

## A MOMENT FOR PRAGMATISM

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WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION. By *Bruce Ackerman*. Cambridge and London: Harvard University Press. 2014. Pp. xi, 419. \$35.

### INTRODUCTION

One of the least controversial things to say about the U.S. Constitution is that it has proven very difficult to amend. The numbers are familiar. Only 27 amendments have been made since the Constitution was ratified, and 10 of those were adopted at the same time, only a few years after the original ratification. These numbers are all the more remarkable given that there have been over 11,500 attempts to amend the Constitution since it was first enacted.<sup>1</sup> The paucity of amendments is also striking as a comparative matter. The national constitution that India approved in 1949 has been amended 98 times since then,<sup>2</sup> and Alabama's 1901 constitution has been amended a whopping 880 times.<sup>3</sup>

Perhaps the resistance to constitutional change was hardwired into the design of the American Constitution. In requiring multiple supermajorities,<sup>4</sup> Article V creates the kind of formidable procedural obstacles that are avoided in systems that permit amendment through simple majorities or national ballot measures.<sup>5</sup> Alternatively, it may be that the founders did not foresee this extreme dearth of amendments. After all, when Article V was

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1. *Measures Proposed to Amend the Constitution*, U.S. SENATE, [https://www.senate.gov/pagelayout/reference/three\\_column\\_table/measures\\_proposed\\_to\\_amend\\_constitution.htm](https://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm) (last visited Nov. 2, 2014).

2. INDIA CONST.; *see also Amendments*, NAT'L PORTAL OF INDIA, <http://india.gov.in/my-government/constitution-india/amendments> (last visited Nov. 2, 2014) (listing amendments).

3. ALA. CONST.; *see also Constitution of Alabama – 1901*, ALA. ST. LEGISLATURE, [http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/Constitution1901\\_toc.htm](http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/Constitution1901_toc.htm) (last visited Nov. 2, 2014) (listing amendments).

4. Article V allows amendments to be proposed only by a constitutional convention called for by two-thirds of the states or by a supermajority of both houses of Congress, and in both cases it requires ratification by three-quarters of the states. U.S. CONST. art. V.

5. The California initiative process offers a domestic example of a majority-rule system. *See* CAL. CONST. art. II, §§ 8–10. For a comparative law perspective, see Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014). Of course, streamlining the amendment process does not always translate to a constitutional culture of multiple amendments.

written in 1787, there were only thirteen states; the requirement that three-quarters of the states ratify amendments *relaxed* the Articles of Confederation's requirement of unanimity to amend;<sup>6</sup> and whatever form of political polarization existed at the framing was likely less complex and embedded than it has become over time.<sup>7</sup> Then too, given how closely the Constitution followed on the heels of the Articles of Confederation, the founders may simply not have foreseen the longevity of the Constitution and the need that would emerge to amend it.

Explanations aside, the undeniable difficulty of amendment has motivated basic debates in constitutional scholarship—debates that are often cast in metaphors of mortality. The functional inability to keep the document in sync with societal change aggravates anxieties about the “dead hand” of the past and fuels attempts to justify “living constitutionalism,”<sup>8</sup> which makes interpretation the mechanism for updating. At the same time, some have argued that living constitutionalism paradoxically exacerbates the “dead hand” problem by removing the impetus to amend; strict adherence to originalism might create effective pressure for actual Article V amendments.<sup>9</sup> Beyond this set of interpretive battles, the problem also features in the turn toward popular constitutionalism, which acknowledges the rarity of Article V amendments and advocates ongoing democratic participation in shaping constitutional norms.<sup>10</sup>

As a descriptive matter, it has been judicial interpretation—not formal amendments—that has done the most to keep the Constitution current with massive social, economic, and cultural change. Whether that state of affairs is normatively appropriate remains one of the basic questions in constitutional theory. Bruce Ackerman,<sup>11</sup> in an influential and generative series of books, rejects the conventional structure of this debate and proposes a different way of looking at things.<sup>12</sup> Ackerman suggests that a rare handful of

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6. See ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 1.

7. See, e.g., Jonathan Haidt & Marc J. Hetherington, *Look How Far We've Come Apart*, N.Y. TIMES (Sept. 17, 2012, 9:48 PM), <http://campaignstops.blogs.nytimes.com/2012/09/17/look-how-far-weve-come-apart/> (examining research in political science that looks at variations in polarization over time).

8. For recent versions of living constitutionalism, see JACK M. BALKIN, *LIVING ORIGINALISM* (2011), and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010). Despite the title of Professor Balkin's book, I regard it as more about living constitutionalism than about originalism as understood by many originalist scholars.

9. See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013). McGinnis and Rappaport argue that, if courts had faithfully adhered to originalist methodology, there might well be more Article V amendments. See *id.* at 88.

10. See, e.g., David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048–64 (2010) (noting the link to Article V and offering a typology of popular constitutionalist approaches).

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12. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

historical “constitutional moments,” such as the New Deal,<sup>13</sup> have filled the vacuum resulting from the gaping lack of formal amendments. His reckoning of American constitutional and political culture distinguishes between “normal” politics, when the citizenry is largely inattentive and inert, leaving lawmaking to its representatives, and “higher” politics, when the citizenry is actively engaged in decisive historical moments that achieve and reflect significant constitutional change.<sup>14</sup> Ackerman’s central proposition is that constitutional change can come without any formal constitutional amendment at all. And while courts have a role to play in bringing about this kind of change, his principal emphasis is reflected in the phrase that names the series: *We the People*. Ackerman identifies a threat to popular sovereignty when citizens leave matters of constitutional change to courts alone.<sup>15</sup> He accordingly stresses the qualities of public engagement that characterize these rare, but potent, constitutional moments. Indeed, the first volume of *We the People*, and the lectures that preceded it,<sup>16</sup> can be seen as an early—if somewhat idiosyncratic—incarnation of the popular constitutionalism that has risen to scholarly prominence today.<sup>17</sup>

In the third and most recent volume of his series—*We the People: The Civil Rights Revolution*—Ackerman focuses on what is sometimes called the “Second Reconstruction.” His narrative of the civil rights era in the 1950s and 60s is a rich and textured political history, rendered with elegance and panache. The analysis is often subtle, and it bristles with insights and fascinating stories from behind the scenes in Congress, the Oval Office, and the Supreme Court. Ackerman’s account leaves the reader with no basis to quarrel with the idea that the civil rights era was of surpassing importance to the country. The harder question, and the one on which I will focus in this Review, is how to characterize the *nature* of this importance in terms of the Constitution.

