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## The People Maybe? Opening the Civil Rights Revolution to Social Movements

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## THE PEOPLE MAYBE? OPENING THE *CIVIL RIGHTS* *REVOLUTION* TO SOCIAL MOVEMENTS

Sidney Tarrow\*

BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION*  
(2014). Pp. 432. Hardcover \$ 35.00.

The people yes  
The people will live on.  
The learning and blundering people will live on.  
They will be tricked and sold and again sold  
And go back to the nourishing earth for rootholds,  
The people so peculiar in renewal and comeback,  
You can't laugh off their capacity to take it.  
The mammoth rests between his cyclonic dramas.<sup>1</sup>

Bruce Ackerman has done it again: he has published the third in his magisterial series of books on American political/constitutional history.<sup>2</sup> The first volume,<sup>3</sup> *We the People: Foundations*, made the greatest splash among constitutional lawyers. Its innovation was to range well outside formalist boundaries to bring popular politics into the study of constitutional revision. His second volume,<sup>4</sup> *We the People: Transformations*, focused on the transformations in U.S. constitutional practice from the Civil War through the New Deal. The third volume, *We the People: The Civil Rights Revolution* (hereinafter *CRR*), brings the story up to the civil rights revolution, which Ackerman sees as the latest constituent moment in American history.<sup>5</sup> Among them, these three volumes contribute to one

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1. CARL SANDBURG, *THE PEOPLE YES*, available at <http://glenavalon.com/peopleyes.html>.

2. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984). Ackerman's books grew out of his Storrs Lectures at Yale in 1984, which were published by the *Yale Law Journal* with the subtitle "Discovering the Constitution." Volume I of *We the People* was published by Harvard University Press in 1993, with the subtitle "Foundations." The same press published Volume II in 1998 with the subtitle "Transformations."

3. BRUCE ACKERMAN, *WE THE PEOPLE, VOL. I: FOUNDATIONS* (1993).

4. BRUCE ACKERMAN, *WE THE PEOPLE, VOL. II: TRANSFORMATIONS* (1998).

5. Note that Ackerman intends to bring the story up to date in a fourth volume.

side of a growing bridge between constitutional scholars and students of social movements.<sup>6</sup>

Ackerman is not alone: at the same time as lawyers are reaching towards social movements, movement scholars have been expanding the range of their interests to a broader range of “contentious politics”<sup>7</sup> and to the interactions between movements and institutions.<sup>8</sup> They are examining the mechanisms and processes that link movements to the law, to the courts, and to legal mobilization.<sup>9</sup> Ackerman’s work contributes to this bridge, but it misses the opportunity to explore the mechanisms and processes that link the law to popular movements in cycles of contentious politics.

To be fair, Ackerman is not attempting to speak to a social movement audience, a fact that critics in the legal academy have already pointed out.<sup>10</sup> But a book whose title is “We the People” cries out for a response from students of movements. In turn, movement scholars can profit from Ackerman’s effort to embed constitutional history in popular politics. I will argue that a more capacious concept of contentious politics, disaggregating “The People” and linking them to political cycles in a more interactive way, could have gone further in building a bridge between legal scholarship and social movement research.

I begin in Part One with what Ackerman says about movements and their connection to institutional politics. Part Two proceeds to a critique of his concept of movements and constitutional cycles. Part Three examines Ackerman’s potential contributions to bridging

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6. An excellent literature review that attempts to bring together the insights of legal scholarship, organization theory, and social movement research is: Lauren Edelman, Gwendolyn Leachman, & Doug McAdam, *On Law, Organization, and Social Movements*, 6 ANN. REV. OF LAW AND SOC’Y 653-85 (2010). See STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* (2004); MICHAEL MCCANN, *RIGHTS AT WORK* (1994) [hereinafter MCCANN, *RIGHTS AT WORK*]; LAW AND SOCIAL MOVEMENTS (Michael McCann ed. 2006) [hereinafter LAW AND SOCIAL MOVEMENTS]; GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) [hereinafter ROSENBERG, *THE HOLLOW HOPE*]; CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1997); CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart Scheingold eds., 2006).

