorical appeal to John Locke, his commitment to the original understanding requires him to consider

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24. Barnett, *supra* note 3, at 2579.

25. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 272–78 (1993).

26. Barnett, *supra* note 3, at 2581 (emphasis added).

27. 2 ACKERMAN, *supra* note 20, at 99–252 (2000) (discussing the Reconstruction); *id.* at 255–382 (discussing the New Deal).

whether my blow-by-blow description of these latter-day transformations satisfies the principles of popular sovereignty established at the Founding.

This is not the place to repeat my analysis, but I should restate my basic conclusion.<sup>28</sup> In the late eighteenth century, the Founders believed that they could earn the authority to speak for the People by gaining the consent of nine out of thirteen states under Article Seven. Since this seemed like an appropriate test for their own initiative, it seemed sensible for the Framers to invite future constitutional revolutionaries to gain higher lawmaking recognition by undertaking an analogous higher lawmaking exercise. Just as Washington and Madison gained the support of a national assembly, Article Five invited would-be Publians to do the same sort of thing; and then to emulate the Founders by gaining the support of three-fourths of the states. After all, wasn't it sensible to suppose that a change in Founding principles should be accomplished through the same institutional process that led to their prior endorsement by We the People?<sup>29</sup>

It was only after the Civil War that Americans began to create an alternative higher-lawmaking system for the expression of popular sovereignty. Out of this terrible conflict emerged a new form of constitutional identity shared by citizen/soldiers and their families throughout the Union: "We" were no longer Pennsylvanians first, and Americans, second, as we were in 1787. "We" were now Americans first, and only derivatively, citizens of the states in which we chose to reside.

What is more, the institutional precedents created by Thomas Jefferson, Andrew Jackson, and Abraham Lincoln had by then established that, on appropriate occasions, the presidency could credibly claim a *popular* mandate that the draftsmen of 1787 neither desired nor expected from their First Magistrate.<sup>30</sup> Given these political and institutional transformations, it was entirely legitimate for Reconstruction Republicans and New Deal Democrats to rely increasingly on the separation-of-powers in Washington, D.C., to speak in the name of We the People of the *United States*.

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28. I emphasize this basic point in chapter 1, *Are We a Nation?*, of the present volume. 3 ACKERMAN, *supra* note 1, at 23-36.

29. This remained an open question. The Founders refused to follow the example of the Articles of Confederation by expressly stating that the rules of Article Five were exclusive. See 2 ACKERMAN, *supra* note 20, at 34, 71-81.

30. See ACKERMAN, *supra* note 2, at 55-77 (on Jefferson); GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES (2007) (on Jackson); 2 ACKERMAN, *supra* note 20, at 126-27 (on Lincoln).



Professor Barnett misses this basic point.<sup>31</sup> On his account, “the only serious objection to Article V . . . is that its procedures make changing our Constitution too hard.”<sup>32</sup>

This is *not* my central objection: I agree that higher lawmaking procedures ought to be hard. The problem is that Article Five’s reliance on the assent of federal and state assemblies is out of sync with more nation-centered understandings that give the presidency an important role. This is precisely why we should applaud, not disparage, the constitutional creativity involved in the transformation of the separation-of-powers into a structure for higher lawmaking during Reconstruction and the New Deal. As current events in Washington show, it is no easy thing for a transformative political movement to maintain control over the presidency, Congress and the Court for the decade or two required to elaborate and consolidate a fundamental change of our constitutional principles. But when they manage to do so, they have *earned* the precious authority to speak for the People at least as much as when Congress and state legislatures enact a formal Article Five amendment.

What is more, the leading protagonists of the Second Reconstruction *self-consciously* embraced this separation-of-powers model during the civil rights revolution. Professor Barnett ignores the intensive case study that my book presents to establish this central claim. Chapters 5 and 6 discuss the federal effort to eliminate the poll tax—one of the White South’s great weapons against black suffrage.<sup>33</sup> During the early sixties, Congress proposed, and the states ratified, the Twenty-Fourth Amendment banning poll taxes in *federal* elections—which went into effect in 1964.

But immediately thereafter, Dr. King’s campaign in Selma generated the movement-energy required to push the President and Congress to ban *all* poll taxes as part of the Voting Rights Act of 1965. Given the recent passage of Twenty Four, such a sweeping ban raised obvious constitutional questions: If an Article Five amendment was required to authorize a narrow prohibition

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31. It appears explicitly in the current volume in both the first chapter and the concluding one, see 3 ACKERMAN, *supra* note 1, at 28-30, 311, although previous volumes elaborate the point at length.

32. Barnett, *supra* note 3, at 2586.

33. Chapters 5 and 6 build on a collaboration with Jennifer Nou that led to the joint publication of Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV 63 (2009). While I have revised the article’s basic argument in some respects, I am very grateful to Professor Nou for her great help when she was a law student at Yale.

restricted to federal elections, wasn't *another* Article Five amendment required to impose a sweeping ban in all state and local elections?

After fierce and extended public debate, Congress' answer was No. The landmark Voting Rights Act of 1965 *self-consciously* created a new statutory system of higher lawmaking—in which all three branches cooperated in the radical revision of deeply entrenched principles of federalism. My forty-eight-page case study follows the statutory elaboration of this “coordinate model” of inter-branch cooperation step-by-step—showing the decisive contributions made by the bipartisan congressional leadership, Attorney General Katzenbach, President Johnson, and Martin Luther King, Jr. to the new system.<sup>34</sup> All this goes unnoticed in Professor Barnett's formalist account.

To sum up: Once Professor Barnett abandons his self-defeating reliance on *Chisholm*, I very much hope that he seriously considers the enduring significance of the *Federalist Papers'* rival theory, emphasizing the revolutionary right of the People to refashion the law of higher lawmaking; and that he confronts the historical record that demonstrates how latter-day movements—up to and including the Second Reconstruction—followed the Founders' precedent by reworking the law of higher-lawmaking in ways that expressed Americans' changing understanding of their constitutional identity. If he does so, I am sure that his responses will greatly enrich the ongoing legal conversation—and build new bridges to approaches that may seem starkly opposed to his own.

### B. Critical Constitutionalism

On first impression, there is a yawning gap between Professor Barnett and Professor Levinson, who is justly famous for his view that the Constitution requires a total overhaul.<sup>35</sup> While I debate the original understanding of Article Five with Professor Barnett, Professor Levinson offers a very different critique: He thinks that I'm too mired in the Founding tradition, and its subsequent transformations, to consider the large contributions made by twentieth-century Progressives to the theory and practice of popular sovereignty.<sup>36</sup> He

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34. 3 ACKERMAN, *supra* note 1, at 83-123, 354-62.

35. See SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

36. Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 *YALE L.J.* 2644 (2014).

emphasizes the way state constitutions have massively adopted Progressive systems of initiative, referenda, and recall over the past century, and urges me to take them seriously in reforming higher lawmaking practices on the national level.

I agree. Indeed, this Progressive tradition has already influenced my analysis of modern higher-lawmaking. As I argued in *Transformations*,<sup>37</sup> the separation-of-powers system emerging out of the New Deal and the Second Reconstruction suffered a serious blow in the aftermath of the Bork nomination in 1987. Acting in the spirit of Franklin Roosevelt, President Reagan had set about repealing the New Deal constitution through New Deal methods: Rather than relying on formal Article Five amendments, he sought to revolutionize entrenched constitutional understandings by making a series of transformative appointments to the Supreme Court. Just as Roosevelt nominated Felix Frankfurter to spearhead the New Deal Court's elaboration of the principles of the activist regulatory state, Reagan nominated Robert Bork to provide the intellectual heft to transform the existing regime into a neo-liberal constitutional order.<sup>38</sup>

Reagan's effort failed, but Bork's rejection by the Senate had enduring consequences, seriously damaging the modern higher-law system based on the separation of powers. Bork famously treated his Senate confirmation hearing as a great "national seminar" to instruct the American people on the bright future promised by his revolutionary jurisprudence. But after his rejection, nominees never made this mistake again. Henceforth, both Democratic and Republican Presidents pursued their constitutional ambitions by advancing "stealth" nominees—who might (or might not) reveal their revolutionary intentions once they safely made it to the bench.

This is an abuse of the principle of popular sovereignty. Before would-be revolutionaries can gain a mandate for fundamental change, the President and his party should be obliged to make their constitutional case in public. They also should be required to win a series of electoral victories in support of decisive change—not achieve their objectives by the devious use of Supreme Court appointments. To remedy post-Bork pathologies, *Transformations* proposed a new landmark statute that would provide an alternative to "stealth" revolutions.<sup>39</sup> Under its provisions, a second-term President could place constitutional initiatives before the voters if they were approved by appropriate

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37. 2 ACKERMAN, *supra* note 20, at 403-16.

38. *Id.* at 383-420; Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

39. 2 ACKERMAN, *supra* note 20, at 403-18.

majorities of the House and Senate. If a supermajority of voters then supported the initiative at the next two presidential elections, courts should treat them as fully authorized by the People of the *United States*, and give them higher-law status equivalent to Article Five amendments passed by We the People of the *United States*.

