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Bringing Down *Brown*: Super Precedents, Myths of Rediscovery, and the Retroactive Canonization of *Brown v. Board of Education*

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BRINGING DOWN *BROWN*: SUPER PRECEDENTS, MYTHS OF REDISCOVERY, AND THE RETROACTIVE CANONIZATION OF *BROWN V. BOARD OF EDUCATION*

*Matthew E. K. Hall**

INTRODUCTION

In June of 2007 the Supreme Court issued its opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.[1] The Court, in a 5-to-4 decision, ruled that the race-conscious student assignment processes in the Seattle and Louisville school districts were not narrowly tailored to serve a compelling government interest as required by the Equal Protection Clause.[2] The plurality opinion by Chief Justice Roberts, Justice Thomas's concurrence, and the dissents by Justices Stevens and Breyer all purported to follow the principles established by the Court's decision in *Brown v. Board of Education*.[3] According to the Chief Justice's opinion, even "[t]he parties and their *amici* debate[d] which side is more faithful to the heritage of *Brown*."[4] After noting this fact, the Chief Justice then proceeded to enlist language from the *Brown* decision to buttress his own position.[5] Justice Thomas attacked the

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[1] 551 U.S. 701 (2007).

[2] *Id*. at 730.

[3] 347 U.S. 483 (1954).

[4] *Parents Involved in Cmty. Schs.*, 551 U.S. at 747.

[5] *Id*. ("The position of the plaintiffs in Brown was spelled out in their

dissenters by suggesting that their approach was "reminiscent of that advocated by the segregationists in *Brown v. Board of Education*" and "replicates" the arguments rejected in *Brown* "to a distressing extent."[67] Justice Stevens countered by claiming that the majority opinion was not "loyal to *Brown*," and Justice Breyer lamented that the majority "undermines *Brown*'s promise of integrated primary and secondary education."[8]

The Court's ruling was surrounded by bitter disagreement, but on one point, it seemed almost all could agree: an appropriate ruling must not simply be faithful to the Fourteenth Amendment; it must also be faithful to *Brown*. *Brown*'s legitimacy could not be seriously questioned. The decision had become more than an interpretation of the Constitution; it had become a constitutional text to be interpreted. It had become what some would call a "super precedent."[9]

In the recent confirmation hearings for John Roberts and Samuel Alito, Arlen Specter, Chairman of the Senate Judiciary Committee, devoted considerable attention to the notion of super

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brief and could not have been clearer: 'The Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.' What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in Brown put it: 'We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.' There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was 'at stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis,' and what was required was 'determining admission to the public schools on a nonracial basis.' What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?").

[6] *Id*. at 748.

[7] *Id*. at 774.

[8] *Id*. at 803.

[9] The term "super-precedent" was first used in William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251 (1976).

precedents in constitutional law.[10] Following these hearings, the concept has come under extended scrutiny by constitutional scholars.[11] The term is generally understood to refer to cases that are so entrenched in the law and the legal culture that they can never or should never be reconsidered or overruled.[12] The use of the term in this high profile venue raises numerous questions: Do certain decisions truly function as super precedents in our legal system? If so, why? Which decisions become super precedents, and how do we know a super precedent when we see one? These questions have sparked heated debate, both inside and outside the Senate Judiciary Committee.[13] The notion of super precedents raises serious objections, and those who believe that super precedents exist often disagree about which cases belong in such a prestigious category.[14] But on one point

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[10] *See Confirmation Hearing on the Nomination of Samuel Alito to be Associate Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 321 (2006) (Statement of Sen. Arlen Specter, Chairman of S. Comm. On the Judiciary) (inquiring whether Alito agreed "that *Casey* is a super precedent or a super stare decisis as Judge Luttig said"); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144–45 (2005) [hereinafter *Confirmation of John G. Roberts*] (Statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) (asking Judge Roberts whether *Roe* qualified as a "super-duper precedent in light . . . of 38 occasions to overrule it").

[11] *See* Randy E. Barnett, *It's a Bird It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1241–42 (2006); Daniel Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180 (2006); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006); Michael Sinclair, *Precedent, Super Precedent*, 14 GEO. MASON L. REV. 363, 365 (2007).

[12] *See* Sinclair, *supra* note 11, at 365 (calling a super-precedent a case that is "judicially unshakable, a precedential monument which may not be gainsaid, akin to having the statute-like force of vertical stare decisis horizontally"); Gerhardt, *supra* note 11, at 1205–06 ("Super precedents are the constitutional decisions whose correctness is no longer a viable issue for courts to decide.").

[13] *See supra* notes 10–12 and accompanying text.

[14] *See infra* section I.B. for competing arguments about which cases qualify as super precedents.

senators and scholars seem to agree: if there are super precedents in American constitutional law, *Brown v. Board of Education* is one of them.[15]

Politicians, judges, and legal scholars of all ideological stripes hail *Brown* as a momentous decision in the history of the Supreme Court. In the words of one Court historian, constitutional scholars have "lavished" attention on the "celebrated decision" which has achieved "iconic status in American legal culture."[16] Scholars repeatedly list *Brown* as the quintessential super precedent.[17] In search of canonical texts to articulate the meaning of the civil rights movement, one article begins by simply assuming *Brown's* inclusion.[18]

From one perspective, *Brown's* exalted status should not be surprising. The decision marked a radical break from the Court's previous segregation rulings. In fact, in John Robert's confirmation hearings, *Brown* was repeatedly cited as a cautionary tale against absolute adherence to *stare decisis*.[19] Even more importantly, *Brown* is closely associated with the civil rights movement, which is arguably the most important social, political, and legal change of the last half century.[20]

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[15] *See infra* notes 73, 81, 84 and accompanying text.

[16] Jeffrey Hockett, *The Battle Over Brown's Legitimacy*, 28 J. SUP. CT. HIST. 30 (2003).

[17] *See infra* notes 73, 81, 84 and accompanying text.

[18] Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 64 (2009).

[19] *See Confirmation Hearing of John G. Roberts*, *supra* note 10, at 144 (statement of Judge John Roberts) (while John Roberts recognized that "[a]n overruling of a prior precedent . . . is inconsistent with principles of stability," he stated that "the principles of *stare decisis* recognize that there are situations when that's a price that has to be paid. Obviously, *Brown v. Board of Education* is a leading example, overruling *Plessy v. Ferguson*").

[20] The Court's decision in *Brown* has been frequently cited as an extremely important social, political, and legal event. *See generally, e.g.*, Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1305 (2004); Lenneal J. Henderson, Jr., Brown v. Board of Education *at 50: The Multiple Legacies for Policy and Administration*, 64 PUB. ADMIN. 270 (2004); Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334 (2004); Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of

Yet, from another perspective, *Brown's* iconic status is puzzling. The legitimacy of the opinion was seriously questioned when it was written by segregationists and integrationists alike.[21] As late as 1959, five years after the Court handed down its opinion, a law professor speaking at Harvard Law School questioned the principles used by the Court in its decision.[22] If *Brown's* legitimacy was so seriously contested when it was handed down and for years after, how has it become so enshrined in the legal culture as to serve as the quintessential candidate for super precedent status?

The questions surrounding *Brown's* legitimacy were squarely put to rest by the civil rights movement of the 1960s. To challenge *Brown* today is to challenge the legitimacy of that movement, a position considered well outside the legal and political mainstream.[23] The decision has come to symbolize the essence of the civil rights movement that was endorsed by the American public during the social and political transformation of

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Education, 91 COLUM. L. REV. 1867 (1991).

[21] *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1790 (2007) (noting Herbert Wechsler's point that "continuing dissent to Brown was not the monopoly of segregationist bitter-enders, but was a serious option for mainstream professionals"); *see also* Gerhardt, *supra* note 11, at 1215.

[22] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler questions whether the *Brown* decision was based on neutral principles.

[23] *See* Ackerman, *supra* note 21, at 1752 ("[N]o Supreme Court nominee could be confirmed if he refused to embrace Brown."); Hockett, *supra* note 16, at 49 (referencing "[t]he near-universal agreement regarding *Brown*'s greatness and the invective visited upon those few individuals who would question the legitimacy of the decision." However, Hockett emphasizes that *Brown* is still the subject of scholarly controversy). Several scholars have questioned the methods and reasoning the Court employed in the *Brown* decision. *See, e.g.*, BRUCE ACKERMAN, ET. AL., WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin, ed., 2002). Nonetheless, the existence of such critiques only highlights the almost universal acceptance of the desegregation movement *Brown* symbolizes as today's legal scholars consider how the justices may have more effectively pursued this ideal.

the 1960s.[24] Scholars, politicians, and the public treat the *Brown* decision as if it embodies the principles established by the civil rights revolution, but this belief is deeply flawed.

Despite the common acceptance of the *Brown* decision, scholars and judges differ considerably in their interpretation of its meaning. These divergent interpretations were highlighted in the *Parents*[25] case. According to Chief Justice Roberts,

> [i]n *Brown v. Board of Education*, we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. The next Term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of determining admission to the public schools *on a nonracial basis*."[26]

In other words, on the Chief Justice's view, *Brown* vindicated anticlassification principles—the notion that "government may not classify on the basis of race."[27]

The Chief Justice's opinion draws on a long tradition of cases applying anticlassification logic to invalidate racial discrimination. This principle was first employed as early as 1886 in *Yick Wo v. Hopkins*,[28] though for the next eighty years it was unevenly and unpredictably applied. Perhaps the clearest articulations of the anticlassification principle between *Yick Wo*

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[24] *See generally* Ackerman, *supra* note 21, at 1763–92; Ackerman & Nou, *supra* note 18, at 63–65.

[25] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746–48 (2007).

