
The Civil Rights Canon: Above and Below

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TOMIKO BROWN-NAGIN

The Civil Rights Canon: Above and Below

ABSTRACT. This essay builds on the constitutional history of the civil rights movement from below to complement and complicate the canon identified in *We the People: The Civil Rights Revolution*. Like Professor Ackerman's work, this essay embraces the concept of popular sovereignty: it is a powerful resource for social movements seeking constitutional change. However, this essay expands the "who" and the "what" of the civil rights era's constitutional vision beyond the public figures and antidiscrimination statutes to which *We the People* attaches great significance. Ackerman's civil rights canon emanates from officialdom—Lyndon Johnson, Hubert Humphrey, and Everett Dirksen—and a single representative of the civil rights movement, Rev. Dr. Martin Luther King, Jr. Antidiscrimination statutes—the Civil Rights Act (CRA), Voting Rights Act (VRA), and Fair Housing Act (FHA)—comprise the canon. This essay argues that A. Philip Randolph, Bayard Rustin, Ella Baker, and the new abolitionists of the Student Nonviolent Coordinating Committee (SNCC)—representatives of the grassroots and proponents of an economic vision of equality—also were architects of a civil-rights-era canon.

These avant-garde figures, often critics of the Democratic Party, pushed Dr. King and federal officials to pursue economic citizenship as a component of a new constitutional vision of equality. In the Equal Opportunity Act (EOA), the heart of the War on Poverty, this element of the movement partly realized some of its economic goals. These activists contributed to change during the civil rights era in the absence of formal power in legislatures and courts, and pressed states and local people to implement (or ratify) locally relevant elements of the national civil rights agenda. Because this activism was tethered to local communities and local concerns, these activists personify popular sovereignty in its truest meaning.

The exclusion of such mobilized and organized citizens as agents of political influence—as elemental to the "we" in "We the People"—reveals two conceptual limitations in *We the People's* canonization project. First, it denies voice, agenda-setting power, and historical significance to the same classes of persons denied full citizenship and left outside of the corridors of power when the drafting and ratification of the Constitution originally took place. Second, *We the People's* imperfect version of history results in an inaccurate description of civil rights constitutionalism. It conceives "higher lawmaking" as the byproduct of power brokers who leverage institutional power and achieve consensus about the meaning of equality through assent by electoral majorities. A more descriptively accurate and normatively desirable account of civil rights constitutionalism would concede historical and ongoing contest over the meaning of equality.

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INTRODUCTION

We the People: The Civil Rights Revolution permits us to reflect on the legacies of one of our most talented constitutional scholars—Professor Bruce Ackerman—and one of the most celebrated social movements of all time—the black freedom struggle. In this book, Ackerman applies an analytical framework that he deployed with tremendous success in past works.¹ Ackerman’s project of pinpointing moments of “higher lawmaking” serves a worthy purpose. He hopes to identify certain principles that are beyond the reach of ordinary politics even if they are not products of Article V’s cumbersome process for amending the Constitution.² In Ackerman’s framework, higher lawmaking is premised on a separation-of-powers model of earning popular consent for a new vision of constitutional government. The President, Congress, and the Supreme Court “earn . . . broad popular consent” for fundamental constitutional change.³ The civil rights revolution achieved revolutionary change in this manner, Ackerman explains, under the leadership of President Johnson, storied members of Congress, Martin Luther King, Jr., the Warren Court, and the American electorate.⁴

There is so much about this project to embrace. Many of its essential elements resonate deeply with my own conceptual commitments. Part I of this essay identifies these commonalities in perspective.

Part II sketches how our different methodological starting points produce distinct thoughts about which civil-rights-era actors, political forms, and laws matter most to the civil rights movement’s legacy today. Ackerman’s book privileges the formal lawmaking process and popular consensus, as reflected in federal legislation and national elections. By contrast, this essay argues for a civil rights canon that honors formal and informal influences on lawmaking, moments of consensus and contest, and federally ratified and locally sanctioned dimensions of the socio-legal agenda established during the civil rights era.

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1. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (2000).
 2. The Article V process requires that amendments be ratified by the legislatures of three-fourths of the states after being passed by two-thirds of both houses of Congress. States may also initiate the amendment process. It is a notoriously difficult process. See U.S. CONST. art. V.
 3. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 3–4 (2014).
 4. *Id.* at 5–7.

From this standpoint, Ackerman's spokesperson-lawmaker model of representation, while compelling, is incomplete.

Part III explores the constituent elements of my vision of the civil rights canon. It supplements Ackerman's rubric along two dimensions. The canon from below supplements the canon from above in its identification of "who" and "what" are important. It finds different figures—who—and different subject matter—what—vital to a civil-rights-era canon. A. Philip Randolph, Bayard Rustin, Ella Baker, and the new abolitionists of the Student Nonviolent Coordinating Committee (SNCC)—representatives of the grassroots and proponents of an economic vision of equality—are vital elements of any civil-rights-era canon. These avant-garde figures, often critics of the Democratic Party, pushed Dr. King and federal officials to pursue economic citizenship as a component of racial equality. Their vision of economic citizenship complemented the nondiscrimination goals of the Civil Rights Act (CRA), Voting Rights Act (VRA), and Fair Housing Act (FHA), which surely did reconfigure the American social contract and racial order. If we are to canonize developments relevant to our time, it is not enough to focus on antidiscrimination laws. We must also recall that the civil rights movement partly realized some of its economic goals in the Equal Opportunity Act (EOA) and subsequent Great Society legislation.

Part IV discusses why it is particularly important to recognize the EOA, the signature legislation of the War on Poverty, as a part of the civil rights era's legacy. The statute did not codify all of the movement's economic aspirations, but its targeted programming for impoverished Americans constituted a critical step toward the movement's goal of full citizenship for all. This Part also explains that because *We the People's* account of higher lawmaking necessarily excludes the movement's economic commitments, it is a less convincing account of civil rights era constitutionalism.

I. THE VISION AND VISIONARIES OF THE CIVIL RIGHTS ERA

A. *Past and Prologue*

*We the People: The Civil Rights Revolution*⁵ resonates deeply with my own methodological commitments in critical respects. Ackerman and I agree that the preservation of thick historical memories, featuring a mobilized populace

5. 3 ACKERMAN, *supra* note 3.

instead of the Court alone, is critical to the future. These memories can be a tool of democratic engagement and empowerment for lawyers and citizens alike. Ackerman beautifully captures his commitment with the sentiment: “What the rising generation chooses to remember—and what it chooses to forget—will shape the way it understands America’s constitutional choices for the twenty-first century.”⁶

I wholeheartedly embrace this viewpoint. In a recent work on the long social and constitutional history of the civil rights movement, I argued that a richer, fuller picture of civil-rights-era history can rescue us from the concern about backlash and setbacks in the post-Warren-era Court. “When we remember the past in a way that makes the activism of th[e] wide[] collection” of people who sought change during the postwar movement apparent, “it makes a crucial difference in how we view both the past and the world today. It is the difference between seeing and not seeing possibilities, avenues, and tools for change.”⁷ The stories that scholars tell about the past define the future by opening or closing our eyes to the ways in which our socio-legal structures can contribute to the betterment of the nation-state, democratic engagement matters, and change is possible.

B. Popular Sovereignty

The turn away from juricentrism implies methodological innovation. Ackerman casts his redefinition of civil-rights-era history as a “regime-centered” instead of a Court-centered perspective.⁸ The regime approach “focuses on the institutional relationships and public values affirmed by the constitutional system as a whole, fitting the courts into this larger framework.”⁹ Ackerman’s approach proceeds from his faith that popular sovereignty animates the entire project of America’s constitutional democracy. The embrace of the idea that the American government is a creature of “We the People”¹⁰ is, however, a deeply controversial idea.

6. *Id.* at 1.

7. TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 434 (2011).

8. 3 ACKERMAN, *supra* note 3, at 2.

9. *Id.*

10. *Id.*

“We the People” rings hollow to many observers, as Ackerman well knows.¹¹ As Justice Thurgood Marshall famously argued, “[t]he government [the Framers] devised was defective from the start.”¹² For when the Framers drafted the first three words of the preamble, “We the People,” in 1787, “they did not have in mind the majority of America’s citizens.”¹³ The “people” comprised a narrow class of propertied white men at the time of the Constitution’s ratification.¹⁴ Even with the addition of the Reconstruction Amendments, “We the People” remained fictive, with women, among others, defined as separate and apart from the body politic.¹⁵

Notwithstanding the inarguable defects in the Founders’ vision, Ackerman claims, the men at Philadelphia created a structure that has not merely persisted: it has proved vital to the restructuring of society in ways they could scarcely have imagined. The Founding “established paradigms for legitimate acts of higher lawmaking that subsequent generations have developed

11. See, e.g., *id.* at 16–17.

12. Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm; see also Dorothy E. Roberts, *The Meaning of Blacks’ Fidelity to the Constitution*, 65 *FORDHAM L. REV.* 1761, 1761 (1997) (noting that it would make sense for blacks to “repudiate” the Constitution rather than “pledge allegiance to” it because it “defined them as less than human, was structured to enslave them, and has been interpreted time and time again to keep them subjugated to whites”).

13. Marshall, *supra* note 12.

14. See U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not Taxed, three fifths of all other Persons.”); *id.* art. I, § 9, cl. 1 (“The Migration or Importation of such Person as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”); *id.* art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

15. See *id.* amend. XIV, § 2 (“But when the right to vote at any election . . . is denied to any male inhabitants . . . the basis of representation . . . shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”); *id.* amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.”); *id.* amend. XXIV, § 1 (“The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.”).

further.”¹⁶ Ackerman points to “Reconstruction Republicans, New Deal Democrats, and the civil rights leadership” as examples of Americans who relied on the Founders’ framework to “win[] broad and self-conscious popular consent for their sweeping transformations of the constitutional status quo.”¹⁷ The current volume of his work focuses on the civil rights era and argues that the period’s leadership vindicated popular sovereignty to a greater extent than the Founders.¹⁸ All three branches of government advanced a new, racially inclusive vision of constitutional government. Ackerman argues that executive branch edicts, judicial decisions, and legislation heralded revolutionary changes in the name of “We the People” during the 1960s.

1. *Constitutional Constructs as Mobilizing Tools*

Ackerman’s instinct that the Constitution sets forth a basic charter that can be leveraged to powerful effect by future generations converges with my own views. Notwithstanding enslavement,¹⁹ post-Reconstruction legal codes that left blacks in quasi-slavery,²⁰ and the terror of Jim Crow,²¹ activists for black freedom, from the era of slavery through the postwar period, made claims on the Constitution. By invoking constitutional principles, individuals secured rights and made significant progress toward liberation.²²

Consider the words of Frederick Douglass. The former slave turned abolitionist proclaimed: “The Constitution[’s] . . . language is ‘we the people’;

16. 3 ACKERMAN, *supra* note 3, at 3.