Whatever its deficiencies, my proposal has all the virtues of formalism that Professor Barnett emphasizes in his defense of a rule-based approach to constitutional amendment. Once he recognizes the anti-textualist character of his reliance on *Chisholm*, I hope that he will seriously consider supporting my formalist solution to the serious problems that stealth appointments pose in our real-world system of higher-lawmaking.

Professor Levinson, however, thinks that my reform proposal is too timid. He emphasizes that it would allow only the President and Congress to decide whether the voters should be consulted in a popular referendum. This pro-establishment bias will block the sweeping reforms he believes are necessary before the Constitution can deal with the twenty-first century. Given this diagnosis, Professor Levinson proposes a far more sweeping adoption of Progressive techniques that will allow ordinary citizens to trigger national plebiscites.

I am not convinced. When we test Progressive dreams against California realities, it seems pretty clear that moneyed interests have corrupted voter initiatives, making a mockery of the ideal of citizen-sovereignty. Given this fact, I continue to think it's wise to authorize only second-term presidents to put referenda before the electorate, and only if Congress backs them up, and voters approve in two successive elections.<sup>40</sup>

A more emphatic embrace of Progressive ideas might be justified if we were to succeed in both restricting the role of big money and providing serious occasions for citizens to deliberate on big electoral issues before casting their ballots.<sup>41</sup> But unless and until we make real progress in these areas, I cannot join Levinson's campaign for more sweeping Progressive reforms.

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40. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 666-68 (2000).

41. For a proposal in campaign finance, see BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002). Larry Lessig has been doing great work propelling a similar reform into the center of public debate. See LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011). I have also been working with my friend Jim Fishkin to work out a proposal to create a new institutional forum to support serious citizen deliberation before important elections. See BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004). For a brief overview

### C. *Popular Constitutionalism*

But let's stop speculating about tomorrow. The main task of my new book is to understand how the higher lawmaking system actually operated the day-before-yesterday—when the civil rights movement engaged with the national political leadership during the Second Reconstruction.

This issue is taken up by Professors Tomiko Brown-Nagin, Lani Guinier and Gerald Torres, and Rogers Smith.<sup>42</sup> They all support my challenge to the profession's narrow fixation on the constitutional legacy of the Warren and Burger Courts. But they criticize the Washington-centered character of my separation-of-powers story, believing that it fails to do justice to the central role played by millions of ordinary Americans in the civil rights movement. To be sure, I give great prominence to Dr. King's Letter from a Birmingham Jail, and gesture toward the large significance of civil rights mobilizations in the rest of the country. But even in Dr. King's case, I tend to emphasize his Beltway bargains with President Johnson and Congress in hammering out the great landmark statutes.

I agree with this critique. From the time of the Founding, higher lawmaking in America has neither been an elite construction nor the simple reflex of grass-roots mobilization. It has been the product of an ongoing dialogue between transformative leaders and ordinary Americans, culminating in a series of self-conscious popular decisions by the voters in support of the new regime.

The only excuse for the book's top-down treatment is my own personal race with time: It's taken me thirteen years to write *The Civil Rights Revolution*, and this seems a good moment to pass the torch on to the next generation.<sup>43</sup> I hope that, with scholars like Brown-Nagin, Guinier, Torres, and Smith in the lead, the profession will be moving on to a deeper understanding of the Second Reconstruction than the one I've managed to present.

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of the entire reform package, see Bruce Ackerman, *Reviving Democratic Citizenship?*, 41 POL. & SOC'Y 309 (2013).

42. Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698 (2014); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Rogers M. Smith, *Ackerman's Civil Rights Revolution and Modern American Racial Politics*, 123 YALE L.J. 2906 (2014).

43. Indeed, my Conclusion calls for further exploration of the complex ways in which "bottom-up accounts of the civil rights movement shaped and reshaped the terms of the Washington-centered story presented here." 3 ACKERMAN, *supra* note 1, at 314.

But I do have some problems with my commentators' more particular claims.<sup>44</sup> It is one thing to emphasize, in Professor Brown-Nagin's words, the "agenda-setting" power of the larger civil rights movement; quite another, to disparage "the 'malignant kinship' that [Martin Luther King, Jr.] forged with Lyndon Johnson."<sup>45</sup> (Professors Guinier and Torres express similar sentiments.<sup>46</sup>)

I disagree with this condemnation of Dr. King. To win the support of We the People of the *United States*, it was not enough to rally millions of activists to the civil rights movement; it was also necessary to gain the support of tens of millions of Americans who were less engaged, but nevertheless entitled to a voice and a vote on the nation's constitutional destiny.<sup>47</sup> There was nothing "malignant" in King's decision to engage in the inevitable compromises required to gain broad support for transformative legislation. To the contrary, he was demonstrating constitutional statesmanship of the highest order—enabling President Johnson and Congress, for example, to place the Civil Rights Act before the voters in 1964, thereby putting them on notice that the bipartisan coalition of liberal Democrats and Republicans was now seriously engaged in rewriting the terms of America's social contract.

Similarly, Professors Guinier and Torres are right to emphasize the importance of grassroots leaders like Fannie Lou Hamer, whose compelling presence at the Democratic Convention of 1964 helped pave the way for the Voting Rights Act of 1965. But so far as the critical election of 1964 was concerned, Barry Goldwater's conduct was far more consequential. In taking the Senate floor to denounce the Civil Rights Act of 1964, Goldwater not only dissented on policy grounds; he engaged in a frontal assault on the statute's constitutional legitimacy. By nominating Goldwater over the liberal Nelson Rockefeller, the Republican Convention was offering the American People a "choice, not an echo" on the constitutional principles advanced by President Johnson and Congress in their landmark civil rights initiative.

Professor Driver challenges my characterization of Goldwater's role, suggesting that the Republican candidate's approach "was considerably more

44. I will defer further consideration of Professor Smith's arguments to Part II of this essay.

45. Brown-Nagin, *supra* note 42, at 2715.

46. See Guinier & Torres, *supra* note 42, at 2767-76.

47. In terms of the definitions of popular sovereignty developed in Chapter 11 of Volume 1, the civil rights movement was essential in establishing "depth," but more was required to establish the "breadth" and "decisiveness" of the supermajority required for an authoritative act by We the People. 1 ACKERMAN, *supra* note 25, at 295-322.

indirect than [my] ‘frontal assault’ metaphor connotes.”<sup>48</sup> He points out that Goldwater never deployed racist rhetoric, and had supported some anti-discrimination laws. Isn’t it overstating things to portray him as an implacable foe of the Civil Rights Act?

I stand by my characterization. It was precisely the *non-racist* character of Goldwater’s assault on the Act that made it so seductive. By choosing Goldwater over Johnson, ordinary voters did *not* have to endorse racism to bring the Second Reconstruction to a screeching halt.

Goldwater gave them a different option: He attacked the Civil Rights Act’s foundation in the New Deal commerce clause, urging Americans to return to the Old Court jurisprudence that, in the words of the *New York Times*, had been repudiated by “the courts in the late nineteen-thirties.”<sup>49</sup> What is more, Lyndon Johnson refused to respond to Goldwater’s critique with obfuscations and ambiguities. He counterattacked with a spirited defense of both New Deal constitutionalism and the transformative principles expressed by the Civil Rights Act.<sup>50</sup> As a consequence, his crushing defeat of Goldwater served as a key moment in the process by which the American people redefined their constitutional identity.

Professor Driver is unimpressed. Appealing to Albert Hirschman’s analysis of reactionary rhetoric, he fails to appreciate Goldwater’s key role in providing Americans with a “choice, not an echo.” This isn’t a critique of Hirschman, who wasn’t a constitutional lawyer; nor is it really a critique of Driver, who rightly sees Hirschman’s relevance in analyzing the current predicaments of some liberal constitutionalists. But it is better to turn from Hirschman to Publius, and later spokesmen for higher lawmaking, when assessing Goldwater’s importance to America’s constitutional development. By providing a “choice, not an echo,” his candidacy transformed the election into a vehicle that ultimately provided Johnson with the *national* mandate from the People required to legitimate further civil rights initiatives.

It is the national character of the 1964 mandate which leads me to a final caveat. Professors Brown-Nagin, Guinier, and Torres go beyond the struggles surrounding the landmark statutes to consider mobilizations for social justice after the civil rights revolution had run its course. But they don’t sufficiently

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48. Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616, 2620 n.11 (2014).

49. *Id.* at 2625 n.39 (quoting Anthony Lewis, *The Courts Spurn Goldwater View*, N.Y. TIMES, June 19, 1964, at 18).

50. See generally 3 ACKERMAN, *supra* note 1, at 68–78.

appreciate that these later campaigns never gained the repeated and self-conscious consent of the American people on the national level—and so fail to qualify as authoritative acts of We the People.