[26] *Id.* at 746–47 (citations omitted) (emphasis in original).

[27] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1470 (2004).

[28] 118 U.S. 356, 373 (1886).

and the 1960s appeared in cases upholding discriminatory treatment of citizens of Japanese ancestry during World War II. In these cases, the Court ruled that "[d]istinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality,"[29] and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[30] The application of anticlassification principles became formalized in the 1960s, when the Court held that the Fourteenth Amendment "renders racial classifications 'constitutionally suspect,' and subject to the 'most rigid scrutiny,' and, 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose."[31] In the decades that followed, the Court relied on this anticlassification framework to invalidate numerous policies extending preferential treatment to members of disadvantaged racial minorities.[32]

Justice Breyer's dissenting opinion in *Parents* advanced a strikingly different assessment of *Brown's* meaning, arguing that the decision "promised" to bring about "racially integrated education."[33] On this view,

> [t]he Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races . . . . The plurality cites in support those who argued in *Brown* against segregation . . . . But segregation policies did not simply tell schoolchildren "where they could and could not go to school based on the color of their skin;" they perpetuated a caste system

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[29] Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[30] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[31] McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

[32] *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[33] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803 (2007).

> rooted in the institutions of slavery and 80 years of legalized subordination.[34]

Rather than articulating anticlassification principles, Justice Breyer understood *Brown* as supporting antisubordination principles: "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups."[35]

Justice Breyer's arguments find strong support in the text of the *Brown* opinion. Chief Justice Warren's decision firmly embraced antisubordination principles by focusing on segregation's tendency to be "interpreted as denoting inferiority of the negro group" and "generate[] a feeling of inferiority as to their status in the community."[36] Conspicuously absent from the *Brown* opinion is any mention of racial classification or the strict scrutiny standard articulated in *Hirabayashi v. United States* and *Korematsu v. United States*.

This contrast between Chief Justice Roberts's opinion and Justice Breyer's opinion reflects a common point of conflict in the academic understanding of equal protection jurisprudence. Beginning with Own Fiss's seminal article in 1976, *Groups and the Equal Protection Clause*,[37] scholars have come to understand the competition between anticlassification and antisubordination as the fundamental debate underlying the interpretation of the Equal Protection Clause. Although some participants in this debate contend that *Brown* has always stood for anticlassification principles,[38] most agree that the opinion vindicates antisubordination values.[39] On this latter reading, only years

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[34] *Id.* at 864–67.

[35] *See* Siegel, *supra* note 27, at 1472–73.

[36] Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan., 347 U.S. 483, 494 (1954).

[37] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Fiss' article posed a serious challenge to the predominant anticlassification paradigm by advancing the antisubordination paradigm.

[38] *See* William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 997–98 (1984).

[39] *See* Robert A. Burt, The Sit-In Cases and the Constitutional

after *Brown* did anticlassification principles gain wide acceptance as judges and politicians began to recognize the political and jurisprudential advantages of accepting this framework.[40]

Why do judges and academics differ so dramatically in their interpretation of *Brown*? If *Brown's* importance and legitimacy are so universally accepted, why is the meaning of the opinion so hotly contested? From where do these conflicting interpretations originate? I argue that the justices in *Parents* and the numerous academics who participate in this debate reach divergent conclusions about the meaning of *Brown* because proponents of both views subscribe to a "myth of rediscovery"—a common understanding in the legal-academic community about the meaning of a text and its origin in our history that is widely accepted, but is not based on historical fact.[41] Myths of rediscovery provide coherent, if limited, descriptions of American political and constitutional development in service of particular policy aims; however, these myths frequently produce more confusion than clarity for understanding constitutional meaning.[42]

In this instance, the myth to which judges and academics cling is the widely accepted notion that *Brown* articulates an unquestionable principle of constitutional law, though adherents to the myth disagree about what that principle is. In a desperate

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Legitimation of the Civil Rights Act 90 (2003) (unpublished manuscript, on file with the *Journal of Law and Policy*); Fiss, *supra* note 37; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 47 (1991); Randall Kennedy, *Commentary, Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1337 (1986); Siegel, *supra* note 27, at 1481; William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 783 (1979).

[40] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 29 (2003); Fiss, *supra* note 37, at 118–28; Siegel, *supra* note 27, at 1498–1520.

[41] BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 259 (1998) [hereinafter TRANSFORMATIONS].

[42] *See generally* Ackerman, *supra* note 21 (discussing the resistance to *Brown* among both segregationists and mainstream professionals).

attempt to salvage this myth, judges, lawyers, and academics construct competing historical narratives linking together *Brown v. Board of Education*, subsequent equal protection cases, the civil rights movement of the 1960s, and the legislation spawned by that movement.[43] Although many of these narratives are fascinating, the perpetuation of this ahistorical myth has hindered and confused the debate between anticlassification and antisubordination principles.

This article argues that *Brown v. Board of Education* has been mistakenly, retroactively canonized to fill the void of judicial articulation for the civil rights movement of the 1960s. Although *Brown* was certainly decided correctly from a moral perspective and probably decided correctly from a jurisprudential perspective, its iconic status in American law is dependent on the myth of its role as an articulation of the popular movement that established civil rights in the United States. The perpetuation of this myth obscures the meaning of *Brown*, as well as the constitutional principles embraced by the civil rights movement of the 1960s; the myth forces Chief Justice Roberts to artificially read anticlassification principles into the *Brown* decision and allows Justice Breyer to inappropriately claim super precedent status for antisubordination principles. I do not question the legitimacy or value of the *Brown* ruling; I simply argue that *Brown* should not be considered a super precedent. The case's importance should be de-emphasized relative to other important acts of constitutional politics, such as the sit-in protests of the early 1960s,[44] Martin Luther King's *I Have a Dream* speech,[45] and, most importantly, the Civil Rights Act of 1964.[46]

Part I of this article begins by considering the fundamental

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[43] *See, e.g.*, Ackerman, *supra* note 21 (incorporating *Brown* into such a narrative); Balkin & Siegel, *supra* note 40 (integrating *Brown* into a larger antisubordination narrative); Reynolds, *supra* note 33 (incorporating *Brown* into a larger anticlassification narrative).

[44] *See* Burt, *supra* note 39.

[45] *See* DREW D. HANSEN, THE DREAM: MARTIN LUTHER KING, JR., AND THE SPEECH THAT INSPIRED A NATION 97 (Ecco 2003).

[46] Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964).

authority of the courts to interpret the constitution. The Supreme Court's legitimacy in handing down a controversial opinion such as *Brown* rests on the notion that the Court is enforcing principles established by the people in a process, which is widely recognized as constitutional decision-making. If there are "super precedents" in American constitutional law—decisions which deserve a heightened degree of deference as precedents—the existence of these super precedents can only be justified by their relation to such acts of higher lawmaking. Although *Brown* is frequently cited as an example of a super precedent due to its alleged association with the Reconstruction movement of the 1860s or the civil rights movement of the 1960s, Part II of this article argues that neither of these interpretations is correct, because *Brown* was not the articulation of a popular process of higher lawmaking. Instead, Part III argues that when looking for writings that illuminate the meaning of the civil rights movement in the constitutional canon, we should look beyond court cases to other artifacts of constitutional change. In Part IV, I examine some of these alternate canonical texts, which suggest that the myth of *Brown's* super precedent status has obscured the true nature of the debate between antisubordination and anticlassification principles. Part V explores the negative ramifications of *Brown's* misclassification as a super precedent.

I. DUALIST DEMOCRACY AND SUPER PRECEDENTS

A. The Role of Judicial Review in Constitutional Democracy

Establishing criteria for identifying super precedents requires an examination of the justification for judicial review itself. The process of judicial review is certainly anomalous in a democracy. Why, in a system of government founded on the will of the people, should unelected judges serving life terms be empowered to strike down laws and practices enacted through the democratic process? Famously dubbed the "counter-majoritarian difficulty" by Alexander Bickel,[47] this fundamental

[47] *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH:

dilemma in the American legal system has received persistent and focused attention from legal philosophers and democratic theorists.[48] A wide range of answers has been advanced to resolve this "difficulty," but most of these solutions attempt to link judicial review to a theory of constitutionalism rooted in popular sovereignty.

Alexander Hamilton offered the original justification for judicial review in *Federalist 78*.[49] There he argues that courts are responsible for interpreting and applying all laws, both those enacted by a legislature and the Constitution itself.[50] If an act of the legislature conflicts with a provision of the Constitution, the Constitution must be given priority because legislators are simply the agents of the people, whereas the Constitution was created by the people themselves: "The Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[51] In other words, judicial review is legitimate in a democracy because constitutional commands represent a more accurate reflection of the people's will than do mere statutes. From this perspective, judicial review is not an undemocratic process, but a *more* democratic process; the will of the people is preferred over the will of lawmakers.

The role of popular sovereignty is at the center of many theories of constitutional law. For example, Keith Whittington argues for an originalist interpretation of the constitution as the

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THE SUPREME COURT AT THE BAR OF AMERICAN POLITICS (Josephine A. Bickel ed., Yale Univ. Press 2 ed.,1986) (1962).

[48] *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2007) [hereinafter CONSTITUTIONAL INTERPRETATION]; JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (2001); Mark Graber, T*he Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Keith Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

[49] THE FEDERALIST NO. 23 (Alexander Hamilton).

