WE THE PEOPLE · VOLUME 3

THE CIVIL RIGHTS REVOLUTION

BRUCE ACKERMAN

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THE BELKNAP PRESS OF
HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts
London, England
2014

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data
Ackerman, Bruce A.
We the people / Bruce Ackerman.
p. cm.
Includes bibliographical references and index.
Partial Contents:
I. Foundations.
ISBN 978-0-674-94840-2/0-674-94840-8 (alk. paper)
II. Transformations.
ISBN 978-0-674-94847-1/0-674-94847-5 (alk. paper)
III. The Civil Rights Revolution.
ISBN 978-0-674-05029-7
I. United States—Constitutional history. 2. United States—Constitutional law. I. Title.
KF4541.A8 1991
342.73'029—dc20
[347.30229]
91-10725

For Owen Fiss

Insight. Integrity. Commitment.

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ACKNOWLEDGMENTS

I began working on *We the People* in the late 1970s, and I could not have sustained this project over the past thirty-five years without the support of a wonderful circle of friends. From the very beginning, I have talked my way through countless questions with Bo Burt, Guido Calabresi, Mirjan Damaska, Owen Fiss, Al Klevorick, Tony Kronman, Jerry Mashaw, and Alan Schwartz. Over the decades, this conversation circle was enriched by a remarkable community of scholars who have made their way to New Haven: Anne Alstott, Akhil Amar, Ian Ayres, Jack Balkin, Aharon Barak, Rick Brooks, Amy Chua, Drew Days, John Donohue, Don Elliott, Bill Eskridge, James Forman, Heather Gerken, Abbe Gluck, Robert Gordon, Michael Graetz, Dieter Grimm, Oona Hathaway, Christine Jolls, Paul Kahn, Daniel Markovits, Tracey Meares, Nick Parrillo, Robert Post, Cristina Rodriguez, Jed Rubenfeld, Vicki Schultz, Scott Shapiro, Reva Siegel, Alec Stone-Sweet, Patrick Weil, Jim Whitman, and John Witt. All have contributed to this book. More important, they have made Yale Law School into an intellectually vibrant place where serious ideas are taken seriously in day-to-day encounters at lunch, in the hallways, and in an endless stream of faculty workshops.

I am also much indebted to my friends in the Yale political science department. Robert Dahl, Juan Linz, David Mayhew, and Steve Skowronek have been real inspirations, providing detailed comments and larger perspectives that have structured my basic framework. Seyla Benhabib and Ian Shapiro have played a similar role in helping me define my philosophical path. Beyond New Haven, Meir Dan-Cohen, Stephen Gardbaum, Laura Kalman, Ethan Leib, Sandy Levinson, Teemu Ruskola,

John Skrentny, Rogers Smith, and David Super provided extremely helpful commentaries on one or another draft.

Then there are my students, who have critiqued my evolving ideas over more than a decade of courses and seminars. Some followed up with formidable investigations into critical sources, often hidden in the archives. My work with Jennifer Nou culminated in a jointly authored article, and final completion of the larger project greatly depended on a series of remarkable contributions by several generations of Yale law students, including Josef Ansorge, Larry Benn, Arwyn Carroll, Ben Cassady, Eric Citron, Justin Collings, Jesse Cross, Tomas Dombrowski, Blake Emerson, Danieli Evans, Dov Fox, Rob Heberle, Craig Konnoth, Kevin Lamb, Marin Levy, John Lewis, Chris Lynch, John Paredes, Matt Pearl, Nick Pedersen, Alex Platt, Adam Sharpe, Julia Spiegel, Lisa Wang, Victoria Weatherford, and Chan-young Yang.

While I was working on this book, my longtime secretary, Jill Tobey, passed away; she is sorely missed. Lise Cavallaro and Jennifer Marshall have filled a very large gap with distinction. Thanks too to the library staff, and especially Gene Coakley and Sarah Kraus, for searching out obscure legal materials with blinding speed. This made it possible to review large masses of relevant sources at the same time, allowing for a deeper appreciation of their complex relationships.

As you can see, I am a lucky guy. But the greatest gift has been my life with Susan Rose-Ackerman, my wife of forty-five years. She has combined unconditional love with extraordinary intelligence, making it possible to combine work and family in wonderful ways.

Thank you.