Professor Brown-Nagin, for example, turns her attention to the War on Poverty, and says that Lyndon Johnson considered it to be an integral part of his program of revolutionary reform. I agree. If you will forgive my jargon, Johnson's poverty initiatives served as a *constitutional signal* in much the same way that *Brown* had catapulted the question of racial justice onto center stage in 1954. But as David Super shows,<sup>51</sup> the anti-poverty campaign did not repeat the success of the civil rights movement in winning the mobilized consent of the American people over the next decade. To the contrary, when George McGovern appealed to voters for an anti-poverty mandate in the 1972 elections, Americans crushed his hopes as thoroughly as they crushed Goldwater's attack on the Civil Rights Act. Indeed, even where civil rights were concerned, the era of mobilized popular commitment to further sweeping change had ended by the time Gerald Ford succeeded Richard Nixon in 1973.<sup>52</sup>

Constitutional moments do not last forever—this is what Madison taught in the Federalist Papers, and Madison's analysis has been vindicated time and again in our national life.<sup>53</sup> When my commentators provide thick descriptions of successful local implementation of the Equal Opportunity Act or the mobilization of the United Farm Workers, these engaging case studies should not divert us from the hard truth: since 1973, We the People of the *United States* have never again mobilized repeatedly at the polls in support of a decisive breakthrough for economic or racial equality.

This doesn't mean that the last fifty years of normal politics are devoid of significance. While economic and racial egalitarians have had to compete with many other issues and movements for political and legal support, they have scored many victories—as well as stinging defeats. And latter day popular mobilizations—both on the left and the right—have played an important role in shaping the current policy terrain.

In his important essay, Professor David Super invites us to consider whether any of these movements have generated “petit constitutional” micro-moments deserving of special recognition.<sup>54</sup> In raising this possibility,

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51. David A. Super, *Protecting Civil Rights in the Shadows*, 123 YALE L.J. 2806 (2014).

52. See 3 ACKERMAN, *supra* note 1, at 276-87.

53. See 1 ACKERMAN, *supra* note 25, at 169-99.

54. See Super, *supra* note 51.



Professor Super contributes to an important debate precipitated by Professors William Eskridge and John Ferejohn, who also argue for the quasi-constitutional status of a special class of “superstatutes” (although on very different grounds than those offered by Super).<sup>55</sup>

I hope to contribute to this debate in the future, but this was not my aim in the present book. *The Civil Rights Revolution* tries to put recent decades of normal politics into perspective by establishing that there was indeed a moment, a half-century ago, when Congress, the President, and the Court spoke with the *full* authority of We the People in support of a Second Reconstruction—and it calls on the rising generation of lawyers and judges to preserve this great constitutional legacy as they confront the challenges of the twenty-first century.

#### D. Common Law Constitutionalism

Which brings me to the question raised by Professors Justin Driver and David Strauss in different ways: What *was* the appropriate role of the Warren and Burger Courts during the constitutional revolution, and what *should be* the Court’s future role in preserving the civil rights legacy?

Professor Driver is right in believing that I refuse to join in the general retreat from judicial review that characterizes the contemporary work of many liberal constitutionalists.<sup>56</sup> Professor Strauss is right to suggest that my understanding of the judicial role differs from the common law approach he develops in his well-known work.<sup>57</sup>

In engaging with my book, Professor Strauss’s essay should serve as a model for the collaborative conversations of the future. After all, he is famous for his straight-out denial that the formal text plays a significant role in real-world adjudication, and it would have been easy for him to dismiss my effort to revitalize higher lawmaking by emphasizing the role of landmark statutes. Instead, he incorporates large elements of my analysis into his understanding of the civil rights revolution, and then proceeds to redefine key issues for the next round of discussion.

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55. See generally WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010).

56. See Driver, *supra* note 48, at 2638 n.101.

57. See David A. Strauss, *The Neo-Hamiltonian Temptation*, 123 YALE L.J. 2676, 2689 (2014); see also DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

He is right to emphasize that we continue to have significant disagreements.<sup>58</sup> On my view, the fundamental task of the Supreme Court is to preserve the past achievements of popular sovereignty once American politics returns to its normal modes of operation. As national attention turns to other issues, politicians will have a hard time sustaining higher lawmaking commitments if this will make it tougher for them to win the next election. In contrast, life tenure and professional training predispose the men and women on the Supreme Court to take more seriously the great moments in American history when We the People spoke in a higher lawmaking voice.

I sketched out the character of the Court's preservationist mission in *Foundations*,<sup>59</sup> and so the briefest summary will suffice. The place to begin is with a distinctive feature of America's constitutional practice. While the Great Seal of the United States announced the arrival of a *Novus Ordo Seclorum*—a New Order for the Ages—the Founders were not trying to transform everything at once in their zeal to create a Brave New World. They were aiming instead for deep-cutting, but partial, revolutionary reforms—and so were their successors during the First Reconstruction, the New Deal, and the Second Reconstruction.

The *partial* character of American revolutions generates a distinctive interpretive problem—call it intergenerational synthesis. Since our Constitution is the work of many generations, it is up to the courts to synthesize these partial transformations into a coherent doctrinal whole. From the days of John Marshall and Roger Taney, constitutional litigation has become an engine for this project—with one side arguing that the meaning of Constitutional Moment A should govern their case while opponents rely on Constitutional Moment B as their principal source of law. This point-counterpoint has required the courts to undertake an ongoing effort to synthesize the meaning of our multiple constitutional moments into a coherent doctrinal pattern.

A contemporary example is the familiar debate over the extent to which the Fourteenth Amendment, enacted at Time Two, “incorporates” the Bill of Rights, enacted at Time One. Scholars and judges have been arguing about the right way to synthesize these two different pronouncements for a very long time—and they will continue to do so. A great deal of professional judgment is required to resolve these intergenerational issues in a case-by-case fashion—

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58. Strauss, *supra* note 57, at 2689.

59. 1 ACKERMAN, *supra* note 25, at 81-162.

sometimes requiring the exercise of techniques like those which Professor Strauss commends.

But these similarities should not be allowed to conceal a basic difference. The preservationist Court always tries to anchor its judgments in the original understandings of the relevant constitutional moments—thereby preserving the basic principles of each moment while doing justice to the case at hand. It sometimes happens, of course, that a later decision of the People directly conflicts with an earlier one—in which case, the later decision should be followed. But there are many cases in which principles from both eras can be harmonized into a larger pattern which takes *both* generations' commitments seriously. Indeed, there are many situations in which a proper synthesis requires the integration of principles inherited from several eras of constitutional politics—challenging the courts to do justice to principles inherited from the Founding, Reconstruction, New Deal, *and* the Second Reconstruction in a thoughtful fashion.

This is no easy task—which is precisely why the ongoing collaboration of judges, lawyers, and scholars is so necessary if the legal profession is to fulfill its responsibilities to the American people. To make the problem even more complex, the profession must make an ongoing effort to apply its principled synthesis to cases arising in a country whose economic and social life increasingly diverges from the America in which the People first announced one or another of its constitutional commitments. While changing circumstances require courts to *adapt* principles in a contextually compelling fashion, they should never operate as an excuse for courts to *erase* these commitments.<sup>60</sup>

This is the danger raised by an overenthusiastic embrace of Professor Strauss's common law methods. I don't want to overemphasize the risk. As he makes plain, his common-law judge *is* attentive to history—major precedents typically express large principles inherited from earlier eras of constitutional politics. Moreover, as Strauss's model judge adapts the case-law tradition to express the spirit of her own era, she will look to major legislative and presidential initiatives—including landmark statutes—in determining which precedents are ripe for overruling. But as Professor Strauss emphasizes, landmark statutes are only one of many resources for sound judicial development. He also invites his common law judge to consider evolving social

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60. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1260 (1993).

and economic mores as well as his or her own understanding of good public policy.<sup>61</sup>

Given Professor Strauss's capacious sense of acceptable methods, there is a very real risk that his brand of constitutionalism will permit the courts to lose sight of fundamental commitments reached by the People in earlier generations. I will provide a contemporary example of this danger later,<sup>62</sup> but it is enough to emphasize the basic constraint that emerges from my preservationist approach: The Supreme Court has no authority to repudiate the commitments of the People of prior eras merely because they don't conform to its reading of evolving social mores, let alone its views of good public policy. If the constitutional legacy of prior generations seems unsatisfactory, it's up to the People of the twenty-first century to repudiate these earlier commitments by engaging in the same kind of mobilized politics that was required to enact them in the first place. Until this happens, the job of the Supreme Court is to respect the past achievements of We the People.

There is a lot more to be said about the relationship between common-law and preservationist methods. But for now, it's more important to respond to a more particular challenge raised by Professor Strauss: "[O]n Ackerman's account," he asks, "why was *Brown* a lawful decision [at all]?"<sup>63</sup> What gave the Warren Court the authority to begin a constitutional revolution at a time when President Eisenhower and Congress showed no inclination to take on the race question, and Martin Luther King and Rosa Parks had not even begun their campaign in Montgomery?

This is a crucial question: If I can't answer it, it would put me on the side of the congressional authors of the Southern Manifesto of 1956, who denounced *Brown* as unconstitutional. If Professor Strauss is right, I would be placed in a self-defeating situation analogous to the one confronting Professor Barnett—in which I can only defend my views by repudiating some of my key premises.