[50] *Id.*

[51] *Id.*

enduring embodiment of the people's will.[52] For Whittington, the Constitution's authority is founded on the notion of "potential sovereignty."[53] This idea does not assume that the people would consent to the Constitution if asked; it simply contends that the Constitution is the last and only legitimate expression of the people's will until the next express act of constitutional revision.[54] Whittington calls this dichotomy "democratic dualism."[55] The sovereign people do not always exist; they emerge at certain times to deliberate and express their will as constitutional decision-making.[56]

Even drastically different approaches to constitutional interpretation rely on the authority of the framers for democratic accountability. For example, Sotirios Barber contends that the Constitution should be read through an "aspirational approach" that is aimed at achieving the aspirations of the framers embodied in the text to form the best possible society.[57] Jed Rubenfeld claims that constitutionalism is the practice through which a democratic nation governs itself by making and keeping commitments over time, despite differing preferences among temporary majorities at one particular moment.[58] For Rubenfeld, the Constitution embodies the will of the people, expressed as a self-commitment that binds the people because of its necessity for popular self-government.[59] Both Barber and Rubenfeld present theories of constitutional change that permit courts to legitimately extend constitutional obligations apart from any popular movement. This feature of their theories separates them from pure dualist theories; however, it is important to note that even they reach back to popular movements for some basis of democratic legitimacy.

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[52] *See generally* CONSTITUTIONAL INTERPRETATION, *supra* note 48.

[53] *Id.* at 129.

[54] *Id.*

[55] *Id.* at 135.

[56] *Id.*

[57] SOTIRIOS BARBER, ON WHAT THE CONSTITUTION MEANS 76 (1986).

[58] JED RUBENFELD, REVOLUTION BY JUDICIARY (2005).

[59] *Id.* at 89 ("Self-government, on this view, requires a practice of making and keeping commitments.").

Bruce Ackerman also supports an understanding of American government as a dualist democracy.[60] However, Ackerman's theory differs significantly from Whittington's because Ackerman recognizes that constitutional transformations can occur through both formal and informal tracks of higher lawmaking.[61] The formal track is the Article V amendment process envisioned by the framers.[62] The informal track is a five-stage process in which political elites enter into a dialogue with ordinary people in order to reach and express a new constitutional decision. These five stages are: (1) a popular movement signals its intention to break with the constitutional status quo, (2) reformers propose a specific plan for change, (3) the people trigger the change by supporting reformers who then challenge dissenting institutions, (4) the plan is brought to the people for final ratification, and (5) the advocates of change consolidate the "constitutional moment" by coercing dissenting institutions.[63]

B. Popular Decision-Making and Criteria for Super Precedents

Each of the theories discussed above suggests that the legitimacy of judicial action rests on its connection to the will of the people themselves. Therefore, if there are super precedents in American constitutional law—judicial decisions that deserve special deference from future judges, lawyers, politicians, academics, and publics—then the authority of these super precedents can only be justified by an especially close connection between these rulings and willful acts of higher lawmaking by the American people. By reframing the definition of super precedents as judicial articulations of popular constitutional decision-making, I develop new criteria for evaluating which decisions deserve this special status.

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[60] *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) [hereinafter FOUNDATIONS]; TRANSFORMATIONS, *supra* note 41.

[61] TRANSFOMATIONS, *supra* note 41, at 3–31.

[62] *Id*. at 15.

[63] *Id*. at 17–23.

To begin, I should point out a potential circularity, which is apt to appear in any discussion of super precedents. If super precedents are defined as cases which enjoy great popular support, then the process of categorizing a case as a super precedent is as simple as reading a public opinion poll asking which Supreme Court cases are most important. The definition quickly becomes circular: super precedents are cases that are popular; therefore, cases that are popular are super precedents. In order to avoid this circularity we must distinguish between a descriptive canon (those cases which currently enjoy super precedent status) and a prescriptive canon (those cases which should, by some objective criteria, be categorized as super precedents). Scholars may disagree about what criteria to use, but if we wish to pursue a set of objective criteria to establish which cases should, or should not, be considered super precedents, we must be prepared to conclude that some cases currently enjoying widespread support may not qualify and some cases may qualify which do not enjoy such support. This point is critical to my argument. I believe *Brown v. Board of Education* is currently treated as a super precedent, yet does not deserve this iconic status.

What objective standards can we use to identify which cases are super precedents? The use of the term in the recent confirmation hearings of John Roberts and Samuel Alito has prompted a lively discussion of super precedents in legal scholarship. This discussion provides a good starting point for a working definition of super precedents.

Michael Gerhardt defines super precedents as "the doctrinal, or decisional, foundation for subsequent lines of judicial decisions."[64] Their function in the law is to provide structure for the development of law: "Super precedents seep into the public consciousness, and become a fixture of the legal framework. Super precedents are the constitutional decisions whose correctness is no longer a viable issue for the courts to decide."[65] After discussing what he calls "foundational

[64] Gerhardt, *supra* note 11, at 1205.

[65] *Id.* at 1205–06.

institutional practices"[66] and "foundational doctrine,"[67] Gerhardt addresses "foundational decisions" on discrete questions of constitutional law. Gerhardt suggests five criteria for identifying these decisions: super precedents are cases

> that (1) have endured over time; (2) political institutions repeatedly have endorsed and supported; (3) have influenced or shaped doctrine in at least one area of constitutional law; (4) have enjoyed, in one form or another, widespread social acquiescence; and (5) are widely recognized by the courts as no longer meriting the expenditure of scarce judicial resources.[68]

Gerhardt offers *Knox v. Lee*,[69] *The Civil Rights Cases*,[70] *Washington v. Davis*,[71] *Youngstown Sheet and Tube Co. v. Sawyer*,[72] and *Brown v. Board of Education* as examples of super precedents.[73]

Michael Sinclair defines a super precedent as a decision which is "judicially unshakable, a precedential monument which may not be gainsaid, akin to having the statute-like force of vertical *stare decisis* horizontally."[74] For Sinclair, the main

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[66] Gerhardt defines "foundational institutional practices" as practices which "have become so well entrenched in society . . . that they may be undone only through the most extremely radical, unprecedented acts of political and judicial will[.]" *Id.* at 1207–10. Examples include the practice of judicial review established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) or federal judicial review of state court decisions established in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

[67] Gerhardt defines "foundational doctrine" as "the support in case law for recognizing the existence and application of basic categories, kinds or classes of constitutional disputes that endure over time," such as the incorporation doctrine and the rule establishing classical political questions as nonjusticiable. Gerhardt, *supra* note 11, at 1210–13.

[68] *Id.* at 1213.

[69] 79 U.S. 457 (1870).

[70] 109 U.S. 3 (1883).

[71] 426 U.S. 229 (1976).

[72] 343 U.S. 579 (1952).

[73] Gerhardt, *supra* note 11, at 1215–17.

[74] Sinclair, *supra* note 11, at 365.

feature of a super precedent is its entrenchment in society.[75] Accordingly, only a dramatic societal change could alter the precedent.[76] Being upheld by courts over and over again is not a sign that a case is a super precedent, because that means it is being repeatedly challenged.[77] However, frequent citations to a case might suggest its super precedent status.[78] He suggests *Marbury v. Madison*, *Erie Railroad v. Tompkins*,[79] *Miranda v. Arizona*,[80] and *Brown v. Board of Education* as examples.[81]

Daniel Farber uses the term "bedrock precedents" instead of super precedents, but his meaning is similar.[82] Farber defines bedrock precedents as "precedents that have become the foundation for large areas of important doctrine."[83] He gives as examples the New Deal cases upholding federal taxing and spending programs and recognizing federal jurisdiction over the economy, cases validating the existence of independent agencies, decisions incorporating the Bill of Rights through the Fourteenth Amendment, and the desegregation cases, such as *Brown*.[84]

All of these authors focus on the importance of consistency in the law and stability in political institutions. Gerhardt argues that "[s]ecuring the permanence of some decisions extends all of the institutional values advanced by fidelity to precedent, including the preservation of stability and scarce judicial resources."[85] Sinclair claims that the most significant benefit of *stare decisis* is the "stability, continuity, and predictability it

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[75] *Id.* at 411 ("That some cases should be more solidly ensconced and of more determinate consequence than others is hardly surprising. To overrule such a case should be viewed by society as particularly momentous and hence something to be done circumspectly.").

[76] *Id.* at 400.

[77] *Id.* at 402.

[78] *Id.*

[79] 304 U.S. 64 (1938).

[80] 384 U.S. 436 (1966).

[81] Sinclair, *supra* note 11, at 400–03.

[82] Farber, *supra* note 11, at 1175.

[83] *Id.* at 1180.

[84] *Id.*

[85] Gerhardt, *supra* note 11, at 1221.

lends to the law."[86] Farber echoes this justification.[87] For each of these authors, super precedents exist as a pragmatic necessity for stable government, perhaps reinforced by popular support for the decision, but not necessarily as a principled articulation of a popular expression of sovereign will.

Randy Barnett offers a convincing rejoinder to this conception of super precedents. Barnett suggests that Gerhardt and Farber have committed two logical fallacies: "The first is the conflation of the 'is' with the 'ought'; the second is the conflation of the 'actual' with the 'necessary'."[88] Barnett argues that simply because, as an empirical matter, some cases are not going to be reversed anytime soon does not mean that they should not be reversed.[89] If there ever came a time when a court thought it appropriate to overturn a case, the fact that it was dubbed a super precedent in the past should not influence the court's decision. Additionally, even if these cases are not going to be reversed, it does not mean that they could not be reversed. The factual assumptions underlying the necessity of certain judicial decisions can change.[90] If these facts change, there is no reason a case's super precedent status—the fact the decision was once thought necessary—should limit a court's options.[91]

Barnett also attacks the justification of super precedents based on support for the ruling in the public or in the other branches of government: "To be sure, some precedents could be super, in part, because they are constitutionally correct. I put *Marbury*, *Brown*, and *Griswold* into this category. But simply identifying these cases as super precedents is no substitute for

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[86] Sinclair, *supra* note 11, at 369.