In Part I, I briefly summarize the key elements of Ackerman’s story. In Part II, I set out and contrast two frameworks for understanding the events chronicled in the book. While these frameworks are related, they diverge in significant ways. The first reflects Ackerman’s own framework, and the second represents a more modest approach I call *pragmatic adaptation*. In Part III, I identify problems in Ackerman’s framework, arguing that his case falls short at several points and that he overplays his hand by forcing momentous *legislative* achievements into the template of constitutional amendment. In doing so, Ackerman bypasses more defensible ways of understanding the civil rights era in relation to the Constitution. I ultimately suggest that, from both a descriptive and normative perspective, pragmatic adaptation serves as

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13. ACKERMAN, TRANSFORMATIONS, *supra* note 12, at 273–74.

14. *Id.* at 4–6.

15. *Id.* at 16–17.

16. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

17. See Pozen, *supra* note 10, at 2048–64, for an overview of contributions to this literature.

a better way to harness Ackerman's insights without triggering some of the most substantial difficulties that his account presents.

### I. THE CIVIL RIGHTS REVOLUTION

Volume 3 in Ackerman's series spans from roughly the epochal decision in *Brown v. Board of Education*<sup>18</sup> to the early 1970s. The analysis focuses especially on the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, along with key early judicial encounters with these statutes. Ackerman adds a brief coda about the Supreme Court's recent decisions in *United States v. Windsor*<sup>19</sup> and *Shelby County v. Holder*.<sup>20</sup> Just as Ackerman saw the New Deal as a constitutional moment in the previous volume of the series,<sup>21</sup> he sees the civil rights era as such a moment in this volume.

In his narrative, Ackerman emphasizes the actions taken by elites, including congressional leaders; Presidents Kennedy, Johnson, and Nixon; Supreme Court justices; and Martin Luther King Jr., the civil rights movement's most visible leader. Ackerman analyzes their actions through the prism of the "formidable obstacle course" (p. 42) that the American system creates for proponents of substantial change—a course that is complicated by the staggered terms of office across the executive and legislative branches and the resulting need for successive elections to bring about genuine change (p. 43). Ackerman's core proposition is that such change ought to be seen as not only fundamental but *constitutional* in a meaningful sense.

Using criteria he introduced in earlier work, Ackerman identifies six stages in what he calls the "popular sovereignty dynamic" (pp. 44–46). In his telling, each of these six stages was on display during the civil rights movement and combined to produce an Ackermanian constitutional moment—that is, an era of significant changes that had the functional effect of amending the Constitution and should be regarded as such. The six stages are as follows: (1) Signaling (*Brown* put racial equality on the agenda); (2) Proposals (the Civil Rights Act of 1964 was offered as a potent national response to discrimination); (3) Triggering Election (1964, with Johnson overwhelming Barry Goldwater); (4) Mobilized Elaboration (the Supreme Court upheld congressional power to enact the Civil Rights Act and thus paved the way for the further elaboration of norms through the Voting Rights Act of 1965 and the Fair Housing Act of 1968); (5) Ratifying Election (1968, when Nixon beat Hubert Humphrey but nevertheless defended key aspects of civil rights legislation and the Supreme Court's response to discrimination, with these changes signifying bipartisan support for core principles); and (6) Consolidating Phase (Nixon advanced certain policies, such as affirmative action, while rejecting others, such as busing) (pp. 51–52, 64–78).

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18. 347 U.S. 483 (1954).

19. 133 S. Ct. 2675 (2013).

20. 133 S. Ct. 2612 (2013).

21. ACKERMAN, *TRANSFORMATIONS*, *supra* note 12, at 346.

Two elements form the heart of the book: it first describes and documents these six stages, and then it traces how different institutions and forces combined to produce constitutionally significant change. In the next Part, I discuss in more detail the second element, contrasting it with an alternative account of the same events.

## II. CONSTITUTIONAL MOMENT V. PRAGMATIC ADAPTATION

In this Part, I will suggest two different ways to state a thesis flowing from Ackerman's basic narrative and then explore what turns on the differences between these formulations.

The first version is the one found in the book, and it represents the more robust version of the claim: the civil rights revolution was a "constitutional moment." In a nutshell, Ackerman argues that in the wake of *Brown*, the public and all three branches of government were focused on moving beyond the arena of school segregation and advancing new policies against racial discrimination. In an ideal world, the text of the Constitution would have been amended to reflect this urgent and deepened commitment. For example, the Constitution could have been amended to lay the groundwork for a law like the Civil Rights Act of 1964 by explicitly overruling the 1883 *Civil Rights Cases*,<sup>22</sup> which barred Congress from using its Section 5 enforcement power under the Fourteenth Amendment to ban racial discrimination by merchants, private employers, and other nonstate actors.<sup>23</sup> An amendment unambiguously authorizing Congress to ban discrimination in markets would have fundamentally altered the constitutional landscape. But that path was not taken. In Ackerman's view, though, the fact that the document was not formally amended to strengthen constitutional protections against the depredations of racism and discrimination does not mean that the Constitution was not *functionally* amended.<sup>24</sup> Following the Supreme Court's lead in *Brown*, in which the Court self-consciously chose to address only the issue of school segregation, Congress proceeded to consider legislation in discrete areas on a "sphere-by-sphere" basis (pp. 129, 165). The laws that were enacted in the 1960s were understood by their proponents to represent "landmark statutes to amend the constitution," and these laws were considered "*a legitimate alternative to the path set out by Article V*" (p. 83). Courts and others should therefore accord these statutes the normative significance of constitutional amendments. As with legislation enacted during the New Deal, this transformative legislation, and the actions taken by courts, agencies, and citizens in relation to it, was generated during a "constitutional moment." The legislation therefore deserves recognition as a full and equal member, as it were, of what Ackerman calls the constitutional canon (p. 7).

