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### The Neo-Hamiltonian Temptation

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#### Recommended Citation

David A. Strauss, "The Neo-Hamiltonian Temptation," 123 Yale Law Journal 2676 (2014).

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DAVID A. STRAUSS

## The Neo-Hamiltonian Temptation

**ABSTRACT.** The central force behind the development of constitutional law, according to Bruce Ackerman's magisterial *We the People: The Civil Rights Revolution*, is not the courts but the People, acting through the elected officials who were responsible for the civil rights laws of the 1960s. But if, as Professor Ackerman emphasizes, the Constitution should be interpreted to reflect actual decisions made by the People—rather than decisions attributed to the People by creative interpreters—it is not clear what room is left for judicial review. Ackerman shows that a true popular consensus against Jim Crow segregation did, eventually, emerge. But many well-settled principles of constitutional law have been established by courts without the support of such a consensus. No such consensus supported *Brown v. Board of Education* itself, when it was decided.

To a greater extent than Professor Ackerman perhaps recognizes, his account may even ally him with skeptics who would abolish judicial review—skeptics who also, albeit in a different way, believe that the Constitution should be entrusted to the People. The great challenge to those skeptics is that they would repudiate *Brown*. Ackerman celebrates *Brown*, but he also shows that the civil rights era was an extraordinary time in which the nation eventually united to finish the work of the Civil War. The logic of Ackerman's account suggests (although he may not intend the suggestion) that *Brown* was an extra-legal but morally justified intervention that was needed to start this process—and was therefore a historically exceptional event that can be accepted as consistent with general skepticism about judicial review.

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## **ESSAY CONTENTS**

<b>I. THE TEMPTATION</b>	<b>2678</b>
<b>II. A CASE STUDY: SEX DISCRIMINATION</b>	<b>2681</b>
<b>III. THE COMMON LAW ALTERNATIVE</b>	<b>2689</b>
<b>IV. THE CIVIL RIGHTS ERA RECONSIDERED</b>	<b>2692</b>
<b>CONCLUSION: A LITERAL SECOND RECONSTRUCTION</b>	<b>2695</b>

## I. THE TEMPTATION

The U.S. Constitution is the work of “We the People.” As a formal matter, the People can, if enough of them feel strongly about it, amend the text. Bruce Ackerman, with characteristic subtlety and sophistication, makes the important point that the People actually change the Constitution in other ways. One way or another, though, the People are the final authority on what the Constitution requires.

But the U.S. Constitution also protects minorities against wrongful treatment by the majority. The protection of property-holding minorities was a central theme during the Founding. The most celebrated chapter in twentieth-century constitutional law, described in Ackerman’s third volume, secured the rights of the African-American minority to be free from state-imposed segregation.<sup>1</sup> And the Constitution is routinely celebrated as a refuge for despised minorities.

To say that the Constitution is ultimately responsive to We the People is to say that it is responsive to the will of the majority, somehow defined. But then there is a problem: how can the Constitution both implement the will of the majority and protect minorities? One way to solve the problem is to establish institutions that have the responsibility of protecting minorities against the People. One can imagine many such possible institutions. A hereditary aristocracy might conceivably play such a role. Political institutions might be structured to insulate some elected officials from popular opinion in a way that allows them to protect minorities, or the political culture may provide that kind of insulation. Or judges might play that role by exercising the power of judicial review. That last option is, of course, the one envisioned by the *Carolene Products* footnote,<sup>2</sup> a central justification for judicial review in the post-New Deal era.

Once we allow institutions like those into the picture, though, we just create another set of familiar problems. We have to justify those institutions’ exercise of power. Which minorities should be protected, and when, and in what ways? These other institutions will have to make those judgments. How are they to make those judgments, and how can we be confident enough that they will make good judgments? Beyond that, how can we be sufficiently confident that these other institutions won’t abuse their authority, consciously or unconsciously using the supposed protection of minorities as a pretext for doing something else?

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

2. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Rule by the People has, for most of us, immediate democratic legitimacy; in some sense, it does not need to be justified. Rule by elites – that is what we are talking about if we establish institutions that derogate from rule by the People – is much harder to justify. Of course, this contrast between elites and the People is overdrawn. There is no single way of identifying what the People want; their various preferences have to be aggregated by some mechanism. And any realistic mechanism of rule by the People will involve the intermediation of elites – governing officials, opinion leaders, and the like. But deliberately insulating an elite from popular opinion raises special concerns and requires special justification. It seems, though, that we must have just that kind of insulation in order to protect minorities.

Professor Ackerman's third volume of *We the People* proposes, among other important things, a different way of solving these problems. In fact, Ackerman can be read as denying that these problems exist. The civil rights revolution, he says, was the product of a persistent national majority. He is certainly right that Jim Crow segregation was ultimately rejected by both major political parties and all three branches of government. This broad consensus did not formally amend the Constitution, but in practical terms it brought about a major change in U.S. constitutionalism. So Ackerman says, and he is persuasive. In Ackerman's telling, there was no tension or paradox. We the People effectively changed the Constitution in a way that secured the rights of a minority.

This is a very appealing vision. Judges and judicial review play a role in Ackerman's account, as do other political figures who enjoyed some insulation from immediate popular sentiment. But the responsibility of these elites was, in Ackerman's vision, to listen to the People and to implement their will. The intuitive democratic justification for rule by the People extends throughout the system. Institutions justified in that way will, on Ackerman's account, protect minorities. The civil rights era is dramatic evidence of that.