[87] Farber, *supra* note 11, at 1180 ("One purpose of having a written constitution is to create a stable framework for government. This goal would be undermined if the Court failed to give special credence to bedrock precedents.").

[88] Barnett, *supra* note 11, at 1241–42.

[89] *Id.* at 1241. ("An explanation of why a particular decision will not soon be overruled, however . . . is distinct from an argument for why it ought not one day be reversed when the time is ripe.").

[90] *Id.*

[91] *Id.* at 1247–48.

showing *why* they are rightly decided."[92] Support for some cases might be strong among the public and the legal community, but if their normative value is so great, then they should not need status as a super precedent. If on the other hand, their normative value fails under serious scrutiny, then perhaps they should not have been thought a super precedent under this criterion in the first place.

As Barnett points out, the justification of super precedents as necessary components of stability or moral imperatives in society has serious deficiencies.[93] More importantly, though, these justifications are incompatible with the justification of judicial review itself. We do not have the process of judicial review because we trust the courts more than the legislature to maintain a stable government or promote morality in society. The legitimacy of judicial review relies on the connection between the court's decisions and a previous expression of popular will. As such, a tenable theory of super precedents, which effectively raises a judicial opinion to the level of a constitutional command, must rely on this connection to the popular will rather than on a theory of stability or morality. If super precedents exist, then their existence can only be justified by their relation to a popular constitutional movement. Consequently, when determining whether a particular case qualifies as a super precedent, we should evaluate its relationship to a moment of higher lawmaking.

As such, I define super precedents as judicial opinions which articulate a pronouncement of the popular will. In order for a case to qualify as a super precedent, it must be the product of a protracted political struggle that engaged the public in a period of higher lawmaking. Like Farber and Gerhardt, I believe that several historic decisions from the 1930s and 1940s establishing the federal government's authority to regulate the economy and upholding new taxing and spending programs qualify as super precedents. I base their status as super precedents, not on their inherent normative value or their necessity for stable

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[92] *Id.* at 1244–45.

[93] *Id.*

government, but rather on their connection to the New Deal political and constitutional revolution. However, my definition of super precedents leads to different conclusions in many other cases. In the next section I will consider its implications for the supposedly quintessential super precedent, *Brown v. Board of Education*.

II. *BROWN* AS SUPER PRECEDENT

If *Brown's* super precedent status depends on its connection to a moment of popular constitutional politics, then in order to evaluate this status we must ask, "What constitutional decision is articulated in the *Brown* opinion?" Two potential answers are generally advanced in the literature: *Brown* is either the articulation of the post-Civil War Reconstruction movement, particularly the movement that supported the Fourteenth Amendment,[94] or it is the articulation of the civil rights movement of the 1960s.[95] I will consider each of these arguments in turn.

A. Brown as the Articulation of the Reconstruction Movement

The defense of *Brown* as the articulation of the Reconstruction Era contends that Warren's opinion reflected the original understanding of the Equal Protection Clause of the Fourteenth Amendment when it was ratified in 1868.[96] The originalist argument for *Brown*, however, finds very little support in current literature on the Fourteenth Amendment. Legal scholars with a wide variety of ideological and jurisprudential views agree that the Fourteenth Amendment was not originally intended to prohibit school segregation.[97] Alexander Bickel, writing shortly after the *Brown* ruling, conducted an extensive review of the history surrounding

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[94] *See infra* section II.A.

[95] *See infra* section II.B.

[96] *See generally* Michael McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 2 (1996).

[97] *See infra* notes 98–109 and accompanying text.

passage of the Amendment and concluded that "section I of the fourteenth amendment, like section I of the Civil Rights Act of 1866 . . . was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation."[98] In a critique of Robert Bork's defense of the *Brown* ruling, Richard Posner echoes this conclusion:

> [O]n a consistent application of originalism [*Brown v. Board of Education*] *was* decided incorrectly . . . all the clause forbids is the selective withdrawal of legal protection on racial grounds. A state cannot make black people outlaws by refusing to enforce the state's criminal and tort law when the victims of a crime or tort are black. To the consistent originalist that should be the extent of the clause's reach.[99]

Similarly, in their revisionist history of *Brown*, Mark Tushnet and Katya Lezin examine the debates over passage of the Fourteenth Amendment and note the "numerous statements in the debates in which proponents and opponents of the Amendment seemed to agree that the Amendment would not affect the states' ability to segregate public schools; the Amendment protected only what they regarded as 'civil rights' as distinct from political rights, such as voting, and social rights, such as education."[100] Lawrence Tribe and Michael Dorf confirm this reading: "There is very little doubt that most of [the people who voted for the Fourteenth Amendment] assumed that segregated schools were, at that time, entirely consistent with the Fourteenth Amendment."[101]

Michael McConnell offers an alternate view. He challenges "the basic premise that, as a historical matter, segregation did not violate the commonly accepted meaning of the Amendment

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[98] Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).

[99] Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990).

[100] Tushnet & Lezin, *supra* note 20, at 1919.

[101] LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 12–13 (Harvard Univ. Press 1991).

at the time it was drafted and ratified."[102] Rather than focus on Congressional debates over the Civil Rights Act of 1866 or the Fourteenth Amendment itself, McConnell examines evidence from the years following passage of the Amendment to show that school segregation was not a completely accepted part of national life. He concludes that "[a] close examination of the debates and votes on segregation between 1870 and 1875 now convinces me that *Brown v. Board of Education* was correctly decided on originalist grounds."[103]

McConnell offers an intriguing historical perspective on the civil rights debates in congress in the 1870s, but Raoul Berger's convincing rejoinder undermines his argument for an originalist grounding for the *Brown* decision. [104] Because Berger's critique is so thorough, I will only highlight his main conclusions. First, Berger challenges McConnell's use of debates over the Civil Rights Act of 1875.[105] The meaning of the Fourteenth Amendment, like the meaning of any text, must be founded on the intentions of the authors, rather than later interpreters of the text.[106] As such, the interpretations adopted by Congress in the 1870s are irrelevant to a debate over original intent.[107] Second, all the evidence from the ratification of the Fourteenth Amendment supports the claim that it was intended to legalize the Civil Rights Act of 1866 and protect a similar list of specific rights, which did not include desegregation.[108] Third, desegregated schools were not within the meaning of the Privileges and Immunities Clause of the Fourteenth

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[102] McConnell, *supra* note 96, at 457.

[103] *Id*. at 458.

[104] *See generally* Raoul Berger, *The "Original Intent"—As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242 (1996).

[105] *Id*. at 245–46.

[106] *Id*. at 242 ("For centuries 'original intention' has meant the understanding of the draftsmen, not that of subsequent readers.").

[107] *Id*. at 245 ("[T]he words are words of art whose meaning is historically confined to the intention of the draftsmen, that is the 1866 framers; it cannot include later interpretations.").

[108] *See id*. at 247–50.

Amendment.[109] Although McConnell's argument shows the lengths to which originalists will go to justify *Brown*, the linkage between desegregated schools and the Reconstruction movement is ultimately unpersuasive.

B. Brown as the Articulation of the 1960s Civil Rights Movement

Perhaps because arguments connecting *Brown* to the Reconstruction Era operate on such shaky ground, or perhaps because the case is so temporally distant from that period, the *Brown* decision is much more frequently framed as connected to the civil rights movement of the 1960s. In their elucidation of the super precedent concept, Gerhardt, Farber and Sinclair all cite *Brown v. Board of Education* as a prime example of a super precedent (or bedrock precedent), and each of their arguments hinge on the opinion's connection to the popular expression of constitutional politics during the 1960s.[110]

Gerhardt notes the strong initial backlash after the *Brown* decision, and points out that the debate over school desegregation was not truly resolved "until national political leaders fell behind *Brown* in the late 1950s, particularly through politically and socially significant legislation such as the 1964 Civil Rights Act and the 1965 Voting Rights Act."[111] As further evidence of *Brown's* super precedent status, Gerhardt points out the importance of Supreme Court nominees accepting *Brown* in order to get confirmed.[112] While Robert Bork's criticism of the *Brown* decision caused serious problems for his confirmation, Clarence Thomas did not signal any intention to abandon the precedent.[113] Then, Gerhardt segues back into a discussion of the 1960s:

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[109] *See id*. at 255–59.

[110] *See* Farber, *supra* note 11, at 1186; Gerhardt, *supra* note 11, at 1215; Sinclair, *supra* note 11, at 400.

[111] Gerhardt, *supra* note 11, at 1215.

[112] *Id*.

[113] *Id*.

> Nor, more importantly, did Justice Thomas suggest he would call into question the landmark legislation *Brown* and its progeny arguably spawned, including the 1964 Civil Rights Act and the 1965 Voting Rights Act . . . . Subsequent nominees, including Chief Justice John Roberts and Justice Samuel Alito, have declared unambiguously their fidelity to *Brown* and to the landmark legislation, and thus the precedents upholding them, embedding it deeply into American culture, society, and constitutional law.[114]

Why is the importance of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 included in an analysis of *Brown*? What relevance do these acts have in establishing *Brown* as a super precedent? The only plausible explanation for this link is the claim that "*Brown* and its progeny arguably spawned" the civil rights legislation of the 1960s.[115] Gerhardt is not so subtly implying that *Brown's* super precedent status is, at least in part, dependent on the popular endorsement of its principles in the following decade.