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22. 109 U.S. 3 (1883).

23. The Civil Rights Act of 1875 provided that public accommodations must be available to all, regardless of race. In doing so, it regulated market actors. The Supreme Court concluded, however, that this provision was not supported by Section 5 of the Fourteenth Amendment, which the Court held reached only actions taken by states. *Id.* at 16–17.

24. See, e.g., pp. 19, 81–83.

Contrast a different version of these events. This alternative version is what I have called a story of pragmatic adaptation.<sup>25</sup> This account—a more tempered version of the events chronicled in the book—similarly views the civil rights era as a historically significant time of multi-institutional engagement that generated and embedded in society important new public values about equality. On this view, civil rights advocacy, including the enactment of the Civil Rights Act of 1964 and later legislation, was broadly inspired by norms of equality and citizenship traceable to the Fourteenth Amendment. These norms became a rallying cry for social movements, political leaders, and lawyers. In a general way, the movement to enact these laws took ideas about racial equality from *Brown v. Board* to the political realm and made them the basis for landmark bills that went much further than *Brown* itself. In the absence of an amendment overruling the *Civil Rights Cases*, the Supreme Court accepted an alternative source of congressional power—the Commerce Clause—to authorize congressional enactment of the Civil Rights Act (pp. 147–48). While perhaps a textually obtuse strategy, such judicial accommodation exemplifies what has been a core characteristic of our constitutional culture for a long time. Even without clear constitutional text, courts and political actors have frequently made creative use of other parts of the Constitution to adapt the document to current times and enable it to address important problems.<sup>26</sup> And the political branches have supplemented the apparatus of the Constitution with legislation and administrative actions that pursue and amplify broad values enshrined in the document.

We can productively understand the civil rights revolution in these terms. In the absence of specific constitutional text or amendments to address problems like widespread discrimination in employment and public accommodations, the political branches took action through legislation, the Court used available constitutional authority to uphold this legislation, and, as a result, significant change was made. Even though the Civil Rights Act and the Voting Rights Act reflected *legislative* change, not constitutional change, these changes were nevertheless extremely important. And, while not themselves constitutional measures, the landmark laws were inspired by constitutional norms and supported by constitutional interpretation.

In the remainder of this Review, I argue that this second account proves more descriptively accurate and more institutionally viable than the first, Ackermanian account of the same events. In light of the problematic claims in Ackerman's account, I suggest that his rich history of the era is better

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25. The alternative account I briefly set out here is in sympathy with WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010). Unlike the arguments in that book, however, the ideas sketched out here do not lean in the direction of Ackerman by recognizing a “small ‘c’ constitution” of which statutes are a part.

26. A notable example is the idea of substantive due process in the wake of the Supreme Court's early evisceration in the *Slaughter-House Cases* of the more textually plausible Fourteenth Amendment Privileges and Immunities Clause. 83 U.S. (16 Wall.) 36 (1872).

understood through a lens of pragmatic adaptation than through one of high constitutional moments.

### III. CLAIMS THAT FALL SHORT

I focus now on a few key elements of Ackerman's argument and explain why the argument ultimately falters. Understanding the problems with Ackerman's account helps to show why the history he marshals is better understood in the more modest framework I have suggested.

#### A. *The Subjective Understanding That the Constitution Was Being Amended*

To the extent that Ackerman wants the civil rights era to reflect a distinctively *constitutional* form of change, he carries some burden of proof. At a minimum, he must establish that those involved in what he calls a "popular-sovereignty dynamic" (p. 116)—public officials, social movements, citizens—knew that they were making, or trying to make, constitutional change. Otherwise, we risk devolving into a word game in which what is "really important" becomes "constitutional." To cabin what might qualify as a constitutional moment, Ackerman offers his six stages—signaling, proposals, triggering election, mobilized elaboration, ratifying election, and consolidation.<sup>27</sup> Each of these criteria is fuzzy, however, and each raises its own questions. To name a few, who decides if these tests are met? On the basis of what evidence? How can we know, precisely, what voters did and did not "ratify" in an election, or whether they were on notice of what to ratify or reject? Moreover, there is a temporal problem here. Ackerman's criteria, by their very nature, seem to call for objective, ex post application to historical facts. By contrast, a meaningful conception of collective awareness or intentionality is an ex ante notion that goes to the issue of subjective self-consciousness at the critical moments.

Meeting this burden of proof is no mean feat, and Ackerman appears to fall short. Sometimes, the evidence he proffers on the issue of self-conscious constitution amending is simply much too general. For example, in discussing the Voting Rights Act, Ackerman contends not only that "Martin Luther King Jr., Lyndon Johnson, and many other leaders were well aware that they were using landmark statutes to amend the constitution" but also that "*they publicly defended this choice as a legitimate alternative to the path set out by Article V*" (p. 83). What is the evidence? At one point, Ackerman notes that a key address that Johnson delivered to Congress invoked Lincoln and the Emancipation Proclamation and thus "anchored the meaning of the [civil rights] crisis within the constitutional past" (p. 96). Does a passage this amorphous really get us beyond the general idea of historic importance? Indeed, statutes like the Voting Rights Act are probably more important as a

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27. See *supra* Part I.

functional matter than, say, the Twenty-Fourth Amendment (which outlawed the poll tax in federal elections). But this does not itself—and need not—turn these laws into constitutional provisions. There is something especially odd about characterizing a statute passed under congressional enforcement power explicitly granted by previous constitutional amendments as a de facto constitutional amendment. That is, the Voting Rights Act was not intended to *amend* the Fourteenth and Fifteenth Amendments but to legislatively *enforce* them as they were written—in line with the very kind of congressional enforcement that Ackerman celebrates in the book.<sup>28</sup>