In *Federalist* 78, Alexander Hamilton defended judicial review against the argument that it "supposes a superiority of the judicial to the legislative power."<sup>3</sup> Hamilton said that, on the contrary, judicial review "only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the [C]onstitution, the judges ought to be governed by the latter rather than the former."<sup>4</sup> Ackerman is a neo-Hamiltonian. Judges exercise power in his system, but we do not need a separate justification for that. It all

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3. THE FEDERALIST NO. 78, at 380 (Alexander Hamilton) (Terence Ball ed., 2003).

4. *Id.*

comes back to the will of the People. Ackerman, to his credit, does not accept Hamilton's suggestion that the will of the People is embedded in the written Constitution alone. We the People have other ways of changing the Constitution. But the Constitution—including the ways in which it protects minorities—is all the work of We the People.

It would be great if Ackerman's powerful and inspiring vision worked. But I do not believe it does. To be specific, I do not think it is an adequate account of much of American constitutional law, including central aspects of constitutional law that Ackerman (like many of the rest of us) celebrates. In fact, I do not think it is even a fully adequate account of the civil rights revolution. I do think that Ackerman's view potentially points the way toward a radical revision of American constitutionalism—a revision that would effectively eliminate judicial review and would treat what the courts did in the civil rights era as a form of morally imperative civil disobedience. That revisionist view is not totally unappealing, but it is a radical revision, and I do not believe Ackerman would endorse it.

In our system, the Constitution can be best understood, I think, not as the work of the People in Ackerman's sense but rather on the model of the common law. The common law model shares with Ackerman the idea that there is much more to the Constitution than just the document. But the common law view emphasizes not relatively discrete acts by the People but, instead, precedents and traditions that often evolve over time. Perhaps more important, the common law approach also acknowledges that the Constitution is, unavoidably, shaped in part by judgments of morality and policy made by the people who interpret it. This is all part of the common law tradition, a tradition with deep roots in our legal system. Judges who enforce the Constitution are not implementing the decisions of the People in Ackerman's sense; they are acting according to the norms of the common law. Of course, everyone, not just judges, plays a role in enforcing the Constitution; judges may not even be the most important actors. But it is their commitment to a common law method, not simply allegiance to the will of People, that justifies their role. Judges and others resolve the questions about which minorities should be protected, and how, in that way—with attention to precedent and explicit acknowledgment of the moral issues at stake. That, I believe, is our system, and it is illustrated by both the civil rights revolution and constitutional law generally.

The neo-Hamiltonian vision is tempting because it promises the virtues of our constitutional system without fully confronting the ways in which our system is not democratic. We have, in our system, actors—like judges—with limited incentives to respond to popular will. Sometimes those actors make decisions that are crucially dependent on their own judgments about matters of

policy or morality. Maybe these undemocratic elements are not good. We the People might do a good enough job protecting minorities; Ackerman's account of the civil rights era certainly provides evidence for that claim. If that is true, then we could diminish the power of the courts (and maybe other elites) and have a better system. Or maybe not; maybe our system is better than a more democratic alternative. But in any event we should confront and analyze these undemocratic elements of our system—elements that do not answer to We the People in the way Ackerman describes.

In the next Part of this essay, I will discuss the constitutional law governing sex discrimination. That body of law—well established by now—illustrates some of the strengths of Ackerman's approach. But it also illustrates the weaknesses of Ackerman's approach and, I want to suggest, the relative strengths of the common law account. The constitutional law of sex discrimination developed in the shadow of the civil rights revolution; indeed, Ackerman suggests that it can be attributed to decisions that We the People made. The strengths and weaknesses of Ackerman's account in this context might, for those reasons, fairly suggest what its strengths and weaknesses are throughout constitutional law generally.

After that, I will suggest that Ackerman's account—important and enormously illuminating as it is—does not fully explain even the civil rights revolution in constitutional law. In conclusion, I will suggest where a thoroughgoing neo-Hamiltonian approach might lead: to an understanding of the civil rights revolution as an extraordinary event rather than a template for constitutional change, and to a sharply diminished role for judicial review.

## II. A CASE STUDY: SEX DISCRIMINATION

The development of the constitutional principles governing sex discrimination forced the courts to grapple, implicitly and explicitly, with fundamental questions regarding their role. But at the same time, because the sex discrimination cases involved a less dramatic series of events than the civil rights revolution of the 1950s and 1960s, those cases provide some insight into the more routine aspects of constitutional law. An early sex discrimination case, *Frontiero v. Richardson*,<sup>5</sup> forced to the surface some of the central issues about how constitutional law develops. In *Frontiero*, which was decided in 1973, the Supreme Court considered whether classifications based on sex, “like classifications based upon race, alienage, and national origin, are inherently

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5. 411 U.S. 677 (1973) (plurality opinion).

suspect and must therefore be subjected to close judicial scrutiny”<sup>6</sup>—strict scrutiny, as we would call it today.