I plead not guilty. As I argue in *Foundations*,<sup>64</sup> *Brown v. Board* should be viewed as an exercise in intergenerational synthesis. To see my point, we must go beyond familiar One-Two problems like the "incorporation debate," and consider how intergenerational issues multiply once judges confront the constitutional contributions of the New Deal (Time Three) and the Civil

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61. See STRAUSS, *supra* note 57, at 92.

62. See *infra* text accompanying notes 128-132.

63. Strauss, *supra* note 57, at 2694.

64. See 1 ACKERMAN, *supra* note 25, at 142-53.

Rights Revolution (Time Four). Within this expanding framework, *Foundations* presents *Brown* as an early judicial effort at Two-Three synthesis. I will summarize my earlier argument with a new analogy, asking you to consider *Brown's* family resemblance to *Shelley v. Kraemer*, decided a few years earlier.<sup>65</sup>

*Shelley* confronted pre-New Deal decisions that allowed homeowners to use their freedom of contract to exclude blacks from their community. But now that the New Deal had repudiated freedom of contract as a central constitutional principle at Time Three, *Shelley* insisted on the need to rethink the meaning of equal protection enacted at Time Two. Given the People's new and fundamental commitment to the activist regulatory state emerging from the 1930s, the Roosevelt Court of the 1940s rightly rejected the notion that there is no "state action" involved in the judicial enforcement of racially restrictive covenants. Within the emerging framework of New Deal constitutionalism, the enforcement of these contracts was a discretionary matter of public policy, not the expression of a pre-political right of contract. As a consequence, *Shelley* engaged in a model act of Two-Three synthesis in finding that the Equal Protection Clause required a rejection of pre-existing doctrine that presupposed a natural-rights foundation for freedom of contract.

While *Shelley* focused on the broader implications of the New Deal's *repudiation* of laissez-faire constitutionalism, *Brown* focused on a key issue arising out of the New Deal's *affirmation* of the welfare state. Given the New Deal turn, public education now appeared as a paradigmatic success story of activist government, requiring a reassessment of *Plessy's* key claim that the "underlying fallacy" in the integrationist argument was that state-ordered segregation "stamps the colored race with a badge of inferiority . . . solely because the colored race chooses to put that construction upon it."<sup>66</sup>

This was no longer a "fallacy" in a constitutional order that affirmed state responsibility for so many outcomes in previously private sectors. For the Warren Court, it was obvious that black children did not, as *Plessy* asserted, "choose" to interpret segregated schooling as a badge of inferiority. Instead, *Brown* found that "separating the races is *usually interpreted* as denoting the inferiority of the negro group," and that this ongoing process of institutionalized humiliation "generates a feeling of inferiority as to their status

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65. 334 U.S. 1 (1948).

66. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>67</sup>

In my next book on *Interpretations*, I hope to refine the relationship between the project of intergenerational synthesis and (different) understandings of common-law constitutionalism. But I hope I’ve said enough to suggest why I don’t accept Professor Strauss’s suggestion that my approach to *Brown* is “lawless.”<sup>68</sup> I view *Brown* instead as a paradigmatic example of Two-Three synthesis, rethinking the meaning of “equal protection” in a world in which the activist state has accepted responsibility for achieving real-world results in broad-ranging spheres of social and economic life.

## II. THE MEANING OF THE CIVIL RIGHTS REVOLUTION

### A. *Beyond Brown*

But enough jurisprudential chit-chat.

For Professor Kennedy, *Brown* was a political decision through and through. He emphasizes Warren’s desire to write an opinion that was “short, readable by the lay public, non-rhetorical, unemotional, and above all, non-accusatory.”<sup>69</sup> But Warren’s determination to avoid inflammatory rhetoric is perfectly consistent with a good-faith effort at legal analysis. After all, judicial opinions generally strive to be “unemotional.” Sometimes it is possible to walk and chew gum at the same time: Why wasn’t Warren successful in managing this tricky business?

Indeed, the Chief Justice’s effort to reach out to the general public helps explain why *Brown* was so successful in shaping the escalating debate over the next decade. Once again, Professor Kennedy is skeptical, challenging me to provide “empirical evidence” of *Brown*’s impact. I must confess that my judgment is based on nothing more than years of immersion in the primary sources: *Brown*’s “short [and] readable”<sup>70</sup> opinion was reprinted by newspapers throughout the country, and it was the subject of endless popular commentary

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67. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (emphasis added).

68. Professor Strauss also suggests that my approach will experience great difficulty in dealing with the constitutional transformation of the status of women since the 1970s. For my treatment of these issues, see Bruce Ackerman, *Interpreting the Women’s Movement*, 94 CAL. L. REV. 1421 (2006).

69. Randall L. Kennedy, *Ackerman’s Brown*, 123 YALE L.J. 3064, 3066 (2014).

70. *Id.*

in the weeks and years that followed. Perhaps it's time for some big-data analysts to enter this particular dispute. The number-crunchers have come to my rescue on similar questions raised by my work in the past.<sup>71</sup>

In any event, Professor Kennedy's main complaint isn't with *Brown's* impact on the media, but with Warren's message: he condemns the opinion because it "says remarkably little about segregation's origins, ideology, implementation, or aims."<sup>72</sup> Or again, "Warren's opinion portrays an insult without an insulter."<sup>73</sup>

I agree. I only disagree with Professor Kennedy's suggestion that it might have been more politically productive to speak in a more prophetic voice.<sup>74</sup> Our debate on this issue should not, however, prevent us from coming to an understanding of *Brown's* enduring significance.

After all, both of us agree that the conventional understanding of *Brown's* legacy is misconceived. On the standard view that we both reject, Warren's opinion is a turning point in an ongoing judicial conversation that continues through *Loving* and *Bakke* up to the latest Delphic utterances by the Roberts Court on affirmative action. In contrast, both of us insist on a regime-oriented approach, which puts *Brown* in conversation with the men and women who successfully struggled to gain the assent of We the People to the landmark statutes of the 1960s—showing how Rosa Parks, Martin Luther King, Hubert Humphrey, Lyndon Johnson, and many others took up themes that Warren had introduced to the "lay public" in his "nonrhetorical, unemotional" fashion. In the final analysis, it is of no great importance whether Parks or Humphrey were directly influenced by Warren, or whether all of them were independent

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71. I have attempted an amateurish survey on Google Books Ngram to determine the frequency of "Brown v. Board" in its collection of American books. Unsurprisingly, this phrase appears twice as often in 1954 as it did in 1953; but it doubles again by 1960, and again by 1970, suggesting an enduring impact. Obviously, a serious study should explore other verbal formulations, and investigate their frequency in newspapers and magazines, not only books. See GOOGLE BOOKS NGRAM VIEWER, [https://books.google.com/ngrams/graph?content=Brown+v.+Board&year\\_start=1950&year\\_end=1970&corpus=17](https://books.google.com/ngrams/graph?content=Brown+v.+Board&year_start=1950&year_end=1970&corpus=17) (last visited Apr. 1, 2014).

For similar big-data investigations of other claims in *We the People*, see Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010); and Daniel Taylor Young, Note, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 YALE L.J. 1990 (2013).

72. Kennedy, *supra* note 69, at 3067.

73. *Id.*

74. For my critique of the prophetic critique of *Brown*, see 1 ACKERMAN, *supra* note 25, at 142-45.

vehicles of the constitutional *Zeitgeist*. Or, if you will allow me to lapse into my native legalese: We can both join forces in elaborating the *original public meaning* of the landmark statutes *and* judicial super-precedents of the Second Reconstruction—and thereby allow the coming generation to preserve more intelligently this precious part of their constitutional legacy.

I invite Professor Kennedy to join in this exercise with the formidable lawyerly tools at his command.

### *B. Landmark Principles*

Let me proceed, then, to a summary statement of the principles reached by the Congress, the President, and the Court during the Second Reconstruction.

First, the landmark statutes do not endorse an anti-discrimination principle or an anti-subordination principle or any other one-size-fits-all approach to equal protection. Second, these landmarks impose different egalitarian principles in different spheres of life—employment, housing, public accommodations, schooling, and voting, to name the most important. Third, as a general rule, these sphere-specific principles do not take account of the treatment that groups receive in other spheres. Fourth, *Brown's* anti-humiliation principle serves as a constitutional floor in all spheres, but it does not serve as a ceiling. Institutions have a constitutional responsibility to achieve more ambitious egalitarian objectives—real-world equal opportunity in employment and housing markets, a fair share of political power for minorities in democratic politics, and so on. Fifth, it is constitutionally appropriate for government to monitor institutional compliance with spherical principles by using technocratic statistical techniques. Last but not least, both private and public institutions are under the *same* obligations to fulfill their spherical responsibilities.<sup>75</sup> So long as the sphere is a strategic site of constitutional concern, these egalitarian obligations do not depend on whether government is visibly involved in the ways suggested by the traditional state doctrine.