Sometimes, the argument falls short in other ways. For example, in one of the most powerful parts of the book, Ackerman deftly tells the tale of the forgotten section 10 of the Voting Rights Act, a section in which Congress expressed its view that state poll taxes are unconstitutional and instructed the attorney general to seek judicial relief against them.<sup>29</sup> He describes this as a “collaborative” model of constitutionalism (pp. 107–08). While section 10 is a noteworthy provision with an intriguing story, for many reasons its passage does not rise to the level of a surrogate constitutional amendment. For one thing, it is quite a stretch to think that many citizens would have known about the content of section 10.<sup>30</sup> Without that knowledge, the “popular” part of “popular sovereignty” founders. For another, Ackerman’s narrative elaborately shows us how section 10 went on to be “eras[ed]” when advocates and the Supreme Court chose largely to ignore it (p. 114). Whatever ambitions this exercise of collaborative congressional constitutionalism had, then, they failed to materialize. Indeed, when the Supreme Court struck down state poll taxes in *Harper v. Virginia Board of Elections* in 1966,<sup>31</sup> it ignored section 10. Ackerman laments this neglect and sharply criticizes the advocates—including Thurgood Marshall, then the solicitor general—for failing to press the point (pp. 111–13). Still, the eclipse of section 10 proves damning to Ackerman’s theory because the provision hardly offers persuasive proof of popular sovereignty and an informal amendment to the Constitution if it was broadly ignored and failed on its own terms.

Moreover, Ackerman offers as evidence of self-conscious, informal constitutionalism actions (like the passage of statutes) that unfolded alongside acts of formal constitutionalism (like the passage of a constitutional amendment or the issuance of a judicial decision) (pp. 121–23). It does not seem unduly formalist to think that the latter creates a reasonable negative inference about the constitutional character of the former. Once again, consider

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28. For an originalist argument that “Section 5 reflected the common expectation that Congress, not the courts, would be the principal agency for enforcement of the Fourteenth Amendment,” see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1113 (1995).

29. Voting Rights Act of 1965, Pub. L. No. 89–110, § 10, 79 Stat. 437, 442 (codified as amended at 42 U.S.C. § 1973h (2012)).

30. See generally Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 756 n.90 (2004) (collecting sources documenting citizens’ lack of knowledge about legislation and public policy).

31. 383 U.S. 663 (1966).



the poll tax. The Twenty-Fourth Amendment was ratified in 1964. Given that the amendment did not reach state elections, it would be reasonable for an observer to assume that the provisions of the 1965 Voting Rights Act addressing state poll taxes were not *also* constitutional amendments. That Congress expressed its view of the constitutionality of state poll taxes remains significant, and Ackerman is quite persuasive in arguing that the Court could and should have done more with it. But that alone does not mean that the passage of the Voting Rights Act ought to have been taken as a constitutional amendment or, more relevant to this discussion, that it was taken as such by the populace or even by legislators. The idea that the Voting Rights Act did not itself change the Constitution was further reinforced only a year later when the Supreme Court in *Harper* used a part of the written Constitution—the Fourteenth Amendment—to strike down state poll taxes.<sup>32</sup>

The book's discussion of the state poll tax issue also reveals other ways in which Ackerman's history proves uneven. On the one hand, his excavation of the forgotten section 10 and his nuanced exploration of the behind-the-scenes dynamics that shaped *Harper* shine a fascinating light on some significant and underappreciated events. On the other hand, one is left with the sense that Ackerman has tried to squeeze more from this history than there is to be had. For example, he displays puzzling confidence about a counterfactual: What would have happened to the constitutional law regarding state poll taxes had Justice Goldberg remained on the Supreme Court? When *Harper* first came to the Court, Justice Goldberg argued in favor of taking the case and urged the Court to rely, in part, on the legislative history of the Twenty-Fourth Amendment in adjudicating it. In particular, Justice Goldberg wanted to enlist as support those portions of the congressional debate that challenged the idea that poll taxes had any legitimate purpose in ensuring an informed electorate (p. 110). This was before Congress had passed section 10 of the Voting Rights Act. By the time *Harper* was decided, Justice Goldberg had left the Court. Given his previous assertion about the relevance of the Twenty-Fourth Amendment to state poll taxes, Ackerman argues, Justice Goldberg "never would have" left "unchallenged" Justice Black's suggestion in his *Harper* dissent that the appropriate constitutional remedy for a state poll tax is an Article V amendment (p. 115). Ackerman then sketches out a hypothetical opinion by Justice Goldberg that relies on both the Twenty-Fourth Amendment and section 10. He concludes that, had this opinion been written, "lawyers and judges of the twenty-first century would have learned a very different lesson from *Harper*," as they would have viewed the decision as a "culmination of a popular-sovereignty dynamic in which Americans of the 1960s played the key propulsive role" (p. 116). But this conclusion seems more like romantic speculation than like anything that is, or could be, grounded in fact. Could Justice Goldberg have garnered the votes for this approach? Had he done so, would the technical changes in

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32. *Harper*, 383 U.S. at 666–67.

judicial reasoning really have made such a profound difference to the legal culture?

On this last question, consider *Katzenbach v. Morgan*,<sup>33</sup> a decision that Ackerman praises and contrasts with *Harper* in order to provide an example of Congress's potentially robust role in generating constitutional norms (pp. 116–21). In *Morgan*, the Court considered the extent of congressional power to enact voting rights protections under Section 5 of the Fourteenth Amendment and adopted a relatively expansive construction of that power.<sup>34</sup> The case is often taught to law students as the counterpoint to *City of Boerne v. Flores*,<sup>35</sup> a more recent decision that substantially curtailed Congress's Section 5 power. But *Morgan* hardly built the foundation for any lasting idea of robust, legislative constitutionalism. Even in its heyday, before being eclipsed by *Boerne's* more restrictive approach, *Morgan* prompted hand-wringing from diverse quarters about the risks of allowing Congress to define constitutional rights.<sup>36</sup> It thus seems far more likely that the constitutional habit of court-centeredness—one that Ackerman himself has spent decades trying to dislodge—is simply too entrenched<sup>37</sup> to have been meaningfully destabilized by changes to the reasoning of the *Harper* opinion.