7. The founder of this strand of social movement scholarship was Charles Tilly, especially in his landmark works: *From Mobilization to Revolution*, *The Contentious French*, and *Popular Contention in Great Britain 1758-1834*. For a review of Tilly’s contributions up to his latter books, see SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (1994) [hereinafter TARROW, *POWER IN MOVEMENT*]. For truth in advertising, note that this author was a collaborator of Tilly’s, along with sociologist Doug McAdam, who has done much of his empirical work on the civil rights movement. See DOUG MCADAM, SIDNEY TARROW & CHARLES TILLY, *DYNAMICS OF CONTENTION* (2001); CHARLES TILLY & SIDNEY TARROW, *CONTENTIOUS POLITICS* (2006); DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930-1970* (1999) [hereinafter MCADAM, *POLITICAL PROCESS*]. See also CHARLES TILLY, *FROM MOBILIZATION TO REVOLUTION* (1978); CHARLES TILLY, *THE CONTENTIOUS FRENCH* (1986); CHARLES TILLY, *POPULAR CONTENTION IN GREAT BRITAIN 1758-1834* (1995).

8. See SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS (Anne Costain & Andrew McFarland eds., 1998); STATES, PARTIES, AND SOCIAL MOVEMENTS (Jack A. Goldstone ed., 2003). See also Doug McAdam & Sidney Tarrow, *Ballots and Barricades: On the Reciprocal Relationship Between Elections and Social Movements*, 8 PERSP. ON POL. 2 (2010) (for an analysis of the relations between movements and elections).

9. Michael McCann, who has done more than anyone to bring together legal and social movement studies, is not optimistic. He wrote that, “most social movement scholars still seem relatively uninterested in sociological scholarship.” LAW AND SOCIAL MOVEMENTS, *supra* note 6, at xi.

10. In his response to his critics Tomiko Brown-Nagin, Lani Guinier and Gerald Torres, Sanford Levinson, and Rogers Smith, Ackerman says as much: “My larger aim, though, is to build bridges between interpretive schools that generally don’t have much to say to one another—textualism, on the one hand; common law constitutionalism, on the other hand; popular constitutionalism, on the third hand; critical constitutionalism, on the fourth; and there are even more hands clapping to different beats in other juristic circles.” Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3105 (2014) [hereinafter Ackerman, *De-Schooling Constitutional Law*] available at <http://www.yalelawjournal.org/article/de-schooling-constitutional-law>.

social movement scholarship and constitutional law.

### I. WHAT ACKERMAN TELLS US ABOUT MOVEMENTS

Ackerman has become best known among constitutional lawyers for the thesis that revisions of the American Constitution no longer depend—if they ever did—on Article V amendments to the Constitution. He argues that since the New Deal, what amount to constitutional revisions are the result of major waves of legislative reform. He links this thesis to a more general critique of what he sees as the unwillingness of constitutional lawyers to look beyond formalism to major changes in the constitutional order outside the courts. An important implication of his critique is that non-state actors are more likely to push for *non*-Article V constitutional revisions than to struggle through the obstacle course of the formal amendment process. For Ackerman, this means that a robust account of constitutional cycles should not only go beyond the courts to include other branches of government, but also link these branches to The People.

Volume One of *We the People* focused largely on the Founding, although it also dealt with the political process that led to the Reconstruction amendments; Volume Two turned to structural revisions of the Constitution during the New Deal; Volume Three focuses on the non-Article V constitutional changes in the Kennedy and Johnson administrations that were triggered by the Civil Rights movement. This is a major achievement.