Professor Rogers Smith heartily endorses the pragmatism of this overall scheme, but he has doubts about some of its moving parts. His first target is the notion of distinctive sociological spheres of life. In his view, the sphere-by-sphere approach is neither “logically mandated [n]or even logically consistent.”<sup>76</sup>

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75. See generally 3 ACKERMAN, *supra* note 1, at 127–310.

76. Smith, *supra* note 42, at 2915.



I agree that logic alone doesn't compel sphericity. Even during the Second Reconstruction, Congress and the courts created exceptions to an exclusively spherical focus, and as Cary Franklin notes,<sup>77</sup> they have more recently expanded interspherical concerns in dealing with work-home relationships in achieving equal employment opportunity for women. What is more, my closing pages call for a Third Reconstruction in which the constitutional order would move beyond spherical limits to guarantee equal protection to broad classes of people mired in poverty or confronting systematic stigmatization. My only point is that, despite the urgings of Lyndon Johnson and Martin Luther King, the American people did not embrace such system-wide principles of social justice during the Second Reconstruction.

I part company with Professor Smith, however, when he claims that the spherical approach is "logically" inconsistent. Consider, for example, the *Price Waterhouse* case described by Professor Richard Ford, in which the accounting firm turned down a Ms. Hopkins for a partnership "because of shortcomings in her 'interpersonal skills.'"<sup>78</sup> Ms. Hopkins was allegedly deficient because she failed to follow advice that "to improve her chances for promotion she should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry.'"<sup>79</sup>

Professor Ford argues that, if such allegations were true, Price Waterhouse breached its organizational obligation to provide Ms. Hopkins the real-world equal opportunity demanded by Title VII. My interpretation of the original understanding of the landmark statute strongly supports his position.<sup>80</sup>

He returns the favor, moreover, by providing me with ammunition in my argument with Professor Smith on sphericity. To see the point, suppose that Ms. Hopkins turned out to be the child of a wealthy family, who went to an exclusive private school and college before graduating from an elite business school, and that she quickly transcends her defeat at Price Waterhouse by getting a first-rate job elsewhere. Although she may remain firmly in the top tenth of one percent, Price Waterhouse has nevertheless breached its spherical obligations to her. My hypothetical Hopkins may have suffered no wrong under the anti-subordination principle, but she can still appeal to the spherical

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77. Cary Franklin, *Separate Spheres*, 123 YALE L.J. 2878, 2889 (2014).

78. Richard Thompson Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942, 2952 (2014) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234 (1989)).

79. *Id.* at 2953 (quoting *Price Waterhouse*, 490 U.S. at 235).

80. See generally 3 ACKERMAN, *supra* note 1, at 174-99.

principle that insists on real-world equal opportunity in the workplace. This shows that there is nothing *logically* “incoherent” about spherical justice.

But Professor Smith is right to suggest that anti-subordination provided a very serious competitor during the 1960s as Congress and the courts tried to hammer out a new constitutional approach to equal protection in the Jim Crow South. He emphasizes that Southern blacks experienced “systemic humiliation” in “economic, political, legal, residential, religious, cultural, recreational, [and] romantic” areas of life in a totalizing fashion.<sup>81</sup> *Within this context*, Congress and the courts were indeed faced with a big doctrinal choice. On the one hand, they could have invoked the anti-subordination principle to emphasize the systematic humiliations imposed by Jim Crow; on the other hand, they could have tried to remedy racial injustice one sphere at a time.

The protagonists were perfectly aware that they were at a crossroads – with judges like John Minor Wisdom<sup>82</sup> and senators like Abraham Ribicoff<sup>83</sup> forcefully making the case for the systemic approach over its spherical rival. I myself would have vastly preferred it if they had won this great debate. But alas, the statutory history and the evolving case-law reveals a clear choice in favor of spherical justice.

Professor Cary Franklin reads this history differently, arguing that the Second Reconstruction admits of multiple interpretations.<sup>84</sup> On her view, the canonical materials suggest a greater emphasis on interspherical impacts. To assess her claim, distinguish between two ways in which interspherical impact enters the basic equal protection argument developed by Warren in *Brown* and elaborated during the next two decades. Here is how I described the first question: “[N]ow that courts [and other decisionmakers] recognize the plurality of social spheres, they must begin to assign priorities. Which spheres are central for the guarantee of equal protection, and which aren’t?”<sup>85</sup>

To resolve this priority issue, it’s only common sense to consider interspherical relationships. Warren explains, for example, that he is prioritizing public schools in *Brown* because of their importance in preparing students for democratic citizenship, for military service, for professional

81. Smith, *supra* note 42, at 2915.

82. 3 ACKERMAN, *supra* note 1, at 236-37.

83. *Id.* at 261.

84. Franklin, *supra* note 77.

85. 3 ACKERMAN, *supra* note 1, at 130. In my five-stage reconstruction of *Brown*’s lost logic, the priority question represents step 3 in the larger argument.

training, and the like.<sup>86</sup> In developing her counter-interpretation of the sources, most of Professor Franklin's examples involve inter-spherical appeals of this type—justifying intensive statutory or judicial concern with the distinctive problems raised by employment, higher education, housing, marriage, or voting.<sup>87</sup> While much of her discussion is persuasive, it is irrelevant to the key issue raised by my thesis—which only arises at the next stage of the analysis: Once a sphere is given priority, how to evaluate the participants' claims to equal protection? In particular, if they have been treated unconstitutionally in other spheres, should this fact be taken into account?<sup>88</sup>

This is the question I mean to emphasize in speaking of interspherical impact, and it is here where I find Professor Franklin's expansive interpretation less compelling. On her view, I single out one Supreme Court decision as the “*only* instance in which the landmark decisions and statutes of the Second Reconstruction departed from ‘a sphere-by-sphere approach to racial injustice.’”<sup>89</sup> This is *Gaston County v. United States*,<sup>90</sup> which struck down literacy tests imposed on would-be black voters when they had received inferior segregated educations which made it harder to pass such tests. Despite some misleading language, I did not intend to claim that *Gaston County* was unique, but that it served “as a counterexample to my general thesis” rejecting inter-spherical impact, and that “there aren't lots of others.”<sup>91</sup> In any event,<sup>92</sup> I agree with her conclusion that “by 1970, it seems fair to say that concerns about interspherical impacts—at least those generated by racial inequalities in education—were fairly well-established *in the context of voting rights law*.”<sup>93</sup>

We part company only when she moves beyond this context. In her view, *Griggs v. Duke Power Co.* also supports her position, since it forbids employers

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86. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

87. See Franklin, *supra* note 77.

88. I introduce the notion of sphere-specific equality in my discussion of *Brown*, see 3 ACKERMAN, *supra* note 1, at 128-29 (in general), 131-33 (stages 4 and 5), but it serves as a leitmotif throughout, see *id.* at 152 (announcing a major theme organizing the remaining chapters' sphere-by-sphere examination of the civil rights revolution).

89. Franklin, *supra* note 77, at 2898 (quoting 3 ACKERMAN, *supra* note 1, at 165).

90. 395 U.S. 285 (1969).

91. 3 ACKERMAN, *supra* note 1, at 165.

92. Compare Professor Franklin's discussion of *Katzenbach v. Morgan* and *Harper v. Virginia State Board of Elections*, see Franklin, *supra* note 77, at 2895-97, with my analysis of the same cases, 3 ACKERMAN, *supra* note 1, at 107-21.

93. Franklin, *supra* note 77, at 2899 (emphasis added).

to impose seemingly neutral standardized tests which have a disproportionate impact on blacks.<sup>94</sup> But *Griggs* went on to say that the company could continue to use such tests provided that *they reliably predicted on-the-job performance*. In other words, so long as they were justified on sphere-specific grounds, testing could proceed even if it had a disproportionate effect on black applicants.<sup>95</sup> Rather than allowing extra-spherical injustices to trump intra-spherical considerations, *Griggs* insists on the primacy of spherical criteria, so long as they are genuinely relevant to the case at hand. So far as I can see, Professor Franklin doesn't take this basic point into account.

She is on solid ground when she moves beyond the civil rights era to consider *Nevada Department of Transportation v. Hibbs*,<sup>96</sup> where the Court in 2003 did indeed uphold the Family and Medical Leave Act (FMLA) on interspherical grounds: In mandating twelve weeks of family leave, the statute tried to assure greater equality in the workplace—especially for women—by requiring employers to take home-life realities into account.<sup>97</sup> Moreover, Professor Franklin uses *Hibbs* to raise a more fundamental question. As she notes, it was possible to pass the FMLA without the massive and sustained mobilization required for another successful constitutional moment. Can't we continue to make similar progress on an evolutionary basis, slowly breaking down the interspherical barriers that prevent poor and stigmatized groups from fully sharing in the gains of the civil rights revolution?

I certainly hope so—what is more, I don't see any constitutional objection to step-by-step endorsements of intersphericality. Since the Second Reconstruction engaged in such context-specific moves in the area of voting, it does provide a precedent for similar acts of specific trans-sphericity in the future.