17. *Id.*

18. *Id.*

19. See, e.g., IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* (1998).

20. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008) (discussing the system of legally facilitated labor trafficking of black Americans in the South following the formal end of slavery).

21. See, e.g., BROWN-NAGIN, *supra* note 7, at 17-174; ADAM FAIRCLOUGH, *RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972* (1995); HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* (1977); NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006); CHARLES M. PAYNE, *I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* (1995); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008).

22. See generally GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1984).

not we the white people,” “not we the privileged class, not we the high, not we the low . . . but we the people” as he argued for the abolition of human bondage.²³

Nearly one hundred years later, Dr. Martin Luther King, Jr. repeatedly cited foundational precepts of the Constitution in sermons and speeches urging America to redeem its promises. During the Montgomery Bus Boycott²⁴ and at the March on Washington of 1963,²⁵ King turned to the promises of the Declaration of Independence and the Constitution’s “thin paper” to argue that the laws of segregation violated both the laws of God and legal precepts.²⁶ Dr. King eloquently summarized how both the legal and direct-action wings of the movement reinterpreted the country’s foundational documents to justify demonstrations, picketing, and boycotts, as well as antidiscrimination and voting rights legislation. When the movement petitioned for redress, it did so with the goal of persuading authorities to “Be true to what you said on paper.” King uttered these words during his final public address, at Memphis in 1968:

All we say to America is, “Be true to what you said on paper.” If I lived in China or even Russia, or any totalitarian country, maybe I could understand the denial of certain basic First Amendment privileges, because they hadn’t committed themselves to that over there. But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of the press. Somewhere I read that the greatness of America is the right to protest for right.²⁷

The students who engaged in sit-ins and other forms of direct action likewise demanded equal rights by turning to their fictive status as equal citizens under the Constitution. In Atlanta in 1960, students illegally sat in at businesses on the grounds that the Constitution superseded contrary state statutes. We are “striving for the freedom that should be ours under the

23. BROWN-NAGIN, *supra* note 7, at 431 (quoting Frederick Douglass).

24. Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

25. See Carlton Waterhouse, *Dr. King’s Speech: Surveying the Landscape of Law and Justice in the Speeches, Sermons, and Writings of Dr. Martin Luther King, Jr.*, 30 LAW & INEQUALITY 91, 108-09 (2012).

26. On the boycott, see Kennedy, *supra* note 24, at 1021-22.

27. Martin Luther King, Jr., *I’ve Been to the Mountaintop*, in GIVING WELL, DOING GOOD: READINGS FOR THOUGHTFUL PHILANTHROPISTS 441, 444 (Amy A. Kass ed., 2008).

Constitution,” they declared.²⁸ “We hold that” segregation is “not in keeping with the ideals of Democracy,” they argued.²⁹ Before long, Congress and the Court vindicated the proposition the students cited during their protests—federal supremacy over state laws that permitted racial discrimination in places of public accommodation.³⁰

In short, the entire movement invoked constitutional constructs to astounding effects. In civil disobedience campaigns against segregation throughout the South, the Southern Christian Leadership Conference (SCLC), the Congress of Racial Equality (CORE), and SNCC, in collaboration with local people, appropriated the nation’s founding ideals brilliantly.³¹ They used the master’s own tools to dismantle the foundation of the master’s house—if not the structure itself.³²

2. Constitutional Constructs as Litigation Tool

A range of civil-rights-era litigators also invoked the construct of popular sovereignty and constitutional principles to demand inclusion. Thurgood Marshall, who objected to uncritical praise of the Founders and the unamended Constitution, is the most obvious figure to cite.³³ Marshall profoundly understood the value of the U.S. Constitution’s foundational, if imperfect and

28. BROWN-NAGIN, *supra* note 7, at 3.

29. *Id.* at 149.

30. See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. II, 78 Stat. 253 (codified at 42 U.S.C. §§ 201-07 (2006)); see also *Hamm v. Rock Hill*, 379 U.S. 306 (1964) (holding that state trespass convictions of civil rights demonstrators must abate under the CRA); *Peterson v. Greenville*, 373 U.S. 244 (1963) (holding a segregation ordinance unconstitutional); *Lombard v. Louisiana*, 373 U.S. 244 (1963) (holding unconstitutional the convictions of students who conducted sit-ins to protest segregation where no ordinance required segregation).

31. See generally RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* (2d ed. 2011); PAYNE, *supra* note 21 (discussing SNCC and local groups in Mississippi, Alabama, and Georgia).

32. The reference is a play on Audre Lorde’s assertion that the “master’s tool will never dismantle the master’s house.” AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110 (1984).

33. On Marshall’s relationship to the Constitution, see, for example, MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 5 (1994).

unrealized, commitment to popular sovereignty and inclusion.³⁴ “You’ll never find a better Constitution,” he said in 1979 amid debates over affirmative action, to deploy as a tool for striving toward the “goal of a true democracy such as ours.” “I know.”³⁵ The foundational principles of the Constitution held out hope that:

Any baby born in the United States, even if he is born to the blackest, most illiterate, most underprivileged Negro in Mississippi, is, merely by being born and drawing his first breath in this democracy, endowed with the exact same rights as a child born to a Rockefeller.³⁶

Marshall acknowledged that the reality of America did not live up to the ideal. “Of course it is not true. Of course it never will be true.”³⁷ However, America’s constitutional democracy created a framework that enabled advocates to constantly strive toward equal opportunity for all. Charles Hamilton Houston, Marshall’s mentor; Robert L. Carter; and many of the lawyers who collaborated with Marshall during the NAACP Legal Defense and Educational Fund’s successful campaign against Jim Crow laws similarly recognized the significance of the Constitution’s structure.³⁸ Houston taught that injustice could be challenged under the U.S. Constitution if students deployed the principles in the document “creatively” and “innovative[ly].”³⁹ Generations of civil rights lawyers who followed the pioneers, such as Howard Moore, Jr. and Len Holt, attorneys whose legal practices focused on the concerns of the black poor and the political dissidents who organized and aided them, also turned to

34. Since childhood, Marshall had believed that the U.S. Constitution might offer special protection for blacks. See MICHAEL D. DAVIS & HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* 37-38 (1994).

35. TUSHNET, *supra* note 33, at 5.

36. *Id.*

37. *Id.*

38. See Darlene Clark Hine, *Black Lawyers and the Twentieth-Century Struggle for Constitutional Change*, in *AFRICAN AMERICANS AND THE LIVING CONSTITUTION* 33-55 (John Hope Franklin & Genna Rae McNeil eds., 1995); see also MCNEIL, *supra* note 22, at 4-5, 84-85; Jay Clay Smith, Jr. & E. Desmond Hogan, *Remembered Hero, Forgotten Contribution: Charles Hamilton Houston, Legal Realism, and Labor Law*, 14 HARV. BLACKLETTER L.J. 1 (1998) (discussing how Houston combined legal arguments with sociological jurisprudence in advocating for equality).

39. MCNEIL, *supra* note 22, at 85.

the Constitution.⁴⁰ Pauli Murray saw within the Constitution a foundation for a challenge to intersectional discrimination, premised on race and sexual oppression.⁴¹ Each of these lawyers acknowledged that the Reconstruction Constitution contained within it the seeds to destroy racial oppression.⁴² And all of them deployed those principles on behalf of their clients and communities with great success.

C. Conclusion

By these lights, surely it is right that the concept of popular sovereignty, coupled with the First Amendment's protections for the rights of assembly and protest⁴³ and the Reconstruction Amendments' promises of due process, equal protection, and equal voting rights, have proven conceptually powerful resources for social movements in search of inclusion. These constructs proved

40. See BROWN-NAGIN, *supra* note 7, at 281-86, 291-93, 301 (discussing Moore); *id.* at 188-94 (discussing Holt).

41. See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 17-19 (2011).

42. Congresswoman Barbara Jordan perhaps best expressed this perspective in a 1974 address during the impeachment proceedings against President Richard M. Nixon. She said:

Earlier today we heard the beginning of the Preamble to the Constitution of the United States, We, the people. It is a very eloquent beginning. But when that document was completed on the 17th of September in 1787 I was not included in that "We, the people." I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake. But through the process of amendment, interpretation and court decision I have finally been included in "We, the people."

Today, I am an inquisitor My faith in the Constitution is whole, it is complete, it is total. I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution.

Debate on Articles of Impeachment: Hearings on H. Res. 803 Before the H. Comm. on the Judiciary, 93d Cong. 111 (1974) (statement of Rep. Barbara Jordan).

43. For relevant cases, see, for example, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (reversing jury verdict against the *Times* for publishing editorial advertisement criticizing actions of Montgomery officials for punishing African American student protesters on grounds that state libel standard did not comply with First Amendment protections); *NAACP v. Button*, 371 U.S. 415 (1963) (holding that NAACP lawyers' initial interactions with prospective clients constituted "modes of expression and association protected by the First Amendment"); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (striking down anti-segregation protesters' breach-of-the-peace convictions as First-Amendment violations); *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that the NAACP's membership lists were protected under the First Amendment).

no less useful or powerful because the Founders had *not* meant for blacks (or women⁴⁴) to deploy them or because the movements may have deployed the resources strategically.⁴⁵ To the contrary, the Constitution is all the more powerful a resource because many of those who wielded it to such tremendous effect originally had no claim to constitutional personhood.

II. METHODOLOGICAL DIFFERENCES: MATTERS OF PROCESS AND SUBSTANCE

Ackerman and I agree that it is important to de-center the Court and to privilege the people. However, we differ over the “who” and the “what” of the civil rights era’s constitutional vision. Ackerman identifies Martin Luther King, Jr., Lyndon Johnson, Hubert Humphrey, and Everett Dirksen as the *primary* spokesmen for the American people “as they hammered out the new terms of our social contract.”⁴⁶ The CRA, VRA, and FHA established the new terms of the contract.⁴⁷ These statutes encapsulated the new vision, Ackerman argues, because each transformed racial status law in vitally important areas,⁴⁸ and

44. Woman suffragists also made claims for citizenship and equal rights based on aspirational readings of the text and preamble of the Constitution. See JOAN HOFF, *LAW, GENDER & INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 152-61 (1991) (discussing Susan B. Anthony, *Is It a Crime for a U.S. Citizen to Vote?* (Apr. 3, 1873)); see also 1 IDA HUSTED HARPER, *THE LIFE AND WORK OF SUSAN B. ANTHONY* 435 (Arno Press 1969) (1899); Ann Miraglia, *Susan B. Anthony: The Rhetorical Strategy of Her Constitutional Argument* (Aug. 1, 1989) (unpublished M.A. thesis, SUNY Brockport), http://digitalcommons.brockport.edu/cgi/viewcontent.cgi?article=1003&context=cmc_theses. For a discussion of how suffragists’ arguments ultimately resulted in the passage of the Nineteenth Amendment, see Reva Siegel, *She the People, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 945, 968-76 (2002).