#### B. *The Uncertain Content and Dynamics of the Constitutional "Moment"*

A second problematic aspect of the book is uncertainty in defining and understanding some of its core concepts. In order to assess the book's argument, we need to know what the "revolution" was about, what the constitutional "moment" subsumed, and how the dynamics between the relevant institutions operated. In this Section, I highlight some key uncertainties about how Ackerman conceives of the scope, the normative emphasis, and the interbranch dynamics of the civil rights era.

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33. 384 U.S. 641 (1966).

34. *Harper* was not a Section 5 case because it concerned a state enactment. But Ackerman argues that the Court could and should have brought the spirit of *Morgan* to *Harper* by placing decisive weight on section 10 in striking down the state poll tax. Pp. 120–21.

35. 521 U.S. 507 (1997).

36. Alexander Bickel, for example, accused the Court of "abdicating judicial review." Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 97–98. For other critiques, see William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606–07 (1975), and Irving A. Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U. L. REV. 656 (1977). For an opposing view during this period, see Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106–07 (1966). For a contemporary defense of a robust role for Congress under Section 5, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

37. On the entrenched character of court-centeredness, see generally Sanford Levinson, *Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 84 IND. L.J. 1337 (2009).

## 1. Scope

One question concerns the boundaries of the relevant constitutional moment. Ackerman suggests that it runs roughly chronologically, from the decision in *Brown* to the decision in *Milliken v. Bradley* in 1974.<sup>38</sup> In the face of rising public opposition to busing, *Milliken* sharply limited any such remedy that crossed school district lines (and thus involved suburban schools in the endeavor to desegregate urban schools). *Milliken* seems one reasonable bookend to an era of progress on racial equality, although it is hardly the only plausible one. Alternatively, the 1968 election might have marked the end of the era, given the volatile race politics that characterized that time, the emphasis on busing that prefigured *Milliken* itself, and the “Southern strategy” pursued by Nixon and the Republican Party.<sup>39</sup> Ackerman persuasively argues that Nixon in fact defended important parts of earlier civil rights victories (pp. 53–55). And yet the fact that Nixon was a complex figure with a mixed legacy on race only underscores the difficulty of neatly circumscribing the end of the constitutional moment in the civil rights era.

I want to probe at greater length a different point about the scope of the constitutional moment. Ackerman categorically contends that there was a civil rights revolution but not a poverty revolution (p. 72). He argues that, while Johnson declared his War on Poverty in early 1964, his landslide reelection later that year provided a signal that “inaugurated a period of popular debate,” but, “in contrast to the civil rights revolution, the American people never followed up on this signal by giving the War on Poverty their sustained electoral support” (p. 72). Ackerman is undoubtedly right that there was, and has been, no sustained revolution on the issue of poverty in this country. But as he himself acknowledges elsewhere in the book, the relationship between race and poverty is complex in ways that undermine the simple dichotomy he offers in this part of his analysis.

Another way to describe this history would be to say that the civil rights revolution was always deeply intertwined with the War on Poverty. In his 1964 State of the Union address, for example, Johnson appealed for progress on both civil rights and antipoverty legislation, and at one point he noted the following: “Unfortunately, many Americans live on the outskirts of hope—some because of their poverty, and some because of their color, and all too many because of both.”<sup>40</sup> His Great Society speech at the University of Michigan in 1964 likewise asserted that “[t]he Great Society rests on

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38. 418 U.S. 717 (1974). Ackerman considers *Milliken* a “doctrinal monstrosity,” p. 280, and, harkening to the New Deal, he calls the Court’s ruling in the case a “switch in time” that bowed to public hostility on busing. Pp. 284–85.

39. On the “Southern strategy” that sought to exploit white anxieties about race and welfare policy, see NUMAN V. BARTLEY & HUGH D. GRAHAM, *SOUTHERN POLITICS AND THE SECOND RECONSTRUCTION* (1975), and KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (Arlington House 1969).

40. President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union, (Jan. 8, 1964), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=26787>.

abundance and liberty for all. It demands an end to poverty and racial injustice, to which we are totally committed in our time."<sup>41</sup> Martin Luther King also repeatedly called for action on poverty as well as race.<sup>42</sup> And there were political strategies and goals that linked the two claims of injustice.<sup>43</sup>

Notably, as the Johnson administration was securing the passage of the Civil Rights Act and the Voting Rights Act, it was also securing the passage of landmark antipoverty measures. Bills that passed in the two years after the 1964 State of the Union include the Economic Opportunity Act of 1964;<sup>44</sup> the Social Security Amendments of 1965;<sup>45</sup> the Elementary and Secondary Education Act of 1965;<sup>46</sup> and legislation creating the U.S. Department of Housing and Urban Development.<sup>47</sup> This tidal wave of legislative activity on poverty was accompanied by some early Supreme Court victories in the same period. For example, *Harper*, on which Ackerman spends a great deal of time in the book, was about a poll tax that had its biggest impact on the poor, and the opinion contained language suggesting that wealth might be a

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41. President Lyndon B. Johnson, The Great Society Speech at the University of Michigan (May 22, 1964), available at <http://www.pbs.org/wgbh/americanexperience/features/primary-resources/lbj-michigan/>.

42. See, e.g., THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS 159–60, 171–72 (2007); Mark Engler, *Dr. Martin Luther King's Economics: Through Jobs, Freedom, NATION* (Jan. 15, 2010), <http://www.thenation.com/article/dr-martin-luther-kings-economics-through-jobs-freedom>.

43. See, e.g., FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 256 (1971) (arguing that Great Society programs were motivated by the political needs of the Democratic Party to strengthen support among blacks); Guian A. McKee, *Lyndon B. Johnson and the War on Poverty: Introduction to the Digital Edition*, PRESIDENTIAL RECORDINGS OF LYNDON B. JOHNSON 13 (2010), <http://rotunda.upress.virginia.edu/pdf/american-cent/WarOnPoverty-introduction-USletter.pdf> (arguing that Johnson thought the War on Poverty could reduce race-related rioting in black inner-city neighborhoods).