I introduced some of this project's larger themes in "The Holmes Lectures: The Living Constitution," 120 *Harvard Law Review* 1727 (2007). I am grateful to Elena Kagan, then dean of the Law School, and the Harvard Law faculty for their hospitality and incisive commentary when I visited Cambridge to deliver those lectures. With the permission of the *Review,* Chapters 1–4 are derived in part from this earlier publication. Similarly, a joint essay with Jennifer Nou serves as the basis of Chapters 5 and 6: "Canonizing the Civil Rights Revolution: The People and the Poll

Tax," 103 *Northwestern University Law Review* 63 (2009). That publication has given me permission to reprint relevant excerpts here.

Finally, I deeply appreciate the unstinting support of Anthony Kronman, Harold Koh, and Robert Post during their deanships at Yale Law School—they provided all the help any scholar could hope for. I also thank President Louis Vogel for inviting me as a visiting research professor at the University of Paris (Pantheon-Assas) in the fall of 2011, permitting me a few months' escape from day-to-day distractions when I was rethinking the foundations of this project.

INTRODUCTION

Confronting the Twentieth Century

The sun is setting on the civil rights revolution. The struggle was an unforgettable experience for the generation that lived through it—the stunning news of *Brown v. Board of Education,* the bitter conflict at Little Rock, the passage of the great civil rights laws, and so much more have reverberated in our public life for decades.

All this is ancient history for the rising generation. They may celebrate Martin Luther King Jr. Day, but the civil rights revolution will never have the same living resonances. We are fast reaching a critical moment in the dialogue between the generations that is constitutional law—the moment at which lived experience becomes historical legacy. What the rising generation chooses to remember—and what it chooses to forget—will shape the way it understands America's constitutional choices for the twenty-first century.[1]

This is not a new problem. On July 4, 1826, John Adams and Thomas Jefferson died at almost the same moment—making it painfully clear that the fate of the Republic was in new hands. Americans had two choices. They could follow Jefferson's famous advice that "the earth belongs to the living" and replace the Constitution of 1789 with a new Constitution for a new age. Or they could sustain political order by creating a constitutional tradition, with generation upon generation debating the half-remembered legacy of the constitutional past, using this endless debate to anchor a collective confrontation with the trackless future.

Americans have taken this second path. The elaboration of our tradition has become more demanding over time. Two centuries onward, the Founding is only the beginning of a much longer story of constitutional vision and revision. Our challenge is to fit the civil rights revolution into this larger pattern of constitutional development. What is the best way to understand the relationship between the Second Reconstruction of the

1960s and the first Reconstruction of the 1860s? Does the rise of New Deal constitutionalism in the 1930s help explain why the Second Reconstruction succeeded where the first period of Reconstruction failed? Does it help explain the limits, and the distinctive character, of the egalitarian commitments emerging from the civil rights revolution?

My answers build upon the first two volumes in this series, but don't be alarmed—you won't have to read them before confronting these questions! It's enough to suggest how the basic framework of *We the People* challenges conventional legal wisdom.

The dominant professional narrative is court-centered—the young lawyer is taught from casebooks that focus almost exclusively on judicial opinions stretching from *Marbury v. Madison* to *Brown v. Board, Roe v. Wade,* and beyond. *We the People* is regime-centered. It focuses on the institutional relationships and public values affirmed by the constitutional system as a whole, fitting the courts into this larger framework.

The Founding generated a distinctive governmental constellation during the Early Republic. But the Civil War and Reconstruction revolutionized this pattern to establish the Middle Republic—adding new values and institutional relationships into the Founding mix. The same thing happened during the New Deal, with Americans repudiating key elements of the nineteenth-century constitution to create a Modern Republic to meet the challenges of the Great Depression. The New Deal regime, in turn, set the stage for the civil rights revolution—which ultimately destroyed the coalition of racist southerners and ethnic northerners that had united to form the Democratic coalition established by Franklin D. Roosevelt. During the two decades spanning the Eisenhower and Nixon administrations, liberal Democrats and Republicans joined with the civil rights movement to build a distinctive New Deal–Civil Rights regime that continues to serve as the foundation for the Modern Republic. This book explores the constitutional legacy they left behind.

Early, middle, modern—historians and political scientists have used similar categories to make sense of long-term constitutional developments. Nevertheless, this familiar trichotomy challenges conventional legal wisdom, which focuses narrowly on the Supreme Court at the expense of larger changes in the governing regime.