Given the plutocratic realities of present-day politics, however, I remain skeptical about the realistic potential of small-bore approaches. If the next generation of ordinary Americans want real-world equal opportunity for their

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94. 401 U.S. 424 (1971); see Franklin, *supra* note 77, at 2902-03.

95. For a more elaborate discussion of this point, see 3 ACKERMAN, *supra* note 1, at 185.

96. 538 U.S. 721 (2003).

97. Franklin, *supra* note 77, at 2893-94. But I disagree with Professor Franklin's suggestion, *id.*, that the "interspherical kind of reasoning" exemplified by *Hibbs* was also on display in *United States v. Virginia*, 518 U.S. 515 (1996). While the Court did indeed emphasize VMI's strategic relationship to success in other spheres of life in explaining why it was prioritizing the institution for equal protection scrutiny, this priority issue is analytically distinct from the interspherical impact question under discussion here. See *supra* notes 85-88 and accompanying text.

children, they will have to win it the good-old-fashioned American way—by organizing a new political movement for a Third Reconstruction, and winning election after election until their demands for social justice are vindicated in the name of We the People.

In any event, this book's sole objective is to make it plain that such exercises of popular sovereignty have served as a vital force in our recent past, thereby providing a precedent that might serve as a lodestar for future efforts to revitalize and expand our constitutional commitments to equality in the twenty-first century.

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In presenting my six-point summary of the civil rights legacy, the principle of sphericity has turned out to be the most controversial. But Professor Smith also usefully pinpoints other questions surrounding my presentation. He suggests that my emphasis on anti-humiliation may give the impression that the landmark statutes impose “a mandate for colorblind policies.”<sup>98</sup> If so, this would be a misreading: I devote lots of pages to demonstrating that these transformative initiatives clearly endorse statistical techniques to assess real-world compliance with spherical obligations.<sup>99</sup>

It is also a mistake to read me as advocating the near-exclusive pursuit of the anti-humiliation principle. It is no less imperative to fulfill the more ambitious egalitarian objectives that the landmark statutes impose on each sphere (which, as we have seen, vary as the statutes and cases move from education to employment to housing to voting, and beyond).

It is only when the anti-humiliation principle *directly conflicts* with government-by-numbers that we have a serious priority problem. This is, at least, the lesson I draw from the Court's responses to the busing controversy of the early 1970s. In this context, I argue that the Court's stress on anti-humiliation in the *City of Emporia* case provides a better reference point than its subsequent embrace of government-by-numbers in *Keyes* and *Milliken*.<sup>100</sup> But this limited claim should not obscure the larger six-point agenda that emerges from a systematic assessment of the legacy of the Second Reconstruction.

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98. Smith, *supra* note 42, at 2913.

99. See 3 ACKERMAN, *supra* note 1, at 160-70 (discussing voting); *id.* at 180-87 (discussing employment); *id.* at 222 (discussing housing).

100. *Id.* at 267-87.

### C. *Humiliation, Reconsidered and Revitalized*

Nevertheless, the anti-humiliation principle is of great importance, and I am grateful to Professor Deborah Hellman for putting *Brown's* logic under the analytic microscope.<sup>101</sup>

On her view, Warren was only concerned with the effect of segregation on the “the hearts and minds of black school children.”<sup>102</sup> Moreover, it was “social science, rather than interpretive judgment” that served as the Court’s “tool” in determining the impact.<sup>103</sup>

I disagree. Professor Hellman is placing too much weight on Warren’s famous Footnote 11, which cites Kenneth Clark’s “doll study,” and other social scientific investigations, to establish stigmatizing impact. If we lift our eyes from the footnotes to the text, we see Warren basing his claim on the findings of a Kansas trial court that “the policy of separating the races is *usually interpreted* as denoting the inferiority of the negro group.”<sup>104</sup> Social science only comes into the argument when Warren further supports “this finding” by claiming that it “is amply supported by modern authority” – which is the point where he drops his Footnote 11.

To express the two-stage character of Warren’s argument, my elaboration of *Brown's* lost logic proceeds by distinguishing two analytically distinct steps: the first, emphasizing the capacity of “judges, and the rest of us, to make commonsense judgments about the prevailing meaning of social practices”;<sup>105</sup> the second, seeking to determine whether we can “buttress[] . . . commonsense conclusions with the findings of social science.”<sup>106</sup>

Professor Charles Black long ago urged a reading that put common sense first, and science second;<sup>107</sup> as did the Burger Court in 1972, when it codified *Brown's* doctrine in *Wright v. City of Emporia*.<sup>108</sup> Even if Warren had eliminated Footnote 11, his appeal to commonsense interpretation of social meaning

101. Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036 (2014).

102. *Id.* at 3046.

103. *Id.*

104. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (emphasis added).

105. 3 ACKERMAN, *supra* note 1, at 131.

106. *Id.* at 132.

107. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960); see 3 ACKERMAN, *supra* note 1, at 362 n.11.

108. 407 U.S. 451 (1972); see 3 ACKERMAN, *supra* note 1, at 267-70.

sufficed to ground his judgment. Professor Hellman fails to appreciate this key point.

Paradoxically, this failure makes Professor Hellman's principal arguments more – not less – important. Her main contribution isn't her (mis)reading of *Brown*. It is her invitation to refine our understanding of the stigmatizing social meanings with which *Brown* is in fact principally concerned.

Broadly speaking, Professor Hellman and I agree that these expressive assaults on dignity condemn a person or group to public dishonor – and that analytic progress will come by reflecting on the different ways in which English-speakers address the subject. For example, consider a conversation in which I tell you about an incident in which I was *humiliated*. In describing my situation in this way, I am saying something different from claiming that I have been *embarrassed* or *ashamed* or . . . .

The question Professor Hellman raises is whether *humiliation* provides the best way to describe *Brown's* deepest concerns. In her view, a better path to travel is the road marked by the verb “to demean.”<sup>109</sup>

I have a threshold problem with her proposal. It diverts us from the language used by ordinary Americans in expressing the modalities of dishonor: If I had told my uncle (who was an ordinary working guy) that I'd been shamed, embarrassed, or humiliated, he would have immediately understood what I was talking about, and we could talk about whether I'd appropriately diagnosed the incident that provoked my anxiety. But if I had told him that I'd been “demeaned,” my use of this high-toned talk would lead him to drop further conversation on the subject with his nephew from the Ivy League.

Putting this non-trivial point to one side, I'm also unpersuaded by Professor Hellman's elaboration of the concept. In her view, “demeaning” behavior is best understood by asking two questions: Is the alleged wrongdoer expressing a denigrating message? And does the perpetrator – call him the “demeaner,” since we lack a standard term – have the victim in his power?<sup>110</sup>

Professor Hellman requires a Yes to both questions before a message “demeans” its target. I disagree: As a matter of social meaning, a Yes on the first question should suffice. It's quite common for spokesmen for the powerless to demean the powerful, expressing contempt for their cavalier treatment, or despicable indifference, to others who are less fortunate. To be sure, it's easier for plutocrats or kleptocrats or their legal representatives to

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109. See Hellman, *supra* note 101, at 3046–53.

110. *Id.*

ignore these critiques, but they are nevertheless well aware of them—and they sometimes react defensively to the assaults on their honor, lashing out at the ingratitude of the masses who fail to appreciate the great social contributions of the top one-tenth-of-one-percent.

Nevertheless, these cases don't count as "demeaning" for Professor Hellman. She insists that the "demeaner" also have the victim in his or her power. In adding this second condition, Professor Hellman isn't engaged in a philosophical inquiry into community understandings expressed by ordinary language. She's doing something different, and no less commendable: She is trying to elaborate a *legal doctrine* that makes the best sense of *Brown's* effort to root equal protection law in social meaning.

When judged as an exercise in legal interpretation, however, I think her emphasis on the power of the perpetrator does not do justice to the distinctive character of Warren's reasoning. To see my point, recall Professor Kennedy's critique of *Brown*. As he rightly emphasized, Warren's opinion is distinctive precisely because it portrays an insult without an insulter.<sup>111</sup> In placing the focus on the power of the "insulter," a/k/a the "demeaner," Professor Hellman's second criterion is unfaithful to this central aspect of *Brown's* legacy.

In contrast, my account of *institutionalized* humiliation builds directly upon Warren's reasoning. Professor Hellman's critique largely misses this point because she focuses on my introductory presentation, which invites the reader to consider the occasions on which he or she has been *personally* humiliated in life. I agree with her that a fuller treatment of this subject would require a host of additional complexities.<sup>112</sup> Nevertheless, my brief treatment sufficed for my larger purpose, which was to introduce *Brown's* special concern with *institutionalized* humiliation:

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111. Kennedy, *supra* note 69, at 3069.

112. My discussion of personal humiliation is restricted to a few paradigm cases, and doesn't try to work out all the peripheral complexities. Since it was only intended as a prelude to the larger inquiry into institutionalized humiliation, a full analysis of one-on-one cases would have required a lengthy detour from my central aim.