Constitutional scholars who review Ackerman's new book will no doubt want to know<sup>11</sup>:

- Does constitutional change really no longer depend on the formal amendment process?
- Is originalism as foolish—or as wrongheaded—as his thesis would make it sound?<sup>12</sup>
- Were there *three* constitutional moments after the Founding—Reconstruction, the New Deal, and Civil Rights—as Ackerman insistently argues? Why not two, or four, or five?<sup>13</sup>

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11. For an initial set of thoughtful comments, see Symposium, *The Meaning of the Civil Rights Revolution*, 123 YALE L.J. 8 (2014) available at <http://www.yalelawjournal.org/>. See also *De-Schooling Constitutional Law*, *supra* note 10 (Ackerman's response).

12. In a personal communication, Ken Kersch points out that actually, Ackerman is a kind of originalist himself, since each new constitutional cycle provides a framework of higher law for the period that follows. In this volume, James Fleming inquires whether Ackerman is better understood as an originalist or living constitutionalist. See James E. Fleming, *Fidelity to Our Living Constitution*, 50 TULSA L. REV. 449 (2015).

13. Ackerman has been somewhat inconsistent on this point, sometimes arguing that there was another constitutional moment around the end of World War II, involving the treaty power. One might also wonder whether the Progressive period, with its major constitutional changes, ranging from the wave of direct legislation in the constitutions of 23 states, to the constitutional amendment that created the direct election of U.S. Senators, was not a constitutional moment. That period was also rich with social movement activism, from the Progressives themselves to Single Taxers like Henry George, and the Muckrakers epitomized by Lincoln Steffans. Akhil Amar treats it as such. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2006). I am grateful to Joseph LaPalombara for reminding me of this period.

To readers who have followed Ackerman's trajectory since the 1980s, these are familiar questions. More important for movement scholars is that his theoretical model puts The People—working through social movements and movement-parties—at the origin of the major watersheds in American history. The dynamic spurred by these movements, he argues, is then picked up by “movement-presidents” with large congressional majorities.

Popular politics played a key role in triggering all three of Ackerman's constitutional moments, but only in the third volume does he offer his reader a definition of social movements: “The defining feature of a movement,” he writes, “is its *activists*, a *large body* of citizens who are willing to *invest enormous time and energy* in the pursuit of a new constitutional agenda.”<sup>14</sup> Movement scholars would agree with Ackerman that movements do not empower political change on their own; they transform into or influence what he calls “movement-parties.” This transition leads to the “normalization of movement politics,” which gives added importance to the election of a movement president and to the plebiscitarian presidency.<sup>15</sup>

Though the origins of the movement-presidency lie in the nineteenth century—especially in the figure of Lincoln—it was Franklin Roosevelt and his New Deal legislative program that represented its apotheosis. The New Deal was created by a great popular upswell in the election of 1932; it was certified by a massive vote of confidence in the election of 1936; and it was this popular impulse that convinced the Supreme Court to throw in the towel and accede to the new activist state that FDR initiated. The constitutional precedents FDR established could then serve as a platform for civil rights,<sup>16</sup> and for the reforms of post-New Deal figures like Lyndon Johnson, and the Warren Court majority that handed down the *Brown* decision in 1954.

But the institutional grammar inherited from the past did not remain unchanged: a new model, superimposed on the New Deal constitution, was built during the civil rights movement.<sup>17</sup> With some poetic license, Ackerman regards Johnson as a movement-president in the line started by FDR.<sup>18</sup> Whether that is a fair depiction of Johnson, the constitutional changes represented by the Civil Rights period still frame the constitutional debate today.<sup>19</sup> One of the most revealing parts of Ackerman's book is showing how the current debates around Supreme Court decisions echo with the great debates around the Civil Rights and Voting Rights Acts of the 1960s.<sup>20</sup>

Like Volumes I and II of *We the People*, *The Civil Rights Revolution* has a lot to teach social movement scholars and lawyers alike. The new work makes a powerful case

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14. BRUCE ACKERMAN, *WE THE PEOPLE*, VOL. III: THE CIVIL RIGHTS REVOLUTION 39 (2014) (emphasis added) [hereinafter CRR].

15. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1997). Ackerman's idea of “normalization” is strikingly parallel to social movement scholars' idea of a “movement society.” See *THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY* (David S. Meyer & Sidney Tarrow eds., 1998) (for more on this concept, which grew out of the research on the post-1960s movements).

16. See Ken Kersch, *The New Deal Revolution as the End of History? The Judicial Negotiation of Labor Rights and Civil Rights*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken I. Kersch, eds., 2006) [hereinafter *THE SUPREME COURT*].

17. CRR, *supra* note 14, at 41.

18. *Id.*

19. *Id.* at 40-41.

20. *Id.* at ch. 13.

against constitutional formalists whose concerns, Ackerman argues, are largely limited to Supreme Court doctrine.<sup>21</sup> It does this not by mere polemic—although of that there is plenty!<sup>22</sup>—but by demonstrating how the Court’s decisions and discussions interacted with presidential initiatives, with congressional debates, and even with “administrative constitutionalism.”<sup>23</sup> The book is a depository of deep knowledge on how the separation of powers works in practice during major constitutional moments.

While embedding the Civil Rights movement in the sequence of constitutional revolutions, Ackerman also lays out the significant differences between those earlier cycles and the recent one.<sup>24</sup> He shows how the Supreme Court, rather than the Presidency or the party system, played the key signaling role in the 1950s; how the Kennedy assassination transferred constitutional leadership to the movement-presidency of Lyndon Johnson; how New Deal precedents allowed Johnson to claim a Rooseveltian heritage and encouraged the Court to defer to this mandate by upholding the Civil Rights Act.<sup>25</sup>

Taken together with such major books as Richard Valelly’s *The Two Reconstructions*,<sup>26</sup> and Desmond King’s and Rogers Smith’s *Still a House Divided*,<sup>27</sup> Ackerman’s new book takes a major step beyond the Court-centered account of the period of constitutional change initiated by the *Brown* decision. It goes beyond these books in specifying the inter-branch interactions in this period of major reform. However, it leaves a gap between the concrete concept of “social movements” and the more abstract one of “The People.”<sup>28</sup> Moreover, his concept of “constitutional cycles” is strangely two-dimensional, leaving out the role of social movements during post-emergence stages of the cycles he examines. A closer look at social movement theory—especially at the concept of “cycles of contention”—might have better specified the role of We the People in Ackerman’s major constitutional moments.

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21. Berating “constitutional formalists” is, of course, *de bonne guerre*. Thanks, in good part, to Ackerman’s example, many constitutional scholars today can be counted as anti-formalists, which is why so many of them are interested in the connections between constitutional law and social movements. But note the “new formalism” built around labor rights that Kersch finds in the decisions of the New Deal Court after 1937. THE SUPREME COURT, *supra* note 16 (Kersch’s analysis of New Deal labor rights decisions and their impact on civil rights).

22. Writing of commentaries on the Civil Rights Act, he polemizes: “If lawyers of the twenty-first century really want to understand the greatest egalitarian achievement [i.e., civil rights] of the twenty-first century, they must look beyond the *United States Reports* . . . they must listen to the voices of Martin Luther King Jr., Lyndon Johnson, Hubert Humphrey, and Everett Dirksen as they hammered out this landmark statute in the name of the American people.” CRR, *supra* note 14, at 75.

23. Ackerman adapts the term from William Eskridge and John Ferejohn’s *A Republic of Statutes* but uses it to describe such constitutional moments as the passage of the Voting Rights Act. WILLIAM N. ESKRIDGE JR. & JOHN FEREOH, A REPUBLIC OF STATUTES (2010). See also CRR, *supra* note 14, at 160-73 (for an example of Ackerman’s interactive interpretation of constitutional legislation at its most persuasive).

24. CRR, *supra* note 14.

25. *Id.* at 5, 41.