A change in focus from court to regime has wide-ranging ramifications. In proposing the Constitution, the Philadelphia Convention claimed to speak in the name of We the People, setting up a first fundamental

problem: should constitutionalists take popular sovereignty seriously as they study the successive transformations of the American constitution over time?

Many serious scholars have said no. Most famously, Charles Beard and a host of Progressive writers did their best to puncture the Founding myth of popular sovereignty, portraying the Philadelphians as largely motivated by economic self-interest.

I take a different view. Popular sovereignty isn't a myth. The Founders developed a distinctive form of constitutional practice that successfully gave ordinary (white male) Americans a sense that they made a real difference in determining their political future. This Founding success established paradigms for legitimate acts of higher lawmaking that subsequent generations have developed further. Reconstruction Republicans, New Deal Democrats, and the civil rights leadership once again confronted the task of winning broad and self-conscious popular consent for their sweeping transformations of the constitutional status quo—and each time they (more or less) succeeded. The challenge is to analyze the concrete ways in which the evolving constitutional system tested their claims by requiring them to return repeatedly to the voters to earn the very special authority required to create a new regime in the name of We the People.

Conventional constitutional lawyers have failed this challenge. They don't seriously consider how Americans responded to the Civil War, Great Depression, and civil rights movement by creatively adapting the paradigms of popular sovereignty inherited from the eighteenth century. They have indulged a series of legal fictions that obscure the distinctive character of these latter-day exercises in revolutionary constitutional reform. They pretend that the political leadership in each of these eras transformed America's fundamental commitments by obediently following the path set out by the Founding Federalists for formal constitutional amendment.

They are wrong.

Americans have occasionally used the formula for formal amendment laid out by the Founders in Article V—under which Congress proposes, and state legislatures ratify, changes in our higher law. But the great political movements of the past have often displayed far more creativity in gaining popular consent to their new constitutional settlements. In earlier volumes, *We the People* followed Reconstruction Republicans and New Deal Democrats step by step as they built new systems of popular sovereignty

to win broad and self-conscious popular support for their transformative initiatives.

To sum up my argument: In writing Article V, the Founders relied on the *division of powers* between the states and the central government to organize debate and decision on constitutional amendments. But Reconstruction Republicans and New Deal Democrats increasingly relied on the *separation of powers* between the presidency, Congress, and the Supreme Court to earn the broad popular consent required for fundamental change in the name of We the People.

This separation-of-powers model has been elaborated in different ways at different times. Most often, the president claims that his successful reelection represents a "mandate from the people," and he successfully convinces Congress and the Court to endorse his new vision of constitutional government. This is the scenario that worked for Lincoln in the case of the Thirteenth Amendment, and for Roosevelt in the case of the New Deal Revolution.

But sometimes another branch has taken the lead. During Reconstruction, John Wilkes Booth's bullet replaced Lincoln with the conservative Andrew Johnson, who tried to enlist the Supreme Court in a joint effort to stop the Republican revolution in its tracks. If Reconstruction was to move beyond the Thirteenth Amendment, the Republican Congress had no choice but to assert constitutional leadership. Although the point is ignored in standard legal accounts, it was a series of dramatic conflicts between Congress, the president, and the Court—not the formal ratification of the Fourteenth and Fifteenth Amendments—that largely determined the constitutional shape of the Middle Republic. If Andrew Johnson, backed by the Supreme Court, had won his struggle for public support, Congress never would have been in a position to force the South, through military means, to ratify the Fourteenth and Fifteenth Amendments. The new Republican regime would have been based on the more modest vision of human rights and national power suggested by the Thirteenth Amendment.

While different branches have taken leadership roles in the struggle for regime change, their challenge is always the same—to gain sufficient public support for their constitutional revision so that, over time, *all three branches* repeatedly endorse the legitimacy of the breakthroughs that initiated the new regime. During the presidential election of 1868, Democratic candidates were still denouncing the legitimacy of the

Fourteenth Amendment. It was only when Ulysses S. Grant won the White House and appointed strong Republicans to the Supreme Court that the validity of the Reconstruction Amendments was put beyond question.

The legitimation of the New Deal proceeded at a similar pace. The Old Court stopped its assault on activist legislation in 1937. But the meaning of this retreat was initially unclear. Was it merely a strategic retreat or the inauguration of a new vision of constitutional government in America? Only Roosevelt's precedent-shattering third term decisively answered this question—enabling him to reconstitute the entire Supreme Court, which then unanimously endorsed the principles of New Deal constitutionalism in ringing terms. By the early 1940s, all three branches had given their repeated support to the New Deal regime—ending serious legal debate about its legitimacy. Critics who sought to restore the Constitution of the Middle Republic found themselves treated as extremists, far outside the mainstream of legal opinion.