45. See Roberts, *supra* note 12, at 1761. I have written about the movement’s leveraging of legal precepts as a resource in BROWN-NAGIN, *supra* note 7, at 134-39, 148-49; Tomiko Brown-Nagin, *Do Protests Work?*, 56 HOWARD L.J. 721, 726-27 (2013); and Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005).

46. 3 ACKERMAN, *supra* note 3, at 7.

47. *Id.*

48. These statutes institutionalized the anti-humiliation principle by banning exclusionary practices in public accommodations, private employment, and the private housing market. In taking these decisive actions, Congress and the President moved far beyond the narrow version of state responsibility inherited from Republican Reconstruction—requiring private actors, as well as state officials, to accept wide-ranging responsibilities to realize the principles of constitutional equality. See 1 ACKERMAN, *supra* note 1, at 31.

because the three branches of government sanctioned these changes. The President proposed the statutes, Congress enacted them, and the Supreme Court inspired or upheld them (in pertinent part).⁴⁹ The people themselves ratified the constitutional vision that these statutes represented—most critically, in 1964, when Johnson won the presidency by a landslide.⁵⁰ In Ackerman's telling, even the election of 1968 is a win for the landmark statutes. Richard Nixon's presidential campaign typically is recalled for its racially coded appeals to "law and order."⁵¹ However, Ackerman emphasizes that Nixon never repudiated formal racial equality.⁵² To that extent, his victory in 1968, like Johnson's in 1964, represented an affirmation of the new racial order.

The three civil rights statutes that Ackerman cites and the men who played such definitive roles in the legislative processes that yielded them are inarguably important. And it makes sense that proposals and ratification through the formal processes and institutions of the state are the *sine qua non* of change in Ackerman's analysis. Nevertheless, I begin with different assumptions about what constitutes politics and political agency in the civil rights narrative. Therefore, the substance of the canonical civil rights narrative, in my telling, looks different.

A. *Beyond Formal Power and Spokesperson-Lawmakers as Representatives*

It is critical to understand politics and political agency outside of the boundaries of formal power structures. Presidential administrations, courts, legislatures, and national elections need not dominate thinking. When politics and agency are defined more broadly, new actors and modes of influence come into view. In the context of the civil rights era, the result is that we can see national leaders—the figurative "top" of the power dynamic—interact with the people below, or the "bottom." Below, we find the movement and the complicated relationships and fast-moving developments that comprise social movements.⁵³

49. See *id.* at 108–11.

50. *Id.* at 110.

51. See MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 6, 232–33, 236 (2006).

52. See 1 ACKERMAN, *supra* note 1, at 109.

53. For an overview of the nature and functions of social movements, see, for example, *SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS* (Anne N. Costain & Andrew S. McFarland eds., 1998); and Marco Giugni, *How Social Movements Matter: Past Research,*

Any narrative of the civil rights era should acknowledge Dr. King's relationship to a larger movement. For when Dr. King counseled President Johnson, he leveraged the wisdom of an entire movement. He served as the movement's agent, sometimes (but not always) faithfully conveying its messages and interests to the President. A. Philip Randolph, Bayard Rustin, Ella Baker, and the "new abolitionists" of SNCC loomed large in the movement that King represented.⁵⁴ These avant-garde figures, often critics of the Democratic Party, pushed Dr. King and lawmakers to pursue a progressive agenda of economic citizenship for all more quickly. They played informal but important roles in the making and implementation of civil rights laws at the national, state, and local levels. Sidelined in the formal processes of lawmaking, these civic leaders and lawyers nonetheless shaped the political context in which negotiation over the new social contract took place.⁵⁵

Precisely because these figures contributed to change during the civil rights era in the absence of formal power in legislatures and courts, these grassroots actors embodied popular sovereignty in its purest form. It is critical to acknowledge representatives of the grassroots in the civil rights canon.

Relatedly, it is critical to acknowledge role differentiation between King and Johnson and interest divergence on economic policy matters. Johnson, the politician, held himself accountable to the majority-white American electorate. King, the pacifist theologian and civil rights leader, confronted other constituencies. He found himself accountable to a movement, elements of which embraced a vision of social change more expansive than the anti-humiliation principle that Ackerman emphasizes.⁵⁶ And King held himself accountable to his own conscience, which led him to differ from Johnson on how to address poverty.⁵⁷

Present Problems, Future Developments, in *HOW SOCIAL MOVEMENTS MATTER*, at xiii-xxxiii (Marco Giugni et al. eds., 1999).

54. See CLAYBORNE CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S*, at 59-65 (1981); JOHN D'EMILIO, *LOST PROPHET: THE LIFE AND TIMES OF BAYARD RUSTIN* 1-6 (2003); BARBARA RANSBY, *ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION* 357-66 (2005).

55. See sources cited *supra* note 54.

56. See *infra* Part III.

57. *Id.*

B. *Why a View from Above and Below Matters*

Thus the differences in analyses from above and analyses from below are significant. The narrative that deems Johnson, Humphrey, Dirksen, and King—or at least, a flattened-out version of King—as the most significant spokespersons for the American people because of the men’s roles in the lawmaking process is incomplete. Concerns related to the democratic process and to substance limit the appeal of a civil rights canon that cannot encompass less formal modes of politics or influence outside of the spokesperson-lawmaker model.

1. *Democratic-Process-Based Concerns*

Ackerman’s spokesperson-lawmaker model of how the people affect constitutional meaning rests on a remarkably narrow understanding of the democratic process and of the popular agenda for change that emerged and gained traction during the civil rights era. It implies that the forms of civic participation that are most worth memorializing take place in legislatures, in talks with the President, and in courts. Political agency is partisan and electoral, and influence flows from the top down.

This thin view of political representation and influence has been contested for quite some time. It fell out of favor partly because it neglected modes of influence deployed by those historically excluded from, or subordinated within, state-authorized mechanisms of political participation.⁵⁸

58. See ARCHON FUNG, *EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY* (2004); WILLIAM A. GAMSON, *THE STRATEGY OF SOCIAL PROTEST* (1975); STEVEN F. LAWSON & CHARLES PAYNE, *DEBATING THE CIVIL RIGHTS MOVEMENT, 1945-1968*, at 3-4 (1998); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLES’ MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 324-25 (1979) (discussing the welfare rights movement’s involvement in lobbying); William H. Chafe, *Women’s History and Political History: Some Thoughts on Progressivism and the New Deal*, in *VISIBLE WOMEN: NEW ESSAYS ON AMERICAN ACTIVISM* 101 (Nancy A. Hewitt & Suzanne Lebsock eds., 1993) (discussing the tendency of traditional political history to focus on presidential administrations and to view reforms as emanating from the top down); Anne N. Costain, *Women Lobby Congress*, in *SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS*, *supra* note 53, at 171 (discussing the circumstances under which Congress responds to citizen mobilization and the success of women’s groups’ lobbying efforts); Douglas R. Imig, *American Social Movements and Presidential Administrations*, in *SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS*, *supra* note 53, at 159 (discussing the influence of social movement actors and organizations on policy); Michael W. McCann, *Social Movements and the Mobilization of Law*, in *SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS*, *supra* note 53, at 201 (discussing the

Instead of emphasizing formal, partisan modes of influence, scholars intent on studying activism by a variety of actors looked for – and found – meaningful political engagement in a range of alternative political and social formats. They found impactful engagement by social movement organizations, civic groups, religious orders, and social welfare institutions, all located in the states and in local communities.⁵⁹ In these spaces, aggrieved people without special access to officialdom formulated agendas, asserted interests, wrote petitions, engaged in direct action and boycotts, and spurred counter-mobilizations.⁶⁰ Through these efforts, participants influenced decision makers, including lawmakers, and shaped the implementation of new socio-legal norms.⁶¹

The more capacious conception of political engagement and influence is especially apt for the 1960s, an era of momentous popular uprisings that precipitated the fall of Jim Crow. During the civil rights era, citizens decisively influenced the new social contract, but did so informally, and non-linearly.⁶² As we imagine a civil rights canon, it is vital to recognize the organized but non-state-based means through which citizens influenced decision makers and the path of law.

The exclusion of organized and mobilized citizens as primary agents of political influence during the civil rights era—as elemental to “We the People”—unintentionally perpetuates the error that bedeviled the original constitutional project. It denies voice, agenda-setting power, and historical

ways in which citizens make legal claims on government to advance their interests); Charles Tilly, *Social Movements and National Politics*, in *STATEMAKING AND SOCIAL MOVEMENTS: ESSAYS IN HISTORY AND THEORY* 297 (Charles Bright & Susan Harding eds., 1984) (discussing the effects and outcomes of various types of citizen mobilizations); see also Paul Burstein, *Interest Organizations, Political Parties, and the Study of Democratic Politics*, in *SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS*, *supra* note 53, at 39 (arguing that interest groups, social movements, and political parties are the same thing).

59. See Chafe, *supra* note 58, at 102; see also sources cited *supra* note 58; BROWN-NAGIN, *supra* note 7, at 133–304.

60. See sources cited *supra* note 58; see also KENNETH T. ANDREWS, *FREEDOM IS A CONSTANT STRUGGLE: THE MISSISSIPPI CIVIL RIGHTS MOVEMENT AND ITS LEGACY* (2004); Ellen Carol DuBois, *Taking the Law into Our Own Hands: Bradwell, Minor, and Suffrage Militance in the 1870s*, in *VISIBLE WOMEN: NEW ESSAYS ON AMERICAN ACTIVISM*, *supra* note 58, at 19; *VISIBLE WOMEN: NEW ESSAYS ON AMERICAN ACTIVISM*, *supra* note 58, at 15 (discussing the tradition of analyzing political and social history as separate domains).

61. See sources cited *supra* notes 58–60.

62. See LAWSON & PAYNE, *supra* note 58.

significance to the very classes of persons denied full citizenship when the drafting and ratification of the Constitution originally took place.⁶³

This would be an extraordinarily strange error to commit in the context of the civil rights movement. The Second Reconstruction is one of the most powerful examples to date of citizens deliberately and repeatedly denied their rights banding together and pushing themselves into the polity. It is not a narrative in which the power of elected and designated spokespersons should be memorialized to the exclusion of organized and effective civic advocacy. A full rendering of the civil rights canon must take account of the broad spectrum and reach of these historically excluded citizens, their agendas, and their impact.

2. Substantive Concerns

In the civil rights canon that many socio-legal and political historians of the movement aspire to memorialize, citizen mobilizations in Atlanta, Birmingham, Montgomery, New York, Chicago, and “Up South” in Philadelphia, among other places, are the main event.⁶⁴ The narrative of the movement emerges from below, a perspective that enables a thicker description of activists’ objectives. From the bottom up, the labor roots of the movement and the struggle for economic equality are clear.⁶⁵ The struggle against Jim

63. See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-1788* (2010).

64. For representative works, see MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* (2003); MARK BRILLIANT, *THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA, 1941-1978* (2010); BROWN-NAGIN, *supra* note 7; MATTHEW J. COUNTRYMAN, *UP SOUTH: CIVIL RIGHTS AND BLACK POWER IN PHILADELPHIA* (2006); DONNA JEAN MURCH, *LIVING FOR THE CITY: MIGRATION, EDUCATION, AND THE RISE OF THE BLACK PANTHER PARTY IN OAKLAND, CALIFORNIA* (2010); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996). On the importance of local perspectives in history, see, for example, Thomas J. Sugrue, *All Politics is Local: The Persistence of Localism in Twentieth-Century America*, in *THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY* 301 (Meg Jacobs et al. eds., 2003); see also the discussion of state and local law in LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 3-25 (2009); and the discussion of the significance of local custom in Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899.