The plurality opinion, written by Justice Brennan, concluded that sex-based classifications should be subject to strict scrutiny. Justice Brennan made two main arguments. One was an analogy to race discrimination: Justice Brennan compared the treatment of women, both at the time and in the past, to the treatment of African Americans.<sup>7</sup> Women, although numerically a majority, were treated like a minority—treated enough like African Americans to justify a similar constitutional rule. Justice Brennan also made an argument that, superficially at least, anticipated the approach Professor Ackerman takes in his book. Justice Brennan noted that, over the previous decade, Congress had “manifested an increasing sensitivity to sex-based classifications.”<sup>8</sup> He mentioned Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, which outlawed sex discrimination in employment.<sup>9</sup> He also said:

[Section] 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.<sup>10</sup>

Justice Brennan did not get a majority for the position that sex-based classifications should get strict scrutiny. Justice Powell, in a concurring opinion, agreed that the particular classification at issue in *Frontiero* was unconstitutional but concluded that the Court should not hold that sex classifications are suspect.<sup>11</sup> Justice Powell did not take issue with Justice Brennan’s account of the discrimination women faced, past and present. But Justice Powell drew exactly the opposite lesson from Justice Brennan about the significance of the proposed Equal Rights Amendment. He said that a “compelling” reason for the Court not to treat sex classifications as suspect was that the ERA, “which if adopted will resolve the substance of this precise

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6. *Id.* at 682 (footnotes omitted).

7. *Id.* at 685.

8. *Id.* at 687.

9. *Id.*

10. *Id.* at 687-88 (footnote omitted) (quoting H.R.J. Res. 208, 92d Cong. (1972)).

11. *Id.* at 691 (Powell, J., concurring in the judgment).

question,” had been submitted to the states.<sup>12</sup> “If this Amendment is duly adopted,” Justice Powell said, “it will represent the will of the people accomplished in the manner prescribed by the Constitution.” The Court should not “pre-empt . . . a major political decision which is currently in process of resolution.”<sup>13</sup>

These opinions—both of them—vividly present the paradox of a Constitution that is the work of We the People but that is supposed to authorize the courts to protect minorities. Was the fact that Congress had ratified the proposed ERA and sent it to the states a reason to treat sex-based classifications as suspect, as Justice Brennan contended, because it showed that there was popular support for that course? Or was the proposed ERA a reason for the courts to wait, as Justice Powell said, because We the People had not yet spoken? Neither of those conclusions seems obviously wrong.

Following Ackerman’s approach, this question can be taken outside of the context of a formal amendment. One might say that Justice Brennan, like Ackerman, gives the civil rights statutes something akin to constitutional status. At least, in Justice Brennan’s view, the Court’s interpretation of the Constitution was properly influenced by what Congress had done. Is Justice Brennan’s point then that the People have spoken—by enacting civil rights laws and even approving the proposed ERA by supermajorities in both houses of Congress—and the People have declared that women are entitled to judicial protection against discrimination? But if that is the basis of Justice Brennan’s conclusion, his recitation of the ways in which women are discriminated against seems to be beside the point. If the reason to make sex-based classifications suspect is that the People have effectively commanded that result, then the history of discrimination and the analogies to race are misleading. Today—on this Ackerman-like reading of Justice Brennan’s opinion—women have the People on their side. One might even ask: why, then, do they need the protection of having courts treat sex-based classifications as suspect? Why can’t the courts just enforce the statutes that the People’s representatives have enacted?

But perhaps the way to read Justice Brennan’s opinion is that women are functionally a minority, lacking the political power to protect themselves against discrimination at the hands of the majority. If that is the rationale for treating sex-based classifications as suspect, then the discussion of the anti-discrimination laws and the ERA is a potentially misleading distraction. On

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12. *Id.* at 692.

13. *Id.*

this reading, the apparent willingness of the People to battle sex discrimination is just an illusion.

Justice Powell's opinion reflects a different side of the paradox. His view was that the question whether women should get special protection under the Constitution was pending in front of the ultimate authority—the People—and the Court should not preempt the decision. The ratification of the ERA, on Justice Powell's view, would justify treating sex-based classifications as suspect; the rejection of the ERA would establish that they should not be treated as suspect. But this approach, too, seems vulnerable. Wouldn't the failure of ratification show that women were in fact more like a minority entitled to judicial protection?

Judging from the way things turned out, what We the People concluded about the ERA itself didn't matter. The ERA, of course, was not adopted. But while the Court has never held that sex-based classifications are to be treated as suspect in the same way that racial classifications are, the Court has invalidated many sex-based classifications under "intermediate scrutiny."<sup>14</sup> In fact, it is difficult to identify any way in which the law would be different today if the ERA had been adopted. The plight of the ERA confirms something that Ackerman's account shares with the common law approach: formal amendments are not that important.

In fact, I think Ackerman understates this point. Amending the text of the Constitution has not been an important way of changing the U.S. constitutional system. Sometimes, as with the expansion of the powers of the federal government during the twentieth century, changes of constitutional magnitude have happened without formal amendments. Sometimes, as with the Fourteenth and Fifteenth Amendments, formal amendments were mostly nullified for a long time until conditions changed and the amendments could be enforced. Sometimes amendments make only relatively technical adjustments, or they mop up outliers after a fundamental change has already happened. And sometimes, as with the ERA, a proposed amendment is formally rejected but de facto adopted.<sup>15</sup>

Ackerman's willingness to recognize that formal amendments are not the only way of changing our constitutional system is part of what makes his neo-Hamiltonian vision distinctive and plausible. It is very difficult to make the argument that courts are simply enforcing the formal text of the Constitution.

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14. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny for sex-based classifications).