The contrast between Reconstruction and New Deal served as the centerpiece of the second volume in this series, *Transformations,* setting the stage for the present study. During the civil rights revolution, the separation of powers once again organized a lengthy process of debate and decision that culminated in a period in which all three branches vindicated a new vision of constitutional government in the name of We the People. But there was one big difference: while the presidency or the Congress had initiated the previous rounds of constitutional politics, this time the Supreme Court initially seized the initiative. *Brown v. Board of Education* put the issue of racial equality at the very center of a great generational debate, forcing President Dwight Eisenhower and Congress to confront questions they happily would have ignored.

Supreme Court leadership wasn't nearly enough to win the precious sense of mobilized and broad support required to gain the assent of We the People. It was only when President Lyndon Johnson and his liberal Congress followed through with a series of landmark statutes that *Brown*'s promise became a fundamental premise of the modern republic.

Lyndon Johnson's 1964 victory over Barry Goldwater played a pivotal role, giving him a broad mandate to move beyond the Civil Rights Act of 1964 to win passage of the Voting Rights Act of 1965 and the Fair Housing Act of 1968. By the end of his presidency, all three branches had engaged in a collaborative process that extended *Brown* far beyond the sphere of

public education into an escalating series of initiatives that revolutionized the constitutional meaning of equality.

Nevertheless, the future of the New Deal–Civil Rights regime remained in doubt when Americans went to the polls in 1968. A hostile president could have readily used his powers to undercut the emerging constitutional consensus. But Richard Nixon refused to do so. When campaigning in 1968, Nixon made it clear that he was no George Wallace. And he was true to his word after taking office, signing legislation that consolidated the landmark statutes of the 1960s and supporting administrative measures that enhanced their impact. Nixon was not a vanguardist—at crucial moments he actively opposed bureaucratic and judicial efforts to expand the achievements of the preceding decade. But it is a mistake to cast him as a die-hard opponent. Nixon's very real support of the New Deal–Civil Rights regime gave it a bipartisan basis that placed its legitimacy beyond serious question. Southerners who engaged in perfectly respectable constitutional arguments denouncing the Freedom Riders and Martin Luther King Jr. in the early 1960s were faced with some tough choices: they could fall silent, change their opinions, or be treated like cranks.

Most changed their opinions. They were still racial conservatives, but to remain credible, they took a new tack. They no longer denounced the civil rights revolution but rather manipulated its achievements for their own purposes: What did *Brown* really mean? Was it a mandate for sweeping assaults on racial subordination or a more modest ban on differential treatment by the state on racial grounds? Southern conservatives held the second view, but they accepted the legitimacy of *Brown* and the landmark statutes of the 1960s to a degree that would have been astonishing only a decade earlier.

The broad outlines of this story are familiar, but their constitutional implications are suppressed by a lawyerly fixation on Supreme Court opinions as the preeminent source of insight into the constitutional meaning of the civil rights revolution. This focus provides a plausible starting place in understanding developments during the 1950s, when the Warren Court was the only branch of government asserting constitutional leadership. But the mantle of leadership passed to the president and Congress—and, most important, the American people—during the 1960s. It was the People, not the Court, who considered Goldwater's frontal assault on the Civil Rights Act of 1964 and responded by giving Lyndon Johnson a landslide victory. It was the People, not the Court, who gave their sustained support to a

broad and bipartisan coalition in Washington, D.C., that followed up with a series of breakthrough statutes in the late 1960s and early 1970s that redefined the constitutional meaning of equality.

Twenty-first-century Americans should no longer allow the Court to monopolize their vision of the civil rights revolution. They should hear the voices of the *primary* spokesmen for the American people—Martin Luther King Jr. and Lyndon Johnson, Hubert Humphrey and Everett Dirksen—as they hammered out the new terms of our social contract in the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act. They should place the collective decision to adopt these statutes within a larger story of popular sovereignty beginning with *Brown* and ending with the efforts by Richard Nixon and Congress to consolidate the landmark statutes during the early 1970s.