26. RICHARD VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT (2004).

27. DESMOND S. KING & ROGERS M. SMITH, STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA’S AMERICA (2011).

28. (Capitalization is original). This elision may be why Ackerman’s books have barely attracted the notice of social movement scholars. Another reason is that key concepts in Ackerman’s books—beginning with the central concept of “social movement” and ending with the more expansive one of constitutional cycles—are innocent of advances that have been made in linking social movements to broader cycles of political change over the past few decades.

## II. WHAT ACKERMAN DOES NOT TELL US ABOUT MOVEMENTS

There are a number of problems in Ackerman's *tour de force*, beginning with the status and specification of the master concept of "The People." For example, does he mean all of the people, some of the people, all of the people some of the time, or some of the people some of the time? And, how does the term "The People" relate to the term "social movement," or to the cognate term "popular sovereignty?"<sup>29</sup> As Sanford Levinson points out; "The central challenge is to determine whether 'popular sovereignty' is anything more than a 'glittering generality,' useful, perhaps, as a trope in political mobilization but otherwise of little, if any, utility as a genuine analytical concept."<sup>30</sup> It does not help that Ackerman's definition of movement activists ("a *large body* of citizens who are willing to *invest enormous time and energy* in the pursuit of a new constitutional agenda")<sup>31</sup> is never clearly related to his generic concept of "The People." *CRR* would have profited from identifying an analytical space between broad and almost abstract concept of "The People" and the concept of social movements, which has a quite concrete meaning for movement scholars.<sup>32</sup>

Ackerman's definition of movement activists is notable for its populism, its emphasis on the size of the movement, and its insistence on activists' investment of time and energy.<sup>33</sup> But movement scholars have become more circumspect about these demanding parameters.<sup>34</sup> Most movement participants limit their activism to signing petitions, writing checks, perhaps marching in the occasional demonstration, and, increasingly, mobilizing online. Rather than emphasize the popular base, the size, and the time and energy that activists invest in their claims, contemporary scholars are more concerned with the *difficulty* of stimulating participation, with such participation's *intermittent* nature, and with the distinction between the small cadre of elite activists at the core of movements and the broader penumbra of occasional participants and sympathizers.<sup>35</sup>

Not only that, despite the subtitle "We the People," the "space" in Ackerman's book is inside the beltway. By his own admission, *CRR* is "a Washington-centered book, failing to integrate the voices of movement activists, local political leaders, and ordinary Americans into the story."<sup>36</sup> Over and over, "The People" are invoked as the source of the actions of "movement-parties" and "movement-presidents," but after the initial moves in Selma

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29. Randy Barnett, *We the People, Each and Every One*, 123 YALE L.J. 2576 (2014).

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

31. *CRR*, *supra* note 14, at 39 (emphasis in original).

32. The major definitional work on social movements and "social movement organizations" has been done in the "resource mobilization" school founded by Mayer N. Zald and John McCarthy. For some of the foundational contributions to this approach, see SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY (Mayer N. Zald & John David McCarthy eds., 1987).

33. *CRR*, *supra* note 14, at 39.

34. DONATELLA DELLA PORTA & MARIO DIANI, SOCIAL MOVEMENTS: AN INTRODUCTION (2d ed. 2006) [hereinafter DELLA PORTA & DIANI, SOCIAL MOVEMENTS: AN INTRODUCTION] (for the most representative contemporary introduction to social movements); see also THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004) [hereinafter THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS]; TARROW, POWER IN MOVEMENT, *supra* note 7 (for more specialized analyses).

35. DELLA PORTA & DIANI, SOCIAL MOVEMENTS: AN INTRODUCTION, *supra* note 34; THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 34.

36. *CRR*, *supra* note 14, at 314.

and Montgomery, they operate, as it were, offstage. As Lani Guinier and Gerald Torres write: “We agree with Professor Ackerman that the courts, the legislature, and the electoral process are important. However, Ackerman’s focus on the elite should not blind us to the actions of ordinary men and women on the ground.”<sup>37</sup> This is not a “court-centered” book, but it is certainly not a “movement-centered” one either.