15. For an argument along these lines, see David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

Too many established principles of constitutional law just cannot be connected to the text in a straightforward way. But if you recognize, as Ackerman does, that We the People might change the Constitution by means other than formal amendment, you can give a more plausible account of constitutional law today.

There is a second way in which the development of the constitutional law about sex-based classifications seems consistent with Ackerman's approach. Ackerman says that the civil rights legislation of the mid-1960s should be regarded as part of the "constitutional canon." I am not entirely sure what it means to say that something is part of the constitutional canon, but *Frontiero* suggests that the courts are willing to treat those statutes as a potential source of constitutional law. Of course, *Frontiero* is just one data point; the Brennan opinion was only for a plurality; and Justice Brennan's other arguments, drawing on the analogy to race discrimination, may have been sufficient by themselves to justify closer scrutiny of sex-based classifications. But the subsequent development of constitutional law in this area actually suggests that, if anything, Ackerman does not cast his net wide enough. Not just statutes, but lots of other things going on in society, seem to be sources of constitutional law.

Specifically, it is hard to believe that changes in the status of women in society and in the economy did not make the courts more willing to reject sex-based classifications, just as it is hard to believe that changes in the social status of gays haven't affected more recent decisions having to do with discrimination on the basis of sexual orientation. For reasons I will give later, these were not just causal influences; they are part of the justification for what the courts have done. The one puzzling feature of Ackerman's account, for me, is his repeated suggestions that "lawyers" do not understand that there are various legitimate influences on constitutional law beyond the formal text of the Constitution.<sup>16</sup> While there is an academic literature devoted to trying to show that all of constitutional law can be derived from the text, I think practicing lawyers understand very well the limited role of the constitutional text and the variety of sources that they can draw on. I will return to these issues below.

In more fundamental ways, though, I believe that the sex discrimination cases illustrate the limits of Ackerman's approach. In particular, it is hard to square those decisions with the notion that We the People are the source of constitutional law in the way Ackerman envisions.<sup>17</sup> The decisive, crowning

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16. See, e.g., 3 ACKERMAN, *supra* note 1, at 3 (arguing that conventional constitutional lawyers have "failed" the challenge of understanding popular constitutional change).

17. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002), argues that the constitutional law governing sex discrimination should have "take[n]" its critical and normative bearings from the debates

events that Ackerman describes in connection with the civil rights movement did not have counterparts in the movement for women's equality. Of course there was such a movement, and it had its victories. But no presidential election was run with women's equality as a central issue. There was no moment at which a filibuster was dramatically broken. No conservative politicians made speeches about sex discrimination that were like Senator Dirksen's "idea whose time has come" speech about race discrimination. There was no consolidating election comparable to the description Ackerman gives of the 1968 election. In fact, the development of this body of law corresponded with the growth of a movement that exalted women's traditional roles and defeated the ERA.<sup>18</sup>

One other element of the sex discrimination cases seems to be missing from Ackerman's account of constitutional change. It is impossible to deny that the justices' own views about sex discrimination played a role. If we are going to have a theory that explains judicial review as it is practiced in our system today, that theory has to explain why, and to what extent, judges' views about morality and social policy can play a role in decisions.

I do not think Ackerman's theory gives such an explanation, or even leaves room for it. Ackerman says that "[t]he aim of interpretation is to understand the historical commitments that have *actually* been made by the American

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over women's citizenship that begin with the drafting of the Fourteenth Amendment and culminated over a half century later with the ratification of the Nineteenth Amendment." *Id.* at 966. This form of "synthetic interpretation," *id.*, is related to the idea that constitutional law is the work of We the People. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 86-130 (1991). It is not entirely clear what the justification for this method of synthesis is, as I say below. But in any event, in the case of sex discrimination, this synthetic account is frankly revisionist—at odds with the way the doctrine actually developed. See Siegel, *supra*, at 949. And, on this synthetic account, the decisive act of We the People occurred, if I understand correctly, when the Nineteenth Amendment was adopted—well before the Supreme Court's decisions.

18. See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986). In fact, Professor Ackerman's treatment of the development of the constitutional law of sex discrimination—which he provided in an earlier article, not in *We the People: The Civil Rights Revolution*—seems to abjure the claim that the Court's decisions in this area were an effort to carry out decisions that We the People had made about sex equality. See Bruce Ackerman, *Interpreting the Women's Movement*, 94 CALIF. L. REV. 1421, 1436 (2006) (asserting that the Court was not "thinking of itself as the mouthpiece of the movement struggling for ratification of the ERA" and suggesting that the Court was not engaged in "higher lawmaking" but rather in "a very conventional exercise in constitutional interpretation"). The question, then, is how Professor Ackerman justifies "conventional . . . constitutional interpretation" if the neo-Hamiltonian rationale—that the interpreter is simply implementing the will of the People—is inapplicable.

people, not those which one or another philosopher thinks they should have made”—his emphasis.<sup>19</sup> But if the actual commitments are those on which there was a consensus comparable to the 1970s consensus against Jim Crow segregation, then those actual commitments do not get us nearly far enough.