Professor Hellman doesn't take the partial character of my effort sufficiently into account in discussing my views. For example, she believes that I am committed to the notion that "humiliating treatment is produced by virtue of some effort or intention," because I say that the "victim must 'acquiesce[] in the *effort* to impugn his standing.'" Hellman, *supra* note 101, at 3040. (Professor Hellman is quoting me, but providing her own emphasis.) But this reads too much into the word "effort," which comes in my summary conclusions derived from the analysis of paradigmatic cases of *personal* humiliation. I entirely agree that a full analysis of one-on-one cases would require a consideration of a variety of situations in which intentionality was indirect or non-existent.



Up to now, I've been telling stories of personal humiliation that occur against the background premise of shared social competence. The reason my scenarios are damaging is that they operate to strip the victim of this ongoing presumption of competence, thereby degrading him in the eyes of the relevant community. In contrast, *humiliation is institutionalized by social practices that strip an entire group of this ongoing presumption*. The imposition of a systematic degradation ritual is even worse than the individualized form . . . .<sup>113</sup>

Although Professor Hellman's main discussion involves other matters, she recognizes this key point in a characteristically fair-minded discussion of Rosa Parks's act of defiance in the Montgomery bus boycott. After presenting her critique of my views, she considers a possible response:

[Ackerman] might say that while Parks herself wasn't humiliated, the *practice* of segregating public buses was humiliating, as others certainly did acquiesce in the treatment. Or perhaps he might say that the bus driver's order to Parks to move to the back of the bus is an *attempt* to humiliate her . . . .<sup>114</sup>

She is absolutely right: this is precisely what I *would* say. In my view, it is the social practice that counts in determining the existence of *institutionalized* humiliation. More precisely, I understand an institution as a system of roles whose meanings are internalized by participants. If, for example, you reacted with surprise when a New Haven bus driver asked you to pay your bus fare as you entered, you would immediately reveal yourself to be an alien from some distant land, who knew nothing about the institution of public transportation in America. As a well-socialized resident of New Haven, you would not need any such instruction: it simply "goes without saying" that you are supposed to drop the money in the machine.

This much is obvious, but we'll hit pay-dirt by continuing the bus story beyond the boarding stage: Imagine that the New Haven bus is almost empty—there's only a black couple sitting toward the back, and a white guy sitting toward the front. Boarding in 2014, this spatial pattern would have no special significance to you or me. In enacting my social role as bus passenger, it goes without saying that I can sit anywhere I like, and so can everybody else.

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<sup>113</sup>. 3 ACKERMAN, *supra* note 1, at 139 (emphasis added).

<sup>114</sup>. Hellman, *supra* note 101, at 3043.

But this was not true in Montgomery in 1955. To the contrary, *all* socially competent actors had then internalized a very different understanding of their social role as bus passengers, requiring them to match their seats with their race. Not only that, this form of role-playing had a particular social meaning: “separating the races is *usually interpreted* as denoting the inferiority of the negro group”—if I may be permitted to extend Warren’s words from the sphere of public schools to the sphere of public transportation.<sup>115</sup>

Institutionalized humiliation can survive even if every single white and black person on the bus conscientiously believed that segregation was terrible. Professor Hellman describes the social meaning of segregation as “objective,” but to emphasize its sociological character, I will call it the *conventional* meaning of a particular role-system that has been institutionalized in a particular time and place. Such conventions do not necessarily depend on the bus company, or other institution, putting up a big sign proclaiming that “Negroes should go to the back of the bus.” They can often survive without an express announcement, so long as the relevant institution doesn’t take affirmative action to revolutionize existing practices. This means that the national or state government may well be obliged to deploy technocratic techniques—“government by numbers”—to determine whether institutions are complying with their constitutional responsibilities.

But as Professor Kenji Yoshino notes, test-case litigation may also provide a valuable vehicle for bringing forms of institutionalized humiliation forward for constitutional scrutiny.<sup>116</sup> Professor Yoshino is also right to see *Lawrence* and *Windsor* as contemporary vindications of the anti-humiliation principle. Although Justice Scalia denounces Justice Kennedy’s opinion as meaningless “argle-bargle,”<sup>117</sup> the majority opinion virtually paraphrases *Brown*’s famous lines in emphasizing the “humiliat[ions]” DOMA imposed on “tens of thousands of children now being raised by same-sex couples . . . mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>118</sup>

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115. While the Supreme Court upheld the lower court decision requiring desegregation of the Montgomery buses in *Gayle v. Browder*, 352 U.S. 903, 903 (1956), its cryptic per curiam did not explicitly extend *Brown*’s reasoning in the way that I have done here.

116. Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076 (2014).

117. *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

118. *Id.* at 2694 (majority opinion).

Justice Kennedy does not expressly link his formulations to Chief Justice Warren's in *Brown*—probably to avoid a premature attack on the state statutes imposing second-class status on the LGBT community. Nevertheless, Warren's teachings seem decisive in future cases: After all, if *Brown* was right to condemn institutionalized humiliation by states on the basis of race in the sphere of education, why shouldn't the anti-humiliation principle require the Roberts Court to strike down institutionalized humiliation by states in the sphere of marriage?

If there is a good answer to this question, I haven't heard it yet. If Justice Kennedy follows through on his previous opinions, he will establish that the civil rights revolution is alive and well in this contemporary struggle for dignity.

#### *D. The Decline and Fall(?) of Title VII*

But *Windsor* is very much the exception to the general rule followed by the Roberts Court.

Professor Sophia Lee tells the tragic story of the ongoing judicial trivialization of Title VII's great constitutional breakthroughs.<sup>119</sup> During the civil rights revolution, Congress and the President not only repudiated restrictive state action doctrines, inherited from the First Reconstruction, to require hundreds of thousands of private businesses to assure real-world equality of opportunity for blacks and other vulnerable groups. They also authorized technocratic tests to enforce this demanding constitutional responsibility on employers.

Yet decades of judicial hostility have now set the stage for today's Justices to launch an all-out assault on government-by-numbers in this sphere. Professor Lee explains how the case-law has evolved since 1973 to create the impression that We the Judges of the Roberts Court have the authority to strike down one of the greatest achievements of We the People of the Twentieth Century.

As she suggests, this act of betrayal isn't inevitable. It remains doctrinally plausible for a judicial majority to engage in a bit of legalistic jiu-jitsu—using the nineteenth century's "state action" doctrine to preserve a portion—but only

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119. Sophia Z. Lee, *A Revolution at War with Itself? Preserving Employment Preferences from Weber to Ricci*, 123 YALE L.J. 2964 (2014).

a portion—of the twentieth century’s commitment to government-by-numbers.<sup>120</sup>

But, as Lee anticipates, I have a more fundamental complaint. It is utterly illegitimate for the Court to betray *any* part of the twentieth century’s landmark statute on the ground of its incompatibility with the Fourteenth Amendment’s narrower nineteenth-century understanding of equal protection. In case of a conflict between two constitutional moments, it is the later decision by We the People that trumps the earlier one.<sup>121</sup> This act of judicial betrayal is especially bitter, given the history of the Fourteenth Amendment’s enactment presented in *Transformations*. As I show there, the Reconstruction Congress only succeeded in putting the Amendment on the books by playing fast and loose with many of the rules and principles established by Article Five.<sup>122</sup>

In contrast, the Title VII story provides a case study in modern higher lawmaking at its very best. In taking up the problem of fair employment, Congress and the President did not come to their breakthrough decisions lightly. They reached them over the course of an eight-year process of deliberation, experimentation, and repeated shows of broad and deep political support—beginning with the authorization of technocratic experimentation in the 1964 Act, followed by the EEOC’s creative elaborations during the next six years, followed by the Supreme Court’s explicit approval of agency expertise in

120. *Id.* at 2974.

121. See *supra* p. 3121.

122. To encourage readers to immerse themselves in the full blow-by-blow account presented in *We the People: Transformations*, here is John Bingham calling upon his colleagues to endorse the desperate expedients of the Fourth Reconstruction Act because the “final ratification and incorporation” of the Fourteenth Amendment “may depend” on their approval. No less significantly, Bingham was not embarrassed by this brute appeal to realpolitik. To the contrary, he took to the floor to bring its importance to “the attention of the House and of this country.” See 2 ACKERMAN, *supra* note 20, at 231. Similarly, the point was so obvious at the time that Justice Miller emphasized it in his opinion for the Court in the *Slaughter-House Cases*:

[T]he statesmen who had conducted the Federal government in safety through the crisis of the rebellion . . . passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

83 U.S. (16 Wall.) 36, 70-71 (1872) (emphasis added).

Professor Mark Graber greatly enriches my account of the problematic origins of the Fourteenth Amendment in his work-in-progress, *Constructing Constitutional Politics: The Reconstruction Strategy for Protecting Rights*.