In recent years, movement scholars have become increasingly aware that much of the dynamic of contentious politics takes place in the interactions among different groups and tendencies within movements. The civil rights movement—as elaborately shown in Rogers Smith’s critique of *CRR*—was never a single “People,” but a shifting coalition that was divided between those who sought to achieve a race-neutral society and those who were more interested in establishing Black rights.<sup>38</sup> Moreover, each of these tendencies was made up of people with different combinations of preferences, and inclined towards different degrees of cooperation with the Kennedy and Johnson administrations.<sup>39</sup> Once we move beyond the admittedly critical maneuvers of the Johnsons, the Dirks, the Warrens, and the Nixons to the movement itself, the Civil Rights Revolution becomes infinitely more composite and internally contradictory, a phenomenon than what we see in Ackerman’s account. If the movement had been more unified, the legislation that emerged might have been more consistent and more forceful than what resulted from the political process. This takes us to the relationship between Ackerman’s key concept of constitutional cycles and the broader political cycles of which they are a part.

#### *Cycles of Contention and Constitutional Cycles*

Ackerman’s concept of constitutional cycles is in some ways parallel to the model of cycles of contention that has emerged from social movement researchers over the last two decades.<sup>40</sup> In *CRR*, he charts a six-stage model of constitutional change:

- *Signaling*: the first stage in constitutional dynamics in which one or another institution responds to the appeals of one or another reform movement;<sup>41</sup>
- *The proposal phase*, in which the reform movement—now ensconced in the political process—keeps on winning elections and the House, Senate, and the President are prepared to pass

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37. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2799 (2014) [hereinafter Guinier & Torres, *Changing the Wind*]. In Ackerman’s account, the movement-figure of Dr. Martin Luther King Jr. looms large, while key figures, like E. Philip Randolph, Bayard Rustin, and Ella Baker, and militant organizations like the Student Nonviolent Coordinating Committee retreat into the background. Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2708-12 (2014) [hereinafter Brown-Nagin, *The Civil Rights Canon*].

38. Rogers M. Smith, *Ackerman’s Civil Rights Revolution and Modern American Racial Politics*, 123 YALE L.J. 2906, 2913-17 (2014) [hereinafter Smith, *Ackerman’s Civil Rights Revolution*].

39. *Id.*

40. Ruud Koopmans, *The Dynamics of Protest Waves: West Germany, 1965-1989*, 58 AM. SOC. REV. 637 (1993); Ruud Koopmans, *Movements and Media: Selection Processes and Evolutionary Dynamics in the Public Sphere*, 33 THEORY AND SOC’Y 367 (2004); TARRROW, POWER IN MOVEMENT, *supra* note 7.

41. *CRR*, *supra* note 14, at 44.

landmark statutes;<sup>42</sup>

- *The triggering election*, if and when the movement for revolutionary reform wins big at the polls;<sup>43</sup>
- *Mobilized elaboration*, in which the rising movement is now largely in control of all the key institutions;<sup>44</sup>
- *The consolidating phase and ratifying election*. Creative periods never last: popular support may slacken, and the reformers turn into establishment figures.<sup>45</sup> Surprisingly, in this consolidation, even the opposition moderates its stance to adapt to the new constitutional settlement.

Ackerman's sequence is followed by a return to normal politics. But the return to normality is only temporary: American history, for Ackerman, is an unending cycle of contention, reform, and institutionalization:

[A]fter a decade or three, a new call for revolutionary reform will echo through the land, and new leaders will confront the rigors of another long march through the separation of powers—signaling, proposing, triggering, elaborating, ratifying, and consolidating new constitutional meanings in their own voice.<sup>46</sup>

While this notion of cyclical change followed by normalization is also familiar from social movement research, there are two main differences.