65. See, e.g., RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2010); ROBERT KORSTAD, *CIVIL RIGHTS UNIONISM: TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH-CENTURY SOUTH* (2007); EARL LEWIS, *IN THEIR OWN INTERESTS: RACE,*

Crow laws unrelated to economic rights is important but not dominant.⁶⁶

In Ackerman's account, Dr. King stands in as a representative of the people below. King was certainly a central figure in America's civil rights struggle; however, a truer portrait of Dr. King would present multiple dimensions of the leader and the tensions inherent in his relationship with the Democratic Party's power structure. King embraced many roles and issues. He not only mobilized the public to end segregation through missives such as the Letter from Birmingham Jail, but also spoke out against the economic consequences of Jim Crow at the March on Washington for Jobs and Freedom.⁶⁷ In other words, King's objectives extended beyond civil rights to human rights—in particular, economic security, health care, and home ownership.⁶⁸ The Christian "social gospel" critique of capitalistic exploitation of the poor and the New Deal's concepts of social and economic rights inspired King's commitments to economic justice.⁶⁹ However, partly because of the "malignant kinship" he forged with Lyndon Johnson, Dr. King is not properly understood as the exclusive representative of the civil rights movement. The bond with Johnson limited King's ability to push for human rights. For a stronger connection to the grassroots and the movement's broader agenda, scholars turn to organizers such as A. Philip Randolph, Bayard Rustin, Ella Baker, and the students of SNCC.⁷⁰ These figures encouraged King's commitment to a thicker conception of citizenship.

When the portrait of King is enriched and a wider range of representatives of the movement is added to the narrative, the substantive civil rights agenda also broadens. Once King, the social gospel minister, and Randolph, Rustin,

CLASS, AND POWER IN TWENTIETH-CENTURY NORFOLK, VIRGINIA (1993); MACLEAN, *supra* note 21; Jacqueline Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005); Robert Korstad & Nelson Lichtenstein, *Opportunities Lost and Found: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786 (1988); see also Sophia Lee, *Hot Spots in a Cold War: The NAACP's Post-War Labor Constitutionalism, 1948-1964*, 26 LAW & HIST. REV. 327 (2008).

- 66. For scholarship on the civil rights movement that references civil rights lawyering without making it the dominant subject of analysis, see, for example, BIONDI, *supra* note 64; COUNTRYMAN, *supra* note 64; and MACLEAN, *supra* note 21.
- 67. See CARSON, *supra* note 54, at 93-95; THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS 160, 171-72 (2007).
- 68. See JACKSON, *supra* note 67, at 8, 14-15, 29.
- 69. *Id.* at 14-15.
- 70. King specialized in mobilizing for an impact on public opinion, while SNCC organizers focused on more in-depth, community-based work. See PAYNE, *supra* note 21, at 93-100, 156 (contrasting the tactics of King and SNCC).

Baker, SNCC, and other representatives of the grassroots are a part of the canonical narrative, I propose, the character of the new social contract inscribed during the civil rights era looks different. These actors certainly sought the principles of nondiscrimination in schools, voting, and housing encapsulated in the CRA, VRA, and FHA. However, a broader conception of change makers—the “who”—also expands the “what” of the civil rights era to include an economic agenda.

Both the CRA *and* the EOA are elements of the new broadened social contract. That is, contrary to the assumption made in *We the People*, the CRA and EOA are best understood as twins.⁷¹ In these two extraordinary pieces of legislation, the movement’s civil rights *and* economic agendas intertwined. The economic personhood enabled by the EOA and other Great Society programs breathed life into the CRA, VRA, and FHA, as the next two Parts explain.

III. EXPANDING THE “WHO” AND “WHAT” IN THE “CIVIL RIGHTS CANON”

Part III considers the broader array of representatives of “We the People” who helped to create the civil rights era’s canonical constitutional vision. It also examines the particular substantive vision that these representatives from below touted. Sections A and B complicate the picture by depicting a different side of Dr. King than the one found in *We the People*. If a canonical narrative of the civil rights era is to emerge, it is not adequate to erect it on the familiar, sterile image of Dr. King as a civil rights leader. The well-known King, whose image is enshrined on the National Mall, and whose memorable sayings are now quoted by both whites and blacks, Democrats and Republicans, is the catalyst of public opinion who spearheaded protests against segregation in Montgomery, Birmingham, and Selma in televised images seen the world over.⁷² In the more complex version of Dr. King’s public persona, he is not a consensus figure likely to be embraced by overwhelming majorities of Americans. He is a social gospel minister who lamented “black poverty” as “the historic and institutionalized consequence[] of color”⁷³ and America’s “intertwined ‘triple evils’”⁷⁴—racism, economic exploitation, and militarism—

71. See *infra* Section III.C.

72. See Hall, *supra* note 65.

73. JACKSON, *supra* note 67, at 204.

74. *Id.* at 33.

that left people of all colors bankrupt.⁷⁵ This Part explores the more complicated King.

Sections C and D expand the representatives of “We the People” by exploring the vital role in the canonical civil rights narrative of organizers Randolph, Rustin, Baker, and the new abolitionists of SNCC. These figures add depth and breadth to any narrative of the civil rights era. They augment our understanding of popular sovereignty by tethering it to states and localities and expanding the canonical account of the agenda for change that King and the civil rights movement championed. That agenda certainly can be said to encompass a search for dignity, social citizenship, or the anti-humiliation principle that Ackerman touts.⁷⁶ These movement figures also sought economic citizenship. A more textured portrait of “We the People” yields a more expansive concept of the social contract.

A. The Many Faces of Dr. Martin Luther King, Jr.

Like other eminent historical figures, Dr. King was a man of many faces. He negotiated the demands of many publics—whites and blacks, opponents and proponents of segregation, and activists inside the movement and outside of it.⁷⁷ Over the course of the civil rights era, King’s roles, views, and relationships to figures in government—including Presidents Kennedy and Johnson—changed as the movement’s priorities changed. That King and the movement evolved are prominent themes—one might argue cardinal principles—of the voluminous scholarship on the movement. The Democratic Party—including its standard bearers—and King and movement organizations more often than not found themselves embroiled in controversy and tension over the pace and the components of social change.⁷⁸ King managed cleavages within the movement over whether collaboration with the federal government and the pursuit of federal legislation should even be a priority in the struggle

75. See *id.* at 2–3, 21, 209, 350.

76. 3 ACKERMAN, *supra* note 3, at 31–32.

77. See, for example, JACKSON, *supra* note 67, at 188–217, on King’s need to manage many different interest groups. On the subject of blacks as racial representatives and their need to negotiate with different audiences, see KEN MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012), which discusses lawyers such as Charles Hamilton Houston and Thurgood Marshall.

78. JACKSON, *supra* note 67, at 192.

for freedom.⁷⁹ Perhaps, some argued, initiatives should focus on the needs of local communities rather than seeking alliances with unreliable representatives of the state.⁸⁰ Whether or to what extent leaders should press the party for policies to address unequal social and economic conditions borne of Jim Crow became a flashpoint in the movement over time.⁸¹

We the People: The Civil Rights Revolution emphasizes just one face of Dr. King—a single facet of his many roles and a single dimension of his relationship to the multidimensional human rights struggles of the 1960s. Ackerman's book features King in his role as orator and leader of high-profile and climactic protests that preceded the passage of well-known antidiscrimination legislation. King is a critical figure in the 1963 protests in Birmingham, where Bull Connor unleashed his dogs; the Birmingham episode preceded passage of the CRA, which Lyndon Johnson successfully ushered through Congress after the assassination of President Kennedy.⁸² King is front and center at the March on Washington in August 1963.

Ackerman cites King's famous "I Have a Dream" address at the March for the way in which it anticipated the "concerns of the landmark statutes."⁸³ King called for the end of segregation in public accommodations and public schooling and of racial barriers in voting and housing.⁸⁴ Dr. King's address captured the outlines of one of the coming moments of higher lawmaking that *We the People* imbues with so much meaning. Ackerman also highlights King's role as negotiator and sometimes collaborator with President Johnson and the legislators who fashioned these celebrated civil rights statutes.⁸⁵ The conversations between the two, especially around the passage of the VRA, underscore King's vital role in the establishment of formal legal equality.⁸⁶ The statutes that resulted from this exchange and others—the CRA, VRA, and FHA—institutionalized the "anti-humiliation principle" in public

79. CARSON, *supra* note 54, at 37-38, 87; JACKSON, *supra* note 67, at 7; RANSBY, *supra* note 54, at 268-69, 337.

80. JACKSON, *supra* note 67, at 7; RANSBY, *supra* note 54, at 337-38, 342.

81. See, e.g., JACKSON, *supra* note 67, at 164.

82. 3 ACKERMAN, *supra* note 3, at 135.

83. *Id.* at 56.

84. *Id.* at 8-9, 18, 85-86, 108-09.

85. *Id.* at 59, 73, 75, 92-95, 120, 171, 320.

86. *Id.* at 56-60, 63, 73, 75, 79-80, 92-95, 101-04. Thus, Ackerman says that King used "media-politics" to influence the public. *Id.* at 155, 197, 201.

accommodations, employment, voting, and housing, as Ackerman convincingly argues.⁸⁷

B. King's Critiques of Economic Inequality

The canonical civil rights narrative could—and should—also recall a different, less well-known face of King: the one on display in the phases of his career when he explained that racial justice could not exist independently of economic justice. This face of Dr. King challenges received wisdom about the character of the social contract sought and instantiated during the civil rights era.

As a proponent of the social gospel, King lamented intertwined race- and class-based oppression. In addition to arguing that Jim Crow itself should be dismantled, King sought policy solutions to structural economic inequality occasioned by Jim Crow.

This face of Dr. King is visible at the March on Washington, if briefly. Dr. King's address connected the Negro's "un-freedom" one hundred years after the Emancipation Proclamation not only to the "manacles of segregation and the chains of discrimination" but also to his existence "on a lonely island of poverty in the midst of a vast ocean of material prosperity."⁸⁸ Moreover, he associated unalienable rights guaranteed by the U.S. Constitution and Declaration of Independence to material equality. After all, he said, Negroes had come to the nation's capital to "cash [a] check."⁸⁹ Undoubtedly, King used the reference metaphorically, but many images were at his disposal. It is difficult to believe he unthinkingly chose the one that represented the real material deprivation that beset black Americans at the time—and then went on to emphasize the theme of default.⁹⁰

King's history of attention to economic deprivation deepens my conviction that the facet of King's "Dream" speech that addressed poverty is just as noteworthy as his emphasis on the antidiscrimination imperative. Dr. King had been expressing concern about structural economic inequality almost a decade before the March on Washington. Soon after he earned a national reputation during the Montgomery Bus Boycott, Dr. King urged solutions to systemic

87. *Id.* at 318.