44. Economic Opportunity Act of 1964, Pub. L. No. 88–452, 78 Stat. 508. This Act created an Office of Economic Opportunity and led to the establishment of programs such as VISTA, the Job Corps, the predecessor to the Legal Services Corporation, and Head Start. See also Rick Cohen, *Happy Birthday, You Old Economic Opportunity Act, You!*, NONPROFIT Q. (Sept. 1, 2011, 2:42 PM), [https://nonprofitquarterly.org/index.php?option=com\\_content&view=article&id=15511](https://nonprofitquarterly.org/index.php?option=com_content&view=article&id=15511).

45. Social Security Amendments of 1965, Pub. L. No. 89–97, 79 Stat. 375. This Act created Medicaid and Medicare.

46. Elementary and Secondary Education Act of 1965, Pub. L. No. 89–10, 79 Stat. 27. This Act funded primary and secondary education and addressed educational access.

47. Housing and Urban Development Act of 1965, Pub. L. No. 89–117, 79 Stat. 451.

suspect classification.<sup>48</sup> Other important cases from this period include *Shapiro v. Thompson*,<sup>49</sup> *Goldberg v. Kelly*,<sup>50</sup> and *Douglas v. California*.<sup>51</sup>

The progressive antipoverty victories in both the legislative and judicial domains ground to a halt by the early 1970s. Welfare rights lawyers were particularly stung by their defeat in *Dandridge v. Williams*, a case in which activists had hoped to achieve a constitutional right to subsistence.<sup>52</sup> Most pertinent for our purposes, various antipoverty initiatives foundered in part *because of* emerging public perceptions about race and poverty. As I have explored elsewhere, there is persuasive evidence that, as poverty became increasingly—if incorrectly—associated with race in public opinion, support for antipoverty policies declined.<sup>53</sup> In *Why Americans Hate Welfare*, for example, political scientist Martin Gilens compellingly traces how perceptions of poverty became increasingly racialized starting in the mid-1960s and tracked rising opposition to welfare benefits.<sup>54</sup> This was happening just as racial tensions in the country were escalating in the late 1960s.

Taking into account these dynamics offers an alternative way to frame the events that form the core of Ackerman's book. Rather than describing the 1960s as reflecting a revolution on civil rights but not poverty, one might say instead that the trajectory of progressive public policy in both areas was shaped and influenced by volatile public attitudes about race. Indeed, some of the evidence that Ackerman cites to demonstrate a lack of public support for antipoverty legislation might also bolster the conclusion that the "revolution" he sketches on race was limited—perhaps too limited to merit the term "revolution."

## 2. Normative Emphasis

There is a different kind of problem that also relates to the content and meaning of Ackerman's constitutional moment. At various points, Ackerman argues that the moment's unifying theme was about ending "institutionalized humiliation" (p. 128). He traces this "master insight" (p. 128) to

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48. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth . . . like those of race . . . are traditionally disfavored." (citation omitted)).

49. 394 U.S. 618 (1969) (striking down denial of welfare benefits to those who have resided in a state for less than one year).

50. 397 U.S. 254 (1970) (requiring a hearing before termination of welfare benefits).

51. 372 U.S. 353 (1963) (holding that the failure to provide counsel to a criminal defendant on sole appeal as of right amounts to unconstitutional discrimination between rich and poor).

52. 397 U.S. 471 (1970). I review this history at some length in Jane S. Schacter, *Unequal Inequalities? Poverty, Sexual Orientation and the Dynamics of Constitutional Law*, 2014 UTAH L. REV. 867.

53. Schacter, *supra* note 52, at 884–86.

54. MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 104–11 (1999). For a discussion of other contributions to this literature, see Schacter, *supra* note 52, at 884.

the *Brown* opinion, focusing especially on the Supreme Court's "common-sense judgments about the prevailing meaning of social practices" (p. 131). Citing, for example, Chief Justice Warren's well known observation that the practice of segregation "generates [in black children] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,"<sup>55</sup> Ackerman celebrates the Court's "situation-sense" in realizing the obvious.<sup>56</sup> As a broader principle about race discrimination, ending institutionalized humiliation is an appealing and aspirational notion, and it accords well with the recent rise of arguments about "dignity" in constitutional law.<sup>57</sup> But it remains unclear whether this notion was, in fact, a grand unifying theme of the moment and whether institutionalized humiliation differs all that much from previous theories of equality.

Ackerman seems to offer this new formulation both as a descriptive matter (something that distinctively characterized the moment) and as a normative proposition (a way to break through the long-standing conflict between advocates of "anticlassification" theory (who stress colorblindness) and those of "antibordination" theory (who stress racial justice)) (p. 128). It is questionable, though, that the antihumiliation formulation ultimately proves all that distinctive. The very idea of race-based "humiliation" resonates strongly with the familiar idea of race-based "stigma," an idea that lies at the heart of many versions of antibordination theory.<sup>58</sup> As a matter of normative theory, the line between "humiliation" and "stigmatization" is fairly subtle. At core, both involve disrespect, and it is not clear that anything ought to turn on any modest conceptual difference between the two.<sup>59</sup>

Moreover, it remains equally uncertain whether humiliation breaks through the traditional conflict between colorblindness and antibordination. Advocates of both camps have vigorously claimed the legacy of the

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55. P. 131 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

56. Ackerman comments that "only a Martian would have trouble figuring out" that black schoolchildren and their parents would be humiliated by Southern-style segregation. P. 132.

57. See, e.g., Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

58. See, e.g., Barbara J. Flagg, "And Grace Will Lead Me Home": *The Case for Judicial Race Activism*, 4 ALA. C.R. & C.L. L. REV. 103 (2013); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 899 (2004).