To make this point, I will be developing the notion of a *constitutional canon:* the body of texts that law-trained professionals should place at the very center of their constitutional understanding. When modern lawyers want to gain a sense of the legacy left behind by the Early Republic, they focus on the original Constitution, the *Federalist Papers,* and famous Marshall Court decisions such as *Marbury v. Madison*. But up to now they haven't deployed a similarly broad canon when dealing with the civil rights revolution. They have been content to rely on their own half-remembered experiences to provide the context for interpreting particular Supreme Court decisions. As lived experience fades, however, the profession must confront the pastness of the past.

Like the first period of Reconstruction and the New Deal, the civil rights revolution will be accessible only through the printed words and flickering images of an ever more distant age. While a few lucky historians can spend a happy lifetime exploring the archives, lawyers and judges and legislators have no such luxury. They are in the practical business of decision making: the achievements of the past must be packaged into easily readable form for the very busy men and women who are charged with sustaining our constitutional tradition. Canonization is a professional necessity.

It is also a professional peril. By putting a few texts at the center of the legal conversation, practical decision makers leave countless others in obscurity, inevitably distorting the meaning of the past. Constitutionalists should be aware of this danger and make self-conscious efforts at self-correction over time. Part One urges the rising generation to expand the

canon beyond cases such as *Brown* and include the debates and decisions surrounding the landmark statutes of the era. It makes this case by developing three convergent lines of argument.

Chapter 1 explores a more conventional alternative to the inclusion of landmark statutes. If we wish to move beyond court cases, the most obvious place to look isn't the statute books but the formal constitutional amendments passed in recent times. Under our official theory of canon formation, these modern amendments are privileged expressions of We the People. So why not rely on them, ignoring the landmark statutes, to fill out our understanding of the legacy of the twentieth century?

For starters, there have been few formal amendments since the birth of the New Deal regime. This might not be a problem if the ones that were passed accurately reflected the fundamental changes that occurred during the twentieth century. But as Chapter 1 suggests, if lawyers did take these amendments seriously, they would only succeed in generating deeply misleading accounts of the constitutional principles that guide the modern republic.

Systematic miscommunication is a very serious flaw in the construction of a canon. The aim of the entire exercise is to enable law-trained folk to use a small set of texts to generate deep and broad insights into our governing arrangements. This won't happen if we focus our analytic searchlight on texts that lead down blind alleys. Although the modern amendments are undoubtedly a part of our official canon, they can't function as a source of insight without a great deal of supplementation.

Modern lawyers already recognize this point. Despite their official status as solemn commitments by We the People, the modern amendments are generally ignored by lawyers—even most professors of constitutional law would flunk a pop quiz on, say, the Twenty-Fourth Amendment. (Nope, that's not the one that gives residents of the District of Columbia the right to vote in presidential elections!)

In contrast, lawyers *do* take the landmark statutes of the civil rights era very seriously—only they don't treat them as a source of *constitutional* principles. After all, they say to themselves, the Civil Rights Act calls itself a statute—and mere statutes simply don't deserve the special standing of higher law reserved to formal Article V amendments.

My second argument rejects this formalist prejudice. Constitutionalists must recognize that certain landmark statutes are indeed rooted in considered judgments of the people, and that it is these statutes, not formal

amendments, that provided the primary vehicle for the legal expression of popular sovereignty in the twentieth century.

I have already made the key point: while Article V depends on a dialogue between national and state assemblies to revise the Constitution, the civil rights era relied on the separation of powers between Congress, the presidency, and the courts to express the sovereign will of We the People.

But it will take a lot more work to make this point persuasive. Chapters 2 through 4 consider each stage of the process of collective debate and decision—from the Supreme Court's intervention in *Brown* through the central debates of the 1960s to the final acts of consolidation during the Nixon years—and provide a blow-by-blow comparison with the efforts of earlier generations to speak for the People through the separation of powers.

Here is where my earlier studies are useful. They contains a sustained analysis of the historical precedents left behind from Reconstruction, the New Deal, and other crucial turning points in American history, in which the separation of powers was used effectively to earn the constitutional authority to speak in the voice of We the People. When judged by these precedents, the civil rights revolution emerges as one of the most successful exercises in constitutional politics in American history. The lawyers, judges, and statesmen of the twenty-first century dishonor this achievement if they refuse to canonize the principles of the landmark statutes that express it.