Michael Sinclair echoes the importance of popular support for identifying a super precedent.[116] Although Sinclair does not go into great detail in asserting that *Brown* deserves this status, perhaps assuming the claim is not controversial, his brief remarks highlight the importance of subsequent popular opinion in verifying the case's importance: "society now recognizes the moral abhorrence of that state of affairs [before *Brown*], and would surely find a return to it socially repulsive."[117]

Farber firmly grounds his defense of *Brown's* status on the popular ratification of its principles during the 1960s:

> Consideration of nonjudicial precedents also reinforces the significance of bedrock precedent. The post-New Deal understanding of federal power received the support of the President and Congress over a long period of time.

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[114] *Id*. at 121–16.

[115] *See id*. at 1215.

[116] Sinclair, *supra* note 11, at 400.

[117] *Id*.

> So has the racial integration mandate of *Brown*, which was stirringly endorsed by Congress and the President in the Civil Rights Act of 1964. These actions by the 'democratic branches' rebuff any argument that these precedents represent a judicial power grab, and such actions thereby help place the precedents' legitimacy beyond question.[118]

On these points Farber is clear: *Brown* is both legitimate and deserving of special deference as a "bedrock precedent" because it stands for the decision of the people, as represented by Congress and the president, during the 1960s.[119] Without these endorsements, *Brown's* status, and perhaps even its legitimacy, would be in question.

Even Randy Barnett, who disagrees with the value of the super precedent concept, points out that if *Brown* has achieved this status it is because of the popular civil rights movement that succeeded it: "*Brown* itself did not spell the end of Jim Crow. That took decades of political struggle and physical resistance to accomplish, only after which did *Brown* itself become anything like a 'super precedent.'"[120] Once again, for Barnett, it is the expression of popular will through political struggle that explains and legitimizes *Brown's* importance.

As shown above, both the proponents and opponents of the super precedent concept justify *Brown's* status by linking it to the civil rights movement of the 1960s rather than that of the 1860s. But this linkage entails several obvious conceptual problems: If *Brown* spoke for a popular movement which was yet to occur, must we not conclude that the *Brown* decision was wrong the day it was decided? If the opinion's legitimacy depends on a decision the people made in the 1960s, then how could it have been legitimate in 1954? Are we to believe that the unanimous Supreme Court was simply wrong from a jurisprudential perspective, but nonetheless praiseworthy because the people later adopted its principles?

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[118] Farber, *supra* note 11, at 1186.

[119] *Id.*

[120] Barnett, *supra* note 11, at 1244.

In his 2006 Oliver Wendell Holmes Lectures, Bruce Ackerman tries to resolve this temporal dilemma and salvage the connection between *Brown* and the civil rights movement by describing the decision as the first stage in his five-stage process of constitutional transformation.[121] Ackerman agrees with *Brown's* super precedent status and that "*Brown*'s canonization is itself a product of the *very same popular sovereignty dynamic* that gave us the landmark [Civil Rights Act of 1964 and Voting Rights Act of 1965]."[122] He contends that the *Brown* decision was the "signal" of the civil rights constitutional movement, which "forced the question of equality onto the center of the constitutional stage," by "catalyz[ing] an escalating debate that ultimately penetrated the nation's workplaces and churches, breakfast tables and barrooms, in a way that is rare in America . . . ."[123]

At first, Ackerman's claim appears plausible; however, upon closer reflection it is inconsistent with his own theory of constitutional signaling. In Ackerman's *We the People: Foundations*, he describes the signaling phase of constitutional change as an indication that a popular movement enjoys "extraordinary support for their initiative in the country at large. Extraordinary in three senses: depth, breadth and decisiveness."[124] To say that a movement has depth signifies that citizens are informed about an issue and have seriously considered its implications.[125] A movement's breadth indicates that it is supported by a large number of citizens.[126] Although

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[121] Ackerman, *supra* note 21, at 1789. Ackerman lists *Brown v. Board of Education* along with *Marbury v. Madison* and *Wickard v. Filburn* as examples of super precedents. He reinforces *Brown's* importance by asserting that "any lawyer or judge who questions *Brown*'s legitimacy places himself outside the jurisprudential mainstream." *Id*.

[122] *Id*. at 1790 (emphasis in original).

[123] *Id*. at 1763.

[124] TRANSFORMATIONS, *supra* note 41, at 272.

[125] *Id*. at 273–74 ("I shall say that a private citizen's support is 'deep' when she has deliberated as much about her commitment to a national ideal as she thinks appropriate in making a considered judgment on an important decision in her private life.").

[126] *Id*. at 274 ("[T]here must be lots and lots of private citizens who think

Ackerman is hesitant to specify particular numbers, he suggests that for a movement to register a signal, it should have "the deep support of 20 percent of the country, and the additional support of 31 percent of *private* citizens."[127] Finally, a constitutional initiative must be decisive; that is, "[i]t should be in a position to decisively defeat all the plausible alternatives in a series of pairwise comparisons."[128] In *We the People: Transformations*, Ackerman lists as examples of such signaling events the Mt. Vernon and Annapolis conventions in which delegates from several states met and laid the groundwork for the Philadelphia convention, the election of Abraham Lincoln in 1860, the Reconstruction Congress's radical decision not to seat the southern delegates after the Civil War, and the election of Franklin Roosevelt in 1932.[129]

Each of these examples fit the model of a popular movement signaling a radical change in constitutional politics; but how does *Brown v. Board of Education* fit into this framework? A Supreme Court decision is hardly a good example of a popular movement supported by private citizens signaling an intention to initiate change. The justices on the Supreme Court in 1954 were appointed by Presidents Roosevelt, Truman, and Eisenhower—three Presidents hardly known for their strong stances on civil rights and who were certainly not elected by a popular movement demanding constitutional transformation in civil rights law.[130] There were no popular movements in society for which the Court might have been speaking.[131] As Ackerman himself has argued, the dominant constitutional issue on the agenda of the American people in the early 1950s was anti-Communism, not civil rights.[132]

Nor did the Court's decision prompt any such movement to

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that the reform should be taken seriously.").

[127] *Id*. at 275 (emphasis in original).

[128] *Id*. at 277.

[129] *Id*. at 40–49, 127, 166–73, 281–85.

[130] Ackerman, *supra* note 21, at 1762.

[131] As discussed *infra*, the popular movement known as the civil rights movement did not emerge until 1958 at the earliest.

[132] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 375 (2006).

emerge. As Michael Klarman points out, the disconnect between the logic of *Brown* (based on the psychological effects of segregated schools on children) and the logic of the Montgomery bus boycott (based on fairness, equality, and respect for adult African-Americans in public facilities) raises doubts about a direct link between these events, and regardless of "whether or not *Brown* inspired the Montgomery bus boycott, it produced no general outbreak of direct-action protest in the 1950s."[133] Civil rights activism did not emerge as a significant social phenomenon until the early 1960s, and then not because of *Brown's* influence, but because of other factors such as the Cold War and the decolonization of Africa.[134]

But civil rights activism did emerge. Lawrence Benn notes that the "sit-in" protest movement "that began in 1960 with four students at a Greensboro North Carolina lunch counter swelled to a force of 70,000."[135] By the end of 1960, the sit-in movement had spread to every Southern and Border state.[136] That same year, the students who led the sit-ins formed the Student Nonviolent Coordinating Committee, which conducted the Freedom Rides the next summer.[137] In the spring of 1963 massive street protests broke out in Birmingham, Alabama.[138] In the months following, spin-off demonstrations occurred in cities throughout the south, involving more than 100,000 people.[139] In the summer of 1963, more than 250,000 people attended the March on Washington for Jobs and Freedom in which King

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[133] *Id*. at 373.

[134] *Id*. at 374–76. By endorsing the view that several societal factors independent of *Brown* contributed to the growth of the civil rights movement in the early 1960s, I do not mean to embrace the notion that "progress in race relations [was] almost inevitable." Ackerman, *supra* note 21, at 1764, n.81. I simply wish to emphasize the importance of other causal factors.

[135] Lawrence Benn, The Sit-In Cases and the Constitutional Legitimation of the Civil Rights Act (2007) (unpublished manuscript, on file with the *Journal of Law and Policy*).

[136] *Id*. at 2–7.

[137] *Id*.

[138] *Id*.

[139] KLARMAN, *supra* note 132, at 374.

delivered his famous "I Have a Dream" speech, and millions more watched on television.[140] If there was a popular signal of an intention to fundamentally alter the constitutional status of civil rights in America, surely it was the protests of the early 1960s, not the opinion of nine aging white lawyers sitting on the Supreme Court in 1954.

There is little evidence to support the claim that Brown prompted this popular uprising.[141] Michael Klarman's study of the fallout from *Brown* suggests that the decision did more to radicalize southern segregationists and promote violence around the issue,[142] which in turn helped prompt the popular civil rights movement.[143] The *Brown* decision may have served as a catalyst for the civil rights movement by provoking violent resistance, but this does not mean it was a popular signal of constitutional change. The ruling was neither the product of a popular movement, nor the cause of such a movement. *Brown's* catalytic effect has more in common with the *Dred Scott* decision in 1858 and the stock market crash in 1929—both of which raised awareness and provoked a public response—than it does with the presidential elections of Lincoln and Roosevelt. Although Warren's opinion is distinct in that it shares rather than refutes the progressive attitude of the movement to come, this does not mean it was part of a popular movement that enjoyed depth, breadth, and decisiveness in the American public.

Professor Ackerman's depiction of *Brown* in the Holmes Lectures is particularly surprising because it differs so dramatically from his description of the ruling in his earlier work, *We the People: Foundations*. In *Foundations*, Ackerman

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[140] HANSEN, *supra* note 45.

[141] KLARMAN, *supra* note 132, at 374–77; *see also* Gerald Rosenberg, THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE? 107–56 (1991).