59. For dictionary definitions, compare *Humiliate*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/humiliate](http://www.oxforddictionaries.com/us/definition/american_english/humiliate) (last visited Nov. 2, 2014) (defining "humiliate" as to "[m]ake (someone) feel ashamed and foolish by injuring their dignity and self-respect, especially publicly"), with *Stigmatize*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/stigmatize](http://www.oxforddictionaries.com/us/definition/american_english/stigmatize) (last visited Nov. 2, 2014) (defining "stigmatize" as to "[d]escribe or regard as worthy of disgrace or great disapproval").

Civil Rights Act of 1964,<sup>60</sup> and the idea of humiliation can likewise be assimilated to either one. Take the example of affirmative action in admissions. Some opponents of the practice claim that the very use of race as a factor humiliates and stigmatizes those whom affirmative action purports to assist.<sup>61</sup> By contrast, some proponents defend affirmative action as a viable way to counteract pernicious and humiliating stereotypes about “black intellectual inferiority” that are furthered by certain entrenched admissions practices.<sup>62</sup> The debate about how to identify and trace humiliation in this scenario ends up paralleling the familiar structure of arguments between proponents of anticlassification and those of antisubordination.

### 3. Institutional Dynamics: Judicially Wrought “Sphericity”?

Ackerman’s narrative assigns great importance to a notion he calls “spherical justice.”<sup>63</sup> This is the idea that landmark legislation in the civil rights era, “[r]ather than imposing a one-size-fits-all formula,” sought “institution-specific solutions to real-world problems” (p. 186). More precisely, Ackerman draws a clear arrow from the Supreme Court’s opinion in *Brown* to this feature of congressional civil rights legislation. In his telling, Chief Justice Warren’s opinion “began the process of carving up the social into more differentiated spheres. The landmark statutes propelled this spherical dynamic further, marking out public accommodations, employment, and housing for special concern” (p. 306). The *Brown* opinion supplied the blueprint, Ackerman suggests, by rejecting the categorical distinctions among civil, political, and social equality that the Court drew in *Plessy v. Ferguson* (p. 306). By instead addressing segregation only in the realm of education, the book argues, the Court ushered in this new era of sphere-by-sphere remedies in the area of racial equality.

At a general level, it is entirely persuasive to characterize the *Brown* opinion as partly laying the groundwork for legislative progress on racial

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60. For an elaboration of these basic arguments, compare *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (Brennan, J.) (endorsing antisubordination), with *id.* at 219 (Rehnquist, J., dissenting) (endorsing anticlassification). For a broader perspective, see Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

61. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) (arguing that affirmative action stigmatizes racial minorities because it causes observers to wonder whether the minorities were admitted based on race). For an overview of this debate and an insightful perspective on it, see Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299 (2008).

62. See, e.g., Brief for a Committee of Concerned Black Graduates of ABA Accredited Law Schools et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 554393, at \*18 (“Far from stigmatizing Blacks, affirmative action counteracts the stigma of Black intellectual inferiority, the existence of which decreases the likelihood that Black students will contribute to the foregoing speech functions of diversity.”).

63. See, e.g., p. 205.

equality. A considerable body of scholarship has in fact explored and debated that trajectory.<sup>64</sup> It proves far more problematic, however, to contend in particular that Congress addressed inequality in a sphere-by-sphere fashion because it was following the Supreme Court's lead. There is much to belie this claim.

First, in 1964 it was hardly novel for civil rights bills to address particular spheres. On the federal level, for example, consider the Civil Rights Act of 1875. Ackerman discusses this measure at some length in the context of the *Civil Rights Cases*, which struck it down. The Act banned discrimination in the "sphere" of public accommodations and was enacted nearly eighty years before *Brown* was decided.<sup>65</sup> By the early twentieth century, moreover, more than twenty states had enacted similar public accommodations laws.<sup>66</sup> In addition, states began banning race discrimination in employment—another sphere—well before *Brown*. Twelve states had some variation of such a law by 1945.<sup>67</sup> By the time the Civil Rights Act passed in 1964, more than twenty states had statutory protections against discrimination in employment.<sup>68</sup>

Second, leaving aside the particulars of civil rights legislation, certain institutional characteristics of Congress incline it toward subject matter-specific legislation. The pivotal role of interest groups in pursuing legislation and seeking to influence its content is one force that pulls in this direction.<sup>69</sup> Another is the prime importance of legislative committees, which tend to be specialized by subject matter and to facilitate repeated interactions among the lobbyists, agencies, and interest groups that occupy particular policy domains.<sup>70</sup> Because of these structural forces, legislation

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64. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42–169 (2d ed. 2008); David J. Garrow, Commentary, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151 (1994); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

65. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* Civil Rights Cases, 109 U.S. 3 (1883).

66. Lisa Gabrielle Lerman & Annette K. Sanderson, Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–39 (1978).

67. Pauli Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 417–19 & nn.107–13 (1945).

68. David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1079 (2011).

69. Seminal contributions to the vast literature on interest groups include ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); and E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE* (1960).

70. On committees, see, for example, CHRISTOPHER J. DEERING & STEVEN S. SMITH, *COMMITTEES IN CONGRESS* (1984); KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991); and Forrest Maltzman & Steven S. Smith, *Principals, Goals, Dimensionality, and Congressional Committees*, 19 LEGIS. STUD. Q. 457 (1994).



does not typically conform to what Ackerman calls a “one-size-fits-all” model.

Judges operate in a different environment, of course. Their agendas are shaped by what litigants do in the first instance. Once a suit is filed that sounds in constitutional law, judges can and do oscillate between contextual (Ackerman’s “spherical”) and categorical (his “one size fits all”) approaches. As they confront the highly generalized language of constitutional text like the Fourteenth Amendment and apply that text to specific cases, judges have multiple levers to pull in choosing how broadly to frame a ruling. They must decide, for example, how to frame and interpret precedent, what doctrine to follow or create, whether to be more or less judicially “minimalist,”<sup>71</sup> and how and when to use procedural doctrines, including those involving facial and as-applied challenges, as well as justiciability.