My first two arguments deal with a central problem in canon formation. Every canon is necessarily selective and offers the legal profession the prospect of both insight and blindness. The challenge is to maximize the first and minimize the second. A civil rights canon that emphasizes the formal amendments of the modern era condemns us to blindness (argument 1), but a canon that embraces the landmark statutes focuses professional conversation on the right question (argument 2): what were the principles emerging from the ongoing efforts by the likes of King, Johnson, Nixon, and Dirksen to earn the institutional authority to express the will of the People?

Asking the right question doesn't mean that we will all agree on the same answer. Nevertheless, it's a lot better than arguing about the wrong question—one that blinds us to the greatest achievements of the civil rights generation. This is my first punch line.

Part One concludes with a final argument for the canonization of landmark statutes. Up to this point I've been considering a fundamental

predicament that will confront thoughtful lawyers of the twenty-first century. As they grow to professional maturity, they are thrown into a rich tradition of constitutional achievement stretching back over the centuries. If they wish to carry this tradition forward, they must come to understand it. They can't hope for the sound development of constitutional doctrine if they condemn themselves to blindness from the outset by casting the landmark statutes of the civil rights revolution into the shadows.

My third argument takes an originalist turn. It does not deal with the interpretive predicaments of the rising generation. Rather, it focuses on the perplexities of twentieth-century Americans who mobilized in support of the sweeping egalitarian breakthrough of the 1960s. What did *they* think they were doing in hammering out the terms of their landmark statutes? Did they suppose that the great civil and voting rights acts could legitimately serve as the functional equivalents of Article V amendments?

Great questions—but just because they are important to the canonizers of today doesn't mean they were important to the lawmakers of the twentieth century. Originalism's original sin is to forget this simple point. It is easy to march through the archives collecting random statements on one or another issue that is important to us. But it's wrong to suppose that scattershot opinion played a central role in an earlier era's debate. When this obvious point is ignored, the result is "law office history": the scholar emerges with a string of individual remarks that he wrongly supposes to represent the *considered* judgment of We the People of the United States reached at some earlier period of epochal change. Serious constitutionalists should reject this temptation. They should face up to the fact that the past didn't even try to answer many of our most important questions.

But sometimes a particular struggle of an earlier day *does* manage to cast some light. Sometimes the originating generation focuses on a current interpretive problem with the requisite constitutional seriousness—and when this occurs, we should certainly pay attention.

I have found a civil rights struggle that meets these stringent standards, and it serves as the basis for my final argument for canonizing landmark statutes. It involves the successful effort to abolish poll taxes, which had barred millions of blacks and whites from the polls for generations without raising serious constitutional complaint. Poll taxes were then swept away in the 1960s through the joint action of Congress, the president, and the Supreme Court.

The story is important in its own right, but that's not the reason I've put it at center stage. It deserves attention because, through a remarkable concatenation of events, the problem of the poll tax forced the leading figures of the time to confront our central analytic question: to what extent may a landmark statute function as a legitimate alternative to a formal Article V amendment in expressing the considered judgments of We the People?

As we shall see, this question held the key to the passage of the Voting Rights Act of 1965—the statute that would revolutionize southern democracy. As a consequence, a broad range of protagonists took it very, very, seriously—ranging from Martin Luther King Jr. to Lyndon Johnson, from the National Association for the Advancement of Colored People (NAACP) to the Justice Department, and from southern Democrats to racial liberals in Congress. With the fate of their revolutionary reform hanging in the balance, the president and Congress, with the critical assistance of King, reached an answer of large importance: they self-consciously repudiated the idea that Article V should monopolize higher lawmaking, choosing instead to use their landmark statute to function as an engine of constitutional change in the name of the American people.

By rediscovering the original significance of this fateful choice, Part One concludes with a three-part punch line: not only do the formal amendments of the modern period fail to illuminate basic constitutional principles of the New Deal–Civil Rights regime (Chapter 1), but the landmark statutes do indeed represent the considered judgments of We the People as they were mediated by the operation of the separation of powers over the course of two decades (Chapters 2–4), and finally, the leaders of the civil rights revolution understood this and affirmed that landmark statutes were a legitimate alternative to Article V in expressing the considered judgments of We the People (Chapters 5 and 6).

So isn't it past time for constitutionalists to follow through and give these statutes a central place in the civil rights canon?

Part Two takes the next step and uses the landmarks as a springboard for reflection on the animating constitutional principles that we have inherited from the twentieth century. As before, my foil will be a judge-centered definition of the canon, which looks exclusively to the opinions