[142] KLARMAN, *supra* note 132, at 421 ("[I]n addition to radicalizing southern politics in ways that enhanced the likelihood of racial violence, *Brown* created concrete occasions for such outbreaks.").

[143] *Id*. at 435 ("Televised brutality against peaceful civil rights demonstrators in Birmingham dramatically altered northern opinion on race and enabled the passage of the 1964 Civil Rights Act.").

describes the Court's decision in *Brown* as "an intergenerational synthesis, an explicit recognition of the need to integrate the constitutional meaning of two historical periods in reaching a valid judgment."[144] On this account, the Court in *Brown* was trying to reconcile the Reconstruction Era commitment to prohibit racial subordination in political life with the New Deal's acceptance of state intervention into matters previously left to individual choice: "Once the New Deal had authorized the state's power to guarantee a retirement pension or a minimum wage, Justice Brown's confident distinction between social and political equality [in *Plessy v. Ferguson*] was no longer tenable."[145] The New Deal expanded the application of Reconstruction principles into a greater sphere of social life by extending the legitimate reach of government action.[146] The Court in *Brown* decided that, after the New Deal, the protections of the Fourteenth Amendment must be extended to public education,[147] but the Court did not fully embrace the meaning of the civil rights movement.

Ackerman's two depictions of *Brown*—as an intergenerational synthesis case and a constitutional signal—are not incompatible. It is conceivable for the Court to act as a signal while simultaneously synthesizing two historical constitutional principles, but this is not what happened in *Brown*. In fact, Ackerman's description of *Brown* in *Foundations* explicitly rejects his more recent description of the case in the Holmes lecture. In *Foundations*, Ackerman asserts that "*Brown* is a legalistic effort to 'cool' the debate, not a populist or prophetic effort to 'heat' it up."[148] It does not call upon the country to engage in a new round of constitutional politics; it tries to establish that the time had come for Americans to

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[144] FOUNDATIONS, *supra* note 60, at 144.

[145] *Id*. at 146.

[146] *Id*. at 147 ("The New Deal Court recognized the government as an active contributor to the process by which groups made their 'choices' in American society.").

[147] *Id*. at 150 ("Within the new activist order, the schoolchild's sense of racial inferiority had become a public responsibility, not a private choice.").

[148] *Id*. at 143.

comply with legal principles *already affirmed* by the People of the past."[149] It is possible that Professor Ackerman has simply changed his mind since *Foundations* was published more than fifteen years ago. If so, my argument is an affirmation of Ackerman's earlier reading of *Brown* in *Foundations* and a rejection of his more recent interpretation of *Brown* in the Holmes Lectures.

III. SEARCHING FOR SUPER PRECEDENT

The historical connection between *Brown* and the civil rights movement is tenuous at best; nonetheless, the canonization of *Brown* as a super precedent expressing the meaning of the civil rights movement might be justified if the civil rights movement vindicated the principles articulated in this decision. Did the Court's opinion in *Brown* endorse the same constitutional principles that would later be embraced by the 1960s civil rights movement? There are many reasons to believe it did not. A brief comparison of the principles in *Brown* and those emphasized by the civil rights movement highlights the problems of treating *Brown* as an articulation of that movement. However, such a comparison requires identifying textual sources apart from *Brown* that reflect the meaning of the civil rights revolution. Without a constitutional amendment or a transformative judicial opinion to serve as a super precedent, where can we turn to look for a clear pronouncement of civil rights principles? The search for suitable texts must begin with the legal pathology that led to *Brown's* improper canonization.

Ackerman points out that the form of constitutional articulation from a popular movement is dependent on the institutional positions of reformers vis-à-vis dissenters.[150] The Radical Republicans wrote constitutional amendments to establish the Reconstruction movement because the White House was occupied by a southern Democrat; President Andrew Johnson could not be trusted to appoint Radical Republican

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[149] *Id*. at 143 (emphasis in original).

[150] TRANSFORMATIONS, *supra* note 41, at 271–73.

judges who could write transformative judicial opinions.[151] As a result, we have no great super precedents articulating the Reconstruction movement. Instead, we have the Thirteenth, Fourteenth and Fifteenth Amendments.[152]

The New Deal Democrats did not suffer from this dilemma. With Franklin Roosevelt in the Oval Office, they could threaten to pack the Court and eventually appoint New Deal Democrats to write judicial opinions upholding their landmark statutes.[153] As a result, we do not have constitutional amendments from the New Deal era; we have only landmark statutes and super precedent judicial decisions. Franklin Delano Roosevelt and the Democrat-dominated congress passed numerous statutes striving to fundamentally alter the role of the federal government: the Social Security Act,[154] the National Labor Relations Act,[155] and the Fair Labor Standards Act,[156] to name just a few. In upholding these statutes the Court marked out a decidedly new direction for constitutional law by acknowledging the transformation of constitutional principles after the New Deal.[157] These decisions serve as super precedents because they articulate the new constitutional meaning legitimated through popular mobilization during the 1930s.[158]

Unfortunately, the civil rights era did not produce similar super precedent judicial rulings. In the months before the civil rights coalition in Congress passed the Civil Rights Act of 1964

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[151] *Id*. at 273 ("The 'court-packing' issue looked very different to the Republicans after the Civil War. Once Johnson defected from the reform coalition in 1866, he was intent on filling vacancies with solid conservatives who would invalidate the Reconstruction Acts and sabotage the ratification of the Fourteenth Amendment.").

[152] *Id*. at 269.

[153] *Id*. at 272 ("Instead of pushing forward under Article Five, [the New Dealers] could appoint a steady flow of New Dealers to the bench who could uphold revolutionary reforms through a series of landmark judicial opinions.").

[154] 42 U.S.C.A. §§ 301–1397 (1935).

[155] 29 U.S.C.A. §§ 151–169 (1935).

[156] 29 U.S.C.A. §§ 201–219 (1938).

[157] TRANSFORMATIONS, *supra* note 41, at 315.

[158] *See generally id*. at Part III.

and a very different President Johnson signed it into law, the Supreme Court struggled to dispose of *Bell v. Maryland*,[159] a case that squarely presented the question of private discrimination under the Fourteenth Amendment. In *Bell*, the justices were asked whether sit-in protesters could be arrested for trespassing in a public restaurant if they were not welcome in the restaurant due to their race.[160] The issue revealed a complicated split on the Court that is eerily reminiscent of the New Deal split. This time, the Four Horsemen[161] resisting change were Justices Black, Harlan, Stewart, and White. Justices Douglas, Goldberg, and Brennan, as well as Chief Justice Warren, supported extending the logic of *Shelley v. Kraemer*,[162] which had forbidden judicial enforcement of racially restrictive covenants, to the sit-in cases.[163] Justice Clark, somewhat tentatively, opposed extending the Fourteenth Amendment's definition of state action to cover the enforcement of race-neutral trespassing laws.[164] Although Justice Clark momentarily joined an opinion supporting such an extension of the Amendment, this was most likely a strategic ploy.[165] Fearful that a ruling in *Bell v. Maryland* might doom the Civil Rights Act of 1964, Justice Brennan fashioned a compromise to side-step the issue by avoiding a ruling on the merits.[166]

When the Court was forced to rule on the constitutionality of the Civil Rights Act in *Heart of Atlanta Motel v. United States*

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[159] 378 U.S. 226 (1964).

[160] *Id.* at 227–28.

[161] This phrase is short for "The Four Horsemen of the Apocalypse" and was used as a nickname for four members of the Supreme Court during the 1932–1937 terms (Justices James Clark McReynolds, George Sutherland, Willis Van Devanter, and Pierce Butler), who consistently voted to block New Deal Legislation. *See, e.g.*, G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 19 (2000) (discussing usage of the phrase "Four Horsemen").

[162] 334 U.S. 1 (1948).

[163] Benn, *supra* note 135, at 38.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 31.

the justices split once again.[167] According to Justice Douglas's conference notes, only three Justices supported an interpretation of the Fourteenth Amendment that permitted Congress to regulate private racial discrimination—Justices Douglas, Goldberg, and Black.[168] Some scholars claim that a majority may have supported overruling the *Civil Rights Cases* and upholding the Act on Fourteenth Amendment grounds, but, regardless of the outcome, the split would have protracted the constitutional debate.[169] If a majority had struck down the Civil Rights Act in *Heart of Atlanta*, Congress and the president may have responded with an attack on the Court or waited to make transformative judicial appointments. If a majority had upheld the Act over a strong dissent it may have provided encouragement to those resisting the movement. Either way, the Court would have eventually been forced to write an opinion articulating the constitutional transformation of the 1960s that would serve as a super precedent.

Instead, the Court ducked the issue. As Ackerman puts it, "New Deal constitutionalism came to the rescue."[170] Congressional supporters of the Civil Rights Act had cleverly based their authority for passing the Act on the Commerce Clause as well as the Fourteenth Amendment.[171] The justices, all products of the post-New Deal era, were willing to uphold Congress's authority based on the power granted in the Commerce Clause.[172] As a result, rather than a transformative judicial opinion that could serve as a super precedent articulating the civil rights movement's revolution in constitutional meaning, *Heart of Atlanta* turned out to be just another Commerce Clause case.[173] As Ackerman puts it, if the Warren Court

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[167] 379 U.S. 241 (1964).

[168] Benn, *supra* note 135, at 47.

[169] Ackerman, *supra* note 21, at 1780.

[170] *Id*. at 1781.

[171] *See* 42 U.S.C.A. § 2000(a) (2006) (prohibiting discrimination or segregation in places of public accommodation).

[172] *Heart of Atlanta*, 379 U.S. at 250.