First, while movement scholars have largely limited their attention to cycles of contention *outside* the state, with the government as the target of their challenges, Ackerman's constitutional moments take place *within* the state, and, in particular, in the interactions among the executive, Congress, and the courts.

Second, while in movement theories, the interaction of movements and institutions takes place *throughout the cycle*, in Ackerman's scheme, movements appear only at the inception of the cycle—in what he calls “the signaling stage.”<sup>47</sup> The result is that most of the action in his account takes place within institutional politics, a fact that has not escaped his critics.<sup>48</sup> This leaves important changes in the civil rights movement and its shifting

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42. *Id.* at 45.

43. *Id.*

44. *Id.*

45. *Id.* at 46.

46. *Id.* at 46–47.

47. Several of the contributors to the issue of the *Yale Law Journal* symposium, notably Tomiko Brown-Nagin, Lani Guinier, and Gerald Torres, and Rogers Smith, as well as Ackerman himself in his response to these critics, anticipate this critique, perhaps not exactly with the same implications I will emphasize. See Brown-Nagin, *The Civil Rights Canon*, *supra* note 37; Guinier & Torres, *Changing the Wind*, *supra* note 37; Smith, *Ackerman's Civil Rights Revolution*, *supra* note 38; Ackerman, *De-schooling Constitutional Law*, *supra* note 10.

48. Brown-Nagin, *The Civil Rights Canon*, *supra* note 37; Guinier & Torres, *Changing the Wind*, *supra* note

relationship to institutional politics on the margins of his account—especially those that occurred during the late 1960s and the 1970s.<sup>49</sup> Specifying the role of movements during the entire civil rights cycle would have helped Ackerman to explain the delays, accelerations, successes, and failures of the reform process.

Ackerman did not need to look to social movement accounts to specify these changes more effectively—although it would have added depth and richness to his account.<sup>50</sup> Constitutional lawyer Michael Klarman has laid out a sketch of these relations in his path-breaking book *From Jim Crow to Civil Rights*.<sup>51</sup> Klarman’s account is interactive: he argues that the *Brown* decision led to the direct action movements of the early 1960s via the counter-movement against *Brown*, and then to the reform legislation of the late Kennedy and early Johnson administrations.<sup>52</sup> It was the ruthless repression of black civil rights activists in the glare of the national media that radicalized the movement and forced the administration to move determinedly to pass landmark civil rights legislation.<sup>53</sup>

### III. WHAT ACKERMAN CAN TEACH MOVEMENT SCHOLARS

It is easy to poke holes in the vast carapace of an achievement like Ackerman’s, but he has much to teach scholars of social movements.

First, movement scholars too often tell stories that are too “social-movement centered”—that is, they focus on political and policy changes to the extent that they either do or do not result from social movements’ efforts. Yet in many episodes of contentious politics, movements are either insignificant or are absent from the conflict. For example, in their systematic comparative work, McAdam and Boudet found that movements were important actors in the implementation of environmental policies in only a small minority of the cases they studied.<sup>54</sup> Despite his populist convictions, Ackerman’s episodes tell a similar tale. For example, despite the importance of the anti-slavery movement in the Civil War, the struggle over the Reconstruction amendments was largely fought among congressional forces. True, the Radical Republicans were a “movement-party,” but their actions to ram through the Fourteenth and Fifteenth amendments were recognizable as classical maneuvers of a party in power, not a social movement.<sup>55</sup>

Second, movement scholars who focus on the law are most often interested in

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37. As McCann writes, “[i]t only makes sense, after all, that legal mobilization may contribute in different ways and with varying impacts, at different points in ongoing struggles. In the civil rights movement, for example, both litigation and rights discourse surely played very different roles in the 1950s than they did in the 1960s and 1970s.” LAW AND SOCIAL MOVEMENTS, *supra* note 6, at 9.

49. There is an exception: the extraordinary importance that Ackerman gives to the Mississippi Freedom Democratic Party at the 1968 Democratic Party convention. On this episode, *see* CRR, *supra* note 14, at ch. 6; *see also* MCADAM, POLITICAL PROCESS, *supra* note 7.