88. Martin Luther King, Jr., *I Have a Dream*, in *BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY* 347 (August Meier et al. eds., 1971).

89. *Id.* at 348.

90. *Id.*

poverty and lamented the “triple evils” of “racism, economic exploitation, and militarism.”⁹¹ Moreover, well after the 1963 march, this focus persisted and even deepened. During the mid-1960s, King visited slums in the urban North and South and argued that all Americans bore responsibility for the conditions in which the ghettos’ poor lived.⁹²

Most important for present purposes, King strongly critiqued the country’s economic conditions even after Congress enacted the omnibus CRA in July of 1964.⁹³ King, of course, welcomed the new law barring race-based discrimination in public accommodations, schools, and employment.⁹⁴

Nevertheless, he explained to audiences still acclimating to the changes in the racial order that the new law did not go far enough. The CRA had not, and could not, fully resolve the nation’s racial dilemmas because formal equality did not equate to substantive justice. Even if the CRA ended all discrimination, King argued, “black poverty, ‘the historic and institutionalized consequences of color,’ would continue.”⁹⁵

Jim Crow had not only caused dignitary harm; it had devastating, long-lasting material effects. Segregation had left African Americans impoverished. It had confined blacks to the dirtiest, lowest-paying types of employment.⁹⁶ It had prevented blacks from attaining the education and skills that yielded better jobs and facilitated the accumulation of wealth.⁹⁷ Blacks suffered unemployment at disproportionate rates because of exclusionary and discriminatory employment practices, and even those blacks who managed to attain higher levels of education found themselves relegated to employment incommensurate with their skills.⁹⁸ Given Jim Crow’s expansive reach and

91. JACKSON, *supra* note 67, at 33.

92. *See id.* at 2-3, 21, 33, 209, 350.

93. *See id.* at 191.

94. *Id.*

95. *See id.* at 204.

96. *See* MACLEAN, *supra* note 21, at 13-34.

97. *See generally* JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935*, at 1-3, 79-237 (1988); ADAM FAIRCLOUGH, *A CLASS OF THEIR OWN: BLACK TEACHERS IN THE SEGREGATED SOUTH* 9, 116, 131, 367-68 (2007).

98. *See* KAREN FERGUSON, *BLACK POLITICS IN NEW DEAL ATLANTA* 22-23 (2002); PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 63, 145-48 (1984); JERVIS ANDERSON, *A. PHILIP RANDOLPH: A BIOGRAPHICAL PORTRAIT* 241-42 (1986).

devastating results, vastly greater effort would be required to eradicate its vestiges.

King turned to President Johnson for solutions to the economic crisis. The social gospel minister embraced large-scale, redistributive economic policies to address inequality.⁹⁹ In 1964, King called for a “massive assault upon slums, inferior education, [and] inadequate medical care.”¹⁰⁰ He sought job training and a guaranteed income for all Americans that would place the poor (regardless of race) on a path toward wealth accumulation. These policy initiatives, he argued, would complement civil rights reforms.¹⁰¹

Johnson cared about economic inequality, but in a bid to maintain political consensus, he touted a package of reforms that steered clear of redistributive approaches. In the EOA, Johnson emphasized equal opportunity through education, social welfare, and job training, but he never supported a guaranteed income for the poor.¹⁰² The next Part discusses these initiatives and explains why their statutory codification in the EOA deserves to be both memorialized as a cornerstone of the civil rights era and remembered as not having fully realized the movement’s economic imperatives.

The point here is that a full portrait of King requires some discussion of King’s economic agenda. And it requires that we preserve in our historical memory this demand for economic as well as racial justice. If the fuller portrait of King is embraced, it is harder to accept a civil rights canon that excludes any mention of an economic perspective on equality.

C. A. Philip Randolph and Bayard Rustin: Intellectual Architects of Economic Citizenship as a Component of Equality

It is also critical to remember that an entire movement nurtured Dr. King, inspired the signature campaigns he pursued, and shaped the economic security agenda that he put before President Johnson and the nation. The March on Washington of 1963 illustrates the point.

The idea for the March did not originate with King, nor did he implement the idea, although he did support it once leaders agreed upon its tactical utility

99. JACKSON, *supra* note 67, at 189.

100. *Id.* at 204.

101. *See id.* at 192.

102. *Id.* at 192–94.

to the movement.¹⁰³ A. Philip Randolph, a labor leader, and Bayard Rustin, a community organizer and public intellectual, among others, planned and executed the March.¹⁰⁴ Randolph had famously convinced President Franklin Roosevelt to sign an executive order banning racial discrimination by federal contractors by threatening to march on Washington in 1941.¹⁰⁵ Both men served as advisers to Dr. King (although Rustin, a gay man, typically remained in the movement's shadows).¹⁰⁶ In 1962, Rustin, Norm Hill, and Tom Kahn, who were all close collaborators with Randolph, proposed that the movement should descend on Washington in May of 1963—in a march 100,000 strong—to highlight the “economic subordination of the American Negro,” the need to “creat[e] more jobs for all Americans,” and more broadly, the need for a “fundamental program of economic justice.”¹⁰⁷ Randolph eagerly championed the plan to reintroduce his postwar idea. He had long embraced a vision of black freedom centered on labor rights and economic citizenship; indeed, as one of his biographers claimed, Randolph was “among the first to weave race, class, and justice into a seamless message.”¹⁰⁸

Thus, Randolph and Rustin planned a March on Washington for Jobs and Freedom, inviting other leaders, including King, to participate.¹⁰⁹ In public memory and in Ackerman's telling, the reference to jobs often falls away. King is made the singular, public face of the March. And one slim aspect of his Dream is said to encapsulate its meaning. In reality, the visionary pair, Randolph and Rustin, deeply influenced King, the movement, and domestic policy before, during, and after the March.

Rustin's next major contribution occurred in February 1965, when he penned an article that provided an intellectual and strategic foundation for the movement. In “From Protest to Politics,” Rustin charted a path forward for a movement that by then had achieved formal equality in many areas of American life. He argued that, as important as it was, civil rights legislation

103. See DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 265–66 (1986).

104. See WILLIAM P. JONES, THE MARCH ON WASHINGTON: JOBS, FREEDOM, AND THE FORGOTTEN HISTORY OF CIVIL RIGHTS, at xv–xvi (2013).

105. JONES, *supra* note 104, at 38–39; ANDERSON, *supra* note 98, at 249–61.

106. See, e.g., D'EMILIO, *supra* note 54, at 230, 297–302 (2003).

107. GARROW, *supra* note 103, at 266.

108. DAVID WELKY, MARCHING ACROSS THE COLOR LINE: A. PHILIP RANDOLPH AND CIVIL RIGHTS IN THE WORLD WAR II ERA, at xix (2013).

109. See JACKSON, *supra* note 67, at 172–74.

that desegregated public accommodations had not addressed systemic inequality.¹¹⁰ Consequently, the struggle for inequality needed to move to a new phase during which it emphasized “economic relations.”¹¹¹ “At issue, after all,” he said, “is not *civil rights*, strictly speaking, but social and economic conditions.”¹¹² In his analysis, Rustin expressed particular concern for those on the bottom rungs of the economic ladder and those with limited education and skills. In increasingly automated industries, he suggested, they would not find suitable jobs in the American workforce.¹¹³

The employment title of the celebrated CRA, an antidiscrimination law, could not fully offer redress for this class of individuals—underemployed, unemployed, under-skilled, and unskilled Americans.¹¹⁴ Rustin advocated a program of “full employment, abolition of slums, [and] the reconstruction of [the] educational system” to address the full spectrum of the community’s needs.¹¹⁵

President Johnson created an opportunity for Rustin and Randolph to translate the movement’s new priorities into action. His White House Conference, “To Fulfill These Rights,” planned for June 1966, permitted Rustin to connect with opinion makers inside and outside of government.¹¹⁶

110. Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, COMMENTARY (Feb. 1, 1965) (“[W]e must recognize that in desegregating public accommodations, we affected institutions which are relatively peripheral both to the American socio-economic order and to the fundamental conditions of life of the Negro people. In a highly industrialized, 20th-century civilization, we hit Jim Crow precisely where it was most anachronistic, dispensable, and vulnerable—in hotels, lunch counters, terminals, libraries, swimming pools, and the like.”).

111. *Id.*

112. *Id.*

113. *Id.*

114. See *id.* On the history of antidiscrimination law as applied to unskilled workers, see MACLEAN, *supra* note 21. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which established that discrimination could be proven if policies and practices had a disparate, adverse impact on protected classes, altered the legal landscape for a time. But other decisions followed that undermined its impact. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 642 (1989) (holding that the proper comparison for purposes of disparate impact analysis is the “racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market”). On the history of Title VII, see Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431 (2005).

115. Rustin, *supra* note 110.

116. See D’EMILIO, *supra* note 54, at 422–23, 425.

Prominent civil rights leaders, including Rustin and Randolph, attended pre-conference planning meetings and the conference itself.¹¹⁷ The participants discussed next steps in the struggle for racial justice. Rustin floated an idea of a “Marshall Plan” for the cities at one of the planning meetings, or a so-called “Freedom Budget,” that flowered into a new contribution to the movement and its economic agenda.¹¹⁸

Over the course of the year, Rustin, in collaboration with Randolph and under the auspices of the A. Philip Randolph Institute, spearheaded an effort to create a detailed economic policy proposal.¹¹⁹ A “Freedom Budget,” drafted by economist Leon Keyserling, Herbert Gans, Michael Harrington, Vivian Henderson, and Rustin, among others, was the result.¹²⁰ Unveiled in 1966, the budget included several key components: a guaranteed job for all who were willing and able to work, a living wage to lift workers out of poverty, income for those who could not work, health services, educational opportunity, and reformed social security and welfare programs.¹²¹ The Freedom Budget would require a massive public works program, a minimum wage, and new home construction, among other efforts.¹²² The Office of Economic Opportunity (OEO)—the agency that administered the EOA—was designated the administrator of the Freedom Budget.¹²³ Rustin secured support for the Budget from an array of leaders after its unveiling,¹²⁴ garnering more than six hundred signatories of the document, including Dr. King.¹²⁵

The 1966 version of the Budget did not gain significant traction. Timing limited its prospects. It became embroiled in antiwar politics.¹²⁶

117. *Id.* at 418, 421.

118. *Id.* at 423.

119. *Id.*

120. *Id.* at 430.