Griggs, followed by the self-conscious endorsement of government-by-numbers by President Nixon and Congress in their fair employment statute of 1972—thereby reaffirming the breadth and depth of the support for this initiative by the American people.<sup>123</sup>

It would be a very sad day if the Roberts Court were to condemn this landmark achievement of We the People of the Twentieth Century because it violated its (cramped) interpretation of the “equal protection” clause enacted under far more problematic circumstances in the aftermath of the Civil War.<sup>124</sup>

Given the stark factual contrast between the First and Second Reconstructions in winning the broad support of the American people, I don’t think it’s necessary to confront an important theoretical question raised by Professor Lee. As she explains, the story she tells does indeed suggest the need for dualist theorists to elaborate criteria for determining when “the window for [higher lawmaking] closes and [the period] for judicial betrayal opens.”<sup>125</sup> I am particularly reluctant to write a paragraph or two because Professor Stuart Chinn has devoted an entire book to the subject in his forthcoming *Recalibrating Reform: The Limits of Political Change*.<sup>126</sup> Since I’m sure the book will provoke lots of debate, we may well gain greater clarity on the stakes raised by the issue of closure over the next few years.

In the meantime, Professor John D. Skrentny’s essay raises a new agenda for fair employment law.<sup>127</sup> Over the decades, a wide range of private and governmental institutions has gradually elaborated a strategy of “racial realism” that endorses a novel form of affirmative action based on neither the anti-humiliation nor equal opportunity principles codified by Title VII. Under this approach, racial preferences are granted for the purpose of maximizing firm profits or other institutional goals. Professor Skrentny is right to suggest that “realistic” racial preferences raise fundamental issues under the landmark statute.

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123. 3 ACKERMAN, *supra* note 1, at 184–94.

124. See Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627 (2013) (reaching a similar methodological conclusion after an independent assessment of the ratification of the Fourteenth Amendment).

125. Lee, *supra* note 119, at 3000.

126. STUART CHINN, *RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE* (forthcoming 2014). I comment on an earlier version of Chinn’s thesis in Bruce Ackerman, *Beyond Presentism: A Comment on Stuart Chinn’s Race, the Supreme Court, and the Judicial-Institutional Interest in Stability*, 1 J.L. 185 (2011).

127. John D. Skrentny, *Have We Moved Beyond the Civil Rights Revolution?*, 123 YALE L.J. 3002 (2014).

As he emphasizes, Title VII does *not* explicitly allow for race to serve as a bona fide occupation qualification for a job—and for an obvious reason. Before it was passed in 1964, businesses had often justified blatant acts of racial discrimination on profit-maximizing grounds. Time and again, employers denied that they themselves were racists in refusing equal opportunity to blacks. They tried instead to excuse their discriminatory practices by explaining that they were simply satisfying racist customers, who were insisting on service by their race-mates. Given consumer preferences, equal opportunity was bad business.

The landmark statute decisively rejected such excuses in 1964; the question is whether equal protection law, as elaborated by Title VII, should also reject them in 2014. The issue is especially important since, as Professor Skrentny points out, “racial realism” pushes some blacks down dead-end career paths that “lack promotion possibilities.”<sup>128</sup>

I cannot do justice to the complex issues raised by Professor Skrentny’s contextual analysis.<sup>129</sup> But I can highlight the jurisprudential stakes involved, by contrasting my general position to the common-law approach favored by Professor Strauss. On his model, thoughtful judges can’t help but be impressed by the broad-ranging adoption of “racial realism” by social, political, and economic institutions in the early twenty-first century. The depth and breadth of this sea change provide very strong arguments in favor of its acceptance by common law constitutionalists.

In contrast, as Professor Skrentny anticipates, my emphasis on the judicial imperative to preserve the achievements of the Second Reconstruction leads to a more critical encounter with these social and economic trends. Contemporary acceptance of “racial realism” in a variety of low-visibility contexts should not be allowed to erase the high-visibility decision by *We the People* to reject profit-maximization, and analogous considerations, as legitimate reasons for discriminatory treatment during the civil rights revolution. This self-conscious decision places a heavy burden of constitutional justification on the defenders of evolving practices, however “realistic” they may seem to business, non-profit, and governmental officials.<sup>130</sup>

Given Professor Lee’s sad story about the disintegration of Title VII case-law over the past half-century, it’s anybody’s guess how the courts will

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128. *Id.* at 3033-34.

129. Which is elaborated more fully in his new book, JOHN D. SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* (2013).

130. Skrentny, *supra* note 127.

confront “racial realism” issues as they arise on their dockets. But the competing aspirations of preservationism and common law constitutionalism can’t help but make a difference—both in the pattern of judicial decisions and in the larger society’s understanding of the civil rights legacy.

*E. The Tragedy of the Voting Rights Act*

Finally, let’s turn to the sphere in which the Court’s betrayal of the twentieth century is most obvious: voting rights. My concluding Chapter confronts Chief Justice Roberts’s opinion in *Shelby County v. Holder*,<sup>131</sup> which struck down key provisions of the Voting Rights Act. This opinion not only repudiates the core of a great landmark statute endorsed by the American People during the Second Reconstruction; it also reveals a shocking ignorance surrounding the history of the Fourteenth Amendment, and how it provides independent support for the modern Voting Rights Act.<sup>132</sup>

Professor Samuel Bagenstos considers how Congress might respond to this disaster—arguing that race-specific, as well as universal, remedies are required to sustain the integrity of the democratic process in the twenty-first century.<sup>133</sup>

His arguments are persuasive, but it is important to add another factor into the equation: President Obama and Congress should make it clear that it was *wrong* for Chief Justice Roberts to strike down the twenty-five-year statutory renewal enacted into law as the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. As the statutory title suggests, President George W. Bush and his Republican

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131. 133 S. Ct. 2612 (2013).

132. Section 2 of the Fourteenth Amendment provides that states that create barriers to black voting can suffer a proportionate reduction in their representation in the House and in the Electoral College. U.S. CONST. amend. XIV, § 2. This provision, together with section 5 of the Fourteenth Amendment, provides Congress with all the authority it needed to enact the Voting Rights Act of 2006, as “appropriate legislation” preventing states from suffering the severe reductions in their representation in the House and in the Electoral College that would otherwise occur by barring black voters from the polls in violation of section 2. But neither the Court’s opinion by Chief Justice Roberts, nor the dissent by Justice Ginsburg, even mentions the existence of section 2. To the contrary, the Chief Justice asserts a presumption of equal state sovereignty, without noting that section 2 *explicitly* rejects this principle in the sphere of voting rights. I know of no decision in American history which engages in a similar act of judicial amnesia. For further discussion, see 3 ACKERMAN, *supra* note 1, at 330–32, 403–04 nn. 9–12. See also Graber, *supra* note 122.

133. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838 (2014).

Congress believed it essential to sustain the country's commitment to one of the greatest achievements of the American people in the twentieth century—what is more, they passed this statute with overwhelming majorities even though it did not serve the narrow partisan interest of the Republican Party.

The Roberts Court simply had no authority to repudiate this solemn act of political recommitment. Congress and the President have a high responsibility to put the Court on notice that similar acts of betrayal will further discredit its claim to serve as a bulwark against the erosion of the great constitutional achievements of the past two centuries.

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Let me conclude with a fast-forward to the year 2033, when Americans will be celebrating another remarkable semi-centenary. Fifty years earlier, President Ronald Reagan signed legislation making the birthday of Martin Luther King, Jr. into a national holiday. Before 1983, Americans celebrated only three special days directing civic attention to their constitutional legacy: Independence Day, Washington's Birthday, and Lincoln's Birthday (outside the South). But President Reagan and Congress transformed this long standing tradition into our modern trinity: Independence Day, President's Day, and Martin Luther King, Jr. Day. How, then, will Americans celebrate MLK Day in 2033?

Perhaps in the manner we celebrate President's Day in 2014. Throughout the land, there are pallid public ceremonies, and high school civics classes, memorializing the heroic achievements of Washington and Lincoln. But the eyes of the Nation are fixed on the latest news of President's Day bargains, with Americans rushing to the stores in an orgy of cut-rate consumerism.

By 2033, MLK Day may be like that too. Lawyers and judges will play an honored part in school classrooms and civic ceremonies: If they are formalists, they will tell of Dr. King's role in enacting the Twenty-Fourth Amendment; if they are court-centered doctrinalists, they will cite even more obscure texts, say *Gayle v. Browder*,<sup>134</sup> to explain the complicated ways the Warren Court intervened to support King's civil rights struggle. As the audiences nod their heads with a ritual show of respect, their eyes will be glued to their super-iPhones in search of the best MLK Day bargains.

But a different future is also possible.

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134. 352 U.S. 903 (1956) (per curiam).



Behold: Lawyers, judges, politicians, and ordinary Americans are telling each other the dramatic story of mobilized civil rights engagement with a bipartisan coalition in Congress, the presidency, and the Court, that revolutionized our collective commitment to real-world equality. As they tell stories of the Second Reconstruction to one another, what will happen next?

Perhaps Americans of 2033 will turn off their Google Glass for a moment and look at the real-world injustices in their midst? Perhaps they will ask one another whether they too might contribute to the great tradition of popular sovereignty to which King dedicated his life?

We shall overcome.