[173] *Id*. ("Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power

> . . . had overruled the *Civil Rights Cases* in 1964, *Heart of Atlanta Motel* and *McClung* would have eclipsed *Brown* in the modern constitutional canon. In this alternative scenario, today's lawyers and judges would be studying *these* cases, not *Brown,* in their effort to elaborate the breakthrough principles of equal protection and state responsibility that served as the foundation of the landmark Act of 1964.[174]

But after speculating on this alternative scenario, Ackerman fails to confront the pressing interpretive question raised by this hypothetical and its implications for *Brown's* role as a constitutional signal: should we study *Brown* in order to understand the principles of equality and state action embraced by the civil rights legislation of the 1960s? If the focus on *Brown* is simply a consequence of the Court's strategic move to avoid the issue, should we not turn our attention away from the Court towards a branch of government that was willing to articulate a new constitutional meaning? Fortunately, Congress provided clear, substantive meaning for the civil rights transformation in the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[175] It is to these documents, not to *Brown*, that we should look when searching for super-precedent-like texts from this era.

Ackerman admits that *Brown* is a case of "retroactive canonization,"[176] but does not challenge the case's status as a super precedent. Instead, he incorporates the case into his five-stage process in an attempt to salvage its interpretive importance.[177] But again, the Ackerman of the Holmes Lectures can learn a great deal from the Ackerman of *Foundations*. Just as lawyers and scholars should be wary of myths of rediscovery

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[based on the commerce clause], and we have therefore not considered the other grounds relied upon.").

[174] Ackerman, *supra* note 21, at 1779–80 (emphasis in original).

[175] *See infra* note 45.

[176] Ackerman, *supra* note 21, at 1790.

[177] *Id*. at 1762–63 ("In calling *Brown v. Board of Education* an institutional signal, I take a middle path between legalists who exaggerate *Brown*'s significance and political scientists who trivialize it.").

for the New Deal, we should be wary of the myth of rediscovery for the civil rights movement through retroactive canonization of *Brown*.

The Court did not accept the meaning of the civil rights movement in *Brown v. Board of Education*; the Court effectively ducked the constitutional issue and punted the civil rights question to Congress in *Heart of Atlanta*. The Court's clever strategy produced a politically palpable solution, but failed to produce a clear articulation of civil rights principles. Because *Heart of Atlanta* was decided on Commerce Clause grounds rather than the Fourteenth Amendment, constitutional scholars have reached back to *Brown* in search of a more meaningful statement of these principles from the Court.[178] The fact that the justices could authorize the Civil Rights Act of 1964 on New Deal logic is the main reason there were no protracted legal battles, followed by transformative judicial opinions in the 1960s; however, transformative judicial opinions are no more necessary for a successful constitutional transformation than are formal Article V amendments. Rather than mythologize the Warren Court's decision in *Brown v. Board of Education*, the search for an articulation of civil rights principles embraced by the American people in the 1960s should focus on the protests that signaled the coming constitutional transformation and the landmark statutes enacted to achieve that transformation.

IV. *BROWN* AND THE MEANING OF THE CIVIL RIGHTS MOVEMENT

The Court's decision in *Brown* followed a relatively simple line of argument: (1) the history of the ratification of the Fourteenth Amendment is "inconclusive" in determining the constitutionality of school segregation;[179] (2) the Fourteenth Amendment proscribes "all state-imposed discriminations against the Negro race"[180]; (3) at the time the Fourteenth Amendment

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[178] *See, e.g.* Ackerman, *supra* note 21.

[179] Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan., 347 U.S. 483, 489 (1954).

[180] *Id.* at 490.

was passed, "the movement toward free common schools, supported by general taxation, had not yet taken hold" in the southern states, but by 1954 "education [was] perhaps the most important function of state and local governments";[181] (4) separating out African-American students in public schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone";[182] (5) this "psychological knowledge," which is "amply supported by modern authority," compels the Court to clarify the language of *Plessy* and hold that "[s]eparate educational facilities are inherently unequal."[183] The central principles in this line of argument are the importance of education as a state sponsored activity, the psychological damage of segregation in schools, and the imperative against state action that contributes to a racial group's inferior status in the community. Were these the central themes of the civil rights movement?

No one source can properly claim to speak for the civil rights movement.[184] There are several historical sources, though, which shed light on the intentions of civil rights activists during this period. For example, Klarman notes the disconnect between the logic of *Brown* and the motivation of the Montgomery Bus Boycott in December of 1955: "At the outset of the boycott, black leaders repeatedly stressed that they were not seeking an end to segregation, which would have been the logical goal had *Brown* been their primary inspiration."[185] Klarman also

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[181] *Id*. at 489, 493.

[182] *Id*. at 494.

[183] *Id*. at 494–95.

[184] In fact, my central argument is to discredit one potential source, *Brown v. Board of Education*, as an accurate articulation of this movement.

[185] KLARMAN, *supra* note 132, at 371 ("[P]rotesters . . . principally sought an end to the humiliating practices of white bus drivers, including verbal insults . . . physical abuse, and an enraging proclivity to drive off before black passengers, who had to pay the fare at the front of the bus, had boarded again at the rear . . . . At the outset of the boycott, black leaders repeatedly stressed that they were not seeking an end to segregation, which would have been the logical goal had *Brown* been their primary inspiration.").

emphasizes the disjuncture between the goals stressed in the *Brown* decision and those of the larger movement. Whites in the 1950s fervently opposed desegregation; "[b]lacks, conversely, were often much more interested in voting, ending police brutality, securing decent jobs, and receiving a fair share of public education funds than in desegregating grade schools."[186] Based on this history, reading *Brown* as a super precedent articulating the meaning of the civil rights movement seems particularly troubling.

Many civil rights advocates continued to downplay the importance of school desegregation for the civil rights movement well into the 1960s. Consider, for example, Martin Luther King, Jr.'s "I Have Dream" speech, delivered at the March on Washington for Jobs and Freedom in 1963. The title of the march itself points out an initial difficulty with the link to *Brown*: where were jobs in the logic of *Brown*? Warren's opinion talks about the importance of education for society, the logic of state action in the Fourteenth Amendment, and the fear of psychological harm to young children.[187] How do these themes apply to job opportunities in the private sector for adults?

King's speech offers a rich source of meaning for the civil rights movement. Halfway through his speech, King summarizes his goals: "There are those who are asking the devotees of civil rights, 'When will you be satisfied?'"[188] King responds to the rhetorical question with a list of injustices the movement hopes to end: "unspeakable horrors of police brutality" against African-Americans, the inability of African-Americans to "gain lodging in motels of the highways and hotels of the cities," the restriction of mobility within the African-American community "from a smaller ghetto to a larger one, "signs stating 'for whites only,'" and the lack of voting rights.[189] Schools are never mentioned in the entire speech, and the allusion to segregation

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[186] *Id*. at 391–92.

[187] *Brown*, 347 U.S. at 494–95 (1954).

[188] HANSEN, *supra* note 45, at 56.

[189] *Id*. at 56–57.

("signs stating 'for whites only'") is obviously aimed at public accommodations, such as bathrooms, restaurants, hotels, and drinking fountains where such signs were posted. Not only was this issue distinct from school segregation, but it was also an injustice perpetuated as much, if not more, by the private sector as by state actors.

The Civil Rights Act of 1964 offers another description of the movement's objectives. The preamble to the act succinctly lists its purposes:

> To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.[190]

Here, we see the appearance of school desegregation as a main purpose of the Act, and presumably of the movement itself; however, it is listed as only one of several, and certainly not the most controversial. In numerous areas, the act reaches beyond mere state action and addresses discrimination in hotels, restaurants, theaters, stadiums, private industry employment, and union membership.[191] Subsequent civil rights legislation focused on voting rights and fair housing practices, neither of which bears any direct relationship to the reasoning in *Brown*.[192]

Most importantly, the civil rights movement of the 1960s vindicated a very different set of principles than those articulated in the *Brown* decision. Whereas the justices in *Brown* avoided language referring to racial classifications or distinctions, the civil rights movement frequently articulated its purposes and accomplishments in explicitly anti-classification terms. For

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[190] Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964).

[191] Civil Rights Act of 1964 § 201(b).

[192] *See* Voting Rights Act of 1965 § 2, Pub. L. No. 89–110.

example, in his "I Have a Dream" speech, Martin Luther King, Jr. proclaimed the hope that his children would "not be judged by the color of their skin."[193] Title IV of the Civil Rights Act of 1964 defined desegregation as "the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin."[194] The Act repeatedly condemns actions taken which "discriminate," "exclude," "limit, segregate, or classify" "on account" of race, "by reason of race," "because of race," "on the ground of race," "based on race," or "on the basis of race."[195] The Act makes no mention of racial groups, disadvantaged or otherwise, nor does it suggest preferential treatment for particular racial groups in order to address their subjugated status in society.

In fact, the Act explicitly rejects the use of race-conscious criteria aimed at promoting integration. The Act's definition of desegregation specifies that the term "shall not mean the assignment of students to public schools in order to overcome racial imbalance."[196] In the critical section of Title IV, which empowers the Attorney General to file a civil action on behalf of the United States to desegregate public schools, the authors reiterated their rejection of racial balancing. The Act authorizes the Attorney General to institute a civil action in federal court to achieve desegregation:

> provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance.[197]

These passages were included at the behest of pivotal moderate Republicans like Everett Dirksen, whose support was

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[193] HANSEN, *supra* note 45, at 58.

[194] Civil Rights Act of 1964 § 401(b).

[195] *Id*.

[196] Civil Rights Act § 401(b).