121. ANDERSON, *supra* note 98, at 330, 344; D’EMILIO, *supra* note 54, at 430; JACKSON, *supra* note 67, at 258.

122. ANDERSON, *supra* note 98, at 344.

123. JACKSON, *supra* note 67, at 258.

124. D’EMILIO, *supra* note 54, at 430–31.

125. *Id.* at 431.

126. *Id.* at 435–36. During the 1970s, Congressman Augustus Hawkins of California, a member of the Congressional Black Caucus, successfully ushered a Full Employment Service into law, a measure inspired by the Budget. See Matthew Forstater, *The Freedom Budget at 45: Functional Finance and Full Employment 4* (Levy Econ. Inst. of Bard Coll., Working Paper No. 68, 2011).

The Freedom Budget's significance is best understood in the context of its initial proposal at the meeting in November 1965. When Rustin first floated the idea of the budget at the planning session for the 1966 White House Conference, it jolted Johnson to action. Johnson felt upstaged by Rustin's antipoverty proposals; the Budget—"socialist" in scale—"dwarfed" the President's own plan to combat poverty.¹²⁷ The actions Johnson subsequently took show the impact of the movement's economic vision on the country as a whole.¹²⁸

Rustin's proposal convinced Johnson that he must work to achieve buy-in for his more centrist antipoverty efforts among a wide array of American opinion makers and citizens. Johnson established an executive council that included corporate executives; presidents of foundations, labor unions, and universities; and civil rights leaders.¹²⁹ The President tasked the council with developing recommendations that would demonstrate that racial and economic justice belonged to the country as a whole.¹³⁰ Rustin, a member of the council, served as its left flank. He pushed for non-centrist solutions to poverty. The Report that the council unveiled "pointed toward a Scandinavian-style social democratic welfare state."¹³¹ It reflected Rustin's imprint, and through him, the movement's.

Moreover, central ideas in the Budget—for example, the demand for educational opportunity and healthcare—did find expression in the Johnson Administration's War on Poverty programs (appropriations for which ultimately fell victim to spending on the Vietnam War).¹³² And the vision that spawned the Freedom Budget stands as a testament to the movement's core commitment to economic citizenship.

D. Ella Baker and SNCC: Proponents of State and Local Activism as Elemental to Socio-Economic Change

SNCC—called the "shock troops" of the movement—also played a

¹²⁷. D'EMILIO, *supra* note 54, at 423.

¹²⁸. *Id.*

¹²⁹. *Id.*

¹³⁰. *Id.*

¹³¹. *Id.* at 423–24.

¹³². ROBERT F. CLARK, *THE WAR ON POVERTY: HISTORY, SELECTED PROGRAMS AND ONGOING IMPACT* 13 (2002) (noting that President Johnson shifted his attention and resources from the War on Poverty to the Vietnam War).

constitutive role in the civil rights era's politics and vision of equality.¹³³ SNCC formed in April 1960 following the wave of sit-ins by college students at segregated lunch counters that began in Greensboro, North Carolina in February of that year.¹³⁴ The students who founded SNCC committed themselves to the overthrow of injustice through non-violence, group-centered leadership, and coordination of protest activities.¹³⁵ Ella Baker, a SCLC executive and organizer who believed deeply in community-based democratic experimentalism, nurtured SNCC's college-aged activists.¹³⁶ At Baker's urging, SNCC adopted an arsenal of tactics that varied from those favored by King, who Baker considered consumed with political celebrity.¹³⁷ This preoccupation turned King's focus away from mass action and close ties to local communities.¹³⁸

SNCC demonstrated its commitment to local communities' objectives and to the development of local leadership through a preference for community *organizing* (as opposed to community *mobilizing*).¹³⁹ That is, SNCC's signature campaigns featured longer-term, community-based initiatives designed to empower marginalized groups from within, rather than shorter-term, highly-publicized, violent clashes between practitioners of civil disobedience and segregationists aimed at swaying white public opinion.¹⁴⁰ SNCC's distinct tactical interventions supported a particular programmatic agenda. Many of SNCC's efforts focused on political empowerment and economic justice.¹⁴¹

1. SNCC at MOW

By turning to the March on Washington once more, we can appreciate SNCC's contributions to the movement and its agenda. Although many commentators emphasize the link between King's call for colorblindness at the

133. See BROWN-NAGIN, *supra* note 7, at 140 (noting this nickname for SNCC); see generally HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS (1964) (detailing the social movement led by young people known as the Student Nonviolent Coordinating Committee).

134. See CARSON, *supra* note 54, at 19-25.

135. *Id.* at 23-24; see also BROWN-NAGIN, *supra* note 7, at 140.

136. RANSBY, *supra* note 54, at 239-53.

137. *Id.* at 172-74, 187-92.

138. *Id.* at 187.

139. *Id.* at 265-71.

140. On the differences, see PAYNE, *supra* note 21, at 129-30, 156, 236-64.

141. BROWN-NAGIN, *supra* note 7, at 137-38.

March and Congress's enactment of the CRA,¹⁴² a fuller understanding of the demonstration suggests a different interpretation. The March represented a moment of tension in the relationship between movement leaders and Washington elites. SNCC's disagreements with the Kennedy Administration over its commitment to equal employment opportunity stood as the center of the controversy. Leaders in SNCC, including chairman John Lewis and executive secretary James Forman, worried over whether they could, in good faith, attend the demonstration and offer support for then-President Kennedy's bill. Originally, Lewis had planned to announce that SNCC would not support the bill, for it was "too little, and too late."¹⁴³ For SNCC, the greatest point of contention related to the bill's failure to include a fair-employment-practices title that covered major private employers; the bill also did not address the poverty that Jim Crow had wrought for thousands of people SNCC had worked to empower in the Deep South.¹⁴⁴

When Lewis took his turn at the lectern on August 28, 1963, he zeroed in on the plight of the dispossessed and underpaid and the agenda that SNCC had promoted. The first words that emerged from his mouth revealed SNCC's priorities:

We march today for jobs and freedom, but we have nothing to be proud of. For hundreds and thousands of our brothers are not here. For they are receiving starvation wages, or no wages at all. While we stand here, there are sharecroppers in the Delta of Mississippi who are out in the fields working for less than three dollars a day, twelve hours a day.¹⁴⁵

Only in the second paragraph of his address did SNCC's chairman offer "reluctant" support for the Administration's bill.¹⁴⁶

¹⁴². See GARROW, *supra* note 103, at 281 ("Although most press commentary continued to link the March's purpose to the passage of John Kennedy's civil rights bill, King emphasized that the goals went beyond antidiscrimination legislation.").

¹⁴³. *Id.* at 281.

¹⁴⁴. See John Lewis, Speech at the March on Washington (Aug. 28, 1963) ("We must have a good FEPC bill.").

¹⁴⁵. *Id.*; see also JACKSON, *supra* note 67, at 180.

¹⁴⁶. See Lewis, *supra* note 144 ("It is true that we support the administration's civil rights bill. We support it with great reservations, however.").

Despite such moments of tension, in the long term King and the movement benefited from having SNCC on their left flank.¹⁴⁷ SNCC's radicalism made King a more acceptable negotiator in the inner circles of power and pushed the Kennedy and Johnson Administrations toward results that all sides embraced.¹⁴⁸ President Johnson endorsed a more robust fair-employment-practices title for the civil rights bill that became law in July 1964.¹⁴⁹ The movement had not achieved its goal of full employment, but with SNCC's help it had at least come closer to ensuring fair employment.¹⁵⁰

2. *Community Organizing as a Political Tool*

SNCC also distinguished itself from the NAACP, SCLC, and every other major civil rights organization with its claim that ordinary people—the grassroots—rather than “an educated, professional, or clerical class” should lead their own communities in the struggle against injustice.¹⁵¹ In essence, the movement proceeded along two tracks. King negotiated with President Johnson for legislation to address the squalid social and economic conditions that plagued so many Americans. Meanwhile, SNCC implemented a political empowerment and antipoverty agenda in local communities.

SNCC students sought to build political and social capital among the grassroots through community organizing.¹⁵² Its organizing ventures involved several interlocking steps. Workers listened to everyday people discuss their lives and problems, educated people about their citizenship rights, and persuaded them to cast off mental chains imposed by Jim Crow that undermined activism. As I explained in my book-length analysis of the legal and social history of the civil rights movement, “[t]he most effective organizers

147. In the short term, SNCC's radical rhetoric risked alienating white liberals and playing into the hands of segregationists, who saw demands for Jim Crow's demise as a communist plot. See JEFF WOODS, *BLACK STRUGGLE, RED SCARE: SEGREGATION AND ANTICOMMUNISM IN THE SOUTH, 1948-1968*, at 4-5 (2004).

148. See BROWN-NAGIN, *supra* note 7, at 140, 169; RANSBY, *supra* note 54, at 315, 337-38.

149. JACKSON, *supra* note 67, at 170, 183; NICK KOTZ, *JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING, JR., AND THE LAWS THAT CHANGED AMERICA* 136, 141, 153 (2005).

150. For background on the full versus fair employment debate, see JACKSON, *supra* note 67, at 170-71; see also *id.* at 225 (“Mass negro unemployment would not be alleviated simply by opening up trade union apprenticeship programs or even by full enforcement of Title VII of the Civil Rights Act against discriminating corporations.”).

151. See BROWN-NAGIN, *supra* note 7, at 266.

152. *Id.* at 266-67.

possessed emotional and interpersonal intelligence in abundance and embraced a range of roles and personas.”¹⁵³

SNCC tested its community organizing tactic in rural and urban areas. In the Mississippi Delta, overwhelmingly populated by blacks who labored as tenant farmers or domestic servants, SNCC encouraged individuals gripped by fear or indifference to become politically engaged.¹⁵⁴ In Atlanta, SNCC established a project in one of the city’s poorest “forgotten” neighborhoods, a “southern urban ghetto,” to encourage local people to demand economic justice.¹⁵⁵

SNCC’s approach complemented the methods of SCLC and other national civil rights organizations aimed primarily at national bureaucrats. Its community-based advocacy proved particularly useful during the mid-1960s, when the administration sought to involve local people in EOA programs, as the next Part explains.¹⁵⁶

IV. ECONOMIC CITIZENSHIP ABOVE AND BELOW

In the prior Part, I argued that a more textured portrait of *We the People* reveals that the movement sought a social contract during the civil rights era that extended beyond antidiscrimination law. That argument was premised on a fuller and more nuanced depiction of Dr. King’s advocacy and on the inclusion of new people as meaning-makers in the civil rights narrative. The new figures—Randolph, Rustin, Baker, and organizers of SNCC—indisputably possessed an economic vision of racial justice.

The question remains whether the movement’s aspirations for economic citizenship gained traction in law and policy during the 1960s. In this Part, I argue that the EOA comprises an important part of the civil rights movement’s socio-legal legacy. The movement helped inspire the law at the federal level and helped implement it at the state and local levels. Given its relevance to the movement’s legacy, any conception of a civil rights-era canon that excludes the EOA (or some stand-in for economic citizenship) is incomplete.