For example, it is not clear how one can square what Ackerman says about “commitments that have *actually* been made” with this passage:

If taken seriously, the principles announced in Earl Warren’s great opinion [in *Brown*] have a broad reach: blacks and women, Muslim and Hispanic Americans, the mentally and physically disabled, gays, lesbians and the transgendered—all these people often find themselves in conditions of institutionalized humiliation. They are all entitled to constitutional protection under *Brown*’s understanding of the Equal Protection Clause, affirmed by the People during the Second Reconstruction.<sup>20</sup>

Even if one accepts that the People determined that Jim Crow segregation was unconstitutional, in what sense, exactly, did the People *actually* affirm that all of those other groups were also entitled to the same kind of protection as African Americans? I don’t know of any evidence that representative voters for Lyndon Johnson in 1964 would have said, if asked, that they were casting their votes for women’s equality, much less for the constitutional rights of, say, gays, lesbians, and transgendered individuals. The idea that those groups were entitled to the protection of antidiscrimination norms was nowhere near the mainstream at the time.

If that is so, then the principle that condemns institutionalized humiliation generally—outside the context of Jim Crow—has to rely on something more than a conscious political decision of the People. Ackerman’s argument that *Brown*, “taken seriously,” supports those claims and, so understood, was “affirmed” by the People, requires one to accept both that the expansive understanding of *Brown* is correct and that the People endorsed that understanding: that when the People condemned Jim Crow segregation, they also entrenched a principle that condemned other forms of “institutionalized humiliation” besides racial segregation. But the idea that *Brown* condemns “institutionalized humiliation” generally is just one interpretation of *Brown*. It is an interpretation that many of us may be happy to accept, but on Ackerman’s account, it doesn’t matter what many of us (philosophers or not) are happy to accept. What matters is what the People “affirmed” in the 1960s and 1970s.

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19. 3 ACKERMAN, *supra* note 1, at 34.

20. *Id.* at 335.

At this point, I believe, Ackerman's account runs into the same problems that confront less sophisticated forms of originalism. If we attribute to the People simply what they consciously thought they were voting for, we cannot say that they did any more than abolish Jim Crow (if we can even say that). Once we go beyond any plausible account of what the People consciously thought they were doing, we have many options—and no neo-Hamiltonian way to choose among them. We might, with Ackerman, attribute some more general decision to the People, such as a decision to abolish all “institutional humiliation.” But what is the justification for attributing to the People that decision, as opposed to something more specific, like the abolition of discrimination against all racial and ethnic minorities but not discrimination against other kinds of minorities? Or maybe we should attribute to the People something more general, like the abolition of inequality generally, not just those inequalities that are humiliating. Or maybe the People “affirmed” a principle that has to do with racial classifications but not the protection of minorities, like the principle that race should not be used in government decisions, whether it injures or benefits minorities.

We can choose among these possibilities by attributing to the People a decision that is morally better, or more consistent with traditions and precedents, or some combination of those things, à la the common law. But then we are attributing a decision to the People, not implementing what the People actually decided; the neo-Hamiltonian justification does not work, and we might as well just explain why we have chosen the right course for the law instead of claiming that the People have chosen it for us. Of course there is also uncertainty about what the People consciously decided; I have accepted Ackerman's central claim, that there was a genuine national consensus against Jim Crow, but others might take issue even with that. As I said, these are familiar problems with originalism, and Ackerman's more sophisticated form of originalism does not seem to escape them.

In the years since the civil rights revolution, the principle of *Brown* has taken a shape that is something like what Ackerman describes. That process of extension, or interpretation, or implementation, or synthesis—whatever one wants to call it—is the process that must be analyzed and justified. The danger here is that the emphasis on We the People obscures what's involved in this process of going beyond the beliefs that We the People actually held, even if we agree with Ackerman that We the People made a specific decision about Jim Crow and that their decision is the correct starting point. Part of that process requires the judges (or elected politicians, who also have these responsibilities) to exercise their own judgment about how the consensus should be extended.

The logic of the attack on Jim Crow should be extended to other forms of discrimination because it makes good sense to do so, as a matter of morality

and social policy—that is the kind of judgment that the courts, among others, were making. What licensed them to make that judgment? The neo-Hamiltonian temptation is to deny that such a judgment had to be made and to attribute it all to We the People. But that is not an accurate account. Interpretations of the People’s actions that are in part based on the interpreter’s own views should not just be attributed to the People. Those interpretations, and the views that support them, should be candidly avowed and opened to criticism.

### III. THE COMMON LAW ALTERNATIVE

The common law, as I said, seems to me to be a better model of constitutional development than Ackerman’s neo-Hamiltonian view.<sup>21</sup> A mention of the common law often conjures an image that is something like the opposite of rule by the People. The idea is that the common law is a judge-centered institution that leaves no room for constitutional decisions by other actors, in and out of the government—including constitutional decisions by the People of the kind so well described by Ackerman. Worse still, the idea that judicial review in the United States is based on a common law model is sometimes equated with the claim that the judges and justices themselves are, heroically, responsible for all the good developments in constitutional law. So it is important to put those misunderstandings aside.

The common law method is a way of resolving legal issues. It can be used by judges, of course, but it can also be—and is, pretty frequently—used by legislators or executive officials. Members of legislative bodies routinely invoke the past practices of their institutions as arguments for proceeding in a certain way. The executive branch of the U.S. government even has a group of lawyers—the Office of Legal Counsel in the Department of Justice—that self-consciously develops an intra-executive body of precedent to resolve constitutional issues, many of which will never make it to the courts. And quite apart from the formal processes of OLC, informal executive branch reliance on precedent is commonplace. For that matter, relying on precedent is an instinct even outside of distinctively legal settings—corporations, civic organizations, bureaucracies, and university faculties do it. People faced with a decision want to know what was done before.