50. In particular, CRR would have profited from the interactive approaches to civil rights in Doug McAdam’s *Political Process and the Rise of Black Insurgency* (1999) and from Kenneth Andrews’ *Freedom is a Constant Struggle* (2004). MCADAM, POLITICAL PROCESS, *supra* note 7; KENNETH ANDREWS, FREEDOM IS A CONSTANT STRUGGLE: THE MISSISSIPPI CIVIL RIGHTS MOVEMENT AND ITS LEGACY (2004).

51. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

52. *Id.*

53. *Id.* at ch. 6.

54. DOUG MCADAM & HILARY SCHAFER BOUDET, PUTTING SOCIAL MOVEMENTS IN THEIR PLACE: EXPLAINING OPPOSITION TO ENERGY PROJECTS IN THE UNITED STATES, 2000-2005 (2012).

55. Mark A. Graber, *The Declaration of Independence as Canon Fodder*, 49 TULSA L. REV. 469 (2014).

whether “cause lawyers” are successful in bringing about legislative or judicial change.<sup>56</sup> To the extent that they examine the broader political system, it is to ask whether the mobilization of movement energies in the courts displaces energies that might have proven more successful if they had been applied to other forms of activism.<sup>57</sup> For Ackerman, the relations between movements and the law are not limited to questions surrounding legal mobilization. Changes in the law also become structuring principles for popular politics.<sup>58</sup>

Finally, Ackerman has a more capacious concept of the law than we find in most social movement scholarship. The changes in the law created by the Founding, Reconstruction, the New Deal, and the Civil Rights Revolutions not only changed how America was governed and the rights that Americans either enjoyed or lacked. They also changed the social meaning of the law and the opportunity structure of future waves of social movements. Without the Civil Rights Revolution, movements such as the marriage equality movement would have lacked the legal and cultural foundation for the gains they sought. As Michael C. Dorf writes of a more recent movement:

Although the respective decisions differed from one another in some important particulars, with respect to the question of marriage versus civil unions each rested on the same core principle: withholding the word marriage impermissibly connotes a kind of second-class citizenship that is inconsistent with the government’s basic obligation of equal protection.<sup>59</sup>

Ackerman does not use the same language as Dorf but his conclusions—written before the current wave of marriage equality court decisions—make clear that the campaign for same-sex marriage would not have been conceivable without a fundamental shift in the social meaning of the law in the course of the Civil Rights Revolution.<sup>60</sup>

Social movement scholars are of course aware that the law and the courts are fundamental building blocks in the strategies of social movements. But they have been slow to grasp the implications of constitutional revolutions for changes in the social meaning of the law. The reason may lie in the fact that most movement research is short-term, deals, for the most part, with individual movements, and leaves constitutional cycles to historians and constitutional lawyers. It is only by embedding movements in the larger canvass of contentious politics and tracing the impact of legal change on future episodes of contention that we will be able to gauge changes in the social meaning of the law for movements and for “The People.”

Ackerman has taken major steps beyond the constitutionalist formalism he criticizes; he has insisted on the role of movements in initiating constitutional change. I only wish he had better specified the role of “The People” and their relationship to social movements throughout the revolutionary episode he depicts. But, if his work can be criticized, this is because of the vast compass of the task he took on. He has gone far towards building

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56. ROSENBERG, *THE HOLLOW HOPE*, *supra* note 6; MCCANN, *RIGHTS AT WORK*, *supra* note 6.

57. ROSENBERG, *THE HOLLOW HOPE*, *supra* note 6, at 423.

58. Guinier & Torres, *Changing the Wind*, *supra* note 37.

59. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1269 (2011).

60. CRR, *supra* note 14, at ch. 13.

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one side of a bridge to social movement scholars; it is to be hoped that these scholars will do as much to bring The People into constitutional politics.