[197] *Id*. § 407 (a)(2).

critical for the bill's enactment.[198] These moderate Republicans demanded these concessions from ardent supporters of the bill in order to limit its impact on de facto segregation in the North and prevent courts from engaging in racial balancing.[199] Even the ardent supporters of the bill acknowledged these concessions.[200] Senator Hubert Humphrey, speaking on the Senate floor, emphasized the bill's rejection of racial balancing in Title VII, which adopted similar language in regards to employment: "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet the racial 'quota' or to achieve a certain racial balance."[201] In fact, the bill's floor managers, Joseph Clark and Clifford Case, insisted that "any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII."[202] Surely this same logic would apply to the equally explicit rejection of racial balancing in school desegregation. Not only does the Civil Rights Act of 1964 fail to endorse race-conscious measures to combat racial subordination, it was construed by its proponents to forbid such a practice.

V. THE MALADIES OF MYTH

In this article, I have tried to demonstrate that the canonization of *Brown* as a super precedent lacks democratic legitimacy, misrepresents history, and reduces the meaning of the civil rights movement to state action in elementary and secondary education. However, the implications of *Brown's* mistaken canonization extend well beyond democratic theory and

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[198] Daniel B. Rodriquez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspective on the 1964 Civil Rights Act and its Interpretation*, 151 U. PENN. L. REV. 1417, 1474–94 (2003).

[199] *Id*. at 1488.

[200] HIGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, 85 (1990).

[201] *Id* at 150.

[202] *Id* at 150–51.

historical accuracy. By accepting the myth of rediscovery that enshrines *Brown* in our constitutional discourse we do not simply misinterpret history; we misinterpret the meaning of the constitutional decision made by the American people during the 1960s. Disentangling the principles articulated in *Brown* from those endorsed by the civil rights movement sheds light on the fundamental debate that has defined equal protection jurisprudence for the last four decades: anticlassification versus antisubordination.

The arguments advanced by Chief Justice Roberts and Justice Breyer in *Parents v. Seattle* are hampered and confused by their mutual acceptance of *Brown's* super precedent status.[203] Chief Justice Roberts works diligently in his opinion to link anticlassification principles to the *Brown* decision, but this effort is ultimately fruitless because it is ahistorical.[204] The principles to which the Chief Justice subscribes were not established in *Brown v. Board of Education*; they were established through a process of constitutional deliberation beginning with the sit-in protests of the early 1960s and culminating in the passage of the landmark statutes securing basic civil rights. As anticlassification principles garnered the support of the American people, courts began to reframe equal protection jurisprudence to reflect those values.[205] By the 1970s anticlassification became the dominant framework for applying the Equal Protection Clause.[206] Despite gaining popular endorsement of anticlassification values, adherents to these principles have tried to recast the meaning of *Brown* in order to harmonize the myth of its super precedent status with the anticlassification agenda.

Justice Breyer's depiction of *Brown*'s meaning is more historically accurate and textually faithful; however, Justice Breyer's opinion simply props up the myth of *Brown* in order to

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[203] *See supra* notes 25–35 and accompanying text.

[204] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746–47 (2007).

[205] *See generally* Anderson v. Martin, 375 U.S. 399, 402–04 (1964); McLaughlin v. Florida, 379 U.S. 184, 190–92, 196 (1964); Loving v. Virginia, 388 U.S. 1, 2, 10–12 (1967).

[206] Siegel, *supra* note 27, at 1521.

support his antisubordination views.[207] In so doing, he pays insufficient attention to the act of constitutional deliberation that ultimately vindicated anticlassification principles during the 1960s. By employing a court-centered view of constitutional decision making, Justice Breyer is able to portray the anticlassification agenda as an aberration of misguided judicial interpretation rather than a popularly endorsed constitutional principle. He is ultimately correct in arguing that *Brown* and many of its progeny vindicated antisubordination values, but he is mistaken in his implicit assumption that the *Brown* decision deserves super precedent status.

The myth of rediscovery that protects *Brown's* exalted status obscures the significance of the interpretive constitutional process at work in cases considering preferential treatment for disadvantaged racial groups. To once again borrow language from Bruce Ackerman, these cases are best understood as examples of intergenerational synthesis.[208] Just as *Brown* reconciled Reconstruction commitments with New Deal principles, the justices in *Parents* are attempting to reconcile Reconstruction values with the anticlassification principles endorsed by the civil rights movement.[209] Rather than framing the debate between anticlassification and antisubordination values as a struggle over the meaning of *Brown*, judges, lawyers, and legal scholars should strive to grapple with the interpretive and jurisprudential challenge of reconciling these popularly endorsed constitutional principles.

Adherents to antisubordination values may find this interpretation of the civil rights movement disheartening, but they should not. As Ackerman has pointed out, the myth of rediscovery offers politically expedient benefits at the cost of democratic courage.[210] By obsessively trying to reinvent the past

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[207] *See supra* notes 33–35, 39–40 and accompanying text.

[208] *See supra* note 144.

[209] Ackerman would call this interpretive dynamic a 2-4 synthesis. *See* FOUNDATIONS, *supra* note 60, for his use of analogous language.

[210] Ackerman, *supra* note 21, 1803–09 ("The same disease currently afflicts American constitutional law. Our most important fiction involves the pervasive use of 'myths of rediscovery' . . . . We dishonor our fellow

in order to promote modern objectives, we rob ourselves of the most fundamental democratic principle: the right of the people to break with the past and establish new fundamental values for our society.[211] The anticlassification principles vindicated by the civil rights movement may frustrate the proponents of racial balancing in schools, but a shift in focus from *Brown* to the constitutional revolution of the 1960s should offer inspiration to advocates for change across the political spectrum. Those who hope to reshape the structure of American society need neither reinvent history in search of precedent, nor enlist the service of nine old lawyers. The power to change our society rests safely with the People; this power is only obscured when we discount the achievements of previous popular movements. In this way, the disservice we do to history is ultimately a disservice to ourselves.

CONCLUSION

The proponents of civil rights during the 1960s were hoping for much more than the end of state-sponsored racial segregation in public education, and their primary concern was certainly not with the "psychological" effects of racial oppression.[212] The civil rights movement strove for and achieved the delegitimation of racial discrimination that caused tangible damage to African-

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citizens when we tell them a tale that treats their parents and grandparents as if they were pygmies compared to the constitutional giants of the ever-receding past. We should offer them instead a view of constitutional development that invites them to follow in the footsteps of Franklin Roosevelt and Martin Luther King, Jr.—to dream their own Dreams and make their own New Deals, and to build a better America in the twenty-first century.").

[211] *Id*.

[212] *See generally* GRAHAM, *supra* note 200 (analyzing the implementation of the liberal agenda of non-discrimination through the recreation of the debates within Congress and the White House); KLARMAN, *supra* note 132 (discussing how the Supreme Court's decision in Brown v. Board of Education mobilized supporters of non-discrimination); RODRIQUEZ & WEINGAST, *supra* note 198 (utilizing the Civil Rights Act as a "vehicle for considering statute making, legislative rhetoric, and the relevance of our views to the current normative debate over statutory interpretation").

American opportunities across the entire society, especially in public accommodations, housing, employment, and voting, as well as in public education. Furthermore, the proponents of the civil rights movement tended to employ the language of anticlassification when articulating their goals and when enacting these objectives into law.[213] I do not mean to suggest that school desegregation was not an important goal of the civil rights movement. I only claim that focusing on *Brown* as the articulation of that movement obscures the true meanings of both the movement and *Brown*.

Brown v. Board of Education should not be considered a super precedent because it was not a product of the mobilized popular movement that grasped control of the levers of government and transformed the meaning of the constitution. The special place of super precedents in constitutional law should be reserved for judicial pronouncements that articulate changed constitutional meanings after protracted popular disputes. The *Brown* decision is neither an accurate reflection of the full meaning of the civil rights movement, nor is it an historical byproduct of that movement.

By rejecting *Brown's* status as a super precedent, I do not mean to claim that the case was not important.[214] Nor do I mean

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[213] *See supra* Part IV.

[214] There are, undoubtedly, numerous opinions that signal a significant departure from established jurisprudence, yet are not the product of a mobilized popular movement seizing control of the various arms of the state. In each of the cases below, the Supreme Court established a principle of constitutional interpretation which shaped jurisprudence in a particular area of case law for years to come; yet, for most of these cases, no one would assert that the Court's decision reflected and articulated the conscious decision of a popular movement engaged in an act of higher lawmaking. These noteworthy rulings should be taught in classrooms and studied carefully, but they should not be confused with super precedents. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (finding an Ohio statute unconstitutional under the First and Fourteenth Amendments for failing to distinguish between teaching a group the need for violence and preparing a group for violent action); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right of privacy implicit in the Third, Fourth, Fifth, and Ninth Amendments); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the due process clause of the Fourteenth Amendment extended to the States the Fourth Amendment right against unreasonable

to criticize the central holding in *Brown*.[215] My point is that treating *Brown* as a super precedent undermines the conceptual value of super precedents and the historical understanding of the civil rights movement. Confusing a high-minded act of intergenerational legal synthesis with the articulation of a popular political movement does a disservice to the normative value of super precedents; confusing the decision of nine judges with a popular signal from a broad movement of students, ministers, and activists does a disservice to the history of the civil rights era.

searches and seizures); Brown v. Board of Education, 347 U.S. 483 (1954) (declaring state laws establishing separate public schools for black and white students unconstitutional under the Fourteenth Amendment); Lochner v. New York, 198 U.S. 45 (1905) (ruling that the general right to contract and the right to purchase or sell labor is protected by the Fourteenth Amendment); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (one of Ackerman's intergenerational synthesis cases).

[215] Criticizing a case's status as a super precedent and criticizing the merits of the Court's decision in the case are two very different arguments; there are undoubtedly thousands of rightly decided cases that are not super precedents.