Relying on precedent is a good quick description of the common law approach, but it is an incomplete and possibly even misleading description. For

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21. For an elaboration of this approach, see, for example, DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

one thing, “precedent” may be too narrow a term. There are several good reasons to look to precedent, but one of them is a recognition that you can learn from others’ experience. In the case of a judge, the experience need not be—in fact, it should not be—just the past decisions of other judges. Common law judges understood this. They (many of them, anyway) considered statutes to be another kind of precedent: statutes that did not directly address the problem before the court might still be relevant and helpful.<sup>22</sup> One can see the descendant of this attitude in Justice Brennan’s use of the civil rights laws and the unratified ERA and even, maybe, in Ackerman’s idea that the civil rights laws should be part of the “constitutional canon.”

Even beyond that, there are other kinds of relevant experience, from which one can learn, besides the actions of government bodies like courts and legislatures. Both historically and theoretically, the common law approach has used more general trends in society as a source of law. As I said, trends about women’s role in society and in the economy, not just trends in the law, surely played a role in the development of constitutional law as well.

In all of these ways, it is a mistake to suppose that the common law approach exalts judges. In fact, the common law approach does not exclude *We the People*; in a sense, it allows popular opinion a wider role than Ackerman’s theory does. Ackerman focuses on political acts—legislation and executive action—and, to some degree, on popular mobilization for political causes. But once we recognize that constitutional law is not simply a matter of implementing decisions made by *We the People* through the processes that Ackerman describes, there is no reason to limit the people’s influence by taking into account only political acts. On a common law view, the non-political actions (or not explicitly political actions) of people should count, too: those actions can provide support for a decision, by a judge or someone else, about how the requirements of the Constitution should be understood. Women who entered the workforce in large numbers in the 1960s and 1970s may not have been acting in the overtly political way characteristic of the *We the People* mentioned in the preamble or in Ackerman’s theory, but they were entitled to, and did, have an influence on constitutional law.

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22. See, for example, a source that 3 ACKERMAN, *supra* note 1, at 34 n.15, appropriately recognizes: Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12–13 (1936) (arguing that courts should consider a statute to be a “recognition of a policy” that might constitute “a social datum or . . . a point of departure for the process of judicial reasoning”). Justice Harlan’s opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 379–93 (1970), is a well-known example of this kind of use of statutes in common law decisionmaking.

Once the common law approach is described in this way—as drawing on “precedents” that go beyond court decisions, and beyond even government actions, to a range of political and non-political behavior—it risks seeming formless, something that can justify everything and nothing. Precedents can be interpreted in different ways and can point in different directions, especially if the category of precedents is defined so broadly. Now this point too can be overstated. Sometimes the precedents are really quite clear. Many constitutional issues, particularly in the lower courts, are resolved by straightforwardly following the decided cases, without any need or justification for venturing into the further reaches of analogous legislation, social practices, or anything else. But sometimes—certainly when the early sex discrimination cases, like *Frontiero*, came before the Supreme Court—there is an abundance of “precedential” (in the broad sense) material for the justices to invoke, and it does not all point in the same direction. In fact, the sex discrimination cases since the 1970s have systematically rejected what they called the “traditional” view of women’s role—a clear sign that the common law sources did not provide unequivocal support for sex equality, to say the least.

This is the point at which the justices’ own views about the better result—better as a matter of basic fairness or social policy—came into play. This, too, is a well-established feature of the common law. When the precedents are not clear—when there is a choice to be made—the judges’ views about social policy can play a role. That role is limited by the precedential (broadly understood) material. The common law approach enjoins a kind of intellectual humility: do not assume that you know better than all of the other people who, in one way or another, have grappled with the problem you are facing. But subject to that limit, the judge’s views properly play a role.

Judicial review, with judges using a common law approach, is one of the institutions we have set up to deal with matters on which we don’t fully trust We the People. Certain elements of the design of the elected branches of the federal government can be seen in the same way. But judicial review is the most prominent institution. Judges exercising judicial review do a version of what judges have done for a long time in our system: they resolve issues by using common law methods. The People are not excluded from this process, for reasons I have said. But it would be a pretense to claim that what is going on, in courts that exercise the power of judicial review, is simply an implementation of the will of We the People.

Justice Brennan’s opinion in *Frontiero* can be understood, easily, in common law terms—as can many other opinions, I believe. Justice Brennan relied on the analogy to race discrimination. Why was that a good argument? The framers of the Fourteenth Amendment did not think race and sex discrimination presented the same problems as each other. In Ackerman’s

telling, We the People, as I have said, may have condemned Jim Crow racial segregation, but there was no comparable consensus on sex discrimination. But the Court's decisions on race discrimination—and society's condemnation of it more generally—provided a precedent. The extension to sex discrimination was by no means automatic. That was the product of an independent judgment by the Justices. But it was not simply their judgment; Justice Brennan, in the tradition of the common law, and with an implicit acknowledgment of the importance of humility in making such judgments, enlisted the judgment of Congress, reflected in the civil rights laws and the proposed ERA, as a kind of precedent, too.