¹⁵³. *Id.* at 266.

¹⁵⁴. See PAYNE, *supra* note 21, at 237–64.

¹⁵⁵. BROWN-NAGIN, *supra* note 7, at 266–67.

¹⁵⁶. *Id.* at 258–59.

A. *The Movement and the EOA: Origins*

The movement did not rest once President Johnson shepherded the CRA through Congress. Many groups and individuals kept the pressure on the President and Congress to address the movement's demand for *jobs* and freedom.¹⁵⁷

Just a month after the CRA passed, President Johnson responded to the movement's plea for policies specifically focused on economic inequality. President Johnson ushered through Congress legislation to wage an "unconditional war on poverty"; that war would be waged "in city slums and small towns, in sharecropper shacks and in migrant labor camps, on Indian reservations, among whites as well as Negroes, among the young as well as the aged, in the boom towns and in the depressed areas."¹⁵⁸ The movement's demands for attention to black unemployment, the wretched conditions that President Johnson knew from personal experience, and the muckraking exposés of poverty in Appalachia by writers such as Michael Harrington all motivated Johnson's anti-poverty initiatives.¹⁵⁹

The EOA of 1964—a "hand-up rather than a handout"—and the legislative centerpiece of the War on Poverty—resulted in part from discussions between King and Johnson regarding the need for economic redress for blacks and all Americans suffering economic hardship.¹⁶⁰ The EOA established a federal job corps, work training, community action, preschool, community health, legal services programs, and many other signature social welfare programs still with us today.¹⁶¹

Dr. King, who had long recognized that the "inseparable twin of racial injustice was economic injustice,"¹⁶² hailed the legislation.¹⁶³ Rustin, who would seek more expansive programs in coming years, credited the civil rights

157. See JOHN A. ANDREW III, LYNDON JOHNSON AND THE GREAT SOCIETY 59 (1998) ("[T]he War on Poverty developed in part as a corollary to the civil rights movement. . . . [A]n antipoverty program promised to provide jobs and forestall significant structural changes in the economy.").

158. IRWIN UNGER, THE BEST OF INTENTIONS: THE TRIUMPHS AND FAILURES OF THE GREAT SOCIETY UNDER KENNEDY, JOHNSON, AND NIXON 79 (1996).

159. See CLARK, *supra* note 132, at 23-25; KOTZ, *supra* note 149, at 93-94.

160. See KOTZ, *supra* note 149, at 89, 182.

161. 42 U.S.C. § 2711 (2006); KOTZ, *supra* note 149, at 182-84.

162. JACKSON, *supra* note 67, at 25.

163. See *id.* at 193-95.

movement as having done more than any other single force “to initiate the war on poverty.”¹⁶⁴ The EOA represented a victory for the movement and for socially marginal people nationwide.¹⁶⁵ The federal government had enacted a law that addressed structures of inequality that trapped the poor, in addition to racial discrimination.

The EOA fundamentally altered the relationship between the nation and the states in the area of social and economic policy. New Deal programs had been an entering wedge; they had created new social and economic entitlements, most anchored in labor rights.¹⁶⁶ However, the racial state flourished alongside and within the New Deal. Under the influence of Southern congressmen, legislators designed programs to ensure black exclusion.¹⁶⁷ State and local administrators routinely discriminated against blacks.¹⁶⁸ By contrast, President Johnson hoped that the War on Poverty would include and benefit blacks, Hispanics, and other minorities without provoking white or middle-class resentment.¹⁶⁹

B. The EOA at the State and Local Level: Implementation

The federal government and its programs could be leveraged in new ways on behalf of the poor, the marginalized, and people of color at the state and local levels.¹⁷⁰ One provision of the legislation was critical to the new regime. The EOA mandated the establishment of “community action programs” (CAPS).¹⁷¹ The government tasked CAPS with assessing local needs in employment, child and adult education, health, social welfare, or legal services, and with devising strategies and administering programs to address those

¹⁶⁴. Rustin, *supra* note 110.

¹⁶⁵. Annelise Orleck, *Introduction: The War on Poverty from the Grass Roots Up*, in *THE WAR ON POVERTY: A NEW GRASSROOTS HISTORY, 1964-1980*, at 1, 2-3, 15 (Annelise Orleck & Lisa Gayle Hazirjian eds., 2011).

¹⁶⁶. See PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 1, 128 (2008); IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 247-48 (2013).

¹⁶⁷. See KATZNELSON, *supra* note 166, at 159-63.

¹⁶⁸. See *id.*

¹⁶⁹. See, e.g., SUSAN YOUNGBLOOD ASHMORE, *CARRY IT ON: THE WAR ON POVERTY AND THE CIVIL RIGHTS MOVEMENT IN ALABAMA, 1964-1972*, at 21 (2008); KOTZ, *supra* note 149, at 89-90, 93-94, 119, 138, 140-41; UNGER, *supra* note 158, at 50, 85, 91.

¹⁷⁰. CLARK, *supra* note 132, at 43, 49.

¹⁷¹. *Id.* at 43.

community needs.¹⁷² The statute further mandated that CAPS operate with the “maximum feasible participation” of low-income residents.¹⁷³

The EOA’s “maximum feasible participation” provision, where it worked, proved socially transformative, if controversial. African Americans, Latinos, Asian immigrants, women, residents of rural areas, migrant farm workers, and other dispossessed groups gained new access to federal resources.¹⁷⁴ As one historian noted, “[m]arginalized people were astonished when their views were consulted.”¹⁷⁵ Another historian of the EOA agreed. “In many communities,” the EOA provided “the first occasion when people of widely different backgrounds—rich and poor, black and white, urban and rural—sat down together to work on common problems and design programs.”¹⁷⁶

SNCC, the proponent of community organizing, leveraged the EOA’s endorsement of community action to the benefit of allies nationwide. “Although SNCC distrusted Johnson’s motives,” explained a respected historian of the organization, “there was much in the initial orientation of some of the early antipoverty programs that seemed to incorporate the democratic values inherent in SNCC’s own projects.”¹⁷⁷ In the rural and urban South, SNCC workers educated tenant farmers, laborers, and other impoverished people who had never before accessed government largesse how to negotiate application processes and establish programs.¹⁷⁸ As a result of the intervention of SNCC and other organizations, including NAACP and SCLC chapters, local people won grants for housing, educational, and agricultural assistance.¹⁷⁹ These resources immeasurably improved the quality of their lives.

SNCC’s advocacy did not go unchallenged. Whites who still dominated the state and local party apparatus tried to prevent blacks from participating in

172. *Id.* at 43, 49.

173. *Id.* at 44.

174. See ASHMORE, *supra* note 169, at 12–14, 18, 170–72; CARSON, *supra* note 54, at 258–60; CLARK, *supra* note 132, at 44, 48–53; Orleck, *supra* note 165, at 2.

175. UNGER, *supra* note 158, at 173.

176. CLARK, *supra* note 132, at 44. CAPS cover ninety-six percent of the nation’s counties and assist about eleven million low-income people per year. *Id.*

177. CARSON, *supra* note 54, at 258.

178. See *id.* at 258–59; BROWN-NAGIN, *supra* note 7, at 258–60, 266–67 (discussing SNCC’s efforts to leverage antipoverty programs in Atlanta); see also ASHMORE, *supra* note 169, at 134, 139–40, 150–53 (discussing the advocacy of umbrella group of civil rights activists).

179. PAYNE, *supra* note 21, at 338–39, 342; CARSON, *supra* note 54, at 258–59; see also ASHMORE, *supra* note 169, at 150–53, 201–05.

EOA programs.¹⁸⁰ SNCC, SCLC, and NAACP affiliates pushed back in a variety of ways. The groups sought direct intervention from Washington officials.¹⁸¹ They helped clients seek experts from relevant national organizations, form cooperatives, and establish economic development organizations to address their needs and fight antagonistic bureaucrats.¹⁸²

These struggles for power within the federal antipoverty programs and political power intertwined.¹⁸³ Under the guidance of SNCC, local people ran for office, replicating a strategy the group had used at the national level to challenge the Democratic Party.¹⁸⁴ When necessary, locals filed lawsuits and made constitutional claims over black exclusion from state and local political organizations. One challenge went all the way to the U.S. Supreme Court, where Alabama blacks prevailed in 1969.¹⁸⁵

More than ever before, impoverished people themselves gained access to, and had a hand in implementing, federal programs. In Alabama hamlets and Mississippi backwaters, “maximum feasible participation” translated into meaningful change and a declining Southern black rural poverty rate.¹⁸⁶ The same was true in cities such as Atlanta, Philadelphia, Baltimore, Topeka, San Francisco, and New York.¹⁸⁷ Students educated African Americans long shut out of government about how to navigate and leverage state and local bureaucracies tasked with disbursing new and untapped sources of federal

180. See, e.g., ASHMORE, *supra* note 169, at 254–61.

181. See, e.g., *id.* at 271 (“When Washington directly backed programs in the Black Belt, change became possible . . . Against all odds and many obstacles, local people made something out of the War on Poverty for themselves and confirmed that if most OEO guidelines were followed and local obstructions were minimized, the programs could work.”).

182. *Id.* at 12–14, 20–22, 151, 201–05.

183. See Orleck, *supra* note 165, at 11, 17.

184. See RANSBY, *supra* note 54, at 330–31, 336–42.

185. ASHMORE, *supra* note 169, at 158, 247–49. As a result, blacks gained office, including at the all-important county and state levels, including at state houses of representatives. *Id.* at 248–50.

186. Between 1959 and 1978, the Southern black rural poverty rate declined from 77.7% to 37.2%. GAVIN WRIGHT, *SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION* (2013).

187. COUNTRYMAN, *supra* note 64, at 297–98; UNGER, *supra* note 158, at 91, 164–66; Orleck, *supra* note 165, at 13; Rhonda Y. Williams, “To Challenge the Status Quo by Any Means”: *Community Action and Representational Politics in 1960s Baltimore*, in *THE WAR ON POVERTY*, *supra* note 165, at 63.

assistance.¹⁸⁸ In just a brief span of time, the EOA funded over one thousand community action programs that enabled local people to build clinics, preschools, and community centers and to provide food relief—in short, to begin the work of revitalizing their communities.¹⁸⁹

C. Significance of EOA and Undesirability of a Single Modality of “Higher Lawmaking”

These examples of activists’ involvement in the implementation of the EOA are quite meaningful. The EOA, the heart of the War on Poverty, came as close as any legal text of the civil rights era to codifying elements of the movement’s economic citizenship agenda.

That is not to say that the EOA embodied all of the movement’s demands. It did not. The legislation fell short of King’s highest policy aspirations. King’s broad antipoverty agenda included fair and full employment, a guaranteed income for all, trade unionism, equal education, and much more—a “democratic socialist” agenda.¹⁹⁰ The EOA followed a social reform model of change rather than King’s income transfer model.¹⁹¹ With time, King and others would come to view the EOA’s implementation as marred by racial paternalism and underfunding. Like the CRA, VRA, and FHA, the EOA encapsulated only some of the ideals and policies that the movement embraced.