To state the obvious, the Court in *Brown* gravitated toward the minimalist end of the continuum rather than the maximalist end—by deciding less rather than more, and by leaving much unsaid.<sup>72</sup> In framing the opinion, Chief Justice Warren so emphatically stressed the distinctive importance of education that the case obscured its overruling of *Plessy*.<sup>73</sup> The public volatility of the segregation issue—an issue that Ackerman vividly depicts—makes this pragmatic treatment of precedent understandable. The Court had obvious reason to worry about a hostile reaction in the South. To be sure, understanding the opinion as essentially an exercise in pragmatism is ultimately a more pedestrian reading of *Brown* than Ackerman’s loftier notion that the opinion launched a new era of contextuality in the civil rights field. Yet, his assertion that *Brown* somehow gave rise to the sphere-by-sphere characteristic of later civil rights legislation proves unpersuasive.

Ackerman’s genealogy of sphericity remains questionable for one final reason, and this problem recurs in other parts of the book. It is far from certain that the Court’s specific choices in crafting the *Brown* opinion were sufficiently salient to inspire Congress to pursue a path of sphericity. This is another version of the problem that we observed earlier in connection with Ackerman’s argument about the changes that a reframed opinion in *Harper* might have wrought had Justice Goldberg remained on the Court.<sup>74</sup> This problem stems from a misguided assumption about the effects and reach of judicial rhetoric and reasoning. Granting that *Brown* itself may be *sui generis*, there is nevertheless little reason to believe that citizens, legislators, or even many lawyers consume judicial decisions at this level of specificity. Nor is there basis to conclude that the reasoning in judicial opinions powerfully influences public beliefs.<sup>75</sup>

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71. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

72. *Id.* at 37–39.

73. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

74. *See supra* Section III.A.

75. *See* Courtney Megan Cahill & Geoffrey Christopher Rapp, *Does the Public Care How the Supreme Court Reasons? Empirical Evidence from a National Experiment and Normative*

It is odd that Ackerman should fall prey to exaggerating the effect of judicial opinions. As much as anyone in legal academia, he has helped to set scholars on a course of thinking about the Constitution outside the courts. Ackerman in fact pushed in this direction well before “popular constitutionalism” became an established part of the lexicon in constitutional scholarship.<sup>76</sup> And in this very book, he passionately urges lawyers and judges to expand the constitutional canon beyond the bounds of what he calls the “United States Reports” (p. 75). It is thus surprising that he inflates the influence of the words in those same reported decisions.

#### CONCLUSION

Recall the competing versions of the narrative offered earlier in this Review: the Ackermanian idea of a constitutional moment and the more modest notion of pragmatic adaptation. While the framework of pragmatic adaptation may not be as eye-catching as Ackerman’s theory, it reflects both a better descriptive version of the relevant history and a better normative response to our functional inability to amend the Constitution. As I hope to have shown, the difference between the two versions is not about the importance of the history that Ackerman tells. The idea of pragmatic adaptation honors the historic legacy of the civil rights era, acknowledges the participation of all three branches in creating that legacy, grounds the moral claims of civil rights advocates in broad constitutional values, and recognizes that public understandings of the Constitution change over time. And yet this theory recognizes the Civil Rights Act of 1964, the Voting Rights Act, and the Fair Housing Act as *statutes*. While they are rightly regarded as some of our most important statutes, and while they are and should be more resilient to amendment or repeal than many of our laws, the fact is that Congress can amend them. But the crucial point is this: they need not be understood as an unspoken form of constitutional amendment in order to command respect and even reverence.

Moreover, steering clear of Ackerman’s far-reaching claim also avoids some significant pitfalls. One danger is that the implausibility of Ackerman’s capacious account of what counts as “constitutional” will make it harder to argue successfully for special respect for landmark civil rights statutes. The result of moving the marker by falsely equating “special importance” with “constitutional” might be that if the claim of *de facto* constitutional amendment fails, so will the case for special respect. In addition, his argument may

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*Concerns in the Case of Same-Sex Marriage*, 93 N.C. L. REV. 303 (2015); Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 566–69 (2009); cf. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, SSRN 32 (July 21, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2466057](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466057) (“Larger majorities and unanimity do not seem to increase public acceptance of the [Supreme] Court’s decisions.”).

76. For example, in the first volume of *We the People*, published in 1991, Ackerman emphasizes the powerful role of presidential leadership in pressing and realizing new constitutional visions. ACKERMAN, FOUNDATIONS, *supra* note 12, at 268–69 (focusing on key features of presidential constitutionalism in constitutional moments).

heighten anxieties about rule-of-law values in ways that could undermine more modest versions of living constitutionalism. The strand of muscular Ackermanian antipositivism that insists that legislation—even “landmark” legislation—effected a constitutional amendment outside of Article V is vulnerable to the claim that it dilutes the currency of constitutionalism by invoking the term too loosely and without any convincing limiting principles.

Another way to see the risks of Ackerman’s approach is to place it in the context of recent constitutional scholarship. Since Ackerman first began his scholarly project in the 1980s, two strong currents have surfaced in constitutional law. One is popular constitutionalism,<sup>77</sup> a movement that Ackerman himself helped to propel. The other is neo-originalism,<sup>78</sup> a movement that has traditionally rivaled the idea of living constitutionalism that Ackerman endorses in the book and that appears to be at odds with his basic premises and principles. By asserting a form of popular constitutionalism that is as provocatively antipositivist as the one in this book, Ackerman may, ironically, send concerned readers in search of the alluring—if illusory—certainty and simplicity of originalism. That can’t be the kind of moment he wants.

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77. On the rise of popular constitutionalism and its various iterations, see Pozen, *supra* note 10, at 2048–64.

78. On the rise of originalism and its different incarnations, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009). On what I am calling neo-originalism, see MCGINNIS & RAPPAPORT, *supra* note 9, and Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004). For a different kind of originalism that is difficult to distinguish from living constitutionalism, see BALKIN, *supra* note 8, at 21–23 (offering a theory of “framework originalism” that incorporates key aspects of living constitutionalism commonly rejected by originalists).