Seen in this light, it is Justice Powell's opinion that comes closer to Ackerman's approach. This may be unfair to Ackerman, because Justice Powell thought it was important that there be a formal amendment to the Constitution, and Ackerman, correctly in my view, says that formal amendments do not matter so much. But Justice Powell was not satisfied with a common law-like justification for extending strict scrutiny to sex-based classifications. He wanted to hear from the People. On Ackerman's theory, Justice Powell should have been willing to accept more informal expressions of what the People believed. But, as I have said, it is very difficult to make the case that We the People had reached even an informal consensus about sex discrimination in the early 1970s, as they arguably had about race discrimination.

#### IV. THE CIVIL RIGHTS ERA RECONSIDERED

Even if I am right in suggesting that the common law provides a better model for American constitutional law as a whole, large portions of Professor Ackerman's portrait of the constitutional developments of the civil rights era remain very convincing. Ackerman is persuasive in describing how a national consensus against Jim Crow segregation did develop. Civil rights groups and their leaders played a crucial role. Some politicians distinguished themselves; others got out of the way; some resisted, unsuccessfully. The broad waves of opinion between the mid-1950s and the mid-1970s that Ackerman traces so expertly were certainly as significant as he says.

But even some of the constitutional developments of the civil rights era required more than We the People. Ackerman, with characteristic insight, recognizes this. The cases that more or less bracket the era—*Brown v. Board of Education*<sup>23</sup> and *Loving v. Virginia*<sup>24</sup>—are examples. *Loving* held that laws

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23. 347 U.S. 483 (1954).

forbidding interracial marriages were unconstitutional. A common law-like justification of *Loving*—as a morally justified extension of *Brown* and other decisions—is straightforward. But it is hard to make the case that even in 1967, when *Loving* was decided, We the People thought that interracial marriages should be legal.<sup>25</sup> Whether or not the Presidential election of 1968 can be seen as a referendum on the Civil Rights Act of 1964, it was certainly not a referendum on whether there was a constitutional right to interracial marriage. Public opinion polls in 1968 found that 75% of white Americans disapproved of interracial marriage and 56% thought the practice should be illegal.<sup>26</sup>

Ackerman, of course, knows this. His justification for *Loving* relies on what he describes as a “supplementation thesis.”<sup>27</sup> The Court, he explains, “wasn’t elaborating on a decision made by We the People; it was *supplementing* these decisions by entering a sphere that remained too hot for the political branches to handle.”<sup>28</sup> In Ackerman’s view, *Loving* “simply represents an effort by We the Judges to fill in a gap left in the wake of an epochal set of decisions by We the People.”<sup>29</sup>

But then the question is: why was *Loving* correctly decided? What justified the courts in supplementing the decisions of the People? Why weren’t the People allowed to leave the “gap” unfilled? To say that interracial marriage was too “hot” an issue for the political branches is to say that the People—if we aggregate their views in the way that our existing institutions do (or, for that matter, if we look at public opinion polls)—did not want to establish a constitutional right to interracial marriage. So where did that right come from? Ackerman does say that he wants to “deny that *Loving* deserves a central place in the civil rights canon.”<sup>30</sup> But he says this because he disapproves of the reasoning of the opinion, which he believes departs from the principles of *Brown*. I am not sure that I agree with Ackerman’s reading of *Loving*, and in any event I am not sure that the specific reasoning of opinions matters that much. But all of that is another subject. The question is why Ackerman, having (to his credit) candidly recognized that the People did not support a right to

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24. 388 U.S. 1 (1967).

25. For a sustained argument to this effect, see Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 821-25 (2011).

26. See *id.* at 825.

27. 3 ACKERMAN, *supra* note 1, at 291, 296, 300.

28. *Id.* at 296.

29. *Id.* at 291.

30. *Id.*

interracial marriage in 1967, does not say that *Loving* was premature and wrong at the time.

The other question is about *Brown* itself. In Ackerman's account, *Brown* initiated the development of a (non-textual) change in the Constitution.<sup>31</sup> Among other things, it prompted the other branches of government to act. All of that is very plausible; I think *Brown* was not the very beginning but rather itself a partial culmination, but in other respects what Ackerman says about *Brown* seems right. But on Ackerman's account, why was *Brown* a lawful decision?

A common law account can answer that question, just by showing how *Brown* had important antecedents.<sup>32</sup> The judicial precedents alone—*McCabe v. Atchison, Topeka & Santa Fe Railway Co.*,<sup>33</sup> *Buchanan v. Warley*,<sup>34</sup> *Missouri ex rel. Gaines v. Canada*,<sup>35</sup> *Sweatt v. Painter*,<sup>36</sup> and *McLaurin v. Oklahoma State Regents for Higher Education*<sup>37</sup>—arguably left little room for a claim that separate schools could be equal.<sup>38</sup> Many other developments in society provided a kind of non-judicial (and non-governmental) precedent: World War II's lessons about claims of racial superiority; the perceived imperatives of Cold War ideological competition; the growth of an African-American middle class; even the integration of major league baseball.<sup>39</sup> All of these things provided enough of a backing to make it lawful, on a common law-like approach, for the Court to conclude that segregation was unacceptable. Of course that conclusion also rested, not entirely but in part, on the view that segregation was morally wrong—how could it not, and why should it not? The common law approach allows such a judgment to be a component of a lawful decision.

The central point, though, is that these pre-*Brown* developments do not seem to be a part of Ackerman's account of the constitutional change of the

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31. See, e.g., *id.* at 5 (noting that *Brown* “put the issue of racial equality at the very center of a great generational debate”).