The claim made here about the significance of the antipoverty law is thus limited. Of the legal texts that materialized during the civil rights era, the EOA embodied in important respects the movement’s economic agenda for grassroots citizens. To be sure, the employment title of the CRA added an important dimension to black citizenship; the EOA, however, aimed at impoverished Americans *outside of the labor market and sought to reach a subgroup that the antidiscrimination legislation did not*. The EOA aspired to address Dr. King’s and the larger movement’s concern about poverty—particularly disproportionate, intergenerational black poverty.

Ackerman’s civil rights canon omits the EOA as an incident of higher lawmaking. Ackerman writes:

¹⁸⁸. BROWN-NAGIN, *supra* note 7, at 268.

¹⁸⁹. Orleck, *supra* note 165, at 10–11.

¹⁹⁰. JACKSON, *supra* note 67, at 8.

¹⁹¹. CLARK, *supra* note 132, at 10; *see also* Orleck, *supra* note 165, at 9; GUIAN A. MCKEE, “*This Government Is with Us*”: Lyndon Johnson and the Grassroots War on Poverty, in *THE WAR ON POVERTY*, *supra* note 165, at 31.

[I]n contrast to the civil rights revolution, the American people never followed up on this signal by giving the War on Poverty their sustained electoral support. The anti-poverty campaign was unable to sustain political momentum over the next decade, and its fate was sealed when its champion, George McGovern, was decisively defeated by Richard Nixon in 1972. From that moment on, the partisans of economic redistribution pursued their aims—with little success—through normal political means.¹⁹²

This logic is, in a sense, beyond debate. Ackerman's analysis is subject to its own internal parameters: "higher lawmaking" and its component parts are defined according to his own criteria.¹⁹³ Ackerman's rule of recognition for constitutionally significant statutes (those tantamount to Article V amendments) turns on constitutional revisions by all three branches of government, followed by broad public assent, as evidenced in successive national elections.¹⁹⁴ He excludes the EOA from the canon because of pushback against "redistribution" in the aftermath of the 1964 presidential election.

To the extent that economic citizenship by definition finds no purchase in the canon of *We the People*, the project may be under-theorized.¹⁹⁵ That is, perhaps Ackerman's single rule of recognition or modality of higher lawmaking during the civil rights era rests on a descriptively inaccurate, top-down version of history and is normatively undesirable.¹⁹⁶ The premise that officialdom and overwhelming national electoral majorities define the essential elements of the civil rights canon places too much emphasis on formal power structures and what he gleans from a single national election result.

Moreover, Richard Nixon's win over George McGovern—one data point—is unpersuasive evidence that the EOA constituted a "failed signal." The more important national election data occurred earlier. The national electorate plainly sustained the antipoverty effort in Johnson's landslide 1964 election.¹⁹⁷

¹⁹². 3 ACKERMAN, *supra* note 3, at 72.

¹⁹³. See 1 ACKERMAN, *supra* note 1, at 266–94.

¹⁹⁴. 3 ACKERMAN, *supra* note 3, at 4–7.

¹⁹⁵. After all, Ackerman shares my interest in a view of citizenship that encompasses economic security. See Bruce Ackerman, *Reviving Democratic Citizenship*, 41 POL. & SOC'Y 309 (2013) (proposing a citizenship inheritance in the form of \$80,000 to all American adults).

¹⁹⁶. For a discussion of multifaceted recognition practices, see Matthew Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law*, 100 NW. U. L. REV. 719 (2006).

¹⁹⁷. See UNGER, *supra* note 158, at 95–96, 100.

After all, Congress enacted the EOA shortly after it passed the CRA; the two laws were complementary.¹⁹⁸ If Johnson's landslide victory in the presidential election of 1964 conferred a mandate based on his leadership in the debate over the CRA, it stands to reason that his mandate included the goals of the War on Poverty.

And while it is true that McGovern lost to Nixon after endorsing antipoverty programs that Nixon criticized, many factors separated the two candidates. It is difficult to prove whether McGovern's support of the antipoverty programs or his antiwar stance, as opposed to Nixon's "battleground state strategy," his appeal to "law and order" in the wake of urban riots, or his pledge to hold the line on school desegregation, proved decisive in the election.¹⁹⁹ Moreover, Nixon sought a middle ground in his social and economic policies toward the poor and a "middle-of-the-road tone" on all social issues.²⁰⁰ He did not pledge to banish antipoverty programs but to reshape them.²⁰¹ It is only in comparison to the extraordinarily liberal policies of George McGovern—which many Democrats rejected²⁰²—that Nixon's policies appear to be a categorical rejection of Johnson's War on Poverty.²⁰³

Most important, in political struggle on the ground, the statute did achieve a kind of ratification, as I explained above.²⁰⁴ Long after elements of the CRA and VRA fell aside, many EOA programs grew and remain with us.²⁰⁵ CAP, VISTA, Head Start, and Legal Services proliferated and became entrenched in states and localities. Fights ensued over the antipoverty programs during

198. *Id.* at 79.

199. Compare GARETH DAVIS, FROM OPPORTUNITY TO ENTITLEMENT: THE TRANSFORMATION AND DECLINE OF GREAT SOCIETY LIBERALISM 3, 6 (1996) (discussing McGovern's much-disliked guaranteed income proposal), with KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 19-20, 26-27, 33, 35, 46-47, 54-57, 60, 76-77, 170, 206 (2011) (discussing the strategy and rhetoric of Nixon's 1968 campaign).

200. MCMAHON, *supra* note 199, at 206.

201. See DAVIS, *supra* note 199, at 3, 218.

202. *Id.* at 3-5, 232-33.

203. *Id.* at 3-5, 233; MCMAHON, *supra* note 199, at 206.

204. See Orleck, *supra* note 165, at 3 ("The top-down view of the War on Poverty has been written many times over. As seen from the alabaster buildings of Washington, D.C., the antipoverty crusade's failures can seem glaring and its success insignificant. But to truly understand its impact on American cities and rural areas, on men and women, on children and the elderly, on blacks, whites, Latinos, Native Americans, and Asian Americans, requires looking from the bottom up.").

205. See CLARK, *supra* note 132, at 44.

successive administrations; however, the battles turned on the amount of resources allocated to these programs, not whether the programs would exist. Moreover, the EOA changed the culture of federal policy design and implementation. The idea of “maximum feasible participation” of affected communities in the implementation of federal policies is now a cardinal principle.²⁰⁶

Another way to make these points is to observe that Ackerman’s theory of higher lawmaking and narrowly-defined civil rights canon overemphasizes consensus as a social and constitutional norm. More often than not, fundamental constitutional change has resulted from crisis and conflict rather than consensus. Consider the Civil War that predated the Reconstruction Amendments. It is only the fundamental reconfiguration of the nation-state—the exclusion of the Confederate states, bribery, and other political shenanigans—that, in hindsight, lend the Reconstruction Amendments a veneer of consensus. In fact, we know that on the state and local levels and in the federal courts, stakeholders battled fiercely over the meaning of equality. The mere enactment of the Amendments removed nothing from politics.

Or consider the instances of higher lawmaking that Ackerman cites—the CRA, VRA, and FHA. None of these statutes have actually *escaped* politics, notwithstanding their vaunted status as elements of a new “constitutional” vision as opposed to ordinary statutes. One only need consider the evolution of judicial interpretation of Title VI or Title VII of the CRA to appreciate that political values endemic to constitutional law can and have substantially narrowed the scope of these statutes over time.²⁰⁷ To be sure, constitutional politics differ from “ordinary politics,” but functionally speaking, it is politics just the same.

These facts suggest that one cannot take measure of a new constitutional vision merely by reliance on developments at the federal level and the enactment of positive law. To fully measure constitutional change, one has to look below, to details and context.

²⁰⁶. See *id.* at 286.

²⁰⁷. For a discussion of how executive and judicial interpretations of the Title VI of the CRA changed by the 1970s in ways that limited the reach of the title, see BRIAN LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE* 53, 123, 134, 139, 143 (1997); *id.* at 30-31, 67-68 (discussing Title VII); and see also Tomiko Brown-Nagin, *Rethinking Diversity and Low-Income Status as Proxies for Disadvantage*, 2014 U. CHI. LEGAL F. (forthcoming).

CONCLUSION

Ackerman's aspiration to reinvigorate popular sovereignty by identifying a civil rights canon and articulating its relevance to our constitutional vision is admirable. His erudite tome on the civil rights era begins from a premise that can empower the next generation of citizens and lawyers. His thesis powerfully contests the all-too-common cynicism about law and democratic engagement that has beset the academy in recent years. As Ackerman rightly protests: "It is a very serious thing for the legal profession to tell a story of the decline and fall of popular sovereignty in America, when in fact the twentieth century saw its rebirth and revitalization. Not only does this story distort our past, but it impoverishes our future."²⁰⁸ Bravo to the optimism that this sentiment and Ackerman's entire scholarly project encompasses. He inspires us.

This essay has sought to broaden and deepen the depiction of the grand and tumultuous civil rights era that we leave to current and future generations. If we only recall the architects of legislation and formal brokers of power, we miss a great deal that is meaningful about the civil rights era and about popular sovereignty. If we only understand the movement as a struggle for the human dignity that civil rights confer, we elide the full complement of rights that activists and lawyers sought. A canon relevant to today must recognize the economic dimensions of the civil rights struggle.

Contrary to the myth that "Lyndon Johnson declared a war on poverty and poverty won,"²⁰⁹ EOA programs gained traction at the state and local levels. The programs proved important to instantiating the new citizenship rights conferred by better-known civil rights laws and cases. The EOA and the Great Society of which it was a part left an indelible mark on the grassroots and on the country. That history, those elements of the civil rights leadership who pushed for economic citizenship, and the socio-legal legacy of their struggle deserve to be remembered.

In the names of Johnson, King, Dirksen, Humphrey, Randolph, Rustin, Baker, SNCC, and countless local people, we must insist on a broad and deep civil rights narrative. That story should reflect the contributions of those with formal power—those above—and the citizens who struggled on the ground for

208. 3 ACKERMAN, *supra* note 3, at 19.

209. Joseph Califano, *What Was Really Great About the Great Society*, WASH. MONTHLY, Oct. 1999, <http://www.washingtonmonthly.com/features/1999/9910.califano.html> (quoting President Ronald Reagan).

equal justice under law – those below. This richer account of the civil rights era remains profoundly relevant today, when economic inequality remains “the defining challenge of our time.”²¹⁰

210. Barack Obama, President, Remarks by the President on Economic Mobility (Dec. 4, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/04/remarks-president-economic-mobility>; *see generally* JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* (2012) (discussing the dysfunction in the economic system caused by the vast and unsustainable inequities in the distribution of wealth and the threat that the resulting divisions pose to the American social fabric).