32. For an elaboration, see David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 862-68 (2007).

33. 235 U.S. 151 (1914).

34. 245 U.S. 60 (1917).

35. 305 U.S. 337 (1938).

36. 339 U.S. 629 (1950).

37. 339 U.S. 637 (1950).

38. See Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 708 (1992) (“Given what came before, the real question is why *Brown* needed to be decided at all.”).

39. For an account of these developments, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 173-96 (2004).

civil rights era. His account is more compressed and also much neater.<sup>40</sup> There are relatively clearly defined triggering events and turning points. Ackerman's analysis of how the actions of the three branches fit together; of the various devices used, in different "spheres," to attack Jim Crow and its remnants; of how the movement ultimately ran up against its limitations—all of these things, and many more, are immensely illuminating and ensure that this volume will be a classic work.

But as a theory of constitutional change, I think it narrows the frame too much and leaves out a realistic degree of messiness. The U.S. Constitution did change as a result of the civil rights era, even if it was not amended. But the change cannot be treated as the decisive act of We the People in any realistic sense, and an attempt to treat it that way leaves no room for central features of our constitutional system. In the civil rights movement there was drama, and there were heroes, and there were turning points. But in the end it would be surprising if a constitutional change of such magnitude were not the result of a long, messy process.

#### **CONCLUSION: A LITERAL SECOND RECONSTRUCTION**

Ackerman's view of American constitutionalism is coherent, illuminating, impressive, and distinctive. In fact I think it is more than distinctive: I think it leads to a quite radical conclusion. The conclusion, put in the strongest terms, is that *Brown v. Board of Education* and the other great cases of the civil rights revolution (like *Loving*) were correct but extra-legal, and that judicial review should be abandoned.

If one believes unequivocally in rule by We the People, then it is hard to see why there should be a role for judicial review. As I said at the beginning, judicial review is an institution that can be justified by the need to protect minorities against the People. But one lesson of Ackerman's book is that sometimes the People do a pretty good job of protecting minorities. Leaving *Brown v. Board of Education* aside, what the courts did best in the civil rights era, in Ackerman's telling, was to get out of the way. In cases like *Loving* the Supreme Court did mop up some vestiges of Jim Crow that the political branches had left alone, and Supreme Court decisions provided rhetorical cover and an occasional prod to the other branches. But, as Ackerman emphasizes, the role of the courts (*Brown* aside) was secondary at best. The President and Congress led the charge, and the courts, mostly, validated what the President

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40. See, e.g., 3 ACKERMAN, *supra* note 1, at 51 ("Higher lawmaking in America is never a matter of a single moment; it is an extended process, lasting a decade or two . . .").

and Congress did. In fact the other branches spent a lot of time and energy maneuvering around various obstacles that the Supreme Court's precedents had put in their way. I think the radically limited role of the courts is not just a feature of Ackerman's account of the civil rights era; it follows from an approach to the Constitution that places the Constitution squarely in the hands of We the People.

In this way, Ackerman's approach is aligned with that of judicial review skeptics, who deny that the elite contributions of judges are, on balance, a good thing.<sup>41</sup> The skeptics point to all the times the Supreme Court has invalidated legislation that should not have been invalidated. (Everyone's list will differ, but they all include *Dred Scott v. Sandford*,<sup>42</sup> the mainstream lists include *Lochner v. New York*,<sup>43</sup> and nearly everyone will have many other candidates.) The biggest problem for the skeptics, of course, is *Brown* and, more generally, the role of the Supreme Court in dismantling Jim Crow.

I doubt that Ackerman wanted his account to give the skeptics a way to solve their problem, but I think it does just that. The civil rights era can be understood as the second phase of the Civil War era—literally the Second Reconstruction. The national consensus that developed—as Ackerman masterfully shows—was that Jim Crow had to be abolished. In order to abolish it, the federal government had to do some things that were of questionable legality. That was the understanding of *Brown* that some of its proponents had at the time: that it was justified not on conventional legal grounds, but as an extraordinary but necessary intervention in order to take a step toward solving an otherwise intractable political and moral problem.

According to this way of thinking, *Brown* and *Loving* are not models of what the courts should do. They were extraordinary acts of questionable legality, justified by the need to eradicate an extraordinary problem in American society that military force, in the mid-nineteenth century, had not fully uprooted. To exaggerate the point, the actions of the Supreme Court during the civil rights revolution should be compared to the actions of the Union Army. On less extraordinary occasions (that is, every other occasion), the courts should stay on the sidelines. They are not needed to protect minorities; the People will do an adequate job of protecting women, gays, and

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41. See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION*, at ch. 8 (2006); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006).

42. 60 U.S. 393 (1856).

43. 198 U.S. 45 (1905).

other minorities, just as the People—once they got going—did an adequate job of abolishing Jim Crow. On this account, we do not have to justify the form of elite rule that judicial review actually is, and we do not have to live with judicial decisions that mistakenly thwart the will of the People. The Constitution will belong to We the People.

There are many details that will have to be worked out, of course. And, needless to say, this is not our system, and it does not seem likely to become our system any time soon. I doubt it is a vision that Ackerman endorses. But it is one that, perhaps unintentionally, his magisterial work suggests. For better or worse, rule by We the People, if we really mean it, will not leave much room for the courts.